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Committee on Legal Affairs and Human Rights

Draft Minutes

of the meeting held in Tbilisi (Georgia) on 16-17 September 2010

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Friday 17 September 2010, at 10:00

1. **Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations**
Rapporteur: Mr Dick Marty, Switzerland, ALDE

Hearing with the participation of:
- Mr Armando Spataro, Deputy Chief Public Prosecutor, Milan (Italy)
- Mr Ian Leigh, Professor of Law, Durham University (United Kingdom)
- Mr Adam Bodnar, Secretary General of the Polish Helsinki Foundation for Human Rights (Poland)

The Chairman presented and welcomed the three experts, especially Mr. Bodnar, who had kindly stepped in at short notice for Mr. van Oven, who had been unable to attend due to a health problem.

Mr. Marty placed the topic of this hearing in the context of his previous reports on the abuses committed by the CIA. The search for the truth had been impeded by the invocation by Governments of the notion of state secrecy. He stressed that he was not opposed to the notion of state secret as such, but only to its abuse for the purpose of covering up illegal, criminal acts, thus promoting impunity of the perpetrators of serious human rights violations. Whilst the response of Governments to his questionnaire was an exercise in hypocrisy, he had been able to discover part of the truth using other sources, which triggered further revelations over the past three years ("dynamics of truth"). In Germany, the Bundestag committee of inquiry was faced with largely redacted documents or narrowly-defined authorisations of witnesses to testify, leading to a case before the Federal Constitutional Court. Italy was the only country in which a rendition case had been completely elucidated – the prosecutors in Milan were able to establish the involvement of CIA and SISMI (Italian military intelligence) agents in the abduction of Abu Omar. Whilst 25 CIA agents had been sentenced to 5-8 years in prison, none of the SISMI agents has been convicted to date, because key evidence was covered by the state secrets privilege. An appeal in this case is still pending, as Mr. Spataro would explain.

Mr. Spataro referred to the written version of his presentation made available to members, which he would now sum up orally. He agreed that the protection of state secrets can be legitimate also in a democracy. A democracy must also protect its citizens. But the application in practice can lead to tensions, including between the judiciary and the executive. The notion of state secret was defined in Italy in a new law adopted in 2007, to include any information or document whose unauthorised transmission could have a negative impact on the integrity of the Republic, the

* Document declassified by the Committee on 5 October 2010.

independence of the State and its ability to defend itself. This definition, compatible with democracy and with the protection of potential victims, had been widened by administrative acts, without parliamentary debate. A decree of the Prodi Government added for example economic, financial and industrial interests. The Law gave the Prime Minister certain powers over the application of the notion of state secrets. These powers are subjected to parliamentary and judicial control mechanisms: the former involves the information of a parliamentary committee on the security of the Republic, which can demand explanations from the Prime Minister and censor his decision. Judicial control involves the possibility for a court to have the decision of the Prime Minister reviewed within a delay of 30 days. When documents declared secret are of relevance to judicial proceedings, the proceedings may be terminated or stayed by the court. If the court does not agree with the Prime Minister's assessment of the secret nature of a document, it can seize the Constitutional Court, which has the power to lift the classification as secret. If it does not, the document cannot be used in the proceedings. He stressed that the classification of information as constituting a state secret must also respect human rights and international law. In the Abu Omar case, the Italian Constitutional Court had on the one hand confirmed the legality of the actions of the prosecutor's office, and on the other hand recognised the classification of certain documents as state secrets. Some generally known facts were classified as state secrets and could therefore not be used as evidence. The Constitutional Court laid down general principles that had to be applied to each individual piece of evidence - a still on-going process In conclusion, it is not the law, but its application in practice which is problematic. The parliamentary committee, after four years, has still not come to a decision. The expansion of the notion of state secrecy in Italy has also been used in other areas than the fight against terrorism, for example in corruption cases, a case of libel against a journalist, and a mafia trial. He did not find the leakage of secret documents through the media or internet particularly worrisome. Democracy was served best by the free circulation of information.

Mr. Leigh focused his intervention on the role of parliaments, against the background of parliamentary accountability mechanisms of special services established in many countries over the last decades. These mechanisms were often brought in after a domestic scandal, or in response to human rights concerns. They typically work in private and produce heavily redacted reports. These mechanisms are now rather outdated as they focus on domestic aspects of the special services' work only. The main concern today, as illustrated by Mr. Marty's well-known reports, is about the international cooperation between services for purposes such as rendition, target sanctions, watch lists etc. In the United Kingdom, the Intelligence and Security Committee recently conducted two inquiries, one on UK involvement in the questioning of detainees in Afghanistan, Guantanamo Bay and Iraq, and one on UK knowledge of and collusion with the US rendition programme. Whilst some important, critical information was brought to light, concerning in particular the cases of Binyam Mohamed and of Messrs El Banna and Al Rawi, the inquiries focused only on the actions of the British services. In these cases, much additional information was brought to light by litigation. In the case of Binyam Mohamed, for example, 42 documents were released as a consequence of litigation over and above what had been made available to the Security and Intelligence Committee. The Council of Europe's Secretary General had proposed to extend parliamentary oversight to the domestic activities of foreign services, but this would be unlikely to succeed: foreign services actions would either be illegal, or be carried out in cooperation with and thus covered by the domestic services. In his view, the preferable solution would be for national oversight committees to engage in similar international networking as the services they supervise. This had been attempted in Belgium, the Netherlands and Norway. Parliaments could also contribute to the prevention of abuses, by (1) strengthening the legislative framework, to specifically include international cooperation/liaison activities, (2) requiring a proper "paper trail" for international cooperation/liaison, and (3) engage in an exchange of information with other countries' oversight mechanisms. In this context, the Canadian Commission to investigate the case of Maher Arar made useful proposals. A recommendation by the Venice Commission in 2007 proposed applying both the outgoing and the incoming country's control mechanisms to deal with international cooperation between services. He encouraged parliaments to be more skeptical of the excessively protective secrecy afforded to internationally exchanged information based on the argument that otherwise, cooperation may be withheld in future. This argument could be used by both sides, thus effectively excluding any supervision by either of the control mechanisms of the countries involved.

Mr. Bodnar retraced the activities of the Polish Helsinki Foundation following the allegations of the existence of a secret CIA prison in Poland by the Washington Post, which had been investigated by Mr. Marty. In cooperation with the Open Society Foundation, the Polish Helsinki Foundation filed freedom of information requests. The Polish authorities had followed a policy of denial and of refusal to cooperate with the enquiries lead by the Council of Europe and the European

Parliament. The Polish Parliament's own investigation had been closed after one meeting of the committee. Only in 2009, Polish journalists took an interest, and a prosecutorial inquiry was launched, which is still pending now. In 2009, the Polish Helsinki Foundation obtained information, including on flights in and out of Szymany airport, and about the number of passengers on certain flights which had previously been refused to the Council of Europe and the European Parliament. The prosecutorial investigation had been pending for more than two years. According to recently leaked information, three leading politicians of the left party, who had been in charge at the time, could be brought before the State Tribunal for aiding and abetting torture. But in order for the proceedings to continue, these officials must be authorised to testify by exemption from the state secrecy rules applicable to the information in question. The late President Kaczynski had refused to exempt his predecessor Kwasniewski, thus effectively protecting him from prosecution. Likewise, the American authorities had refused to submit the information requested by the Polish prosecutors. And even if the case ended up going to court, the general public would not be informed of the grounds for the accusations made or of the judgment handed down. He nevertheless considered this case as an example for the effectiveness of the "dynamics of truth". Public opinion in Poland was starting to come around to the conclusion that the oversight mechanisms were not sufficient.

Mr. Farina, referring to a motion discussed in Monaco in 2009, stressed that Italy was proud of having routed terrorism inside the courtroom, and not in stadiums. But one should also not fall for accusations made outside courtrooms. Regarding the Abu Omar case, Mr. Marty and Mr. Spataro spoke of "clear proof", whilst judicial proceedings were still pending. When the Governments of Mr. Prodi and of Mr. Berlusconi were in agreement, one should pause to think. The raison d'être of state secrets was to protect the very existence of the democratic state. As regards the actual abduction of Abu Omar, state secrecy had not been invoked. But there were confidential relations between different countries' authorities, which had existed throughout history, which were needed to protect national security and which had to be kept secret in order to avoid harming international cooperation. His own personal assessment of the case was that members of the Italian secret services had not been involved in the abduction of Abu Omar.

Mr. Diaz Tejera asked for further explanations on the "expansion" of the notion of state secrets in Italy, and stressed that actions covered by state secrets must be compatible with democracy and in accordance with the law.

Mr. Kühnel found that as in Florence, one year ago, the composition of the panel was somewhat one-sided. He stressed that it was the State's responsibility to protect its citizens against domestic and foreign threats. States were very different, some were "failed states". The Council of Europe valued the rule of law very highly. Its members states had criticised the United States very strongly about Guantanamo Bay but were now very reluctant to contribute to resettling its inmates. All States (democracies and dictatorships) had secret services. Conflicts nowadays were no longer of a "classic" type, army against army, but "asymmetric", which caused new dangers for the civilian population and put into question the international law governing warfare. A balance needed to be found between the protection of the population and the rule of law. He encouraged the Chair also to invite a representative of a special service to testify before the Committee.

The Chairman replied that the Rapporteur had invited a former director of the German Bundesnachrichtendienst to this hearing, but he had been unavailable.

Mr. Flynn thanked Mr. Marty for his excellent reports. The UK parliament had not been properly informed even of the reasons for joining the war in Iraq. The surveillance of the special services needed to be reformed, in light of Mr. Marty's reports.

Mr. Chope pointed out that the UK Intelligence and Security Committee was not elected by parliament, and asked Mr. Leigh if this was acceptable. Its members lacked independence and were tremendously constrained by secrecy. Ministers were accountable to parliament, but many activities of the services were not even known to Ministers.

Ms Feric-Vac recalled that bombs had been dropped in the Adriatic Sea during the Nato bombing of Serbia, and regretted that this had never been properly investigated. Also, the Croatian contingent in Afghanistan had become involved in fighting that was still officially denied by the Ministry of Defence.

Mr. Spataro, in response to Mr. Farina, recalled that US agents had even given media interviews about the reasons for the abduction of Abu Omar. US Secretary of State Rice asserted in public that the United States never violated the sovereignty of its partner countries. Testimony had been given by members of SISMI, Relations with foreign services deserved protection, but only for the protection of security, not to cover violations of the law. Such violations only produced more terrorists. The parliamentary control committees in Italy obviously lacked the political will to find the truth. Their membership was of primary importance. In Italy, the chairpersons themselves had been involved in the classification of information as state secrets. In response to Mr. Diaz Tejero, he referred to the inclusion of economic interests in the notion of state secrecy and doubted that the interests of private companies could be put on the same footing as the interests of the state. Political control mechanisms were unfortunately rendered inoperative by the political class itself. In response to Mr. Kühnel, he agreed that security must be provided. But certain absurd developments in the CIA were unacceptable. Special services tried to expand their prerogatives and to collect and store data for example on airline tickets, use of credit cards etc. that were often unnecessary.

Mr. Leigh agreed that there had to be a balance, but it could be argued that this balance had been lost in the fight against terrorism. The European Court of Human Rights had developed a balance under Article 6 of the Convention: secret trials were not excluded per se, but the trial judge must be able to see the evidence. It was precisely because of the need for a fair balance that the oversight mechanisms were created. These must be robust and allow democratically elected representatives to have access to relevant information. Members of oversight committees should therefore be appointed by parliaments. In this respect, the UK situation was an anomaly; the Intelligence and Security Committee ought to become a regular joint select committee. The overall aim had to be to establish a “chain of accountability”.

Mr. Bodnar recognised that international intelligence cooperation was necessary, but found that it had to be subject to law and international human rights obligations. In Poland, not only the rendition cases were problematic. The fight against terrorism is presented as a good excuse to limit personal liberty. In Poland, appointees to the supervisory committee must be security-cleared by the services themselves. The Speaker of the Sejm himself did not have the information at his disposal which members of parliament had such a security clearance and were therefore eligible for membership in the supervisory committee. Regarding troops in Afghanistan, a law as now under discussion to authorise the use of different types of weapons – which shows that there are doubts as to the validity of existing parliamentary authorisations for the dispatch of troops to Afghanistan.

Mr. Marty thanked the experts and the participants in the discussion, including those who had relevant experience themselves. He recalled the different stages of the “dynamics of truth”. The 2007 report had been very precise because he had been able to speak with very high-level members of the secret services concerned. They had spoken with him for ethical reasons: they saw their role as collecting intelligence, not kidnapping or torturing. He had been criticised by Tony Blair for mentioning Diego Garcia in his report – but shortly thereafter, the US Government officially apologised to the UK for mistakenly failing to confirm a case of rendition involving this base. These abuses took place because the secret services escaped all political supervision, because of the passive role of too many parliaments. When he testified before the Bundestag committee of inquiry in Berlin, he was questioned in a partisan way – politics took precedence over the truth. The invocation by the United States of Article 5 of the NATO treaty had lead to a secret meeting in which the assistance of allied countries was agreed on the basis of the “need to know” principle. This meant that in each country, only 1-2 persons at the highest level were informed. The first person accused of an offense in Poland in this context had been Dick Marty – who was grateful for his protection by the immunity of the Council of Europe. He considered that it was time to control the services more effectively. The notion of state secret must never again serve to protect criminal activities!

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