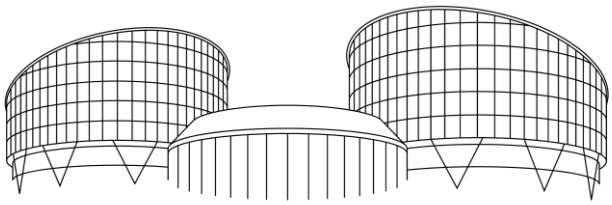

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF EL-MASRI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 39630/09)

JUDGMENT

STRASBOURG

13 December 2012

This judgment is final but may be subject to editorial revision.

TABLE OF CONTENTS

In the case of El-Masri v. the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (Grand Chamber), sitting as a Committee composed of:

Nicolas Bratza, *President*,
Françoise Tulkens,
Josep Casadevall,
Dean Spielmann,
Nina Vajić,
Peer Lorenzen,
Karel Jungwiert,
Isabelle Berro-Lefèvre,
Khanlar Hajiyev,
Luis López Guerra,
Ledi Bianku,
Işıl Karakaş,
Vincent A. de Gaetano,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Helen Keller, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 16 May and 24 October 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39630/09) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Khaled El-Masri ("the applicant"), on 20 July 2009.

2. The applicant was represented by Mr J.A. Goldston, Mr D. Pavli and Mr R. Skilbeck, from the Open Society Justice Initiative ("OSJI") New York Office, and Mr F. Medarski, a Macedonian lawyer. The Macedonian Government ("the Government") were represented by their Agent, Mr K. Bogdanov.

3. The applicant alleged, in particular, that he had been subjected to a secret rendition operation, namely that agents of the respondent State had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to CIA agents who had transferred him,

on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when the applicant returned to Germany.

4. The application was allocated initially to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and this case was assigned to the newly composed First Section (Rule 52 § 1).

5. On 28 September 2010 the applicant's complaints under Articles 3, 5, 8 and 13 of the Convention were communicated to the Government.

6. The German Government, who had been informed of their right to intervene in the proceedings, under Article 36 § 1 of the Convention, gave no indication that they wished to do so.

7. Mirjana Lazarova Trajkovska, the judge elected in respect of the former Yugoslav Republic of Macedonia, withdrew from sitting in the case (Rule 28). The respondent Government accordingly appointed Peer Lorenzen, the judge elected in respect of Denmark, to sit in her place (Article 26 § 4 of the Convention and Rule 29 § 1).

8. On 24 January 2011 a Chamber of the First Section, composed of the following judges: Nina Vajić, Peer Lorenzen, Elisabeth Steiner, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos and Erik Møse, assisted by Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

9. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

10. The applicant and the Government each filed written observations. In addition, third-party comments were received from the United Nations High Commissioner for Human Rights, Interights, Redress, the International Commission of Jurists and Amnesty International, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

11. The Court decided to dispense with an oral examination of Mr H.K., a witness proposed by the applicant.

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 May 2012 (Rule 59 § 3).

13. There appeared before the Court:

(a) *for the Government*
Mr K. BOGDANOV, *Agent*,
Ms D. DJONOVA, Ministry of Justice,
Ms V. STANOJEVSKA, Ministry of Justice,
Ms N. JOSIFOVA, Ministry of the Interior, *Advisers*;

(b) *for the applicant*
Mr J.A. GOLDSTON, Executive Director,
Open Society Justice Initiative,
Mr D. PAVLI, *Counsel,*
Mr R. SKILBECK,
Mr F. MEDARSKI, *Advisers*.

14. The Court heard addresses by Mr Bogdanov, Mr Goldston and Mr Pavli, and also their replies to questions put by its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

15. The applicant was born in 1963 and lives in Senden, Germany.

A. The applicant's version of events

16. In the application, the applicant referred to his declaration made on 6 April 2006 for the purpose of the proceedings before the US District Court for the Eastern District of Virginia (see paragraphs 62 and 63 below).

1. Travel to the former Yugoslav Republic of Macedonia

17. On 31 December 2003 the applicant boarded a bus in Ulm, Germany, with a view to visiting Skopje in order, as he stated, "to take a short vacation and some time off from a stressful home environment". At around 3 p.m. he arrived at the Serbian/Macedonian border crossing at Tabanovce. A suspicion arose as to the validity of his recently issued German passport. A border official checked his passport and asked him about the purpose of his trip and the length and location of his intended stay. A Macedonian entry stamp dated 31 December 2003 was affixed to his passport. On that occasion, his personal belongings were searched and he was questioned about possible ties with several Islamic organisations and groups. The interrogation ended at 10 p.m. Accompanied by men in civilian clothes who were armed, he was driven to a hotel, which later research indicated was the Skopski Merak hotel in Skopje ("the hotel"). Upon his return to Germany, the applicant recognised, through photographs available on the hotel's website, the hotel building, the room where allegedly he had been held and one of the waiters who had served him food during his detention in the hotel.

2. Incommunicado detention in the hotel

18. The applicant was taken to a room on the top floor of the hotel. During his detention at the hotel, he was watched by a team of nine men, who changed shift every six hours. Three of them were with him at all times, even when he was sleeping. He was interrogated repeatedly throughout the course of his detention. He was questioned in English despite his limited proficiency in that language. His requests to contact the German embassy were refused. On one occasion, when he stated that he intended to leave, a gun was pointed at his head and he was threatened with being shot. After seven days of confinement, another official arrived and offered him a deal, namely that he would be sent back to Germany in return for a confession that he was a member of Al-Qaeda.

19. On the thirteenth day of his confinement, the applicant commenced a hunger strike to protest against his continued unlawful detention. He did not eat for the remaining ten days of his detention in the former Yugoslav Republic of Macedonia. A week after he had commenced his hunger strike, he was told that he would soon be transferred by air back to Germany.

3. Transfer to Skopje Airport

20. On 23 January 2004 at around 8 p.m., the applicant was filmed by a video camera and instructed to say that he had been treated well, that he had not been harmed in any way and that he would shortly be flown back to Germany. Handcuffed and blindfolded, he was put in a car and taken to Skopje Airport.

4. Handover to a CIA "rendition" team at Skopje Airport

21. Upon arrival, still handcuffed and blindfolded, he was initially placed in a chair, where he sat for one and a half hours. He was told that he would be taken into a room for a medical examination before being transferred to Germany. Then, two people violently pulled his arms back. On that occasion he was beaten severely from all sides. His clothes were sliced from his body with scissors or a knife. His underwear was forcibly removed. He was thrown to the floor, his hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus. As stated by the applicant's lawyers at the public hearing of 16 May 2012, of all the acts perpetrated against the applicant that had been the most degrading and shameful. According to the applicant, a suppository was forcibly administered on that occasion. He was then pulled from the floor and dragged to a corner of the room, where his feet were tied together. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in a nappy. He was then dressed in a dark blue short-sleeved tracksuit. A bag was placed

over his head and a belt was put on him with chains attached to his wrists and ankles. The men put earmuffs and eye pads on him and blindfolded and hooded him. They bent him over, forcing his head down, and quickly marched him to a waiting aircraft, with the shackles cutting into his ankles. The aircraft was surrounded by armed Macedonian security guards. He had difficulty breathing because of the bag that covered his head. Once inside the aircraft, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. During the flight he received two injections. An anaesthetic was also administered over his nose. He was mostly unconscious during the flight. A Macedonian exit stamp dated 23 January 2004 was affixed to the applicant's passport.

22. According to the applicant, his pre-flight treatment at Skopje Airport, "most likely at the hands of the special CIA [United States Central Intelligence Agency] rendition team", was remarkably consistent with a recently disclosed CIA document describing the protocol for the so-called "capture shock" treatment (see paragraph 124 below).

5. Flight from Skopje to Afghanistan

23. Upon landing, the applicant disembarked. It was warmer outside than it had been in the former Yugoslav Republic of Macedonia, which was sufficient for him to conclude that he had not been returned to Germany. He deduced later that he was in Afghanistan and that he had been flown via Baghdad.

6. Detention and interrogation in Afghanistan

24. After landing in Afghanistan, the applicant was driven for about ten minutes, then dragged from the vehicle, slammed into the walls of a room, thrown to the floor, kicked and beaten. His head and neck were specifically targeted and stepped upon. He was left in a small, dirty, dark concrete cell. When he adjusted his eyes to the light, he saw that the walls were covered in Arabic, Urdu and Farsi handwriting. The cell did not contain a bed. Although it was cold, he had been provided with only one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. Through a window at the top of the cell, he saw the red, setting sun. Later he understood that he had been transferred to a CIA-run facility which media reports have identified as the "Salt Pit", a brick factory north of the Kabul business district that was used by the CIA for detention and interrogation of some high-level terror suspects.

25. During his confinement, he was interrogated on three or four occasions, each time by the same man, who spoke Arabic with a south Lebanese accent, and each time at night. His interrogations were accompanied by threats, insults, pushing and shouting. His repeated

requests to meet with a representative of the German Government were ignored.

26. In March 2004 the applicant, together with several other inmates with whom he communicated through cell walls, commenced a hunger strike to protest about their continued confinement without charge. As a consequence of the conditions of his confinement and his hunger strike, the applicant's health deteriorated on a daily basis. He received no medical treatment during this time, although he had requested it on several occasions.

27. On 10 April 2004, the thirty-seventh day of his hunger strike, hooded men entered his cell, pulled him from his bed and bound his hands and feet. They dragged him into the interrogation room, sat him on a chair and tied him to it. A feeding tube was then forced through his nose to his stomach and a liquid was poured through it. After this procedure, the applicant was given some canned food, as well as some books to read.

28. Following his force-feeding, the applicant became extremely ill and suffered very severe pain. A doctor visited his cell in the middle of the night and administered medication, but he remained bedridden for several days. Around that time, the applicant felt what he believed to be a minor earthquake. In this connection, the applicant submitted the "List of significant earthquakes of the world in 2004", issued by the US Geological Survey (USGS) on 6 October 2005. According to this document, there was one earthquake on 5 April 2004 in the Hindu-Kush Region, Afghanistan.

29. On 16 May 2004 the applicant was visited by a German speaker who identified himself only as "Sam". The latter visited the applicant three more times prior to his release.

30. On 21 May 2004 the applicant began his second hunger strike.

7. Disguised "reverse rendition" to Albania

31. On 28 May 2004 the applicant, blindfolded and handcuffed, was led out of his cell and locked in what seemed to be a shipping container until he heard the sound of an aircraft arriving. On that occasion, he was handed the suitcase that had been taken from him in Skopje. He was told to change back into the clothes he had worn upon his arrival in the former Yugoslav Republic of Macedonia and was given two new T-shirts, one of which he put on. He was then taken to the waiting aircraft, wearing a blindfold and earmuffs, and was chained to his seat there. "Sam" accompanied him on the aircraft. He said that the plane would land in a European country other than Germany, but that the applicant would eventually continue on to Germany.

32. When the aircraft landed, the applicant, still blindfolded, was placed in the back seat of a vehicle. He was not told where he was. He was driven in the vehicle up and down mountains, on paved and unpaved roads. The applicant was aware of men getting out of the car and then of men getting in. All of the men had Slavic-sounding accents, but said very little.

Eventually, the vehicle was brought to a halt. He was taken from the car and his blindfold was removed. His captors gave him his belongings and passport, removed his handcuffs and directed him to walk down the path without turning back. It was dark and the road was deserted. He believed he would be shot in the back and left to die. He rounded a corner and came across three armed men. They immediately asked for his passport. They saw that his German passport had no visa in it and asked him why he was in Albania without legal permission. He replied that he had no idea where he was. He was told that he was near the Albanian borders with the former Yugoslav Republic of Macedonia and Serbia. The men led him to a small building with an Albanian flag and he was presented to a superior officer. The officer observed the applicant's long hair and long beard and told him that he looked like a terrorist. He was then driven to the Mother Teresa Airport in Tirana. He was guided through customs and immigration control without inspection and put on a plane to Frankfurt, Germany. An Albanian exit stamp was affixed to the applicant's passport.

8. Arrival in Germany

33. On 29 May 2004 at 8.40 a.m. the applicant arrived at Frankfurt International Airport. He was about eighteen kilograms lighter than when he had left Germany, his hair was long and unkempt and he had not shaved since his arrival in the former Yugoslav Republic of Macedonia. Immediately after arrival in Germany, the applicant met Mr M. Gnjidić, a lawyer practising in Ulm.

34. In his written submissions, the applicant stated that he had not undergone any medical examination apart from the isotope analysis of his hair follicles (see paragraphs 56 and 57 below). At the public hearing, the applicant's lawyers specified that the results of some medical examinations carried out upon his return to Germany had been submitted by the German public prosecutor to the European Parliament's Fava inquiry (see paragraphs 47-51 below). However, those results had not been submitted to the Court since they had not been conclusive as to the presence of any physical injury, given the long time that had elapsed since the incident at Skopje Airport. Furthermore, the applicant stated that he had been subjected to sophisticated interrogation techniques and methods, which had been specifically designed not to leave any evidence of physical ill-treatment.

35. The 2007 Marty report (see paragraph 46 below) noted that the applicant had asked for treatment at the treatment centre for torture victims in Neu-Ulm shortly after his return to Germany in 2004. However, it took until 2006 for Mr Gnjidić to obtain the required health-insurance funding agreement to start a course of limited treatment (seventy hours) at the centre, which had been considered insufficient both by Mr Gnjidić and by the therapist herself (see paragraph 296 of the 2007 Marty report).

36. The applicant also submitted a written statement of 5 January 2009 by Dr Katherine Porterfield, a senior psychologist at the Bellevue/NYU Program for Survivors of Torture, in which she had confirmed that the applicant had suffered from post-traumatic stress disorder and depression "most likely caused by his experience of capture and extensive maltreatment and abuse". Dr Porterfield's opinion was based on several phone calls and two follow-up discussions with the applicant. She also advised him to visit a clinician in his community with the requisite expertise to help him. The applicant did not comply with that instruction.

B. The position of the Government of the former Yugoslav Republic of Macedonia as regards the applicant's allegations

1. The position of the respondent Government as noted in the reports adopted following certain international inquiries

(a) Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States, Doc. 10957, 12 June 2006 ("the 2006 Marty report")

37. On 13 December 2005 the President of the Parliamentary Assembly of the Council of Europe asked the Assembly's Committee on Legal Affairs and Human Rights to investigate allegations of "extraordinary renditions" in Europe. Senator Dick Marty of Switzerland was appointed as special rapporteur. On 12 June 2006 the Assembly published the 2006 Marty report. It set out, on the basis of meetings that took place between 27 and 29 April 2006, the position of the Macedonian authorities regarding the applicant's case. It stated, *inter alia*:

"**3.1.3.1. The position of the authorities**

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

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

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

Mr El-Masri arrived on the Macedonian border on 31 December 2003, New Year's Eve. The Ministry of Interior had intensified security for the festive period and was operating a higher state of alert around the possible criminal activity. In line with these more intense activities, bus passengers were being subjected to a thorough security check, including an examination of their identity documents.

Upon examining Mr El-Masri's passport, the Macedonian border police developed certain suspicions and decided to '*detain him*'. In order not to make the other passengers wait at the border, the bus was at this point allowed to continue its journey.

The objective of holding Mr El-Masri was to conduct an interview with him, which (according to [the Head of the UBK]) was carried out in accordance with all applicable European standards. Members of the UBK, the security and counter-intelligence service, are present at all border points in Macedonia as part of what is described as 'Integrated Border Management and Security'. UBK officials participated in the interview of Mr El-Masri. The officials enquired into Mr El-Masri's reasons for travelling into the country, where he intended to stay and whether he was carrying sufficient amounts of money. [The Head of the UBK] explained: 'I think these were all standard questions that are asked in the context of such a routine procedure – I don't think I need to go into further details'.

At the same time, Macedonian officials undertook a preliminary visual examination of Mr El-Masri's travel documents. They suspected that the passport might be faked or forged – noting in particular that Mr El-Masri was born in Kuwait, yet claimed to possess German citizenship.

A further passport check was carried out against an Interpol database. The border point at Tabanovce is not linked to Interpol's network, so the information had to be transmitted to Skopje, from where an electronic request was made to the central Interpol database in Lyon. A UBK official in the Analytical Department apparently made this request using an electronic code, so the Macedonian authorities can produce no record of it. Mr El-Masri was made to wait on the border point while the Interpol search was carried out.

When it was established that there existed no Interpol warrant against Mr El-Masri and no further grounds on which to hold him, he was released. He then left the border point at Tabanovce, although Macedonian officials were not able to describe how. Asked directly about this point in a separate meeting, the Minister of Interior [name] said: '*we're not able to tell you exactly what happened to him after he was released because it is not in our interest; after the person leaves the border crossing, we're not in a position to know how he travelled further*'.

The Ministry of Interior subsequently established ... that Mr El-Masri had stayed at a hotel in Skopje called the 'Skopski Merak'. Mr El-Masri is said to have checked in on the evening of 31 December 2003 and registered in the Guest Book. He stayed for 23 nights, including daily breakfast, and checked out on 23 January 2004.

> The Ministry then conducted a further check on all border crossings and discovered that on the same day, 23 January 2004, in the evening, Mr El-Masri left the territory of Macedonia over the border crossing at Blace, into the territory of Kosovo. When asked whether Mr El-Masri had received a stamp to indicate his departure by this means, [the Head of the UBK] answered: '*Normally there should be a stamp on the passport as you cross the border out of Macedonia, but I can't be sure. UNMIK [United Nations Administration Mission in Kosovo] is also present on the Kosovo border and is in charge of the protocol on that side ... My UBK colleague has just informed me that he has crossed the border at Blace twice in recent times and didn't receive a stamp on either occasion.*'
>
> ...
>
> 116. What is not said in the official version is the fact that the Macedonian UBK routinely consults with the CIA on such matters (which, on a certain level, is quite comprehensible and logical). According to confidential information we received (of which we know the source), a full description of Mr El-Masri was transmitted to the CIA via its Bureau Chief in Skopje for an analysis ... did the person in question have contact with terrorist movements, in particular with Al Qaida? Based on the intelligence material about Khaled El-Masri in its possession – the content of which is not known to us – the CIA answered in the affirmative. The UBK, as the local partner organisation, was requested to assist in securing and detaining Mr El-Masri until he could be handed over to the CIA for transfer."

(b) Council of Europe, Report by the Secretary General under Article 52 of the Convention on the question of secret detention and transport of detainees suspected of terrorist acts (SG/Inf (2006) 5, 28 February 2006)

38. On 21 November 2005 the Secretary General of the Council of Europe invoked the procedure under Article 52 of the Convention with regard to reports of European collusion in secret rendition flights. Member States were required to provide a report on the controls provided in their internal law over acts by foreign agents in their jurisdiction, on legal safeguards to prevent unacknowledged deprivation of liberty, on legal and investigative responses to alleged infringements of Convention rights and on whether public officials who had allegedly been involved in acts or omissions leading to such deprivation of liberty of detainees had been or were being investigated.

39. On 17 February and 3 April 2006 the respondent Government replied to this request. In the latter submission, the respondent Government stated their position as regards the applicant's case. They stated, *inter alia*:

> "... As far as the case of Mr Khaled El-Masri is concerned, we would like to inform you that this case was examined by the Ministry of Internal Affairs, and the information about it was sent to the representatives of the European Commission in the Republic of Macedonia, to the Director for Western Balkans in the DG [Directorate General] Enlargement of the European Commission in Brussels and to members of the European Parliament as early as June 2005. ... [T]he Ministry of Internal Affairs of the Republic of Macedonia informs that, based on the police records on entry and exit at the state border of the Republic of Macedonia, Mr Khaled El-Masri arrived, by bus, at the Tabanovce border crossing from the State Union of Serbia and Montenegro on 31 December 2003 at 4 p.m. presenting a German passport.

> Suspecting possession of a forged travel document, the competent police officers checked the document and interviewed Mr Khaled El-Masri at the border crossing. A check in the Interpol records was also carried out which showed that no international arrest warrant had been issued for Mr El-Masri. Mr Khaled El-Masri was allowed to enter the Republic of Macedonia on 31 December 2003 at 8.57 p.m. According to the police records, Mr Khaled El-Masri left the Republic of Macedonia on 23 January 2004 at the Blace border crossing to the State Union of Serbia and Montenegro (on the Kosovo section)."

2. The version of events submitted by the respondent Government in the proceedings before the Court

40. The Government confirmed their version of events as outlined above (see paragraphs 37 and 39 above). They denied that the applicant had been detained and ill-treated by State agents in the hotel, that he had been handed over to CIA agents, and that the latter had ill-treated him at Skopje Airport and transferred him to a CIA-run prison in Afghanistan. In their submission, the applicant had freely entered, stayed in and left the territory of the respondent State. The only contact with State agents had occurred on 31 December 2003, on the occasion of his entry into the respondent State, when inquiries had been undertaken regarding the validity of his passport. There had been no other contact with State agents during his entire stay in the respondent State. The inquiries by the Ministry of the Interior demonstrated that the applicant had stayed in the respondent State by his own choice and free will between 31 December 2003 and 23 January 2004, when he had freely left the State through the Blace border crossing.

41. In support of their argument, they submitted a copy of the following documents: extracts from the official border-crossing records for Tabanovce and Blace; an extract from the hotel guest book in which the applicant had been registered as a guest occupying room number 11 between 31 December 2003 and 22 January 2004, and two letters of February 2006 in which the hotel's manager, firstly, had communicated to the Ministry of the Interior the names of six persons who had been on duty in the hotel at the relevant time and, secondly, had denied that any person had ever stayed in the hotel involuntarily. It was further specified that the person whose photograph was on the hotel's website (see paragraph 17 above) was Mr Z.G., who could be found in the hotel. They also produced a letter of 3 February 2006 in which the Macedonian Ministry of Transport/Civil Aviation Administration had informed the Ministry of the Interior that on 23 January 2004 a Boeing 737 aircraft flying from Palma, registered as flight no. N313P, had been given permission to land at Skopje Airport, that the same aircraft had received permission (at 10.30 p.m.) to take off on the same day to Kabul and that at 2.25 a.m. on 24 January 2004, permission had been given for that aircraft to fly to Baghdad**.** Furthermore, the Government filed a copy of the applicant's hotel bills which, according to them, he had paid in cash. Lastly, they provided a copy of a police record of the

applicant's apprehension at the Tabanovce border crossing on 31 December 2003. As specified in the record, the applicant had been held between 4.30 p.m. and 9.30 p.m. The record does not state the reasons for his apprehension, but it contains an incomplete handwritten note that he was apprehended on the basis of "tel. no. 9106 of 8 December 2003".

C. International inquiries relating to the applicant's case

42. There have been a number of international inquiries into allegations of "extraordinary renditions" in Europe and the involvement of European Governments. The reports have referred to the applicant's case.

1. *Parliamentary Assembly of the Council of Europe – "the Marty inquiry"*

(a) The 2006 Marty report

43. The 2006 Marty report **(see paragraph 37 above)** stated, *inter alia*:

"**A. Draft resolution**

...

7. The facts and information gathered to date, along with new factual patterns in the process of being uncovered, indicate that the key elements of this 'spider's web' have notably included: a worldwide network of secret detentions on CIA 'black sites' and in military or naval installations; the CIA's programme of 'renditions', under which terrorist suspects are flown between States on civilian aircraft, outside of the scope of any legal protections, often to be handed over to States who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft to transport detainees as human cargo to Guantanamo Bay in Cuba or to other detention centres ...

11. Attempts to expose the true nature and extent of these unlawful operations have invariably faced obstruction or dismissal, from the United States and its European partners alike. The authorities of most Council of Europe member States have denied their participation, in many cases without actually having carried out any inquiries or serious investigations ...

C. Explanatory memorandum

...

2.7.1. CIA methodology – how a detainee is treated during a rendition

... Collectively, the cases in the report testify to the existence of an established *modus operandi* of rendition, put into practice by an elite, highly-trained and highly-disciplined group of CIA agents ...

11. Conclusion

287. Whilst hard evidence, at least according to the strict meaning of the word, is still not forthcoming, a number of coherent and converging elements indicate that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe. ..."

44. Skopje Airport was categorised in the 2006 Marty report as a "one-off pick-up point", that is, a point from which one detainee or one group of detainees was picked up for rendition or unlawful transfer, but not as part of a systemic occurrence.

45. As to the applicant's case, the 2006 Marty report stated, *inter alia*:

"**3. Specific examples of documented renditions**

3.1. Khaled El-Masri

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

...

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

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

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

• Passport stamps confirming Mr El-Masri's entry to and exit from Macedonia, as well as exit from Albania, on the dates in question;

• Scientific testing of Mr El-Masri's hair follicles, conducted pursuant to a German criminal investigation, that is consistent with Mr El-Masri's account that he spent time in a South-Asian country and was deprived of food for an extended period of time;

• Other physical evidence, including Mr El-Masri's passport, the two t-shirts he was given by his American captors on departing from Afghanistan, his boarding pass from Tirana to Frankfurt, and a number of keys that Mr El-Masri possessed during his ordeal, all of which have been turned over to German prosecutors;

• Aviation logs confirming that a Boeing business jet owned and operated by defendants in this case [a US-based corporation, Premier Executive Transportation Services, Inc., and operated by another US-based corporation, Aero Contractors Limited], then registered by the FAA [US Federal Aviation Administration] as N313P, took off from Palma, Majorca, Spain on January 23, 2004; landed at the Skopje Airport at 8:51 p.m. that evening; and left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital [a database of aircraft movements, compiled on the basis of information obtained from various sources, was attached to the 2006 Marty report];

• Witness accounts from other passengers on the bus from Germany to Macedonia, which confirm Mr El-Masri's account of his detention at the border;

• Photographs of the hotel in Skopje where Mr El-Masri was detained for 23 days, from which Mr El-Masri has identified both his actual room and a staff member who served him food;

• Geological records that confirm Mr El-Masri's recollection of minor earthquakes during his detention in Afghanistan;

• Evidence of the identity of 'Sam', whom Mr El-Masri has positively identified from photographs and a police line-up, and who media reports confirm is a German intelligence officer with links to foreign intelligence services;

• Sketches that Mr El-Masri drew of the layout of the Afghan prison, which were immediately recognizable to another rendition victim who was detained by the U.S. in Afghanistan;

• Photographs taken immediately upon Mr El-Masri's return to Germany that are consistent with his account of weight loss and unkempt grooming.

...

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

...

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

...

127. It is worth repeating that the analysis of all facts concerning this case points in favour of the credibility of El-Masri. Everything points in the direction that he was the victim of abduction and ill-treatment amounting to torture within the meaning of the term established by the case-law of the United Nations Committee against Torture ..."

(b) Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report, Doc. 11302 rev., 11 June 2007 ("the 2007 Marty report")

46. In his report of 11 June 2007 Senator Marty stated, *inter alia*:

"5. Some European governments have obstructed the search for the truth and are continuing to do so by invoking the concept of 'state secrets'. Secrecy is invoked so as not to provide explanations to parliamentary bodies or to prevent judicial authorities from establishing the facts and prosecuting those guilty of offences ... The same approach led the authorities of 'the former Yugoslav Republic of Macedonia' to hide the truth and give an obviously false account of the actions of its own national agencies and the CIA in carrying out the secret detention and rendition of Khaled El-Masri.

...

273. We believe we have now managed to retrace in detail Mr El-Masri's odyssey and to shed light on his return to Europe: if we, with neither the powers nor resources,

were able to do so, why were the competent authorities unable to manage it? There is only one possible explanation: they are not interested in seeing the truth come out.

...

275. ... We were able to prove the involvement of the CIA in Mr El-Masri's transfer to Afghanistan by linking the flight that carried him there – on the aircraft N313P, flying from Skopje ('the former Yugoslav Republic of Macedonia') to Baghdad (Iraq) to Kabul (Afghanistan) on 24 January 2004 – to another known CIA detainee transfer on the same plane two days earlier, thus establishing the first 'rendition circuit'. ...

276. Upon Mr El-Masri's arrival in Afghanistan, he was taken to a CIA secret detention facility near Kabul and held in a 'small, filthy, concrete cell' for a period of over four months. During this period the CIA discovered that no charges could be brought against him and that his passport was genuine, but inexplicably kept Mr El-Masri in his squalid, solitary confinement for several weeks thereafter.

...

279. Today I think I am in a position to reconstruct the circumstances of Mr El-Masri's return from Afghanistan: he was flown out of Kabul on 28 May 2004 on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called [Bezat-Kuçova] Aerodrome.

...

314. The 'official version' of Mr El-Masri's involuntary stay in 'the former Yugoslav Republic of Macedonia' has definitely become utterly untenable ..."

2. The European Parliament: the Fava inquiry

47. On 18 January 2006 the European Parliament set up a Temporary Committee on Extraordinary Rendition and appointed Mr Claudio Fava as rapporteur with a mandate to investigate the alleged existence of CIA prisons in Europe. The Fava inquiry held 130 meetings and sent delegations to the former Yugoslav Republic of Macedonia, the United States, Germany, the United Kingdom, Romania, Poland and Portugal.

48. It identified at least 1,245 flights operated by the CIA in European airspace between the end of 2001 and 2005. During its visit to the former Yugoslav Republic of Macedonia, the inquiry met with high-ranking officials.

49. On 6 July 2006 the European Parliament adopted a Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2027(INI)), P6_TA (2006)0316), which stated, *inter alia*:

"19. [The European Parliament] condemns the abduction by the CIA of the German national, Khaled el Masri, who was held in Afghanistan from January to May 2004 and subjected to degrading and inhuman treatment; notes further the suspicion – not yet allayed – that Khaled el Masri was illegally held before that date, from 31 December 2003 to 23 January 2004, in the Former Yugoslav Republic of Macedonia and that he was transported from there to Afghanistan on 23-24 January 2004; considers the measures that the Former Yugoslav Republic of Macedonia claims to have taken to investigate the matter to be inadequate ...

> 42. Condemns the fact that the German national, Khalid El-Masri, was held illegally in Afghanistan for more than four months in 2004; deplores the reluctance of the authorities of the Former Yugoslav Republic of Macedonia to confirm that El-Masri was in Skopje and was probably being held there before his rendition to Afghanistan by CIA agents ..."

50. On 30 January 2007 the final Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI)), doc. A6-0020/2007) was published. Noting the lack of thorough investigation by the respondent State, the report stated, *inter alia*:

> "136. [The European Parliament] condemns the extraordinary rendition of the German citizen Khaled El-Masri, abducted at the border-crossing Tabanovce in the Former Yugoslav Republic of Macedonia on 31 December 2003, illegally held in Skopje from 31 December 2003 to 23 January 2004 and then transported to Afghanistan on 23-24 January 2004, where he was held until May 2004 and subjected to degrading and inhuman treatment;
>
> ...
>
> 138. Fully endorses the preliminary findings of Munich Public Prosecutor Martin Hofmann that there is no evidence on the basis of which to refute Khaled El-Masri's version of events;"

51. The report also emphasised that "the concept of 'secret detention facility' includes not only prisons, but also places where somebody is held *incommunicado*, such as private apartments, police stations or hotel rooms, as in the case of Khaled El-Masri in Skopje".

3. UN Human Rights Committee, Concluding Observations on the Former Yugoslav Republic of Macedonia, 3 April 2008, UN Doc. CCPR/C/MKD/CO/2

52. In the course of the periodic review of the respondent State's compliance with the International Covenant on Civil and Political Rights conducted by the United Nations (UN) Human Rights Committee during its March-April 2008 session, the latter "noted the investigation undertaken by the State party and its denial of any involvement in the [applicant's] rendition notwithstanding the highly detailed allegations as well as the concerns [raised by the Marty and Fava inquiries]". The UN Human Rights Committee made the following recommendation:

> "14. ... the State party should consider undertaking a new and comprehensive investigation of the allegations made by Mr Khaled El-Masri. The investigation should take account of all available evidence and seek the cooperation of Mr El-Masri himself ..."

53. This recommendation was supported by the Commissioner for Human Rights of the Council of Europe in his report published on 11 September 2008 (Council of Europe Commissioner for Human Rights, Thomas Hammarberg, "Report on visit to the former Yugoslav Republic of Macedonia, 25-29 February 2008").

4. The applicant's petition before the Inter-American Commission of Human Rights against the United States (US)

54. On 9 April 2008 the applicant filed a petition with the Inter-American Commission on Human Rights. On 23 August 2009 the Commission transmitted the petition to the US Government for comments. No further information has been provided in respect of these proceedings.

D. Relevant proceedings before national authorities other than those of the respondent State

1. Germany

(a) Investigation by the German prosecuting authorities

55. On an unspecified date in 2004 the Munich public prosecutor's office opened an investigation into the applicant's allegations that he had been unlawfully abducted, detained, physically and psychologically abused and interrogated in the former Yugoslav Republic of Macedonia and Afghanistan. According to the applicant, a number of investigative steps were taken, including an examination of eyewitnesses who confirmed that the applicant had travelled to the former Yugoslav Republic of Macedonia by bus at the end of 2003 and that he had been detained shortly after entering that State.

56. Furthermore, a radioactive isotope analysis of the applicant's hair was carried out. An expert report of 17 January 2005 stated, *inter alia*:

> "... it is very likely that the changes observed in the enclosed isotopic signatures [of the applicant's hair] indeed correspond to [the applicant's] statements ..."

57. According to the First Committee of Inquiry of the German *Bundestag* (see below), the radioisotope analysis also confirmed that the applicant had undergone two hunger strikes.

58. On 31 January 2007 the Munich public prosecutor issued arrest warrants for thirteen CIA agents on account of their involvement in the applicant's alleged rendition. The names of the people sought were not made public. The identities of the CIA agents were allegedly given to the German prosecutor by the Spanish authorities, which had uncovered them in the course of their investigation into the use of Spanish airports by the CIA.

(b) German parliamentary inquiry

59. On 7 April 2006 the German *Bundestag* (Federal Parliament) appointed the First Committee of Inquiry of the Sixteenth Legislative Period ("the Committee of Inquiry") to review the activities of the secret services. Over a period of investigation of three years, the Committee of Inquiry held a total of 124 sessions, seven areas of investigation were addressed and a

total of 141 witnesses were heard, including the applicant. The findings of the Committee of Inquiry were made public on 18 June 2009.

60. The Committee of Inquiry's report, which runs altogether to 1,430 pages, stated, *inter alia*:

> "... Khaled El-Masri's report on his imprisonment in Macedonia and in Afghanistan is credible as to the core facts of his detention in Macedonia and his transfer to Afghanistan, as well as his confinement there by United States forces. Doubts remain, however, about some specific aspects of his account.
>
> The police investigations conducted by Swabian law-enforcement authorities and supported by the BKA [*Bundeskriminalamt* – German Federal Criminal Police] reaffirm Mr El-Masri's account. His trip to Macedonia on 31 December 2003 was corroborated by witnesses. El-Masri's account of the transfer from Macedonia to Afghanistan by United States forces is consistent with subsequent reports from other victims of the excesses of the 'war on terror' by the United States government at the time. The recorded movement of an American Boeing 737 of the presumed CIA airline 'Aero-Contractors' that flew from Majorca to Skopje on 23 January 2004 and continued on to Kabul, matches the temporal information that Mr El-Masri provided on the duration of his confinement at a Macedonian hotel ...
>
> All this supports the Committee's profound doubts about the official Macedonian version of the events ... The Macedonian Government continue to deny his detention at the hotel and his transfer to Afghanistan, calling this a defamatory media campaign. This official account of the events by Macedonia is clearly incorrect. Rather, it must be concluded that convincing evidence exists for El-Masri's account of the course of his arrest and transfer outside the country ..." (p. 353)

61. According to the report, doubts remained about the actual purpose of the applicant's trip to Skopje and significant discrepancies were noted in his statements concerning his questioning in the former Yugoslav Republic of Macedonia and Afghanistan, in particular his suspicion as to the German background of "Sam".

2. Legal action in the United States

62. On 6 December 2005 the American Civil Liberties Union (ACLU) filed a claim on behalf of the applicant in the United States District Court for the Eastern District of Virginia against a number of defendants including the former CIA director George Tenet and certain unknown CIA agents. The claim alleged that the applicant had been deprived of his liberty in the absence of legal process and included a claim under the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged arbitrary detention and cruel, inhuman or degrading treatment.

63. In May 2006 the District Court dismissed the applicant's claim, finding that the US Government had validly asserted the State secrets privilege. The District Court held that the State's interest in preserving State secrets outweighed the applicant's individual interest in justice. That decision was confirmed on appeal by the United States Court of Appeals for

the Fourth Circuit. In October 2007 the Supreme Court refused to review the case.

E. Proceedings taken in the former Yugoslav Republic of Macedonia regarding the applicant's alleged arrest, confinement and ill-treatment

1. Proceedings before the Department for Control and Professional Standards within the Ministry of the Interior (DCPS)

64. In 2005 an internal inquiry was carried out into the applicant's claims by the DCPS within the Ministry of the Interior. The applicant was not invited to produce any evidence before the DCPS, nor was he informed of the outcome of the investigation. The results of this inquiry were not communicated to him, but to the representatives of the European Union in the respondent State (see paragraph 39 above).

65. After having been given notice of the instant case, the Government submitted a copy of two reports issued on 20 March 2006 and 10 April 2008 by the DCPS. Both reports were drawn up at the request of the Public Prosecutor's Department of Organised Crime and Corruption, which had acted on two separate legal assistance requests, dated 9 May 2005 and 13 November 2007 respectively, from the Munich public prosecutor investigating the applicant's criminal complaint in Germany. These reports reiterated the Government's version of events as described above. They specified that the applicant, after having arrived at the Tabanovce border crossing on 31 December 2003, had been held between 4.30 p.m. and 9.30 p.m. in the official border premises and interviewed by the Macedonian police in connection with the alleged possession of a forged passport. After he had been released, he had stayed in the hotel, occupying room number 11. He had paid the hotel bill and had left the respondent State, as a pedestrian, at 6.20 p.m. on 23 January 2004 at the Blace border crossing. It was further specified that the then Head of the UBK, which had operated within the Ministry of the Interior, had never been rewarded by any foreign agency, including the CIA. It was concluded that no one, including the applicant, had ever been held in the hotel and interrogated by agents of the Ministry of the Interior.

66. In the course of these inquiries, the Ministry of the Interior submitted to the Macedonian public prosecutor the documents indicated above (see paragraph 41 above).

2. Criminal proceedings against unknown law-enforcement officials

67. On 6 October 2008 the applicant, through his legal representative Mr F. Medarski, lodged a criminal complaint with the Skopje public prosecutor's office against unidentified law-enforcement officials on

account of his unlawful detention and abduction, offences punishable under Article 140 of the Criminal Code. The complaint also alleged the crime of torture or other inhuman or degrading treatment or punishment, punishable under Articles 142 and 143 of the Criminal Code. In support of his complaint, the applicant submitted a copy of his affidavit prepared for the purposes of his lawsuit in the United States and produced the following evidence: a copy of his passport; relevant extracts from the 2006 and 2007 Marty reports and the Fava inquiry; a copy of the aviation logs; a letter from the Skopje Airport authorities issued on 18 June 2008 (in reply to the applicant's request for information) attesting that on 23 January 2004 a Boeing 737 aircraft registered by the FAA as N313P had landed at Skopje Airport without any passengers and that it had taken off on 24 January 2004 carrying only one passenger; a translated version of the expert report on the applicant's hair; and sketches of the hotel room where the applicant had allegedly been detained. The photograph of the waiter who had allegedly served the applicant with food was not included in the submission to the public prosecutor because "the applicant had been unable to preserve a copy at the relevant time and the photograph was no longer available on the hotel's website". The applicant further complained that, while being held at the Tabanovce border crossing and in the Skopski Merak hotel, he had been denied the right to contact his family, a lawyer of his own choosing or a representative of the German Embassy.

68. On 13 October 2008 the public prosecutor requested the Ministry of the Interior to investigate the applicant's allegations, and in particular to provide concrete information regarding the events at the Tabanovce border-crossing point, the hotel and Skopje Airport in order to establish the truth.

69. On 7 November 2008 the DCPS confirmed its previous findings and reiterated that all documents had already been submitted to the public prosecutor's office (see paragraphs 41 and 65 above).

70. On 18 December 2008 the public prosecutor rejected the applicant's criminal complaint as unsubstantiated. Relying on the information submitted by the DCPS, the public prosecutor found no evidence that unidentified officials had committed the alleged crimes. According to the applicant, he was notified of that decision on 22 November 2010.

71. The Government confirmed that during the investigation the public prosecutor had not taken oral evidence from the applicant and the personnel working in the hotel at the relevant time. Furthermore, no steps had been taken to establish the purpose of the landing of the aircraft mentioned in the letter issued by Skopje Airport authorities on 18 June 2008 and attached to the applicant's criminal complaint (see paragraph 67 above). In the Government's view, this was because the inquiries made by the Ministry of the Interior had rebutted the applicant's implausible allegations. Furthermore, during the 2006 inquiries the Ministry had already interviewed the persons working in the hotel at the time (see paragraphs 41 and 65

above). They had produced consistent evidence. However, there had been no record of those interviews.

3. Civil proceedings for damages

72. On 24 January 2009 Mr F. Medarski, on behalf of the applicant, brought a civil action for damages against the State and the Ministry of the Interior in relation to his alleged unlawful abduction and ill-treatment. The claim was based on sections 141 and 157 of the Obligations Act (see paragraphs 91 and 92 below). The applicant claimed 3 million Macedonian denars (equivalent to approximately 49,000 euros) in respect of the non-pecuniary damage resulting from his physical and mental pain and the fear that he would be killed during his detention. He reiterated his complaints that he had been denied the right to establish any contact with the outside world. The fact that his family had no information about his fate and whereabouts had added to his mental suffering. That had amounted to a separate violation of his family life under Article 8 of the Convention. He further argued that such actions by State agents amounted to a violation of Articles 3, 5 and 8 of the Convention. Besides the evidence submitted in his criminal complaint (see paragraph 67 above), the applicant requested that the civil courts hear oral evidence from him and that a psychological examination be carried out.

73. The Government informed the Court that sixteen hearings had so far been scheduled before the Skopje Court of First Instance. Many adjournments had been ordered owing to the absence of the applicant, who was imprisoned in Germany in relation to another offence. The case is still pending before the first-instance court.

F. Other evidence submitted to the Court

1. Sworn witness statement of 4 March 2010

74. Mr H.K., who was the Macedonian Minister of the Interior between November 2002 and May 2004 and the Prime Minister between June and November 2004, gave a written statement, certified by a notary public on 4 March 2010, in which he stated, *inter alia*:

> " ...
>
> 5. I can affirm that it was during my tenure as Minister of the Interior, in December 2003 and January 2004, that Macedonian agents belonging to the UBK, acting under my authority as Minister and under the direct supervision of the then UBK Director, were engaged in detaining a man who was travelling with a German passport under the name of Khaled El-Masri.
>
> 6. Mr El-Masri attempted to enter Macedonia on a bus from Germany on 31 December 2003. Macedonian police officials stopped him at the Tabanovce border

crossing with Serbia. He was taken off the bus and held at the border crossing because the police suspected that his identity might be fraudulent.

7. Our UBK liaisons told their United States intelligence partners about Mr El-Masri's arrival and were told that this man was suspected of involvement in Islamic terrorism. Macedonia received a valid international warrant from the US bearing Mr El-Masri's name and an official request to detain this man.

8. Acting in compliance with the US request, the Macedonian Government agreed to hold Mr El-Masri until he could be handed over to the US authorities for further interrogation. As Minister of the Interior I was kept informed of the UBK's actions and authorised them from the very beginning, although I was not involved at the operational level. I also liaised with our US counterparts on behalf of the Macedonian Government.

9. Mr El-Masri was held for a certain period in a location in Skopje, secretly and without incident, under the constant supervision of UBK agents.

10. Mr El-Masri was not regarded as a threat to Macedonia and held no intelligence value for Macedonia's purposes. If the decision had been ours alone, we would have released him. However, we acted faithfully on the warrant of our US counterparts, who indicated that they would send an aircraft and a team of CIA agents to Macedonia to take custody of Mr El-Masri and fly him out of the country. As time passed I indicated to our US counterparts that Macedonia would have to release Mr El-Masri if this rendition could not take place quickly.

11. Ultimately, some time in 23 January 2004, Mr El-Masri was handed over to the custody of a CIA 'rendition team' at Skopje Airport and was flown out of Macedonia on a CIA-operated aircraft.

12. The entire operation was thoroughly documented on the Macedonian side by UBK personnel in the Ministry of the Interior. This documentation was kept securely and ought to be available in the Ministry's files. I cannot state exactly what the files contain but I know that the relevant materials were not destroyed while I was the Minister of the Interior.

13. Some days after Mr El-Masri had been flown out of the country I received a final report on the operation through the appropriate line of reporting in the Ministry of the Interior. In my recollection, the final report indicated that Macedonia had adhered exactly to the terms of a legitimate international warrant regarding Mr El-Masri. Macedonia acted according to its domestic laws and procedures regulating the activities of the Ministry of the Interior.

14. Macedonia's status as a reliable partner in global counterterrorism was strengthened by the way we carried out this operation. Our US partners expressed great appreciation for Macedonia's handling of the matter.

15. I am aware that the US authorities ultimately released Mr El-Masri, without charge, after several further months of detention. I understand that Mr El-Masri's situation resulted from a mistake. I maintain that if any mistake was made in Mr El-Masri's case, it was not Macedonia's mistake, and I do not believe there was any intentional wrongdoing on the part of the Macedonian authorities.

16. I am aware that Mr El-Masri has now taken his case to the European Court of Human Rights in Strasbourg. My statement is expressly and solely for the purposes of this Court's deliberations on the application of Mr El-Masri, and may not be used in the pursuit of any investigations against individuals.

...

18. I solemnly declare upon my honour and conscience that the evidence contained in this statement is the truth, the whole truth and nothing but this truth. ”

2. Expert report on the applicant's case submitted by Mr J.G.S.

75. Mr J.G.S. is a citizen of the United Kingdom. He works as a lawyer and investigator. Appointed as an adviser to Senator Dick Marty in the context of the Marty inquiry and a member of the Fava inquiry, he took part in fact-finding missions in the respondent State, attended meetings with the highest-level officials and contacted sources close to the Government and the intelligence services. He further discussed the applicant's case with other relevant domestic and foreign Government officials and non-governmental representatives. He also interviewed the applicant on several occasions in 2006, as well as other witnesses. At the OSJI's request, on 28 March 2011 he submitted an expert report running to sixty-two pages in which he detailed the factual findings of his investigations into the applicant's case. The report was based on a "considerable amount of original testimonial, documentary and other physical evidence related to the applicant's case", most of which was obtained from people who had requested anonymity given the confidential and sensitive nature of the matter. According to the expert, "the Government has classified as 'Top Secret' all the documentation in its files that might help to shed light on the case" (see paragraph 21 of the report). He made repeated site visits of the Tabanovce border crossing, the hotel and Skopje Airport and interviewed "witnesses and other sources who participated in or experienced the[se] events at first hand". In the report, the expert gave detailed information about: the applicant's arrival in the respondent State, the chronological sequence of events at the Tabanovce border crossing and the actions taken by the Macedonian border officials with respect to the applicant, the UBK's deployment to Tabanovce and the on-site interrogation of the applicant, the UBK's liaison with the CIA and the landing, route and timing of a CIA-operated flight which had been used for the applicant's transfer from Skopje Airport. As noted in the report, after the arrival of the UBK agents at the Tabanovce border crossing, "the Macedonian authorities took meticulous and wide-ranging measures ... to conceal from scrutiny anything out of the ordinary – including deviations from Macedonian law and procedures – that might happen to Mr El-Masri while held in Macedonian custody. I have been struck by the attention to detail I have learned about on the part of the Macedonian authorities, as they sought to cover up or interfere with almost every avenue of independent investigation into the truth of what happened" (see paragraph 141 of the report).

3. Declarations of the European Centre for Constitutional and Human Rights (ECCHR)

76. The applicant submitted two reports containing the ECCHR's observations on the report of the First Committee of Inquiry of the German *Bundestag* (see paragraphs 59-61 above), cables sent by the US Embassy (see paragraph 77 below) and the arrest warrants issued by the Munich public prosecutor's office (see paragraph 58 above).

4. WikiLeaks cables

77. The applicant submitted several diplomatic cables in which the US diplomatic missions in the respondent State, Germany and Spain had reported to the US Secretary of State about the applicant's case and/or the alleged CIA flights and the investigations in Germany and Spain (cable 06SKOPJE105, issued 2 February 2006; cable 06SKOPJE118, issued on 6 February 2006; cable 07BERLIN242, issued on 6 February 2006; cable 06MADRID1490, issued on 9 June 2006; and cable 06MADRID3104, issued on 28 December 2006). These cables were released by WikiLeaks (described by the BBC on 7 December 2010 as "a whistle-blowing website") in 2010.

II. RELEVANT DOMESTIC LAW

A. The Constitution of 1991 (*Устав*)

78. Under Article 12 §§ 1, 2 and 4 of the Constitution, the right to liberty is irrevocable. No one may be deprived of his liberty except by a court decision and in the cases and under a procedure prescribed by law. Everyone detained must be brought immediately, and in any event no later than twenty-four hours from the detention, before a court that must decide on the lawfulness of the detention without any delay.

B. Criminal Code (*Кривичен законик*)

1. Time bar for criminal prosecution

79. Pursuant to Article 107 § 1 (4) of the Criminal Code, prosecution of offences subject to a prison sentence of more than three years becomes statute-barred five years after the offence was committed.

2. Running and suspension of the time bar

80. Under Article 108 § 3, any procedural step taken with a view to prosecuting the perpetrator interrupts the running of the time bar.

3. Unlawful deprivation of liberty

81. Article 140 of the Criminal Code provides that a person who unlawfully detains, holds in custody or otherwise restricts another's freedom of movement is to be fined or punished by a term of imprisonment of one year. An official who unlawfully deprives another of his or her liberty is to be punished by a term of imprisonment of six months to five years.

4. Torture

82. Article 142 of the Criminal Code punishes acts of torture, providing for a prison term of three months to five years.

5. Ill-treatment in the performance of official duties

83. Article 143 of the Criminal Code provides that a person who, in the performance of his or her official duties, mistreats, intimidates, insults or generally treats another in such a manner that his or her human dignity or personality is humiliated is to be punished by a term of imprisonment of six months to five years.

C. Criminal Procedure Act of 1997 (*Закон за кривичната постапка*), as worded at the material time

84. Section 3 of the Act provided that anyone who was summoned, arrested or detained had to be informed promptly, in a language which he or she understood, of the reasons for the summons, arrest or detention and of his or her statutory rights. He or she could not be forced to make a statement. A suspect, that is, a person accused of an offence, had to be clearly informed from the outset of his or her right to remain silent, to consult with a lawyer, to have a lawyer of his or her choice present during questioning, and to inform a third party of his or her detention. A detainee should be brought promptly or, at the latest, twenty-four hours after the detention, before a judge who would decide on the lawfulness of the detention.

85. Section 16 of the Act provided that criminal proceedings must be instituted at the request of an authorised prosecutor. In cases involving offences subject to prosecution by the State *proprio motu* or on an application by the victim, the authorised prosecutor was the public prosecutor, whereas in cases involving offences subject to merely private charges, the authorised prosecutor was the private prosecutor. If the public prosecutor found no grounds for the institution or continuation of criminal proceedings, his or her role could be assumed by the victim, acting as a subsidiary prosecutor under the conditions specified in the Act.

86. Section 56(1), (2) and (4) provided, *inter alia*, that where the public prosecutor found that there were no grounds for prosecuting an offence subject to State prosecution, he or she was to notify the victim of that decision within eight days. The public prosecutor also had to inform the victim that the latter could conduct the prosecution. The victim could take over the prosecution within eight days from the receipt of the prosecutor's notification. A victim who was not informed of the public prosecutor's decision could make a written application to the competent court to take over the prosecution within three months after the prosecutor rejected his or her complaint.

87. Under section 144, the public prosecutor was to reject a criminal complaint if, *inter alia*, there were no grounds to conclude that a crime had been committed. The public prosecutor had to notify the victim of the rejection and the reasons within eight days (section 56). An amendment to that provision, enacted in October 2004, specified that the public prosecutor should submit a copy of the decision rejecting the criminal complaint in which the victim was to be advised that he or she had the right to take over the prosecution within eight days. Where there was insufficient evidence or a complaint had been lodged against an unknown perpetrator, the public prosecutor would seek information from the Ministry of the Interior. The public prosecutor could also seek information from the complainant or any other person who could contribute to establishing the facts.

88. Section 184 specified the grounds for pre-trial detention.

89. Under section 185, pre-trial detention was ordered by an investigating judge. The person detained could appeal against that order within twenty-four hours before a three-judge panel, which was required to determine the appeal within forty-eight hours.

90. Section 188(2) provided that officials of the Ministry of the Interior could arrest, without a court order, anyone suspected of committing an offence prosecutable by automatic operation of the law. The arrested person had to be brought promptly before an investigating judge. In accordance with section 188(3) and as an exception to the general rule, Ministry officials could detain a person if it was necessary to determine his or her identity, to verify his or her alibi or if there were other grounds requiring the collection of information to enable proceedings to be brought against a third party. Subsection (4) required the arrested person to be given the information referred to in section 3 of the Act. Section 188(6) provided that detention pursuant to section 188(3) could not exceed twenty-four hours. The Ministry official was required either to release the arrested person or to proceed in accordance with section 188(2).

D. Obligations Act (*Закон за облигационите односи*)

91. Section 141 of the Obligations Act defines different grounds for claiming civil compensation.

92. Under section 157, an employer is liable for damage caused by an employee in the performance of his or her duties or in relation to them. The victim can claim compensation directly from the employee if the damage was caused intentionally. The employer may seek reimbursement from the employee of the compensation awarded to the victim if the employee caused the damage intentionally or negligently.

III. RELEVANT INTERNATIONAL LAW AND OTHER PUBLIC MATERIAL

A. International legal documents

1. Vienna Convention on Consular Relations, done in Vienna on 24 April 1963 and entered into force on 19 March 1967

93. The relevant part of Article 36 of the Vienna Convention on Consular Relations reads as follows:

Article 36

Communication and contact with nationals of the sending State

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

...

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph ..."

2. International Covenant on Civil and Political Rights (ICCPR)

94. The relevant provisions of the ICCPR, which was adopted on 16 December 1966 and entered into force on 23 March 1976, read as follows:

Article 4

"...

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

..."

Article 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 9

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

3. International Convention for the Protection of All Persons from Enforced Disappearance ("the CED")

95. The relevant provisions of the CED, which was adopted on 20 December 2006 and entered into force on 23 December 2010 and has been signed but not ratified by the respondent State, read as follows:

Article 1

"1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

Article 2

"For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

Article 3

"Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice."

Article 4

"Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law."

4. UN High Commissioner for Human Rights, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2001

96. The relevant passage of this manual reads as follows:

"80. Alleged victims of torture or ill-treatment and their legal representatives must be informed of, and have access to, any hearing as well as to all information relevant to the investigation and must be entitled to present other evidence."

5. International Law Commission, 2001 Articles on Responsibility of States for Internationally Wrongful Acts

97. The relevant parts of the Articles, adopted on 3 August 2001 (*Yearbook of the International Law Commission*, 2001, vol. II), read as follows:

Article 7

Excess of authority or contravention of instructions

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

..."

Article 14

Extension in time of the breach of an international obligation

"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

Article 15

Breach consisting of a composite act

"1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

Article 16

Aid or assistance in the commission of an internationally wrongful act

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State."

6. UN General Assembly, Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002 (A/57/173)

98. The relevant passage of this report reads as follows:

"35. Finally, the Special Rapporteur would like to appeal to all States to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been

put into place with a view to ensuring that they are treated with full respect for their human dignity ..."

7. Parliamentary Assembly of the Council of Europe, Resolution 1433 on lawfulness of detentions by the United States in Guantánamo Bay, adopted on 26 April 2005

99. The relevant parts of this Resolution read as follows:

"7. On the basis of an extensive review of legal and factual material from these and other reliable sources, the Assembly concludes that the circumstances surrounding detentions by the United States at Guantánamo Bay show unlawfulness and inconsistency with the rule of law, on the following grounds:

...

vii. the United States has, by practising 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement*."

8. Parliamentary Assembly of the Council of Europe, Resolution 1463 on enforced disappearances, adopted on 3 October 2005

100. The relevant parts of this Resolution read as follows:

"1. 'Enforced disappearances' entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law.

2. The Parliamentary Assembly unequivocally condemns enforced disappearance as a very serious human rights violation on a par with torture and murder, and it is concerned that this humanitarian scourge has not yet been eradicated, even in Europe ..."

9. UN General Assembly Resolution 60/148 on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 21 February 2006

101. The UN General Assembly's Resolution 60/148 reads as follows, in so far as relevant:

"The General Assembly

...

11. *Reminds* all States that prolonged *incommunicado* detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person."

10. European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners (no. 363/2005, 17 March 2006)

102. The relevant parts of the Venice Commission's Opinion read as follows:

> "30. As regards the terminology used to refer to irregular transfer and detention of prisoners, the Venice Commission notes that the public debate frequently uses the term 'rendition'. This is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. 'Rendition' is thus a general term referring more to the result – obtaining of custody over a suspected person – rather than the means. Whether a particular 'rendition' is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular 'rendition' is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of state organs), it may still be unlawful under the national law of the other State(s). Moreover, a 'rendition' may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.
>
> 31. The term 'extraordinary rendition' appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time.
>
> ...
>
> 159. As regards inter-state transfers of prisoners
>
> ...
>
> f) There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of sentenced persons for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be provided appropriate legal guarantees and access to competent authorities. The prohibition to extradite or deport to a country where there exists a risk of torture or ill-treatment must be respected."

11. Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/HRC/10/3, 4 February 2009

103. In this report the Special Rapporteur noted the following:

> "38. ... the Special Rapporteur is concerned about situations where persons are detained for a long period of time for the sole purpose of intelligence-gathering or on broad grounds in the name of prevention. These situations constitute arbitrary deprivation of liberty. The existence of grounds for continued detention should be

determined by an independent and impartial court. Without delay, the continued detention of such a person triggers a duty for the authorities to establish whether criminal suspicions can be confirmed and, if this is the case, to bring charges against the suspect and to put him on trial ...

51. The Special Rapporteur remains deeply troubled that the United States has created a comprehensive system of extraordinary renditions, prolonged and secret detention, and practices that violate the prohibition against torture and other forms of ill-treatment. This system required an international web of exchange of information and has created a corrupted body of information which was shared systematically with partners in the war on terror through intelligence cooperation, thereby corrupting the institutional culture of the legal and institutional systems of recipient States.

...

60. The human rights obligations of States, in particular the obligation to ensure an effective remedy, require that such legal provisions must not lead to a priori dismissal of investigations, or prevent disclosure of wrongdoing, in particular when there are reports of international crimes or gross human rights violations. The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence (under the policy of 'originator control') prevents effective investigation and renders the right to a remedy illusory. This is incompatible with Article 2 of the International Covenant on Civil and Political Rights. It could also amount to a violation of the obligation of States to provide judicial assistance to investigations that deal with gross human rights violations and serious violations of international humanitarian law."

12. UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009

104. The relevant parts of the above Resolutions read as follows:

"... recognised the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations ..."

13. Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 30 March 2011

105. The Guidelines address the problem of impunity in respect of acts or omissions that amount to serious human rights violations. They cover States' obligations under the Convention to take positive action in respect not only of their agents, but also in respect of non-state actors. According to the Guidelines, "impunity is caused or facilitated notably by the lack of diligent reaction of institutions or State agents to serious human rights violations. States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system". They provide *inter alia* for the general measures that States should undertake in

order to prevent impunity, the duty to investigate, as well as the adequate guarantees for persons deprived of their liberty.

B. Relevant case-law of foreign jurisdictions and international bodies

1. *Court of Appeal of England and Wales (Civil Division),* Abbasi and Another v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department, *Case No: C/2002/0617A; 0617B, 6 November 2002*

106. This case concerned Mr Feroz Ali Abbasi, a British national who had been captured by US forces in Afghanistan and transported in January 2002 to Guantánamo Bay in Cuba. He had been held captive without access to a court or any other form of tribunal or to a lawyer. He contended that the right not to be arbitrarily detained had been infringed. The court found that Mr Abbasi's detention in Guantánamo, which it referred to as "a legal black-hole", had been arbitrary "in apparent contravention of fundamental principles recognised by both [English and American] jurisdictions and by international law".

2. *United States Court of Appeals for the Ninth Circuit,* Falen Gherebi v. George Walker Bush; Donald H. Rumsfeld, *D.C. No. CV-03-01267-AHM, 18 December 2003*

107. On 18 December 2003, in a case involving a Libyan man (Mr Gherebi) held as an "enemy combatant" at Guantánamo, the US Court of Appeals described what the US Government had argued before it:

> "under the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition. Accordingly, we view Guantanamo as unique not only because the United States' territorial relationship with the Base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles – a position so extreme that it raises the gravest concerns under both American and international law."

3. UN Committee against Torture, Agiza v. Sweden, *Communication No 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), and UN Human Rights Committee*, Alzery v. Sweden, *UN Doc. CCPR/C/88/D/1416/2005 (2006)*

108. Both these cases were discussed in the 2006 Marty report (see paragraphs 150-161 of the report), the most relevant parts of which read as follows:

> "153. In short, the facts occurred in the following manner: on 18 December 2001, Mr Agiza and Mr Alzery, Egyptian citizens seeking asylum in Sweden, were the subject of a decision dismissing the asylum application and ordering their deportation on grounds of security, taken in the framework of a special procedure at ministerial level. In order to ensure that this decision could be executed that same day, the Swedish authorities accepted an American offer to place at their disposal an aircraft which enjoyed special over flight authorisations. Following their arrest by the Swedish police, the two men were taken to Bromma Airport where they were subjected, with Swedish agreement, to a 'security check' by hooded American agents.
>
> 154. The account of this '*check*' is especially interesting, as it corresponds in detail to the account given independently by other victims of 'rendition', including Mr El-Masri. The procedure adopted by the American team, described in this case by the Swedish police officers present at the scene, was evidently well rehearsed: the agents communicated with each other by gestures, not words. Acting very quickly, the agents cut Agiza's and Alzery's clothes off them using scissors, dressed them in tracksuits, examined every bodily aperture and hair minutely, handcuffed them and shackled their feet, and walked them to the aircraft barefoot.
>
> ...
>
> 157. Prior to deportation of the two men to Egypt, Sweden sought and obtained diplomatic assurances that they would not be subjected to treatment contrary to the anti-torture convention, would have fair trials and would not be subjected to the death penalty. The 'assurances' were even backed up by a monitoring mechanism, regular visits by the Swedish Ambassador and participation by Swedish observers at the trial."

109. The relevant United Nations committees found Sweden responsible under Article 7 of the ICCPR, concluding that the treatment to which Mr Alzery had been subjected at Bromma Airport had been imputable to the State party and had amounted to a violation of Article 7 of the Covenant; that Sweden had breached its obligations to carry out a prompt, independent and impartial investigation into the events at Bromma Airport; and that the prohibition of *refoulement*, set out in that Article, had been breached in respect of both Mr Agiza and Mr Alzery.

110. *USA Today* reported that the Swedish Government had paid USD 450,000 to Mr Alzery in compensation for his deportation. The same amount had been agreed to be paid to Mr Agiza ("Sweden compensates Egyptian ex-terror suspect", *USA Today*, 19 September 2008).

C. Public sources highlighting concerns as to human rights violations allegedly occurring in US-run detention facilities in the aftermath of 11 September 2001

111. The applicant and third-party interveners submitted a considerable number of articles, reports and opinions of international, foreign and national bodies, non-governmental organisations and media, which raised concerns about alleged unlawful secret detentions and ill-treatment in US-run detention centres in Guantánamo Bay and Afghanistan. A summary of the most relevant sources is given below.

1. Relevant materials of international human-rights organisations

(a) Statement of the UN High Commissioner for Human Rights on detention of Taliban and Al-Qaeda prisoners at the US Base in Guantánamo Bay, Cuba, 16 January 2002

112. The UN High Commissioner for Human Rights stated as follows:

> "All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention."

(b) Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002

113. In this memorandum, Amnesty International expressed its concerns that the US Government had transferred and held people in conditions that might amount to cruel, inhuman or degrading treatment and that violated other minimum standards relating to detention, and had refused to grant people in its custody access to legal counsel and to the courts in order to challenge the lawfulness of their detention.

(c) Human Rights Watch, "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees", Vol. 14, No. 4 (G), August 2002

114. This report included the following passage:

> "... the fight against terrorism launched by the United States after September 11 did not include a vigorous affirmation of those freedoms. Instead, the country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights ... Most of those directly affected have been non-U.S. citizens ... the Department of Justice has subjected them to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence."

(d) Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects", 26 December 2002

115. This report referred to the *Washington Post*'s article: "U.S. Decries Abuse but Defends Interrogations" which described "how persons held in the CIA interrogation center at Bagram air base in Afghanistan were being subject to "stress and duress" techniques, including "standing or kneeling for hours" and being "held in awkward, painful positions".

116. It further stated:

> "The Convention against Torture, which the United States has ratified, specifically prohibits torture and mistreatment, as well as sending detainees to countries where such practices are likely to occur."

(e) International Helsinki Federation for Human Rights, "Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11", Report, April 2003

117. The relevant passage of this report read as follows:

> "Many 'special interest' detainees have been held in solitary confinement or housed with convicted prisoners, with restrictions on communications with family, friends and lawyers, and have had inadequate access to facilities for exercise and for religious observance, including facilities to comply with dietary requirements. Some told human rights groups they were denied medical treatment and beaten by guards and inmates."

(f) Amnesty International Report 2003 – United States of America, 28 May 2003

118. This report discussed the transfer of detainees to Guantánamo, Cuba in 2002, the conditions of their transfer ("prisoners were handcuffed, shackled, made to wear mittens, surgical masks and ear muffs, and were effectively blindfolded by the use of taped-over ski goggles") and the conditions of detention ("they were held without charge or trial or access to courts, lawyers or relatives"). It further stated:

> "A number of suspected members of *al-Qa'ida* reported to have been taken into US custody continued to be held in undisclosed locations. The US government failed to provide clarification on the whereabouts and legal status of those detained, or to provide them with their rights under international law, including the right to inform their families of their place of detention and the right of access to outside representatives. An unknown number of detainees originally in US custody were allegedly transferred to third countries, a situation which raised concern that the suspects might face torture during interrogation."

(g) Amnesty International, "Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay", 29 May 2003

119. Amnesty International reported on the transfer of six Algerian men, by Bosnian Federation police, from Sarajevo Prison into US custody in Camp X-Ray, located in Guantánamo Bay, Cuba. It expressed its concerns

that they had been arbitrarily detained in violation of their rights under the International Covenant on Civil and Political Rights. It also referred to the decision of the Human Rights Chamber of Bosnia and Herzegovina in which the latter had found that the transfer had been in violation of Article 5 of the Convention, Article 1 of Protocol No. 7 and Article 1 of Protocol No. 6.

(h) Amnesty International, "United States of America, The threat of a bad example: Undermining international standards as 'war on terror' detentions continue", 18 August 2003

120. The relevant passage of this report read as follows:

"Detainees have been held incommunicado in US bases in Afghanistan. Allegations of ill-treatment have emerged. Others have been held incommunicado in US custody in undisclosed locations elsewhere in the world, and the US has also instigated or involved itself in 'irregular renditions', US parlance for informal transfers of detainees between the USA and other countries which bypass extradition or other human rights protections."

(i) Amnesty International, "Incommunicado detention/Fear of ill-treatment", 20 August 2003

121. The relevant passage of this report read as follows:

"Amnesty International is concerned that the detention of suspects in undisclosed locations without access to legal representation or to family members and the 'rendering' of suspects between countries without any formal human rights protections is in violation of the right to a fair trial, places them at risk of ill-treatment and undermines the rule of law."

(j) International Committee of the Red Cross, United States: ICRC President urges progress on detention-related issues, news release 04/03, 16 January 2004

122. The ICRC expressed its position as follows:

"Beyond Guantanamo, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. Mr Kellenberger echoed previous official requests from the ICRC for information on these detainees and for eventual access to them, as an important humanitarian priority and as a logical continuation of the organization's current detention work in Guantanamo and Afghanistan."

(k) UN Working Group on Arbitrary Detention, Opinion No. 29/2006, Mr Ibn al-Shaykh al-Libi and 25 other persons v. United States of America, UN Doc. A/HRC/4/40/Add.1 at 103 (2006)

123. The UN Working Group found that the detention of the persons concerned, held in facilities run by the United States secret services or transferred, often by secretly run flights, to detention centres in countries with which the United States authorities cooperated in their fight against international terrorism, fell outside all national and international legal

regimes pertaining to the safeguards against arbitrary detention. In addition, it found that the secrecy surrounding the detention and inter-State transfer of suspected terrorists could expose the persons affected to torture, forced disappearance and extrajudicial killing.

2. Other public documents

Central Intelligence Agency, "Memo to the Department of Justice Command Centre-Background Paper on CIA's combined use of interrogation techniques", 30 December 2004

124. The applicant submitted to the Court the above-mentioned CIA memo, parts of which are no longer classified. The document "focuses on the topic of combined use of interrogation techniques, [the purpose of which] is to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner ... Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence HVD behaviour, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence ... The interrogation process could be broken into three separate phases: Initial conditions, transition to interrogation and interrogation". As described in the memo, the "Initial conditions" phase concerned "capture shock", "rendition" and "reception at Black Site". It reads, *inter alia*:

> "Capture ... contribute to the physical and psychological condition of the HVD prior to the start of interrogation ...
>
> 1) Rendition
>
> ... A medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods ..."

125. The "Interrogation" phase included descriptions of "Detention conditions", "Conditioning Techniques" and "Corrective Techniques".

3. Media articles

126. The applicant further submitted copies of numerous articles published in Macedonian newspapers. The most relevant are cited below:

(1) "Hunger Strike of the Taliban in Guantánamo", 4 March 2002; "Secret Agreement with Serious Shortcomings", 5 June 2003; "Four Frenchmen in Guantánamo under Torture", 16 October 2003; "In Guantánamo Torture is Performed", 27 November 2003; and "Prisoners without Charges or Rights", 12 January 2004 (all published in the newspaper *Utrinski Vesnik*); and

(2) "CIA Tortures Captured Islamists in Afghanistan", 27 December 2002; "USA Forgets about Human Rights in the course of the Anti-

terrorism Campaign", 16 January 2003; "Oblivion for 140 Prisoners of Guantánamo", 2 December 2003 (all published in the newspaper *Dnevnik*).

127. He also provided copies of articles published in US newspapers, which reported on "stress and duress" techniques employed by the US in interrogating detainees at the US air base at Bagram in Afghanistan ("Army Probing Deaths of 2 Afghan Prisoners", *Washington Post*, 5 March 2003 and "Questioning Terror Suspects in a Dark and Surreal World", *New York Times*, 9 March 2003). Other articles from US and British newspapers reported on the rendition to US custody of individuals suspected of terrorist-related activities prior to January 2004 ("A CIA-Backed Team Used Brutal Means to Crack Terror Cell", *Wall Street Journal*, 20 November 2001; "U.S. Behind Secret Transfer of Terror Suspects", *Washington Post*, 11 March 2002; "Chretien Protests Deportation of Canadian: Prime Minister Calls U.S. Treatment of Terror Suspect 'Completely Unacceptable'", *Washington Post*, 6 November 2003; "The Invisible", *The Independent*, 26 June 2003; and "Missing Presumed Guilty: where terror suspects are being held", *The Independent*, 26 June 2003.

128. The applicant submitted articles in which journalists reported that the US Ambassador in Germany at the time had informed the German authorities in May 2004 that the CIA had wrongly imprisoned the applicant. They further reported that German Chancellor Angela Merkel had stated that the US Secretary of State Condoleezza Rice had admitted to her, in a private discussion, that the US had mistakenly abducted and detained the applicant. According to those articles, US representatives had declined to discuss anything about the case with reporters ("Wrongful Imprisonment: Anatomy of a CIA Mistake", The Washington Post, 4 December 2005; "German Man Sues CIA on claims of torture, El-Masri seeks damages after mistaken-identity 'rendition' case, *NBC News*, 6 December 2005; "Merkel Government stands by Masri mistake comments", *Washington Post*, 7 December 2005; and "Germany Weighs if it Played Role in Seizure by U.S.", *The New York Times*, 21 February 2006). The latter article made reference to an interview with Mr H.K. in which he stated:

> "There is nothing the Ministry has done illegally. The man is alive and back home with his family. Somebody made a mistake. That somebody is not Macedonia."

129. Lastly, in 2007, the Canadian Broadcasting Corporation (CBC) reported that the Canadian Prime Minister was to announce a settlement of 10,000,000 United States dollars (USD) and issue a formal apology to a Mr Arar, a Canadian citizen born in Syria, who had been arrested in 2002 by US authorities at New York JFK Airport and deported to Syria. The Prime Minister had already acknowledged that Mr Arar had suffered a "tremendous injustice" (CBC, "Ottawa reaches $10M settlement with Arar", 25 January 2007). In 2010 *The Guardian* published an article about the

alleged role of the United Kingdom (UK) in the rendition of suspects in which it was announced that former UK detainees in Guantánamo Bay might receive a very large payout from the UK government, in some cases at least one million pounds sterling (*The Guardian*, "Torture and terrorism: Paying a high price", 17 November 2010).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION OF NON-COMPLIANCE WITH THE SIX-MONTH RULE

A. The parties' submissions

1. The respondent Government

130. The Government objected that the applicant had failed to comply with the six-month rule. They argued that he had applied to the domestic prosecuting authorities over four and a half years after the events complained of (the Government cited *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III; *Artyomov v. Russia*, no. 14146/02, §§ 113-118, 27 May 2010; and *Nasirkhayeva v. Russia* (dec.), no. 1721/07, 31 May 2011). Between May 2004 and October 2008 the applicant had remained totally passive and displayed no initiative in informing the Macedonian law-enforcement authorities about the alleged events. Instead, he had pursued remedies in other jurisdictions. Furthermore, he ought to have known long before October 2008 that any criminal investigation in the respondent State would have been ineffective. In this connection they referred to the absence of any contact between him and the law-enforcement authorities of the respondent State, as well as the absence of State prosecution *proprio motu*, despite the fact that the prosecuting authorities had already been alerted about his case by their German counterparts. The last inquiries at international and national level, which had ended in January 2007, long before the applicant had submitted his criminal complaint in October 2008, had not led to any finding of fact which would have been of relevance to that complaint. His criminal complaint had not contained any new evidence capable of reviving the State's duty to investigate 'his allegations.

131. Lastly, they argued that the applicant had not been diligent in pursuing the domestic avenues of redress. His lack of diligence was evident because he had taken no initiative in informing himself about the progress made in the investigation (the Government cited *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002). Moreover, he had failed to

communicate Mr H.K.'s statement to the domestic authorities and to seek the institution of criminal proceedings by the public prosecutor. Had the applicant requested the prosecution of an identified perpetrator, he would have been allowed to take over the prosecution as a subsidiary complainant if the public prosecutor dismissed his complaint. He had had no such opportunity in the present case, given that his criminal complaint of October 2008 had been filed against an unidentified perpetrator. Furthermore, the applicant could not have challenged the decision dismissing his complaint.

2. The applicant

132. The applicant submitted in reply that the respondent State had a positive obligation under the Convention to carry out an investigation of its own motion. The internal investigation undertaken by the Ministry of the Interior (see paragraphs 64-66 above) could not be regarded as effective and independent within the meaning of Articles 3 and 13 of the Convention. Moreover, he had had no possibility of knowing about that inquiry, given the failure of the authorities to contact him or make their inquiry public. From the moment he had returned to Germany in late May 2004 he had actively sought to obtain sufficient evidence to build an "arguable case" to present to the national prosecuting authorities. The period of four and a half years between his release and the filing of the criminal complaint in October 2008 had not been excessive. On the contrary, that time had been entirely reasonable, considering that this was a complex case of disappearance, involving international intelligence cooperation, in which the US and Macedonian Governments had agreed to cover up the existence of a secret, multinational criminal enterprise. Accordingly, he had acted diligently and in compliance with the Court's practice. He had sought in timely fashion to initiate a criminal investigation, but the authorities had not responded expeditiously and instead had secretly rejected his complaint. He had further sought in vain information from the public prosecutor about the progress of the investigation. The public prosecutor had not notified him of her decision rejecting the complaint until 22 November 2010, fourteen months after his application had been lodged with the Court. Since the criminal complaint had been lodged against an unidentified perpetrator, he had been prevented from initiating a private prosecution.

133. The applicant submitted in conclusion that he had accordingly complied with the six-month time-limit, which had started to run on 23 January 2009, the date when the prosecution of the alleged offences had, according to him, become time-barred.

B. The Court's assessment

1. General principles established in the Court's case-law

134. The Court reiterates that the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on respondent Governments, but also has effects on the position of applicants. Where time is of the essence in resolving the issues in a case, there is a burden on the applicant to ensure that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 160, ECHR 2009...).

135. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 39 and 40, 29 June 2012, and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

136. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of such acts or their effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001).

2. Application of the above principles in the present case

137. The Court observes that the Government's objection that the application was out of time was twofold: firstly, that the applicant's criminal complaint was submitted to the domestic authorities too late and

secondly, that the complaint had been an ineffective remedy. In this connection they suggested that the six-month time-limit should be regarded as having started to run when the applicant first became or ought to have become aware of the circumstances which rendered the available domestic remedies ineffective.

138. In order to answer the Government's admissibility objection, the Court must assess whether, in the particular circumstances of the present case, a criminal complaint was an effective remedy to be used by the applicant in order to seek redress for his Convention grievances. The answer to that question will be determinative for the calculation of the six-month time-limit.

(a) Whether a criminal complaint was a remedy to be used by the applicant

139. The Court reiterates that the determination of whether the applicant in a given case has complied with the admissibility criteria will depend on the circumstances of the case and other factors, such as the diligence and interest displayed by the applicant, as well as the adequacy of the domestic investigation (see *Abuyeva and Others v. Russia*, no. 27065/05, § 174, 2 December 2010).

140. The Court notes that it has already found in cases against the respondent State that a criminal complaint is an effective remedy which should be used, in principle, in cases of alleged violations of Article 3 of the Convention (see *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, 15 February 2007; *Trajkoski v. the former Yugoslav Republic of Macedonia*, no. 13191/02, 7 February 2008; *Dzeladinov and Others v. the former Yugoslav Republic of Macedonia*, no. 13252/02, 10 April 2008; and *Sulejmanov v. the former Yugoslav Republic of Macedonia*, no. 69875/01, 24 April 2008). It sees no reasons that could justify departing from this principle, all the more so, in the circumstances of the present case, where allegations of inhuman treatment and unlawful deprivation of liberty purportedly are the result of a secret operation carried out without any legal basis. If the actions of the State agents involved have been illegal and arbitrary, it is for the prosecuting authorities of the respondent State to identify and punish the perpetrators. Alerting the public prosecutor's office about these actions must be seen as an entirely logical step on the part of the victim.

141. The Court considers that it could not have been reasonably presumed that, when it was introduced in October 2008, a criminal complaint was a clearly ineffective remedy. There were merely some doubts about its effectiveness, and the applicant was required, under Article 35 § 1 of the Convention, to attempt it before submitting his application to the Court. It would be unreasonable to expect the applicant to bring his complaints to the Court before his position in connection with the matter had been finally settled at domestic level in line with the principle of

subsidiarity, according to which it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the effectiveness of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention (see *Varnava and Others*, cited above, § 164).

142. It is true that a considerable time elapsed between 29 May 2004, the date of the applicant's return to Germany, and the filing of his criminal complaint on 6 October 2008. No other legal action in the respondent State was taken by the applicant prior to that date. In accounting for this delay, the applicant gave an explanation which cannot in itself be considered unreasonable. His case concerned allegations of "extraordinary rendition", which included allegations of abduction, incommunicado detention and ill-treatment. According to the 2006 Marty report, the authorities of most Council of Europe member States have denied allegations of their participation in rendition operations (see paragraph 43 above). Such policy of obstruction was reaffirmed in the 2007 Marty report (see paragraph 46 above). Given the sensitivity of the matter and the concealment noted above, it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues. Indeed, the inquiries under way in the years prior to October 2008 revealed relevant elements that shed additional light on the applicant's allegations and constituted a more solid background for his criminal claim. Given the complexity of the case and the nature of the alleged human rights violations at stake, it is understandable that the applicant decided to pursue domestic remedies only when he had some corroborative material available to him.

143. In any event, the criminal complaint was brought before the prosecution of the alleged offences' became time-barred (see paragraph 79 above). It was rejected for lack of evidence and not for non-compliance with the admissibility criteria. It does not appear, therefore, that the delay in bringing the complaint rendered it inadmissible, ineffective or otherwise incapable of remedying the situation complained of. On the contrary, by bringing his claim when some corroborative evidence was available at the international level, the applicant furnished the Macedonian judicial authorities with more solid reasons to look further into his allegations.

144. It follows from the above that a criminal complaint was a remedy that had to be used by the applicant in the circumstances.

(b) The starting point of the six-month time-limit

145. It thus remains to be determined when the final decision on his criminal complaint became known to the applicant. This date would mark the starting point of the six-month time-limit.

146. The Court observes that little more than two months elapsed between the submission of the criminal complaint and the decision to reject

it. This time, in the Court's view, cannot be regarded, in the circumstances of the case, so long as to require the applicant to enquire about the steps taken during that period by the domestic authorities. As submitted by the applicant, his further requests for information about the progress made in the investigation were to no avail (see paragraph 132 above).

147. The public prosecutor rejected the applicant's criminal complaint on 18 December 2008. According to the applicant, that decision was not brought to his attention until 22 November 2010, despite the fact that the applicable procedural law placed the prosecuting authorities under an obligation to notify victims of their decision to dismiss a complaint within eight days (see paragraphs 86 and 87 above). The Government have not alleged that this requirement was complied with. Therefore, the starting point of the six-month time-limit cannot be fixed at 18 December 2008, the date of the public prosecutor's decision, but at the date on which the applicant subsequently learned about that decision. In the circumstances of the present case, it is not necessary to ascertain the truthfulness of the applicant's statement about the service of the decision since the Government have not demonstrated that the applicant received an official notification of the decision or otherwise learned about it before 20 January 2009, that is, six months before he lodged his application with the Court.

(c) Conclusion

148. In the light of the above, the Court considers that the applicant has complied with the six-month rule under Article 35 § 1 of the Convention and that the Government's objection that the application is out of time must accordingly be dismissed.

II. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. The parties' submissions

149. The applicant maintained that he had been subjected to extraordinary rendition by CIA agents assisted, to a large extent, by agents of the respondent State. The international inquiries, the foreign investigations and the applicant's further efforts to investigate his case provided a wealth of compelling evidence supporting his allegations and rejecting the Government's explanation as utterly untenable. On the other hand, there had been "not a shred of credible evidence to buttress the Government's version of events".

150. The Government denied the applicant's allegations as unsubstantiated, submitting various materials in support of that argument

(see paragraphs 41 and 65 above). They further denied the existence of any documentation referred to by Mr H.K. (see paragraph 74 above and paragraph 12 of the statement).

B. The Court's evaluation of the facts

1. General principles

151. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Creangă v. Romania* [GC], no. 29226/03, § 88, 23 February 2012, and the cases cited therein).

152. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Rupa v. Romania* (no. 1), no. 58478/00, § 97,

16 December 2008). In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government (see *Orhan v. Turkey*, no. 25656/94, § 274, 18 June 2002).

153. The Court has already found that these considerations apply also to disappearances examined under Article 5 of the Convention, where, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see *Tanış and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005–VIII; *Yusupova and Zaurbekov v. Russia*, no. 22057/02, § 52, 9 October 2008, and *Matayeva and Dadayeva v. Russia*, no. 49076/06, § 85, 19 April 2011). Furthermore, the Court reiterates that, again in the context of a complaint under Article 5 § 1 of the Convention, it has required proof in the form of concordant inferences before the burden of proof is shifted to the respondent Government (see *Öcalan v. Turkey* [GC], no. 46221/99, § 90, ECHR 2005-IV, and *Creangă*, cited above, § 89).

2. Establishment of the facts in the present case

154. The Court notes that the applicant's allegations are contested by the Government on all accounts. Having regard to the conflicting evidence submitted by the parties, the firm denial of the respondent Government of any involvement of State' agents in the events complained of and the rejection of the applicant's criminal complaint, the Court considers that an issue arises as to the burden of proof in this case and in particular as to whether it should shift from the applicant onto the respondent Government.

155. In this connection it emphasises that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Article 3 of the Convention the Court must apply a "particularly thorough scrutiny" (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336, and *Georgiy Bykov v. Russia*, no. 24271/03, § 51, 14 October 2010) even if certain domestic proceedings and investigations have already taken place (see *Cobzaru v. Romania*, no. 48254/99, § 65, 26 July 2007). In other words, in such a context the Court is prepared to be more critical of the conclusions of the domestic courts. In examining them, the Court may take into account the quality of the domestic proceedings and any possible flaws in the decision-making

process (see *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, § 83, 12 February 2009).

156. The Court observes first of all that the applicant's description of the circumstances regarding his alleged ordeal was very detailed, specific and consistent throughout the whole period following his return to Germany. His account remained coherent throughout the international and other foreign inquiries and the domestic proceedings and involved consistent information regarding the place, time and duration of his alleged detention in the former Yugoslav Republic of Macedonia and in the CIA-run detention facility, as well as the treatment to which he was allegedly subjected while in the hotel, during his transfer into the custody of CIA agents at Skopje Airport and in the "Salt Pit" in Afghanistan. In addition to this, there are other aspects of the case which enhance the applicant's credibility.

157. In the first place, the Court notes that the applicant's account was supported by a large amount of indirect evidence obtained during the international inquiries and the investigation by the German authorities. In this connection the Court notes the following evidence:

(a) aviation logs confirming that a Boeing business jet (then registered by the US Federal Aviation Administration (FAA)) took off from Palma de Mallorca (Spain) on 23 January 2004, landed at Skopje Airport at 8.51 p.m. that evening and left Skopje more than three hours later, flying to Baghdad and then to Kabul;

(b) flight logs confirming that a CIA-chartered Gulfstream aircraft with the tail number N982RK took off from Kabul on 28 May 2004 and landed at a military airbase in Albania called Bezat-Kuçova Aerodrome;

(c) scientific testing of the applicant's hair follicles, conducted pursuant to a German criminal investigation, confirming that he had spent time in a South Asian country and had been deprived of food for an extended period of time;

(d) geological records that confirm the applicant's recollection of minor earthquakes during his alleged detention in Afghanistan;

(e) sketches that the applicant drew of the layout of the Afghan prison, which were immediately recognisable to another rendition victim who had been detained by US agents in Afghanistan.

158. On the basis of that evidence the Marty inquiry was able to conclude that the applicant's case was "a case of documented rendition" (see paragraph 45 above) and that the Government's version of events was "utterly untenable" (see paragraph 46 above). The final report of the Fava inquiry "condemned the extraordinary rendition of the German citizen Khaled El-Masri" (see paragraph 49 above). Furthermore, the German *Bundestag* noted that the applicant's story was "credible as to the core facts of his detention in Macedonia and his transfer to Afghanistan, as well as his confinement there by United States forces" (see paragraph 60 above).

159. Secondly, the applicant's inquiries in the respondent State revealed other relevant elements corroborating his story. In this context the Court draws particular attention to the letter from the Skopje Airport authorities issued on 18 June 2008 (see paragraph 67 above) confirming the Marty inquiry's findings regarding the route of the Boeing 737 aircraft with the tail number N313P. That document attested, for the first time, that the aircraft had landed at Skopje Airport without any passengers and that it had taken off carrying only one passenger. Other compelling evidence in support of the applicant was the expert report produced by Mr J.G.S., an investigator involved in the Marty and Fava inquiries, in which a detailed factual finding was made regarding events between the applicant's entry into the former Yugoslav Republic of Macedonia and his transfer into the custody of CIA agents.

160. Thirdly, the Court attaches particular importance to the relevant material (see paragraphs 98, 103, 106-127 above), which is already a matter of public record, issued by different fora disclosing relevant information about the "rendition programme" run by the US authorities at the time. Even though this material does not refer to the applicant's case as such, it sheds light on the methods employed in similar "rendition" cases to those described by the applicant.

161. Lastly, the Court refers to the written statement of Mr H.K., who was, at the relevant time, the Minister of the Interior of the respondent State and soon afterwards became Prime Minister. In the statement, which is the only direct evidence about the events complained of before the Court, the witness confirmed that the Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had detained the applicant, kept him incommunicado and under the constant supervision of UBK (State Intelligence Service) agents in a location in Skopje. He had later been handed over to the custody of a CIA "rendition team" at Skopje Airport and had been flown out of the respondent State on a CIA-operated aircraft. His statement is a confirmation of the facts established in the course of the other investigations and of the applicant's consistent and coherent description of events.

162. It is true that the domestic authorities were not given the opportunity to test the evidence of Mr H.K. Nor has the Court itself had the opportunity to probe the details of his statement in the course of the proceedings before it. However, this does not necessarily diminish its probative value, nor does the fact that it came to light after the domestic prosecuting authorities had already rejected the applicant's criminal complaint prevent the Court from taking it into consideration (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008).

163. In principle the Court will treat with caution statements given by Government ministers or other high officials, since they would tend to be in favour of the Government that they represent or represented. However, it

also considers that statements from high-ranking officials, even former ministers and officials, who have played a central role in the dispute in question, are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavourable light. They may then be construed as a form of admission (see in this context, *mutatis mutandis*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, *ICJ Reports* 1986, p.14, § 64).

164. The Court therefore considers that the evidence produced by this witness can be taken into account. In this connection it notes that the Government has not presented the Court with any reason to cast doubt on its credibility.

165. In view of the above, the Court is satisfied that there is *prima facie* evidence in favour of the applicant's version of events and that the burden of proof should shift to the respondent Government.

166. However, the Government have failed to demonstrate conclusively why the above evidence cannot serve to corroborate the allegations made by the applicant. They have not provided a satisfactory and convincing explanation of how the events in question occurred. Nor have they provided a plausible explanation as to what happened to the applicant after their authorities had taken control of him at the Tabanovce border crossing on 31 December 2003. No credible and substantiated explanation has been given by the Government to rebut the presumption of responsibility on the part of their authorities to account for the applicant's fate since his apprehension on 31 December 2003. The evidence submitted by the Government (see paragraphs 41 and 65 above) is insufficient in this respect. In this connection it is noteworthy that no explanation was given by the Government as to why it had not been made available earlier (see paragraph 45 above and paragraph 113 of the 2006 Marty report). Furthermore, the Government neither commented on nor submitted any objection to the expert report submitted by Mr J.G.S. They further failed to produce the documents regarding the applicant's case held by the Ministry of the Interior to which Mr H.K. had referred in his statement (see paragraph 74 above). Neither was any written material in this context submitted to the Court. Lastly, the investigation which ended with the rejection of the applicant's complaint was inconclusive and the Court is unable to draw any benefit from its results.

167. In such circumstances, the Court considers that it can draw inferences from the available material and the authorities' conduct (see *Kadirova and Others v. Russia*, no. 5432/07, §§ 87 and 88, 27 March 2012) and finds the applicant's allegations sufficiently convincing and established beyond reasonable doubt.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

168. The applicant complained that the respondent State had been responsible for the ill-treatment to which he had been subjected while he was detained in the hotel and for the failure to prevent him from being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje Airport. He further complained that the respondent State had been responsible for his ill-treatment during his detention in the "Salt Pit" in Afghanistan by having knowingly transferred him into the custody of US agents even though there had been substantial grounds for believing that there was a real risk of such ill-treatment. In this latter context, he complained that the conditions of detention, physical assaults, inadequate food and water, sleep deprivation, forced feeding and lack of any medical assistance during his detention in the "Salt Pit" amounted to treatment contrary to Article 3 of the Convention. Lastly, he complained that the investigation before the Macedonian authorities had not been effective within the meaning of this Article.

Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

169. The applicant stated that his unlawful solitary incommunicado detention and interrogation for twenty-three days in the hotel, combined with repeated threats and prolonged uncertainty as to his fate, violated his rights under Article 3 of the Convention. Even without direct physical assaults, the cumulative and acute psychological effects of anguish and stress had been intentionally used for the express purpose of breaking his psychological integrity for the purpose of interrogation, and had been sufficient to drive him to protest by way of a hunger strike for ten days.

170. He further argued that the respondent State had been responsible for the treatment to which he had been subjected during his transfer into the CIA's custody at Skopje Airport because its agents had actively facilitated and failed to prevent that operation. On that occasion, he had been subjected to brutal and terrifying treatment which had been intentionally designed to induce "capture shock" and break his will for the purpose of subsequent interrogation. The violence used to transfer him to the CIA plane had been out of all proportion to any threat that he had posed, and had been inflicted for the purpose of debasing him or breaking his spirit. His treatment both in the hotel and at Skopje Airport amounted to torture.

171. Furthermore, he submitted that the Macedonian authorities had been under an obligation, when handing him to the CIA, to assess the risk of his ill-treatment in Afghanistan and to obtain appropriate diplomatic assurances. However, they had failed to do so despite the fact that there had been ample publicly available evidence of such ill-treatment. The respondent State had accordingly been responsible under Article 3 of the Convention.

172. Lastly, the applicant submitted that the domestic authorities had conducted a cursory and grossly inadequate investigation into his arguable allegations. Despite calls from a plethora of international bodies and his complaints, the respondent State had failed to conduct a prompt, impartial and effective investigation, as required under this Article.

2. The respondent Government

173. The Government repeated their position of complete denial of the applicant's allegations of being ill-treated. They further challenged the credibility of the expert report of 5 January 2009, which, according to them, had not been conclusive regarding the applicant's state of health (see paragraph 36 above). For these reasons they required that the Court consider it with the "utmost reserve".

174. They further conceded that the investigation carried out by the prosecuting authorities had not been effective, but contended that this was due to the late submission of the applicant's criminal complaint and the fact that it had been filed against an unidentified perpetrator.

B. Third-party interveners

1. The UN High Commissioner for Human Rights (UNHCHR)

175. The UNHCHR submitted that the right to the truth was an autonomous right triggered by gross violations, as in the case of enforced disappearances. This right was also embodied in Article 13 and woven into Articles 2, 3 and 5 of the Convention. In enforced disappearances cases, the right to the truth was a particularly compelling norm, in view of the mystery surrounding the fate and whereabouts of the victim, irrespective of the eventual reappearance of the victim. Knowing the truth about gross human rights violations and serious violations of humanitarian law afforded victims, their relatives and close friends a measure of satisfaction. The right to the truth inured to the benefit of the direct victims of the violation, as well as to their relatives and to society at large. Rights holders were entitled to seek and obtain information on various issues, namely the identity of the perpetrators, the progress and results of an investigation and the circumstances and reasons for the perpetration of violations. On the other hand, the right to the truth placed comprehensive obligations on the State,

including duties (1) to carry out an effective investigation; (2) to give victims and their relatives effective access to the investigative process; (3) to disclose all relevant information to the victims and the general public; and (4) to protect victims and witnesses from reprisals and threats. Lastly, the UNHCHR argued that the right to the truth was recognised in international law (the Convention on the Protection of All Persons from Enforced Disappearance) and the jurisprudence of the Inter-American Court and the African Commission on Human and Peoples' Rights.

2. Interights

176. Interights submitted that the present case presented an opportunity for the Court to recognise as impermissible the system of violations which had become known as "extraordinary rendition" and to determine the State's responsibility under the Convention. The treatment of the rendered persons in preparation for or during the rendition process (including so-called "capture shock" treatment) and the use of coercive interrogation methods might amount to torture and/or ill-treatment. Extraordinary rendition practices inherently involved the removal of a person from one State to another where there was a real risk of torture or inhuman or degrading treatment. Such removal was prohibited by the principle of *non-refoulement*, which was recognised in the Court's case-law (Interights referred to *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, and *Saadi v. Italy*, cited above). Under the *non-refoulement* principle, responsibility for complicity, participation or other forms of cooperation in "extraordinary renditions" would arise where the State authorities knew or ought to have known that the violations involved in renditions were being committed. In parallel to the "accomplice liability", under general international law a State could be held responsible where it rendered aid or assistance to another State in the commission of an internationally wrongful act ("accessory responsibility"). The failure to prevent such violations was the most flagrant where the State had given its consent to the acts of foreign agents violating the rights at stake. In addition, acquiescence or connivance in the acts of the foreign agents might engage the State's responsibility. After the rendition had taken place, the State had an obligation to conduct a prompt and effective investigation into allegations of secret detention and transfer, and to provide reparation, including compensation for non-pecuniary damage flowing from the breach.

3. Redress

177. Redress stated that an investigation in the context of allegations of extraordinary rendition must be prompt, independent, thorough and capable of leading to the identification and prosecution of the persons responsible; must provide for public scrutiny and victim participation; and must afford

victims access to information in order to satisfy their right to the truth. The obligation to investigate was incorporated in both Articles 3 and 5 of the Convention. National security considerations could not operate so as to bar a victim from access to such information. If national security concerns were allowed to prevail over the victim's right of access to information, the non-derogable and absolute character of Article 3 and the prohibition of unacknowledged detention would be undermined. In this connection it referred to the Council of Europe's Guidelines of 30 March 2011 on eradicating impunity for serious human rights violations (see paragraph 105 above), according to which "impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims". An adequate remedy and reparation must include recognition of, and respect for, the victims of alleged breaches of Articles 3 and 5 of the Convention, so that they, their families and society, as a whole, could know the truth regarding the violations suffered. Besides compensation, other important components which addressed the long-term restorative aims of reparation must also be provided, including satisfaction (acknowledgment of the breach, an expression of regret or a formal apology), guarantees of non-repetition and rehabilitation. In this latter connection, Redress submitted an expert report of 28 March 2011 in which Dr M. Robertson, a chartered clinical psychologist, explained the psychological benefits for the victim of the public disclosure of the truth. According to her, public recognition of the truth and proper acknowledgment through some form of redress could play an integral role in the survivor's recovery. Conversely, if the truth remained hidden and the perpetrators walked free, that could compound the survivor's sense of helplessness and struggle to create meaning and obtain closure.

4. Joint submissions by Amnesty International (AI) and the International Commission of Jurists (ICJ)

178. AI and the ICJ submitted that the present case concerned a "US-led 'secret detentions and renditions system', a large-scale, organised cross-border system that operated in disregard of national laws, as well as international legal obligations, without any judicial or administrative process, that depended on the co-operation, both active and passive, of many States". That system was characterised by the enforced disappearance of individuals, which constituted a violation of the right to freedom from torture and inhuman or degrading treatment or punishment. Article 3 of the Convention entailed *non-refoulement* obligations enjoining Contracting Parties from acting – and/or omitting to act – in ways that would result in the removal of any individuals from their jurisdiction when the Contracting Parties knew or ought to have known that their removal would expose them to a real risk of ill-treatment.

179. Lastly, they maintained that the right to an effective investigation, under, *inter alia*, Articles 3 and 5, read together with Article 13, entailed a right to the truth concerning violations of Convention rights perpetrated in the context of the "'secret detentions and renditions system"'. This was so not only because of the scale and severity of the human rights violations concerned, but also in the light of the widespread impunity in respect of these practices and the suppression of information about them which persisted in multiple national jurisdictions.

C. The Court's assessment

1. Admissibility

180. In view of the available material, the Court considers that the applicant's complaints under this Article raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established. They must therefore be declared admissible.

2. Merits

181. The Court will first examine the applicant's complaint that there was no effective investigation into his allegations of ill-treatment.

(a) Procedural aspect of Article 3: lack of an effective investigation

(i) General principles

182. The Court reiterates that where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII; *Corsacov v. Moldova*, no. 18944/02, § 68, 4 April 2006; and *Georgiy Bykov*, cited above, § 60).

183. The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions (see *Assenov and Others*, cited above, § 103 and *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 104, ECHR 1999-IV, and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *Boicenco v. Moldova*, no. 41088/05, § 123, 11 July 2006).

184. Furthermore, the investigation should be independent from the executive (see *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III, and *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 37, 20 July 2004). Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms (see *Ergi v. Turkey*, 28 July 1998, §§ 83-84, *Reports* 1998-IV).

185. Lastly, the victim should be able to participate effectively in the investigation in one form or another (see, *mutatis mutandis*, *Oğur*, cited above, § 92; *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 107, 23 February 2006; *Khadzhialiyev and Others v. Russia*, no. 3013/04, § 106, 6 November 2008; *Denis Vasilyev v. Russia*, no. 32704/04, § 157, 17 December 2009; and *Dedovskiy and Others v. Russia*, no. 7178/03, § 92, ECHR 2008).

(ii) Application of the above principles in the present case

186. The Court observes that the applicant, by having filed the criminal complaint in October 2008, brought to the attention of the public prosecutor his allegations of ill-treatment by State agents and their active involvement in his subsequent rendition by CIA agents. His complaints were supported by the evidence which had come to light in the course of the international and other foreign investigations. In the Court's opinion, the applicant's description of events and the available material were sufficient to raise at least a reasonable suspicion that the said Convention grievances could have been imputed to the State authorities as indicated by the applicant. He has thus laid the basis of a *prima facie* case of misconduct on the part of the security forces of the respondent State, which warranted an investigation by the authorities in conformity with the requirements of Article 3 of the Convention. In any event, the fact that the applicant lodged a formal criminal complaint was not decisive since the information brought to the knowledge of the authorities about serious violations of Article 3 at the time

gave rise *ipso facto* to an obligation under that Article that the State carries out an effective investigation (see, *mutatis mutandis*, *Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, § 64, 19 April 2012**).**

187. On the basis of the applicant's complaint, the public prosecutor contacted the Ministry of the Interior with a view to obtaining information regarding the applicant's case. The Ministry submitted in reply a report which summarised the account noted in its earlier reports drawn up in view of the requests for legal assistance by the Munich public prosecutor. In December 2008, almost two and a half months later, the Skopje public prosecutor rejected the complaint for lack of evidence. Apart from seeking information from the Ministry, she did not undertake any other investigative measure to examine the applicant's allegations. The Government confirmed that the public prosecutor had not interviewed the applicant and the personnel working in the hotel at the material time.

188. Lastly, it is not in dispute that no steps were taken to establish the purpose of the landing of the aircraft N313P, which was suspected of having been used to transfer the applicant from the respondent State to Afghanistan. According to the Marty inquiry, that aircraft had been used in the applicant's case and had been on a "rendition circuit" involving other detainees transferred under similar circumstances (see paragraph 45 above). Furthermore, the applicant submitted in support of his allegations an official letter in which the Skopje Airport authorities had attested that the aircraft had landed at Skopje Airport on 23 January 2004 without any passengers and that it had taken off the next morning carrying only one passenger (see paragraph 67 above). The applicant's allegations regarding his transfer to Afghanistan, both in terms of time and manner, were strikingly consistent with the actual course of that aircraft. However, the investigating authorities remained passive and decided not to follow up on that lead. It is surprising that they took no notice of that information and failed to investigate the identity of the passenger who had boarded the aircraft that night. An investigation of the circumstances regarding the aircraft and the passenger would have revealed relevant information capable of rebutting or confirming the well-foundedness of the applicant's account of events.

189. The public prosecutor ruled on the sole basis of the papers submitted by the Ministry of the Interior. She did not consider it necessary to go beyond the Ministry's assertions. When rejecting the applicant's complaint, she relied exclusively on the information and explanations given by the Ministry, whose agents were, broadly speaking, suspected of having been involved in the applicant's treatment. According to the Government, the public prosecutor considered that, in the absence of any evidence contradicting the Ministry's conclusions, no other investigatory measures were necessary (see paragraph 71 above). Having regard to the considerable, at least circumstantial, evidence available at the time of the submission of the applicant's complaint, such a conclusion falls short of

what could be expected from an independent authority. The complexity of the case, the seriousness of the alleged violations and the available material required independent and adequate responses on the part of the prosecuting authorities.

190. The Government also conceded that the investigation undertaken by the prosecuting authorities had not been effective (see paragraph 174 above).

191. Having regard to the parties' observations, and especially the submissions of the third-party interveners, the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the States concerned were not interested in seeing the truth come out. The concept of"'State secrets" has often been invoked to obstruct the search for the truth (see paragraphs 46 and 103 above). State secret privilege was also asserted by the US government in the applicant's case before the US courts (see paragraph 63 above). The Marty inquiry found, moreover, that "the same approach led the authorities of 'the former Yugoslav Republic of Macedonia' to hide the truth" (see paragraph 46 above).

192. The Court considers that the prosecuting authorities of the respondent State, after having been alerted to the applicant's allegations, should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. The Court does not underestimate the undeniable complexity of the circumstances surrounding the present case. However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see *Anguelova v. Bulgaria*, no. 38361/97, § 140, ECHR 2002-IV; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011; and *Association 21 December 1989 and Others v. Romania*, nos. 33810/07 and 18817/08, § 135, 24 May 2011). As the Council of Europe stated in its Guidelines of

30 March 2011 on eradicating impunity for serious human rights violations (see paragraph 105 above), "impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system". The inadequate investigation in the present case deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal.

193. In view of the above considerations, the Court concludes that the summary investigation that has been carried out in this case cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.

194. Against this background, the Court finds that there has been a violation of Article 3 of the Convention, in its procedural limb.

(b) Substantive aspects of Article 3 of the Convention

(i) Ill-treatment in the hotel and at Skopje Airport

(α) General principles

195. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V, and *Labita*, cited above, § 119).

196. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia*, *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports*

1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; and *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

197. In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aksoy*, cited above, § 62). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *İlhan v. Turkey* [GC], no. 22277/93, § 85, ECHR 2000-VII).

198. The obligation on Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III).

(β) Application of the above principles in the present case

199. In view of its conclusion regarding the shifting of the burden of proof to the Government (see paragraphs 165 and 167 above), the Court has already found that the applicant's account is sufficiently persuasive and that his allegations under this Article are established "beyond reasonable doubt". It remains to be ascertained whether the treatment to which the applicant was subjected falls within the ambit of this Article and whether it could be imputed to the respondent State.

Treatment in the hotel

200. As to the applicant's treatment in the hotel, the Court observes that he was under constant guard by agents of the Macedonian security forces, interrogated in a foreign language of which he had a limited command, threatened with a gun and consistently refused access to anyone other than his interrogators. Such treatment led the applicant to protest by way of a hunger strike for ten days.

201. The respondent Government did not provide any justification for such treatment.

202. It is true that while he was kept in the hotel, no physical force was used against the applicant. However, the Court reiterates that Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault (see *Iljina and Sarulienė v. Lithuania*, no. 32293/05, § 47, 15 March 2011). There is no doubt that the applicant's solitary incarceration in the hotel intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress. The applicant's prolonged confinement in the hotel left him entirely vulnerable. He undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he was subjected. The Court notes that such treatment was intentionally meted out to the applicant with the aim of extracting a confession or information about his alleged ties with terrorist organisations (see *Dikme v. Turkey*, no. 20869/92, §§ 82 and 95, ECHR 2000-VIII). Furthermore, the threat that he would be shot if he left the hotel room was sufficiently real and immediate which, in itself, may be in conflict with Article 3 of the Convention (see, *mutatis mutandis*, *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 26, Series A no. 48, and *Gäfgen v. Germany* [GC], no. 22978/05, § 91, ECHR 2010).

203. Lastly, the applicant's suffering was further increased by the secret nature of the operation and the fact that he was kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework (see also paragraph 101 above, and paragraph 236 below).

204. In view of the foregoing, the Court considers that the treatment to which the applicant was subjected while in the hotel amounted on various counts to inhuman and degrading treatment in breach of Article 3 of the Convention.

Treatment at Skopje Airport

205. The Court observes that on 23 January 2004 the applicant, handcuffed and blindfolded, was taken from the hotel and driven to Skopje Airport. Placed in a room, he was beaten severely by several disguised men dressed in black. He was stripped and sodomised with an object. He was placed in a nappy and dressed in a dark blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft (a Boeing 737 with the tail number N313P), which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, he was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) via Baghdad. The same pattern

of conduct applied in similar circumstances has already been found to be in breach of Article 7 of the ICCPR (see paragraphs 108 and 109 above).

206. The Court must first assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII).

207. As to the individual measures taken against the applicant, the Court reiterates that any recourse to physical force which has not been made strictly necessary by the applicant's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Ribitsch*, cited above, § 38). In the present case, it notes that the whole operation of transferring the applicant into the custody of the CIA was well rehearsed and that the applicant did not pose any threat to his captors, who clearly outnumbered him. The respondent Government failed to submit any arguments providing a basis for an explanation or justification of the degree of force used at Skopje Airport. Accordingly, the physical force used against the applicant at the airport was excessive and unjustified in the circumstances.

208. Furthermore, the Court observes that it has already found that the procedure of forcible undressing by the police may amount to such an invasive and potentially debasing measure that it should not be applied without a compelling reason (see *Wieser v. Austria*, no. 2293/03, § 40, 22 February 2007). No such argument has been adduced to show that the measure applied against the applicant, who was already in a particularly helpless situation, was necessary.

209. Nor was any explanation given to justify the use of physical restraints on the applicant. The same concerns the use of hooding, which has already been found to cause, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected to it (see *Ireland v. the United Kingdom*, cited above, §§ 96 and 167).

210. The forcible administration of a suppository while the applicant was held on the ground without any explanation was not based on any medical considerations. Furthermore, the manner in which the applicant was subjected to that procedure caused serious physical pain and suffering (see *Zontul v. Greece*, no. 12294/07, § 89, 17 January 2012, and *Jalloh*, cited above, §§ 69 and 72).

211. The Court notes that the above-mentioned measures were used in combination and with premeditation, the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the

applicant (see paragraph 124 above). In the Court's view, such treatment amounted to torture in breach of Article 3 of the Convention. The respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring (see *Z and Others v. the United Kingdom*, cited above; *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII; and *Members (97) of the Gldani Congregation of Jehovah's Witnesses v. Georgia*, no. 71156/01, §§ 124 and 125, 3 May 2007).

(ii) Removal of the applicant

(α) General principles

212. It is the settled case-law of the Court that the decision by a Contracting State to remove a fugitive – and, *a fortiori*, the actual removal itself – may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (see *Soering*, cited above, § 91; *Saadi v. Italy*, cited above, §§ 125 and 126; *Cruz Varas and Others v. Sweden*, 20 March 1991, §§ 69-70, Series A no. 201; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

213. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material it has obtained *proprio motu* (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II, and *Saadi v. Italy*, cited above, § 128). It must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215).

214. The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the

Contracting State at the time of the removal; the Court is not precluded, however, from having regard to information which comes to light subsequent to the removal. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears (see *Cruz Varas and Others*, cited above, § 76, and *Vilvarajah and Others*, cited above, § 107).

(β) Application of the above principles in the present case

215. On the basis of the facts already established to the required standard of proof, the Court must examine whether any responsibility may be attributed to the respondent State for having transferred the applicant into the custody of the US authorities.

216. In the first place, the Court notes that there is no evidence that the applicant's transfer into the custody of CIA agents was pursuant to a legitimate request for his extradition or any other legal procedure recognised in international law for the transfer of a prisoner to foreign authorities (see paragraph 102 above). Furthermore, no arrest warrant has been shown to have existed at the time authorising the delivery of the applicant into the hands of US agents (contrast *Öcalan v. Turkey* [GC], no. 46221/99, § 92, ECHR 2005-IV).

217. Secondly, the evidence suggests that the Macedonian authorities had knowledge of the destination to which the applicant would be flown from Skopje Airport. Documents issued by the Civil Aviation Administration (see paragraph 41 above) confirm that the aircraft N313P was allowed to land on 23 January 2004 at Skopje Airport. At 10.30 p.m. on 23 January 2004 permission was given for the aircraft to take off for Kabul. At 2.25 a.m. on 24 January 2004 the authorities authorised its onward route to Baghdad.

218. Thirdly, the Court attaches importance to the reports and relevant international and foreign jurisprudence, and given the specific circumstances of the present case, to media articles, referred to above (see paragraphs 99, 106-122, 126 and 127 above), which constitute reliable sources reporting practices that have been resorted to or tolerated by the US authorities and that are manifestly contrary to the principles of the Convention. The Court has already found some of these reports "worrying" and expressed its grave concerns about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism and detained in the naval base in Guantánamo Bay and in Bagram (Afghanistan) (see *Al-Moayad v. Germany* (dec.), no. 35865/03, § 66, 20 January 2007). This material was in the public domain before the applicant's actual transfer into the custody of the US authorities. It is capable of proving that there were serious reasons to believe that, if the applicant was to be transferred into US custody under the "rendition" programme, he would be exposed to a real risk of being subjected to

treatment contrary to Article 3. Consequently, it must be concluded that the Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention. The respondent Government failed to dispel any doubts in that regard (see *Saadi v. Italy*, cited above, § 129). Material that came to light subsequent to the applicant's transfer confirms the existence of that risk (see paragraph 103, 108-110, 123, 124, 128 and 129 above).

219. Fourthly, the respondent State did not seek any assurances from the US authorities to avert the risk of the applicant being ill-treated (see, by contrast, *Mamatkulov and Askarov*, cited above, §§ 71-78; *Al-Moayad*, cited above; and *Babar Ahmad and Others v. the United Kingdom* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 113, 6 July 2010).

220. In such circumstances, the Court considers that by transferring the applicant into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention.

221. Having regard to the manner in which the applicant was transferred into the custody of the US authorities, the Court considers that he was subjected to "extraordinary rendition", that is, "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see *Babar Ahmad and Others*, cited above, § 113).

222. Accordingly the respondent State has violated Article 3 of the Convention on this account.

iii) Conclusion

223. In the light of the above, the Court concludes that the respondent State is to be held responsible for the inhuman and degrading treatment to which the applicant was subjected while in the hotel, for his torture at Skopje airport and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

224. The applicant complained under Article 5 of the Convention that he had been detained unlawfully and kept incommunicado, without any arrest warrant having been issued, and that he had never been brought before a judge. He claimed that the respondent State bore direct responsibility for his entire period of captivity between 31 December 2003 and his return to Albania on 28 May 2004. Lastly, he complained that the absence of a prompt and effective investigation by the Macedonian authorities into his

credible allegations had been in breach of his Article 5 rights. Article 5 of the Convention reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

225. The applicant argued that the respondent State was responsible for the violation of his rights under this Article, by its own agents and/or foreign agents operating in its territory and under its jurisdiction. His detention in the former Yugoslav Republic of Macedonia without charge or judicial oversight had violated his Article 5 rights. His prolonged disappearance during his subsequent detention in Afghanistan constituted a violation of Article 5, for which the Macedonian Government was responsible. In addition, the respondent Government had violated Article 5

of the Convention by failing to conduct an effective investigation into his credible allegations that he had disappeared for an extended period as a result of a joint operation by Macedonian and US agents.

226. The Government contested the applicant's arguments.

B. Third-party interveners

227. Interights submitted that the abduction, rendition and detention of a person in secret and without notification of the person's family amounted to enforced disappearance. Such acts constituted forms of secret detention, where the person was not permitted any contact with the outside world ("incommunicado detention"), and where the authorities did not disclose the place of detention or information about the fate of the detainee ("unacknowledged detention"). The obligation of *non-refoulement* applied to situations involving a real risk of serious violations of the most fundamental human rights, including arbitrary detention and flagrant denial of a fair trial.

228. AI and the ICJ argued that by their nature and severity, deprivations of liberty carried out in the context of the "secret detentions and renditions system" amounted to flagrant violations of Article 5 of the Convention. In such circumstances, Contracting Parties were required, under the *non-refoulement* principle also embodied in Article 5 of the Convention, not to remove any individuals from their jurisdiction when the Contracting Parties knew or ought to have known that their removal would expose them to a real risk of flagrant breaches of their right to liberty and security of person. They further stated that by January 2004, there was much credible information in the public domain indicating that the US had been engaging in arbitrary, incommunicado and secret detention, as well as secret detainee transfers, of individuals the authorities suspected of being involved in or having knowledge of international terrorism. Under the *non-refoulement* principle, States were not absolved from responsibility "for all and any foreseeable consequences" suffered by an individual following removal from their jurisdiction. AI and the ICJ submitted that where an act or omission of a Contracting Party, taking place within its jurisdiction, had a direct causal connection with a rendition involving a continuing violation of Convention rights, taking place partly on its territory and partly elsewhere, both the State's negative and positive Convention obligations were engaged. In such cases, the responsibility of the State was to refrain from any act that would facilitate the rendition operation and to take such preventive, investigative and remedial measures as were available to it within the limits of its jurisdiction, to prevent, remedy or investigate the continuing violation of the Convention rights.

C. The Court's assessment

1. Admissibility

229. The Court notes that the complaints under this Article are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) General principles established in the Court's case law

230. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal*, cited above, § 118). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311).

231. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness, by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptness and judicial supervision assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see *Aksoy*, cited above, § 76). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

232. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 to arrest suspects and detain

them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see *Dikme*, cited above, § 64).

233. The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see *Kurt*, cited above, §§ 123-124).

(b) Application of the above principles in the present case

234. It is not disputed between the parties that on 31 December 2003 the applicant was taken off the bus on entering the territory of the respondent State and was questioned by Macedonian police officers. He subsequently disappeared and was thereafter not seen until he returned to Germany on 29 May 2004. The Court has already established to the required standard of proof that the applicant was held in the hotel under constant guard by the Macedonian security forces between 31 December 2003 and 23 January 2004, when he was handed over, at Skopje Airport, into the custody of the US authorities. On the latter date he was flown on a CIA-operated flight to Kabul (Afghanistan), where he was detained until his return to Germany.

235. The Court must examine whether the applicant's detention in the former Yugoslav Republic of Macedonia was in conformity with the requirements set out in Article 5 of the Convention and whether the applicant's subsequent detention in Kabul is imputable to the respondent State. It will further examine whether there was an effective investigation into the applicant's allegations of unlawful and arbitrary detention.

(i) The applicant's detention in Skopje

236. In the first place, the Court notes that there was no court order for the applicant's detention, as required under domestic law (see paragraph 89 above). His confinement in the hotel was not authorised by a court. Furthermore, the applicant's detention in the respondent State has not been substantiated by any custody records, or, at least, no such documents have been submitted to the Court. The Court has already found that the failure to hold data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Kurt*, cited above, § 125). During his detention in the respondent State, the applicant did not have

access to a lawyer, nor was he allowed to contact his family or a representative of the German Embassy in the respondent State, as required by Article 36 § 1 (b) of the Vienna Convention on Consular Relations (see paragraph 93 above). Furthermore, he was deprived of any possibility of being brought before a court to test the lawfulness of his detention (see paragraphs 84 and 90 above). His unacknowledged and incommunicado detention means that he was left completely at the mercy of those holding him (see *Aksoy*, cited above, § 83). Lastly, the Court finds it wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework, as was the hotel in the present case. It considers that his detention in such a highly unusual location adds to the arbitrariness of the deprivation of liberty (see, *mutatis mutandis*, *Bitiyeva and X v. Russia*, nos. 57953/00 and 37392/03, § 118, 21 June 2007).

237. Having regard to the above finding and the fact that the respondent Government submitted no explanation about the applicant's detention between 31 December 2003 and 23 January 2004, or any documents by way of justification, the Court concludes that during that period the applicant was held in unacknowledged detention in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation of his right to liberty and security as secured by Article 5 of the Convention (see *Gisayev v. Russia*, no. 14811/04, §§ 152-153, 20 January 2011; *Kadirova and Others v. Russia*, no. 5432/07, §§ 127-130, 27 March 2012; and *Chitayev and Chitayev v. Russia*, no. 59334/00, § 173, 18 January 2007).

(ii) The applicant's subsequent detention

238. In view of its finding regarding the facts established to the required standard of proof (see paragraphs 165 and 167 above), the Court observes that on 23 January 2004 the Macedonian security forces handed over the applicant at Skopje Airport into the custody of CIA agents who transported him to Afghanistan on a special CIA-operated flight, described by the Marty inquiry as the "well-known rendition plane N313P" (see paragraph 64 of the 2006 Marty report). He remained there until 28 May 2004, when he was transported back to Germany, via Albania.

239. The Court reiterates that a Contracting State would be in violation of Article 5 of the Convention if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 233, 17 January 2012). In the present case, the Court has already established to the required standard of proof that the applicant was subjected to "extraordinary rendition" (see paragraph 221 above), which entails detention ..."outside the normal legal system" and which, "by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention"

(see *Babar Ahmad and Others*, cited above, §§ 113-114). Furthermore, the detention of terrorist suspects within the "rendition" programme run by the US authorities has already been found to have been arbitrary in other similar cases (see paragraphs 103, 106, 113, 119 and 123 above). In such circumstances, the Court considers that it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5. In this connection the Court reiterates that Article 5 of the Convention lays down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction (see *Storck v. Germany*, no. 61603/00, §§ 100-101, ECHR 2005-V, and *Medova v. Russia*, no. 25385/04, § 123, 15 January 2009). The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004 (see, *mutatis mutandis*, *Rantsev v. Cyprus and Russia*, no. 25965/04, § 207, ECHR 2010).

(iii) Conclusion

240. Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law (see paragraphs 95 and 100 above). The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see *Varnava and Others*, cited above, § 148). In this connection the Court would point out that in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see *Ilaşcu and Others*, cited above, § 321, and see also paragraph 97 above).

241. Having regard to these considerations, the Court concludes that the respondent Government is to be held responsible for violating the applicant's rights under Article 5 of the Convention during the entire period of his captivity.

(iv) Procedural aspect of Article 5: lack of an effective investigation

242. The Court has already found that the respondent State did not conduct an effective investigation into the applicant's allegations of ill-

treatment (see paragraphs 186-194 above). For the same reasons, it finds that no meaningful investigation was conducted into the applicant's credible allegations that he was detained arbitrarily (see *Kurt*, cited above, § 128).

243. It accordingly finds that the respondent State has violated Article 5 of the Convention in its procedural aspect.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

244. The applicant further complained that his secret and extrajudicial abduction and arbitrary detention had violated his rights under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

245. The applicant submitted that his ordeal had been entirely arbitrary, constituting a serious violation of his right to respect for his private and family life under this Article. For over four months he had been detained in solitary confinement, seeing only his guards and interrogators and being separated from his family, who had no idea of his whereabouts. This situation had had a severe effect on his physical and psychological integrity.

246. The Government contested that argument.

B. The Court's assessment

1. Admissibility

247. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

248. According to the Court's case-law, the notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person. The Court further recognises that these aspects of the concept extend to situations of deprivation of liberty (see *Raninen v. Finland*, 16 December

1997, § 63, *Reports* 1997-VIII). Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world. A person should not be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom" (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 65, ECHR 2002-III). Furthermore, the mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family life (see, *mutatis mutandis*, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 59, Series A no. 130). The Court reiterates that an essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 31, Series A no. 297-C).

249. Having regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention, the Court considers that the State's actions and omissions likewise engaged its responsibility under Article 8 of the Convention. In view of the established evidence, the Court considers that the interference with the applicant's right to respect for his private and family life was not "in accordance with the law".

250. Accordingly, it finds that in the present case there has been a violation of Article 8 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

251. The applicant also complained that he had no effective remedy under Article 13 of the Convention in respect of his rights under Articles 3, 5 and 8 of the Convention. He relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

252. The applicant stated that there had been no effective investigation capable of establishing the facts of his detention and treatment, auxiliary to the investigative element of Article 3 of the Convention. Furthermore, there had been no domestic remedy to challenge the lawfulness of his detention in the former Yugoslav Republic of Macedonia and his transfer into CIA custody, auxiliary to his rights under Article 5. The same applied to his rights under Article 8 of the Convention.

253. The Government conceded that prior to Mr H.K.'s statement the applicant had not had an effective domestic remedy as required under Article 13 in respect of his complaints under Articles 3 and 5 of the Convention. They further admitted that in the absence of any conclusions of

the criminal investigation, the civil avenue of redress, as such, could not be regarded as effective in relation to the applicant's complaint under Article 8 of the Convention.

B. The Court's assessment

1. Admissibility

254. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles established in the Court's case-law

255. The Court observes that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. Where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see *Anguelova*, cited above, §§ 161-162; *Assenov and Others*, cited above, §§ 114 et seq.; *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005; and *Aksoy*, cited above, §§ 95 and 98).

256. The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Articles 3 and 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible (see, *mutatis mutandis*, *Orhan*, cited above, § 384;

Khashiyev and Akayeva v. Russia, nos. 57942/00 and 57945/00, § 183, 24 February 2005; and *Kurt*, cited above, § 140).

257. Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State (see *Chahal*, cited above, § 151).

(b) Application of the above principles in the present case

258. The Court has established that the applicant brought the substance of his grievances under Articles 3, 5 and 8 of the Convention to the attention of the public prosecutor. Those complaints were never the subject of any serious investigation, being discounted in favour of a hastily reached explanation that he had never been subjected to any of the actions complained of. The Court has already found the respondent State responsible for violations of the applicant's rights under Articles 3, 5 and 8 of the Convention. His complaints under these Articles are therefore "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

259. The applicant should accordingly have been able to avail himself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation, for the purposes of Article 13. For the reasons set out above (see paragraphs 186-194 and 242 above), no effective criminal investigation can be considered to have been carried out in accordance with Article 13 with regard to the applicant's complaints under Articles 3 and 5 of the Convention. The superficial approach which the public prosecutor took cannot be said to be compatible with the duty to carry out an investigation into the applicant's allegations of ill-treatment and unlawful deprivation of liberty. The Government have also confirmed the lack of an effective remedy at the relevant time (see paragraph 253 above).

260. Furthermore, no evidence has been submitted to show that the decision to transfer the applicant into the custody of the CIA was reviewed with reference to the question of the risk of ill-treatment or a flagrant breach of his right to liberty and security of person, either by a judicial authority or by any other authority providing sufficient guarantees that the remedy before it would be effective (see *Chahal*, cited above, § 152).

261. As the Government pointed out in their submissions, the ineffectiveness of the criminal investigation undermined the effectiveness of any other remedy, including a civil action for damages. The Court has

already found in similar cases that a compensation claim is theoretical and illusory and not capable of affording redress to the applicant (see, *mutatis mutandis*, *Cobzaru*, cited above, § 83; *Estamirov and Others v. Russia*, no. 60272/00, §§ 77 and 120, 12 October 2006; and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 175, 26 July 2007).

262. Accordingly, the Court finds that the applicant was denied the right to an effective remedy under Article 13, taken in conjunction with Articles 3, 5 and 8 of the Convention.

VII. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

263. Lastly, the applicant invoked Article 10 of the Convention, arguing that he had a right to be informed of the truth regarding the circumstances that had led to the alleged violations of his Convention rights. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

264. The Court considers that the issue raised under this Article overlaps with the merits of the applicant's complaints under Article 3 and has already been addressed in relation to those complaints (see paragraph 192 above). The present case does not raise any particular issue that should be analysed under Article 10 alone, which does not apply to the facts complained of. Consequently, there is no appearance of a violation of the applicant's rights and freedoms set out in this Article.

265. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

266. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

267. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage for the suffering, anguish and mental breakdown linked to his ill-treatment, unacknowledged detention, uncertainty about his fate, the refusal of the respondent Government to acknowledge the truth and the impossibility of restoring his reputation. In the latter connection, he claimed that he had been subjected to a "defamatory campaign", which had had a negative impact on his employment prospects. In support of his claim, he referred to similar cases in which the Governments of Sweden, Canada and the United Kingdom (see paragraphs 110 and 129 above) had been ordered or had agreed to pay compensation of between USD 450,000 and USD 10,000,000. He further requested that the Court order the respondent State to conduct an effective and thorough investigation into the facts of his case. The applicant did not claim any award in respect of pecuniary damage.

268. The Government contested the applicant's claims under this head. They reaffirmed that he had not been subjected to "extraordinary rendition" and rejected his allegations as unsubstantiated. Lastly, they stated that the assessment of any damage should be individualised and that it should not be calculated by way of comparison with other cases.

269. The Court reiterates that Article 41 empowers it to afford the injured party such satisfaction as appears to it to be appropriate. In this connection it observes that it has found serious violations of several Convention provisions by the respondent State. It has found that the applicant was tortured and ill-treated and that the responsibility of the respondent State was engaged for having transferred him knowingly into the

custody of the CIA although there had been serious reasons to believe that he might be subjected to treatment contrary to Article 3 of the Convention. It has also found that the applicant was detained arbitrarily, contrary to Article 5. The respondent State also failed to carry out an effective investigation as required under Articles 3 and 5 of the Convention. In addition, the Court has found a violation of the applicant's rights under Article 8. Lastly, it has held the respondent State responsible for having failed to provide an effective remedy within the meaning of Article 13 of the Convention for the applicant's grievances under Articles 3, 5 and 8. The Court considers that in view of the violations found, the applicant undeniably suffered non-pecuniary damage which cannot be made good by the mere finding of a violation.

270. Consequently, regard being had to the extreme seriousness of the violations of the Convention of which the applicant was a victim, and ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards him EUR 60,000, plus any tax that may be chargeable on that amount (see *Ilaşcu and Others*, cited above, § 489).

B. Costs and expenses

271. The applicant did not seek the reimbursement of the costs and expenses incurred before the domestic courts and before the Court.

272. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

273. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection of non-compliance with the six-month rule;

2. *Declares* the complaints under Articles 3, 5, 8 and 13 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention in its procedural aspect on account of the failure of the respondent State to

carry out an effective investigation into the applicant's allegations of ill-treatment;

4. *Holds* that there has been a violation of Article 3 of the Convention by the respondent State on account of the inhuman and degrading treatment to which the applicant was subjected while being held in the hotel in Skopje;

5. *Holds* that the respondent State is responsible for the ill-treatment to which the applicant was subjected at Skopje Airport and that this treatment must be classified as torture within the meaning of Article 3 of the Convention;

6. *Holds* that the responsibility of the respondent State is engaged with regard to the applicant's transfer into the custody of the United States authorities despite the existence of a real risk that he would be subjected to further treatment contrary to Article 3 of the Convention;

7. *Holds* that the applicant's detention in the hotel for twenty-three days was arbitrary, in breach of Article 5 of the Convention;

8. *Holds* that the respondent State is responsible under Article 5 of the Convention for the applicant's subsequent captivity in Afghanistan;

9. *Holds* that the respondent State failed to carry out an effective investigation into the applicant's allegations of arbitrary detention, as required under Article 5 of the Convention;

10. *Holds* that there has been a violation of Article 8 of the Convention;

11. *Holds* that there has been a violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the applicant's grievances under Articles 3, 5 and 8 of the Convention;

12. *Hold*

(a) that the respondent State is to pay the applicant, within three months, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage**;**

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

13. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 December 2012.

Michael O'Boyle	Nicolas Bratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) the joint concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller;

(b) the joint concurring opinion of Judges Casadevall and López Guerra.

N.B.
M.O'B.

JOINT CONCURRING OPINION OF JUDGES TULKENS, SPIELMANN, SICILIANOS AND KELLER

(Translation)

1. In relation to Article 13 of the Convention, which the Court unanimously found to have been breached in conjunction with Articles 3, 5 and 8, we would have liked the reasoning to extend to an aspect which in our view is fundamental. On account of the seriousness of the violations found, we consider that the Court should have acknowledged that in the absence of any effective remedies – as conceded by the Government – the applicant was denied the "right to the truth", that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal (see *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011).

2. Obviously, this does not mean "truth" in the philosophical or metaphysical sense of the term but the right to ascertain and establish the true facts. As was pointed out by the United Nations High Commissioner for Human Rights, and also by Redress, Amnesty International and the International Commission of Jurists,[1] in enforced disappearances cases the right to the truth is a particularly compelling norm in view of the secrecy surrounding the victims' fate.

3. In addressing the applicant's complaint under Article 10 of the Convention that he "had a right to be informed of the truth regarding the circumstances that had led to the alleged violations", the Court considers that the issue raised overlaps with the merits of his Article 3 complaints and has already been dealt with in relation to those complaints (see paragraph 264 of the judgment). It could therefore be argued that the Court is implicitly acknowledging that the right to the truth has a place in the context of Article 3, although it does not really commit itself to such a finding, instead simply noting that there was an inadequate investigation which deprived the applicant of the possibility of being informed (see paragraph 193 of the judgment).

4. We consider, however, that the right to the truth would be more appropriately situated in the context of Article 13 of the Convention, especially where, as in the present case, it is linked to the procedural obligations under Articles 3, 5 and 8. The scale and seriousness of the human rights violations at issue, committed in the context of the secret detentions and renditions system, together with the widespread impunity observed in multiple jurisdictions in respect of such practices, give real substance to the right to an effective remedy enshrined in Article 13, which

[1] See the observations of the third-party interveners, paragraphs 175-179 of the judgment.

includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public.

5. The right to the truth is not a novel concept in our case-law, and nor is it a new right. Indeed, it is broadly implicit in other provisions of the Convention, in particular the procedural aspect of Articles 2 and 3, which guarantee the right to an investigation involving the applicant and subject to public scrutiny.

6. In practice, the search for the truth is the objective purpose of the obligation to carry out an investigation and the *raison d'être* of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned – the victims' families and close friends – establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery.

7. A more explicit acknowledgment of the right to the truth in the context of Article 13 of the Convention, far from being either innovative or superfluous, would in a sense cast renewed light on a well-established reality.

8. Today, the right to the truth is widely recognised by international and European human rights law. At United Nations level, it is set forth in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (Article 24 § 2) and in the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Resolutions 9/11 and 12/12 on the right to the truth, adopted on 24 September 2008 and 12 October 2009 respectively by the United Nations Human Rights Council, state that: "... the Human Rights Committee and the Working Group on Enforced or Involuntary Disappearances ... have recognized the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations ...".

9. The same is true at regional level. In the context of the American Convention on Human Rights, the right to the truth has been expressly acknowledged in the decisions of the Inter-American Court on Human Rights in *Velásquez Rodríguez v. Honduras* (29 July 1988) and *Contreras et al. v. El Salvador* (31 August 2011). On the European scene, with reference first of all to the European Union, the Council Framework Decision of

15 March 2001 on the standing of victims in criminal proceedings[2] establishes a link between truth and dignity and states, in its Preamble, that "[t]he rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood ...". Within the Council of Europe, the Guidelines of 30 March 2011 on eradicating impunity for serious human rights violations pursue a similar approach.

10. In these circumstances, we consider that the judgment's somewhat timid allusion to the right to the truth in the context of Article 3 and the lack of an explicit acknowledgment of this right in relation to Article 13 of the Convention give the impression of a certain over-cautiousness.

[2] *Official Journal* L 082, 23 May 2001.

JOINT CONCURRING OPINION OF JUDGES CASADEVALL AND LÓPEZ GUERRA

We agree with the Grand Chamber ruling, as well as with the reasoning supporting it. We consider, however, that, as regards the violation of the procedural aspect of Article 3 of the Convention on account of the failure of the respondent State to carry out an effective investigation into the applicant's allegations of ill-treatment, no separate analysis as performed by the Grand Chamber in paragraph 191 of the judgment was necessary with respect to the existence of a "right to the truth" as something different from, or additional to, the requisites already established in such matters by the previous case-law of the Court.

According to the Court's case law, as reflected in the present judgment (see paragraphs 182 et seq.), an investigation into alleged ill-treatment must in any event represent a serious attempt to establish the facts of the case concerning the cause of the injuries suffered and the identity of the persons responsible. It seems evident to us that all this required activity amounts to finding out the truth of the matter, irrespective of the relevance or importance of the particular case for the general public, and therefore a separate analysis of the right to the truth becomes redundant.

The right to a serious investigation, equivalent to the right to the truth, derives from the protection provided by the case-law of the Court in the application of the Convention for victims of deprivation of life (Article 2) or of torture or inhuman or degrading treatment or punishment (Article 3); this applies equally in cases which have attracted wide public coverage and in other cases which have not been subject to the same degree of public attention. Therefore, as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 of the Convention, in the light of the Court's case-law.