

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs	
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Petitions	

**THE RESULTS OF INQUIRIES INTO
THE CIA'S PROGRAMME OF
EXTRAORDINARY RENDITION AND
SECRET PRISONS IN EUROPEAN STATES
IN LIGHT OF THE NEW LEGAL
FRAMEWORK FOLLOWING
THE LISBON TREATY**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

**The results of inquiries into the CIA's
programme of extraordinary rendition and
secret prisons in European states
in light of the new legal framework following
the Lisbon Treaty**

NOTE

Abstract

This note provides an assessment of the 'state of play' of European countries' inquiries into the CIA's programme of extraordinary renditions and secret detentions in light of the new legal framework and fundamental rights architecture that has emerged since the Treaty of Lisbon entered into force. It identifies a number of 'EU law angles' that indicate a high degree of proximity between the consequences of human rights violations arising from the alleged transportation and unlawful detention of prisoners and EU law, competences and actions – which challenge the competence of EU institutions and/or their obligation to act. The note presents a scoreboard and a detailed survey of the results, progress and main accountability obstacles of political, judicial and ombudsmen inquiries in twelve European countries. It argues that in addition to the various accountability challenges, the uneven progress and differentiated degrees of scrutiny, independence and transparency that affect national inquiries compromise the general principles of mutual trust, loyal cooperation and fundamental rights that substantiate the EU's Area of Freedom, Security and Justice (AFSJ) and in particular, those policies that are rooted in the principle of mutual recognition. Finally, the note uses the findings to formulate a number of policy proposals for the European Parliament.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

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LINGUISTIC VERSIONS

Original: EN
Executive summary: DE, FR

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Manuscript completed in May 2012
European Parliament, © European Union, 2012

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
APPG	All Party Parliamentary Group on Extraordinary Renditions
CAT	UN Convention against Torture
CEAS	Common European Asylum System
CIA	Central Intelligence Agency
CJEU	European Court of Justice
DG	Directorate General
DIIS	Danish Institute for International Studies
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EIRAN	European Intelligence Review Agencies Knowledge Network
ENU	Europol National Unit
Eurojust	EU Judicial Cooperation Unit
Europol	European Police Office
FRA	European Agency for Fundamental Rights
ICCPR	International Covenant of Civil and Political Rights
ISS	European Internal Security Strategy
LIBE	Civil Liberties, Justice and Home Affairs Committee
SAPÖ	Swedish Security Services
SitCen	EU Joint Situation Centre
SSD	Lithuanian Security Services
TDIP	Temporary Committee on the Alleged use of European countries by the CIA for the transportation and illegal detention of prisoners
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

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EXECUTIVE SUMMARY

The European Parliament (EP) has been one of the most proactive institutional actors in attempting to ascertain EU Member States' accountability for active or passive complicity with the US-led CIA programme of renditions and secret detentions that has been run since 2001. The work conducted by the EP Temporary Committee on the Alleged Use of European Countries by the CIA for the transportation and illegal detention of prisoners (TDIP) in 2007 ('The Fava Report') was exemplary in further illuminating and deepening the scrutiny of these alleged state malpractices and making a number of policy recommendations to the European institutions and those EU Member States that are charged with serious allegations of cooperating with extraordinary renditions.

Five years have passed since the Fava Report. To follow up on the proceedings and recommendations adopted by the TDIP, the EP is working on a new report about the CIA's alleged transportation and illegal detention of prisoners in European countries.¹ This note assesses the 'state of play' on the results and progress of inquiries and investigations into the CIA's extraordinary renditions and the European countries' secret detentions in light of the new legal framework and fundamental rights architecture emerging since the Treaty of Lisbon entered into force. It also examines the factors that connect these hybrid human rights violations to EU law and competence, with the aim of facilitating understanding of the competence of European institutions and agencies, and the expectation that they will act in response to these events.

The note is divided into four main sections: Section 1 provides a comparative and synthesized overview of the progress and state of affairs regarding inquiries (the 'accountability scoreboard') in 12 European countries which have been accused, or where serious allegations exist, of passive or active involvement with the CIA extraordinary renditions and secret detentions program: Denmark, Finland, Germany, Italy, Macedonia, Lithuania, Poland, Portugal, Romania, Spain, Sweden and the UK. Our examination, which should be read with Annexes 1 and 2, reveals a highly heterogeneous picture with varying degrees of democratic and judicial accountability across the various domestic arenas. While all the countries studied (except for Poland) have conducted at least one inquiry of a political or judicial nature, there is a great range in the degrees of scrutiny, transparency and independence.

The results of the mapping exercise are summarized in three main categories, i.e. political inquiries (of a parliamentary or executive nature), judicial investigations and ombudsmen. Most of the political inquiries are now closed and have 'cleared' the Governments and public authorities involved. Judicial inquiries were conducted in nine States; four applications have been filed at the European Court of Human Rights (ECtHR). Ombudsmen intervened in two states. In two other states, the individuals who suffered human rights violations have received financial compensation, and in one state these individuals have been granted the status of victims. Some of the victims have a legal status covered by EU law, including one with EU citizenship, and others are asylum seekers or refugees. The accountable parties also vary from country to country, and include CIA agents, intelligence services, a public prosecutor, military officials, former politicians and state officials, and members of government and the private sector.

The note points out that lacks of independence and impartiality resulting from uneven degrees of scrutiny and transparency in 'political inquiries' – especially those of an executive nature – challenge the effectiveness and adequacy of the national inquiries. Politics and state secrecy have played disproportionate roles in preventing disclosure of the

¹ European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), P6_TA-PROV(2007)0032, 26.01.2006.

truth and hindering the aggrieved individuals' access to justice. In short, our research emphasises the following accountability challenges that affect domestic inquiries: a lack of formal government investigations; the invocation of state secrecy and the immunity of state and security agents; the inexistence of, or impeded access to, sufficient evidence regarding the alleged human rights violations; restrictions that prevent lawyers carrying out effective defences; a lack of transparency in the inquiries and cooperation between the Government and parliamentary committees; and minimal collaboration on the part of US authorities.

Section 2 analyses the implications of the new legal and fundamental rights framework emerging from the Treaty of Lisbon with respect to EU and Member States' actions and obligations regarding allegations of complicity in extraordinary renditions. It analyses the main innovations, shortcomings and dilemmas in the new EU fundamental rights architecture with respect to human rights violations in complex cases such as those examined in this report. When examining extraordinary renditions and secret detentions from the EU-law viewpoint, one main challenge is that these malpractices formally fall outside of EU law or present blurred linkages with it. The Union's Area of Freedom, Security and Justice (AFSJ) and its fundamental rights system are founded on the presumption and 'trust' that in their respective national arenas, Member States will comply with the common values in Article 2 of the EU Treaty, including respect for the rule of law and human rights – even when they are acting 'outside the scope of EU law'. The EU Charter of Fundamental Rights is based on that premise, as it states that its provisions only apply when EU Member States are implementing EU law.

The assumption that EU Member States actually do comply with common values and human rights is increasingly being contested in supranational courts, and by international and regional organisations and members of civil society. The human rights violations and accountability challenges that affect the inquiries into extraordinary renditions and secret detentions show that Europe's 'common values' cannot be taken for granted. They challenge the general principle of mutual confidence and trust between the EU and the national governments and authorities regarding their capacity to make good on their human rights obligations. Unlike the 1970s, when the Court of Justice in Luxembourg was encouraged to develop the doctrine of fundamental rights as a general principle of the EU legal system in order to preserve the supremacy principle of EU law, EU Member States must now show their commitment to respect and deliver these common values 'outside the scope of EU law' by conducting effective, impartial and objective inquiries and investigations regarding alleged human rights obligations. Now it is up to the national jurisdictions to ensure compliance with fundamental rights as a general principle, since this constitutes one of the pillars of the Union's AFSJ. This obligation also stems from the general principle of loyal and sincere cooperation stipulated in Article 4, paragraph 3 of the EU Treaty.

Section 3 identifies a number of 'connecting factors' between the extraordinary renditions affair and EU law and competence. It provides an analysis of those EU legal and policy domains that present closer proximity with EU competence and its remit to act. Our starting point is the salient principle of mutual trust and confidence between the EU and its Member States regarding European cooperation on policies of freedom, security and justice. It is argued that five main areas present closer linkages with EU law and competences: (1) EU law domains that operate under the principle of mutual recognition, such as judicial cooperation in criminal matters; (2) the internal security strategy and information exchange and processing for law enforcement purposes in the fight against terrorism by EU Home Affairs agencies such as Europol; (3) individuals who fall within the scope of EU citizenship and EU law statuses such as asylum seekers, refugees and long-term residents; (4) the implications of the EU's accession to the European Convention of Human Rights (ECHR); and (5) Article 7 of the EU Treaty, which seeks to secure EU Member States'

respect for the conditions of Union membership, in particular the common values stipulated in Article 2 of the EU Treaty, including respect for human rights.

Section 4 concludes with a set of political recommendations for the European Parliament.

KEY FINDINGS

- The **uneven progress and differentiated degrees of scrutiny, independence and transparency, along with various obstacles to accountability** that affect national inquiries and investigations into EU Member States' complicity in CIA-led renditions and unlawful detentions of prisoners **challenge the basic principles of mutual trust, sincere and loyal cooperation, and fundamental rights** of the European Union's legal system. They deeply impact the EU's Area of Freedom, Security and Justice (AFSJ). The **new fundamental rights architecture** emerging from the Treaty of Lisbon is a welcome means of anchoring the centrality and constitutional status of fundamental human rights in the EU legal system. However, it **still contains shortcomings and does not address grave dilemmas** with regard to cases such as those addressed in this note.
- The EU fundamental rights system and the AFSJ rely on the **conclusive presumption that Member States also comply with, and respect, human rights as 'common values' in actions that fall outside EU law** or where the linkages are not clear or formalised by legislation. The EU Charter of Fundamental Rights has assumed that premise by limiting its material scope of application to those instances where Member States are implementing EU law. Action taken by the European Commission and the Council has been extremely limited, if not largely absent, in light of national developments since the 2007 adoption of the EP TDIP Report – because of the restrictive interpretation of the role and scope of application of fundamental rights in the EU legal system, as well as the extraordinary renditions' blurred linkage with EU law, policy areas and agencies.
- **The presumption** that EU states comply with the common values enshrined in Article 2 of the EU Treaty **is increasingly contested by recent rulings by the European Courts in Strasbourg and Luxembourg as well as by evidence revealed by international and regional bodies such as the United Nations, the Council of Europe and relevant civil society organisations**. Serious allegations and evidence regarding the systematic nature of human rights violations in several EU Member States through their complicity with the extraordinary renditions program, along with domestic barriers to truth and justice, demonstrate that the EU and the other Member States cannot fully trust these countries' commitment to Union values. Innovative thinking and proactive public policy responses are needed at the EU level in order to deal with these kinds of human rights violations.
- **Five main areas or 'EU law angles'** indicate closer proximity between the alleged human rights violations resulting from the alleged transportation and unlawful detention of prisoners and EU law, competences and actions:
 - **The principle of mutual recognition:** Member States' complicity with the CIA renditions and secret detentions program negatively impacts the foundations and working premises of most policy domains that fall within the scope of the AFSJ, especially those where the principle of mutual recognition plays a central role. This principle basically means that Member States accept that a decision, practice or measure of one Member State has 'equivalent' effects in another. This is the case in judicial cooperation in criminal matters, as well as other areas of EU law such as asylum policy, the Schengen system and information exchange between national police and intelligence-services forces. European cooperation in

these domains is based on the conviction that Member States act in compliance with fundamental human rights and the rule of law, which are deemed to be preconditions for their effectiveness, added value and practical application.

- **Information exchange and Home Affairs agencies in the fight against terrorism:** Information exchange between European law enforcement authorities and agencies has been termed a key component of the EU's Internal Security Strategy (ISS). However, the discussions have not been accompanied by any serious debate about ensuring legal certainty, accountability and scrutiny of the information being exchanged – or by 'whom'. Nor have proper checks and balances been created to guarantee the quality and trusted nature of the information so as to assure that its sources were not tainted by torture and/or inhuman and degrading treatment. There are no mechanisms in place to ensure that EU home affairs agencies such as Europol and Eurojust have not received, processed or used information or 'intelligence' that was illegally obtained by national authorities or third countries.

- **The EU legal status of the victims:** Some individuals subjected to extraordinary rendition and illegal detention fall within the personal scope of EU law, specifically EU citizenship, and immigration and asylum law. The complicity of some EU Member States in the (extralegal) forcible transfer of persons to countries, where they were unlawfully detained and subjected to inhuman, degrading treatment and/or torture, constitutes a flagrant denial of the substance of EU rights and guarantees that EU law offers individuals.

- **The EU's accession to the ECHR:** Civil society organisations have played an important role in bringing cases and evidence to the European Court of Human Rights (ECtHR) in Strasbourg, where EU Member States are open to additional charges for their alleged human rights violations. Four applications have been filed at the ECtHR: two against Poland (*Al-Nashiri* and *Abu Zubaydah*) and one against Italy (*Abu Omar*). These two EU Member States are accused of multiple human rights violations in terms of their obligations under the ECHR. The EU accession to the ECHR is not expected to bring about any big changes in these cases, and the extent to which EU accession to the ECHR would lead to the EU being held responsible in these cases is unclear. That notwithstanding, once the EU has acceded to the ECHR, the ECtHR will have jurisdiction to review charges against the EU, the EU and Member States together, and also individual EU agencies – for their alleged failure to undertake effective investigations within those domains that **show a closer degree of proximity with EU law and activities.**

- **Article 7 of the EU Treaty:** This provision aims at ensuring EU Member States' compliance with the common values named in Article 2 of the EU Treaty, including respect for human rights. The scope of Article 7 of the EU Treaty is not limited to areas covered by EU law, thereby allowing EU institutions to take action in cases of fundamental rights violations where Member States have acted outside the scope of EU law. Since the 2007 EP TDIP Report, the European Commission has sent 10 confidential letters to Romania, Poland and Lithuania as informal (soft) follow-ups on progress in their respective national investigations. These letters can be regarded as a preliminary phase to the actual application of Article 7 of the EU Treaty. No information is available regarding the existence and/or nature of any response by the Governments of these Member States to the above-mentioned letters. In 2003, the European Commission published a Communication about the conditions for activating Article 7 of the EU Treaty, but there has not yet been any concrete action or follow-up measure.

POLICY RECOMMENDATIONS

- The European Parliament should request the DG Justice of the European Commission to **follow up the 2003 Communication on Article 7 of the EU Treaty and revise and further develop the procedures before and at the time of its full activation**. Special attention should be given to improving the **regular and permanent monitoring** of fundamental human rights protections in the EU as well as **the role of independent expertise and practical experience** when objectively and impartially assessing EU Member States' commitment to Article 2 of the EU Treaty. A retroactive dimension should be included for cases of past human rights violations in which investigations of accountability are pending or have not yet begun.
- The revision of Article 7 of the EU Treaty should ensure a **greater degree of democratic and judicial accountability** of the various decisions that make up an Article 7 procedure. The Court of Justice of the European Union (CJEU) in Luxembourg should be expressly granted the competence to review the adequacy of any final decision and the need to freeze certain national practices that constitute serious risks to, or breaches of, fundamental human rights. **A new network of scholars** should be created, independent of all EU institutions and agencies, to ensure impartial, objective and scientific assessments of the state of play regarding fundamental rights in each EU Member State.
- The EP should establish a **new special (permanent) inter-parliamentary committee on EU regulatory agencies, focused on EU Home Affairs agencies working in the field of security**. The Committee would address accountability gaps at European law enforcement authorities and agencies, especially in the areas that fall within the 'fight against terror'. Its mandate could call for confidential working groups with access to secret or confidential information held by EU agencies. The Committee could also hold regular hearings and meetings on the work, impact and future competences of EU Home Affairs agencies, including those related to increasing their operational competences, information exchanges and foreign affairs tasks.
- **Close participation and inputs from national parliaments** should also be foreseen in light of the 2010 Brussels Declaration. This should accompany the creation of a European Intelligence Review Agencies Knowledge Network (EIRAN), which would be tasked to increase the legal and democratic accountability of intelligence and security agencies in Europe. The inter-parliamentary agreement could serve to discuss 'promising practices' regarding national systems of accountability for intelligence and secret services, as well as the development of a set of European guidelines for cross-border security cooperation, fundamental rights guarantees and accountability standards.
- The EP could request that the **European Ombudsman open an inquiry** on the ways in which EU Home Affairs agencies – especially Europol and Eurojust, but also FRONTEX – implement their fundamental rights obligations regarding the exchange and processing of information within their frameworks of cooperation with Member States' authorities, as well as non-EU third countries. For instance, the European Ombudsman could request information from Europol about how it guarantees compliance with the EU Charter of Fundamental Rights in information exchange activities with regard to the quality of the data and the trusted nature of the sources, so as to prevent data being obtained through torture or other unlawful means. It could also inquire whether Europol was aware of and/or had any dossiers on the individual victims of extraordinary renditions. It could further ask if agencies like Eurojust had any

knowledge of, or access to, privileged data on these cases that comes from information or intelligence exchanged with national authorities and/or third countries.

- The EP should call for a timely amendment to the current EU system of information exchange for law enforcement purposes in the fight against terrorism and crime so as **to ensure that the information exchanged, processed and used at the EU level is reliable and of top quality. A common European model to ensure accountability of information sources and quality** should be established to allow the possibility of refusing to cooperate in cases where the information might be from sources that practice torture or unlawful treatment of prisoners or suspects. **More comprehensive democratic oversight of EU institutions and agencies** that might have been involved and are duty-bound to tell the truth - for example, Europol and Eurojust – should also be included. These agencies should be required to retroactively disclose documents once considered to be 'sensitive' – after a certain time period. To ensure the public accountability of their work, progress and results, these agencies should also have to publicly disclose all information of a non-sensitive nature.
- **The principles of legal certainty and proportionality** should be basic to a model of exemplary practices which would also benefit from the know-how, experience and systems used by national practitioners in the field of security, as well as by ombudsmen, data protection authorities and other relevant domestic authorities. A 'yellow card, red card system' could be adopted, in which transmission of tainted information in breach of the common accord would first be followed by a warning (a 'yellow card'), and in case of a repeated offence would be excluded from the information-sharing system (a 'red card').
- The EP should call on the **European Commission and the EU Counter-Terrorism Coordinator** to issue a **joint information paper** on the state of affairs and next steps in the follow-up of EU Member States' inquiries regarding the human rights implications of complicity with extraordinary renditions. The paper should outline how the affair is related to EU law and the fundamental human rights context – and propose an EU (multi-strategy) approach for the next steps. These could develop some of the recommendations outlined in this note as well as those highlighted by the EP Draft Report of 23 April 2012 in order to prevent similar repetitions of human rights violations. This should be followed by **a joint statement by the EU and its Member States** that condemns the human rights violations of the CIA program of renditions and secret detentions. and their commitment to the principles of mutual trust, loyal cooperation and fundamental rights.

INTRODUCTION²

We can only be successful in the fight against terrorism in the long run if we stay true to our core values: international law, including human rights, and the rule of law....We have to be clear that promoting human rights is one of our most effective means to counter terrorism. To act otherwise would undermine the very legitimacy of our own efforts and thereby their effectiveness.

– De Kerchove, Søvndal and Emmerson
(2012)³

This first section introduces the scope of the note and outlines the main research questions. It presents the various ways in which the principle findings have been structured around the four sections that make up the body of the note.

- The European Parliament has been one of the most active actors to investigate and attempt to determine accountability of EU Member States' alleged involvement in the extraordinary renditions and secret detentions carried out by the USA in the aftermath of the events of '9/11'. In 2006, the special 'Temporary Committee on the Alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (TDIP), was set up, whose final report and recommendations were made public in 2007.⁴ The so-called 'Fava Report' called on EU institutions to fulfil their responsibilities and take appropriate actions. It also instructed the Civil Liberties, Justice and Home Affairs Committee (LIBE) to monitor political reactions and developments following up the TDIP report ,

...in particular, in the event that no appropriate action has been taken by the Council and/or the Commission, to determine whether there is a clear risk of a serious breach of the principles and values on which the European Union is based, and to recommend to it any resolution, taking as a basis Articles 6 and 7 of the Treaty on European Union, which may prove necessary in this context.⁵

- The TDIP Report also recommended that those European countries that had started inquiries at the governmental, parliamentary and/or judicial levels should conduct their work *"as speedily as possible and make public the results of the*

² Unless otherwise indicated, the views expressed are attributable only to the authors in a personal capacity and not to any institutions with which they are associated.

³ Søvndal, V., de Kerchove, G., and Emmerson, B., Counter-Terrorism and Human Rights, *European Voice*, 19.3.2012, available at: www.europeanvoice.com/article/2012/march/counter-terrorism-and-human

⁴ European Parliament, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, (2006/2200/INI), Rapporteur: Giovanni Claudio Fava, 30.1.2007. Refer also to the Working Documents PE 380.593v04-00 and PE 380.984v02-00.

⁵ Paragraph 230. In a Resolution adopted in 2009, the EP called on the EU Member States and the Council (as well as US authorities) to investigate and provide clarification about the abuses and violations of fundamental human rights violations in connection with the 'war on terror' and to establish responsibilities regarding the existence of secret detention centres and the extraordinary renditions programme. European Parliament resolution of 19 February 2009 on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.

investigations". The EP reminded European countries of their positive obligation to investigate allegations of human rights violations and to sanction breaches of the European Convention of Human Rights (ECHR). It also urged those states to which "serious allegations have been made regarding active or passive cooperation with extraordinary rendition and that have not undertaken governmental, parliamentary and/or judicial investigations to commence such proceedings as soon as possible".⁶

- Five years have passed and a number of parliamentary and judicial inquiries on the alleged abuses and violations have been made, or are being made, in European domestic arenas. Since 2007, new data and research about CIA-operated extraordinary renditions and secret detentions in Europe have been provided by supranational actors such as the Parliamentary Assembly Committee on Legal Affairs and Human Rights of the Council of Europe,⁷ the United Nations,⁸ human rights organisations such as Amnesty International,⁹ and various civil society actors, such as Reprieve,¹⁰ as well as several media sources.
- A key issue to be considered since the 2007 Report is the extent to which the necessary measures (in particular, the obligation to conduct an independent and impartial investigation) have been taken to investigate and redress – and/or make reparation in – situations of alleged fundamental human rights violations in those European countries, and in the EU Member States in particular. To follow up the work and recommendations put forward by the EP TDIP Report, a new examination must be made of the 'state of play' in the accountability, judicial reparation and effective remedy or redress granted to affected individuals for Member States' complicity in renditions and secret detentions in Europe. This note assesses the results of the inquiries into the CIA's extraordinary renditions and secret prisons programme in European states.¹¹ Our analysis is structured as follows:

Section 1 starts by providing a comparative assessment (an accountability scoreboard) of the progress and results of past and ongoing national inquiries into State complicity in selected European countries, most of which are EU Member States, as well as legal and judicial actions before the relevant courts. It identifies achievements and the main 'accountability challenges' that hinder the independence, impartiality and overall quality of the investigations, and the legal and judicial accountability of alleged human rights violations in the following States: Denmark, Finland, Germany, Italy, Macedonia, Lithuania, Poland, Portugal, Romania, Spain, Sweden and the UK. In addition to this section, Annexes 1 and 2, which provide a synthesized 'state of affairs' for the inquiries and investigations and a detailed country-by-country overview, should also be read.

⁶ European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), Paragraphs 185 and 186.

⁷ Council of Europe, *Report on the Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Doc. 12714, 16 September 2011.

⁸ United Nations (UN), *Joint Study on global practices in relation to secret detention in the context of countering terrorism by the Special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, A/HRC/13/42, 19 February 2010.

⁹ Amnesty International (AI), *Lithuania: Unlock the truth: Investigate secret prisons now (Index EUR 53/002/2011)*, 29 September 2011; AI, *Open Secret. Mounting evidence of Europe's complicity in rendition and secret detention*, 2010; AI, *State of Denial – Europe's role in Rendition and Secret Detention*, 2008.

¹⁰ See for example: Reprieve, *Rendition on Record – Using the right of access to information to unveil the paths of illegal prisoners' transfer flights*, 15 December 2011.

¹¹ This report does not cover the elements dealing with the external relations dimensions inherent to the questions raised in this report. (This issue has been addressed by the European Parliament's AFET/DROI opinion to the LIBE on the Alleged Transportation & illegal detention of prisoners in European countries by the CIA: follow up of the EP TDIP Committee report by MEP Sarah Ludford).

Section 2 examines the consequences of general and specific implications of the new fundamental rights architecture that is taking shape following the entry into force of the Treaty of Lisbon in regard to these cases – as viewed from the perspective of fundamental human rights and accountability in the EU's Area of Freedom, Security and Justice (AFSJ). The note highlights the opportunities offered by the new institutional framework as well as the gaps that remain when confronting allegations of systematic fundamental rights violations by EU Member States that fall outside the scope of European Union law and the EU Charter of Fundamental Rights.

Section 3 of the note pays particular attention to the question of the extent to which the EU has competence, or should be expected, to act in these domains – from the viewpoint of European law. It explores the specific 'connecting factors' that link EU Member States' actions related to extraordinary renditions and their unlawful detention of prisoners with EU law and competence. The section outlines the most relevant EU legal and policy domains affected by the negative repercussions of these practices in terms of the general principles of mutual confidence, loyal cooperation and fundamental rights upon which the EU legal system was founded and continues to be developed.

Section 4 presents a set of policy recommendations for the European Parliament and other relevant European institutions and agencies that is based on research conducted for this note.

An Interim Version of this Report with recommendations was delivered to the European Parliament on 16 April 2012. It served as a background research document in the elaboration of the Draft Report on the CIA's alleged transportation and illegal detention of prisoners in European countries, which aims at following up the TDIP proceedings politically, as well as monitoring the developments and progress since the TDIP report was adopted in 2007.¹² This final version of the note has benefited from comments by the Policy Unit of the Policy Department C of the EP and by Prof. Martin Scheinin, Professor of Public International Law at the European University Institute (Florence) and former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

The authors would also like to express their gratitude to the EU officials at the European Parliament, the European Commission and the Council (in particular the office of the Counter-Terrorism Coordinator) who were interviewed for this note. They are also grateful to Europol and Eurojust for having considered requests for interviews, although both agencies claimed they would be unable to provide any additional information of value to this note.

¹² European Parliament, *Draft Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: Follow-up of the European Parliament TDIP Committee Report, 2012/2033/ININ*, Rapporteur: Hélène Flautre, 23.4.2012.

1. MAPPING PROGRESS AND OBSTACLES TO POLITICAL AND JUDICIAL ACCOUNTABILITY: THE STATE OF PLAY IN INQUIRIES AND INVESTIGATIONS

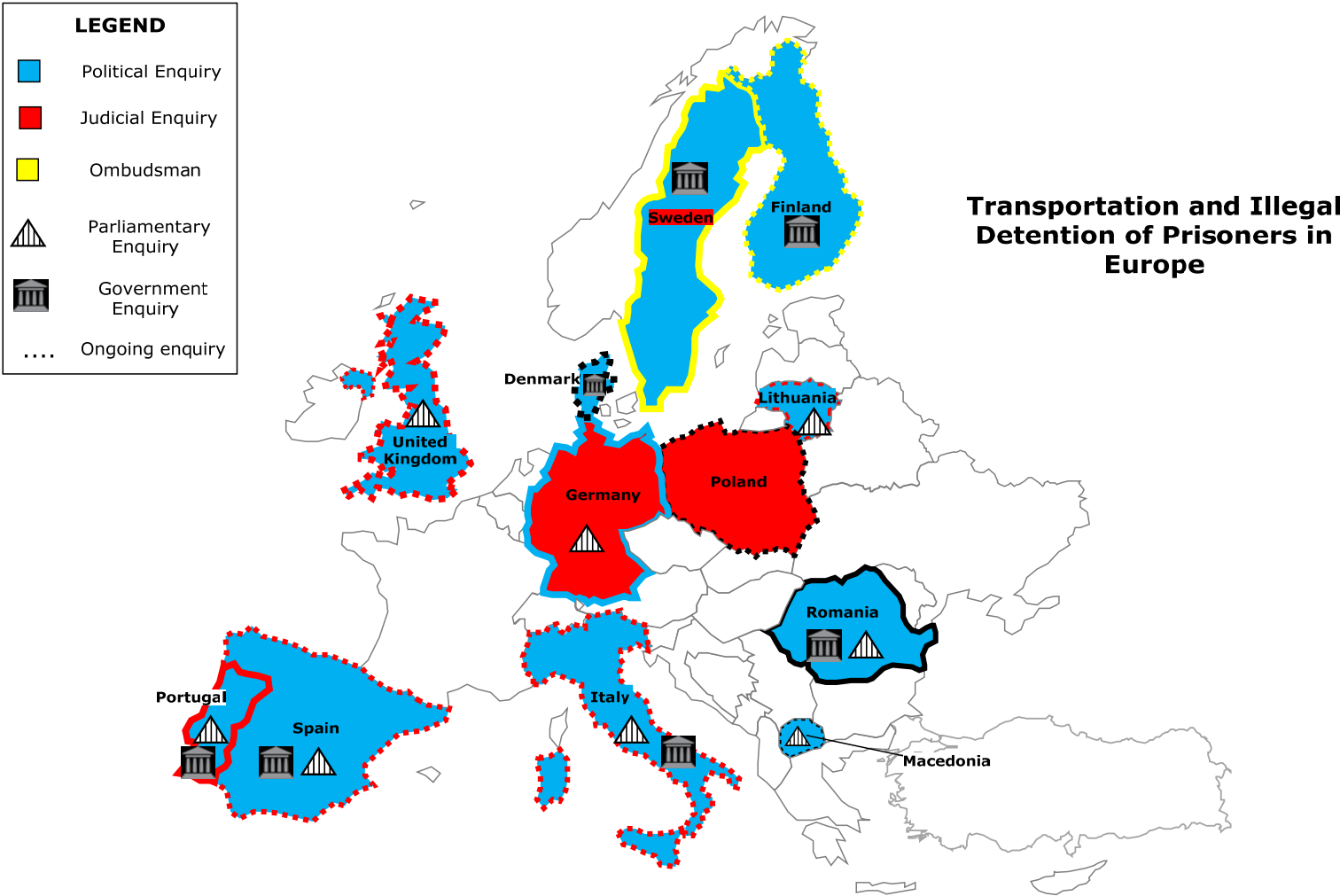
What is the 'state of affairs' in the national political and judicial inquiries and investigations regarding European States' alleged involvement in extraordinary renditions and secret detentions? What form have these inquiries taken? What are the main results and what progress has been made in terms of 'truth and justice'? What principle 'accountability challenges' (or obstacles to truth and justice) characterise the domestic investigations and inquiries across the national arenas of the States examined in this note?

- This section presents the results of mapping the state of play in the inquiries and accountability processes on extraordinary renditions and secret detentions. It provides evidence and an overview of the extent to which those European countries that face serious allegations for their cooperation – whether active or passive – in extraordinary renditions and illegal detentions of prisoners have followed the EP TDIP recommendations to carry out impartial and investigations and conduct their work in a “*speedy manner*”.¹³ The ‘state of play’ is mapped for 12 European States: Denmark, Finland, Germany, Italy, Macedonia, Lithuania, Poland, Portugal, Romania, Spain, Sweden and the UK. The background information for this section was collected from a set of publicly-available reports and academic sources, as well as studies and official documents from a variety of international organisations such as the Council of Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the UN Human Rights Council, the UN Committee Against Torture, and civil society actors such as Amnesty International and the Open Society Institute.
- Active and/or passive cooperation with the CIA between 2001 and 2005¹⁴ (see Figure 2) is imputed to the 12 States under examination, with charges that include hosting a secret detention facility (Romania, Lithuania and Poland); involvement in, or knowledge of, the detention, rendition and/or torture of detainees (all 12 States); collusion with the US to prevent effective investigation (Denmark); mistreatment (Germany, Sweden and the UK); organizing ‘dummy’ flights to conceal other flights (Finland and Lithuania); and the involvement in, or knowledge of, the use of airspace or airports to transfer prisoners (Portugal, Spain, Finland and Lithuania).
- The visualisation of the ‘state of play’ in the inquiries and investigations presented in Figure 1 below and the more detailed narrative survey in Annexes 1 and 2 that follow this note reveal a heterogeneous picture with varying degrees of democratic and judicial accountability across the national arenas. While at least one inquiry – of a political and/or judicial nature – has taken place in all the countries being investigated, this section describes wide variations in the degree of scrutiny and transparency of the investigations, and the obstacles encountered in each of them.

¹³ Refer to footnote 5 on p. 14.

¹⁴ As a result of the CIA programme human rights continue to be violated, as demonstrated by the ongoing administrative detention of Mr Abu Zubaydah and Mr Al Nashiri in the US detention centre at Guantánamo Bay. This, however, does not fall within the scope of this note.

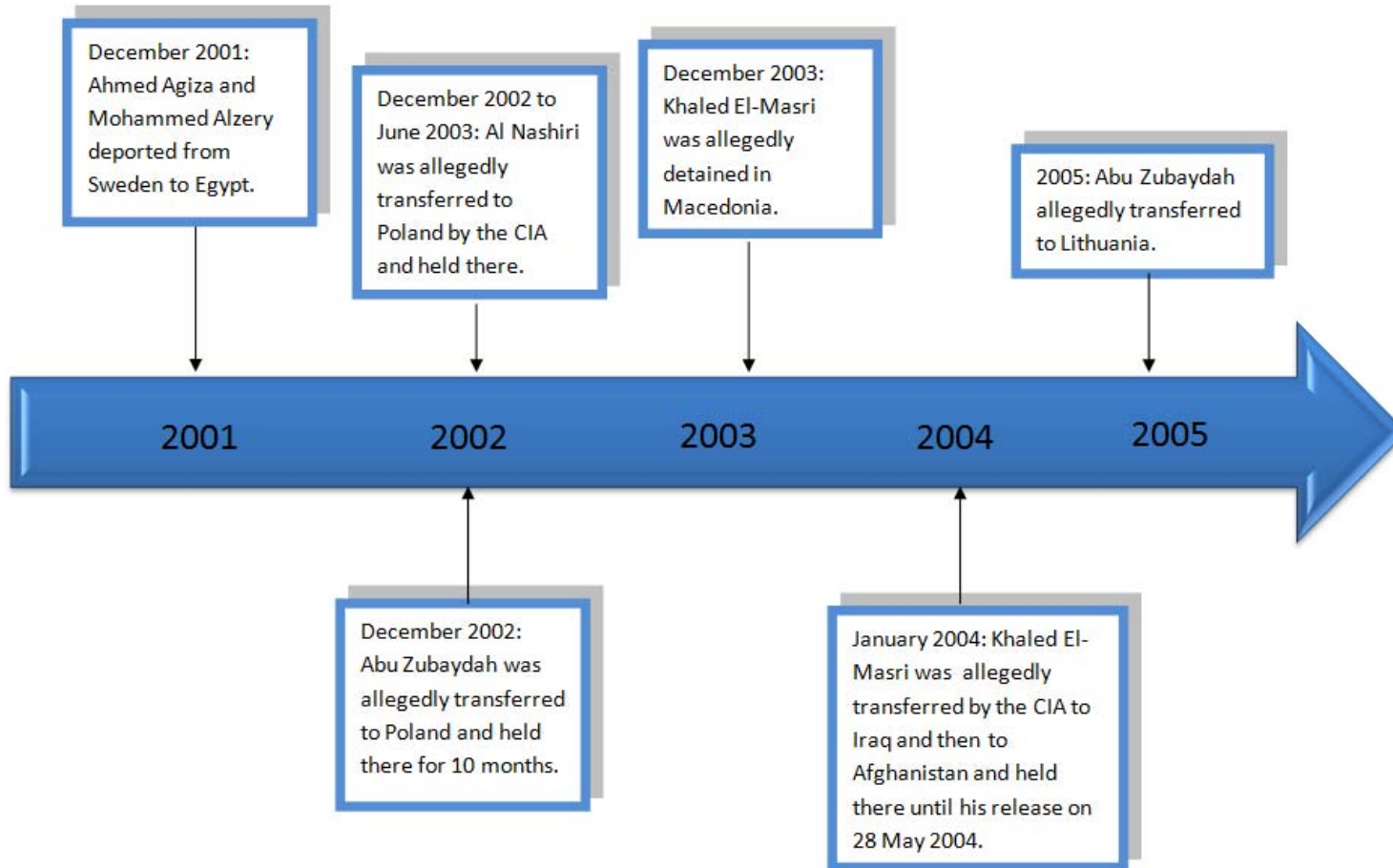
Figure 1: The State of Play in National Inquiries



Source: Compiled by the authors

Figure 2: Timeline on European countries' complicity with the CIA's extraordinary renditions and secret detentions

programme



Source: Compiled by the authors

The results of the mapping exercise, which are summarized in the 'Scoreboard of Inquiries and Investigations' in Table 1, can be grouped into Political Inquiries, Judicial Investigations and Ombudsmen.

1.1. *Political (Parliamentary/Executive) Inquiries*¹⁵

- This assessment adopted a broad interpretation of 'political inquiry'. It contemplated inquiries at both the parliamentary and government levels which have revealed varying degrees of scrutiny, transparency and independence or impartiality – ranging from the creation of special investigative committees to mere parliamentary hearings. According to this broad notion, as is shown in Annexes 1 and 2, 11 of the 12 States analysed underwent political inquiries of different natures, degrees of scrutiny and levels of completion, with Poland being the only exception. More than one political inquiry has been conducted in Germany, the UK, Denmark, Spain and Romania. The nature of each inquiry diverged from country to country. In five States (Germany,¹⁶ the UK, Lithuania,¹⁷ Romania¹⁸ and Macedonia¹⁹), parliamentary committees conducted the inquiries. In the UK, an All Party Parliamentary Group on Extraordinary Rendition (APGG) was created. In Spain, Italy²⁰ and Portugal,²¹ 'parliamentary hearings', which could be considered as 'softer' instruments of scrutiny, were conducted. In the UK, Romania²² and Sweden²³ the Government was involved in the investigations. In Spain²⁴ and in Finland,²⁵ the respective Ministries of Foreign Affairs conducted investigations of the accusations imputed to both States, which in Finland led to the publication of a final report. In Denmark, an inter-ministerial working group was convened to investigate the CIA's use of Danish airports and airspace.²⁶ In some States, external actors also investigated these charges. That was the case in Denmark, where a disclosure on WikiLeaks prompted the Government to request the Danish Institute for International Studies to conduct an investigation.²⁷

¹⁵ See Annex 1 and 2 for detailed information concerning the state of affairs regarding political inquiries in each country. See also Table 1 ('Accountability Scoreboard').

¹⁶ Deutscher Bundestag, Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes, Drucksache 16/13400, 18.06.2009; Deutscher Bundestag, Beschlussempfehlung und Bericht des Verteidigungsausschusses als 1. Untersuchungsausschuss gemäß Artikel 45a Abs. 2 des Grundgesetzes, Bundestags Drucksache 16/10650. 15.10.2008.

¹⁷ Washington Post, *Lithuania investigates possible CIA black site*, 19 November 2009. Available at: <http://www.washingtonpost.com/wpdyn/content/article/2009/11/18/AR2009111803994.html>

¹⁸ Letter sent by the Romanian Prime Minister's Office to the European Parliament, 10 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf>

¹⁹ AI, *State of Denial – Europe's role in Rendition and Secret Detention*, p. 31

²⁰ European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at <http://www.statewatch.org/rendition/rendition.html> and European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Senate), available at <http://www.statewatch.org/rendition/rendition.html>

²¹ TSF, *Ministério Público abre inquérito sobre alegados voos*, available at: http://www.tsf.pt/paginainicial/interior.aspx?content_id=774175&page=-1

²² AI, *Romania must come clean over secret prisons*, 9 December 2011.

²³ Rasmusson, K. and Jordan, O., *Jäv när S-regeringen utredde CIA-flygen*, <http://www.newsmill.se/artikel/2011/12/26/j-v-n-r-s-regeringen-utredde-cia-flygen>

²⁴ The Telegraph, *Spain 'authorised' CIA rendition flights*, 1 December 2008, available at: <http://www.telegraph.co.uk/news/worldnews/europe/spain/3538908/Spain-authorised-CIA-rendition-flights.html>.

²⁵ Finland Ministry for Foreign Affairs, *Flight information requested by Amnesty International released on human rights grounds*, 3 November 2011, available at: <http://formin.finland.fi/public/default.aspx?contentId=233396&nodeId=23&contentlan=1&culture=fi-FI>.

²⁶ See Annexes 1 and 2, pp. 52, 70-71.

²⁷ Available at: <http://um.dk/da/politik-og-diplomati/retsorden/cia-overflyvninger/>

- Most of these political inquiries have been closed – in Italy, Spain, Lithuania, Romania, Macedonia, Portugal, Germany and Sweden. In Denmark, the inter-ministerial working group investigation of 2008 has been closed, but that of the Danish Institute for International Studies is ongoing. There is a similar situation in Finland, where the Finnish Government plans to seek clarification from the US regarding one specific flight.²⁸ The UK-Government-requested 'Gibson Inquiry', investigating whether Britain is implicated in the improper treatment of detainees held by other countries, was later halted by the Government, which has announced plans to hold another inquiry – after all the police investigations have been concluded. The APGG continues to be active.²⁹ The Investigation and Security Committee investigation was closed after a final report about British authorities' knowledge and possible collusion with the American renditions programme was submitted to the Prime Minister in 2009.³⁰
- The political inquiries supposedly 'cleared' most of the Governments and public authorities investigated by the TDIP. However, as we show below, most of the inquiries processes had 'accountability challenges' which taint the clearance, impartiality and objectivity of the final results. In the case of Germany, for instance, the Government was not found responsible for any human rights violations that occurred within the context of the international fight against terrorism, having acted within the boundaries of fundamental rights and basic principles of law in all cases.³¹ However, the German Constitutional Court found that the German Government failed to cooperate with the parliamentary inquiry.³² There was a similar situation in Denmark where the inter-ministerial working group's investigation concluded that the authorities had no knowledge of any flights, and were therefore unable to either confirm or deny the illegal transportation of prisoners. In Italy, the Government also fully denied any knowledge of the abduction of Abu Omar,³³ and maintained that held for all the national institutions.³⁴ In Spain, the Foreign Affairs Minister indicated that clarifications regarding flights with prisoners landing and departing from Spain were requested from the US authorities – who claimed that they had no information indicating the presence of clandestine or illegal passengers on board flights during stopovers in Spain.³⁵ In a similar fashion, the Romanian Government's 2007 secret inquiry also concluded that the accusations were groundless, while the Senate report

²⁸ AI, *Finland must further investigate USA rendition flights*, 1 November 2011, available at: <http://www.amnesty.org/en/news/finland-must-further-investigate-usa-rendition-flights-2011-11-01>. For more information see Annexes 1 and 2, pp. 52, 72-73

²⁹ *All Party Parliamentary Group on Extraordinary Rendition (APPG) v The Information Commissioner and the Ministry of Defence*, available at: www.judiciary.gov.uk/media/judgments/2011/appger-v-the-ic. For more information, see Annexes 1 and 2, pp. 51, 66-69.

³⁰ See Annexes 1 and 2, pp. 51, 66-69.

³¹ Deutscher Bundestag, *Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes*, Drucksache 16/13400, 18.06.2009; Deutscher Bundestag, *Beschlussempfehlung und Bericht des Verteidigungsausschusses als 1. Untersuchungsausschuss gemäß Artikel 45a Abs. 2 des Grundgesetzes*, Bundestags Drucksache 16/10650, 15.10.2008.

³² BVerfG, 2 BvE 3/07, Urteil vom 17.06.2009.

³³ BBC News, *CIA Agents guilty of Italy kidnap*, 4 November 2009, available at: <http://news.bbc.co.uk/2/hi/8343123.stm>. See also Annexes 1 and 2.

³⁴ European Parliament, *Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber)*, p. 58, available at: <http://www.statewatch.org/rendition/rendition.html>

³⁵ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>, p. 3.

remains classified.³⁶ Despite recent evidence produced by the German media, there has been no move to begin a new inquiry.³⁷ In Macedonia, the parliamentary committee responsible denied that the Macedonian security services had overstepped their authority by detaining a German citizen, Khaled el-Masri, in a Skopje hotel.³⁸

In Lithuania, however, the results were different: The report of the Lithuanian Parliamentary Committee released in December 2009 referred to two detention sites in Lithuania that had been prepared to receive detainees. However, evidence showed that one of the sites had not received any detainees, and it proved impossible to ascertain whether the second one had ever received detainees.³⁹ The report also recommended that the Prosecutor General's Office open an inquiry into the actions of the Lithuanian Security Services (SSD).⁴⁰ These results led Members of the European Parliament (MEPs) to claim that some questions still needed to be answered regarding illegal detentions and secret CIA prisons in Lithuania, which led to an EP country visit to Lithuania in April 2012.⁴¹ In the UK, the Intelligence and Security Committee's report of 2007 indicated that there was "reasonable probability" that intelligence gathered by the Security Service was subsequently used in an interrogation.

- The Governments of the 12 States reacted in similar fashion: they refuted any involvement or participation in the cases. Some Governments conducted inquiries to assess the situation (Lithuania⁴² and Romania⁴³). In the case of Romania, more evidence came to light in a 2011 investigation by German media about a secret prison in Bucharest. The Romanian President, however, has denied any knowledge of the subject.⁴⁴
- The parties held accountable or investigated in the different States included CIA agents (Germany and Italy); intelligence services (Germany, Poland, Sweden, the UK, Italia, Lithuania and Macedonia); the Public Prosecutor (Germany); military officials (Germany and Italy); former politicians (Poland) and private parties (Elite LLC, a now-defunct company based in Delaware and Panama which was allegedly purchased by the US embassy in Vilnius, Lithuania⁴⁵).

³⁶ AI, *Romania must come clear over secret prisons*; AI, *Romania – AI Romania Country Report 2010*, available at: <http://www.amnesty.org/en/region/romania/report-2010>.

³⁷ Associated Press, *AP Exclusive: Inside Romania's secret CIA prison*, 8 December 2011, available at: <http://news.yahoo.com/ap-exclusive-inside-romania-secret-cia-prison-050239912.html>.

³⁸ AI, *State of Denial – Europe's role in Rendition and Secret Detention*, p. 31.

³⁹ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, 25 January 2011, pp. 4-5. See also Annex 2 for more information, pp. 86-88.

⁴⁰ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, 25 January 2011, pp. 4-5.

⁴¹ Liberal Democrat Members of the European Parliament, Ludford: rendition inquiries in Lithuania positive but incomplete, 27 April 2012, available at: <http://libdemmeeps.com/?p=600>. See also 15min.lt, *After visit to Lithuania, EP delegates say there are unanswered questions about alleged CIA prison*, available at: www.15min.lt/en/article/in-lithuania/after-visit-to-lithuania-ep-delegates-say-there-are-unanswered-questions-about-alleged-cia-prison-525-214492#ixzz1v2jYjR.IS

⁴² AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, 25 January 2011, pp. 4-5

⁴³ Letter sent by the Romanian Prime Minister's Office to the European Parliament, 10 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf>

⁴⁴ Associated Press, op.cit.

⁴⁵ The Guardian, *Lithuania faces legal action over prisons set up for CIA rendition programme*, 27 October 2011. Available at: www.guardian.co.uk/world/2011/oct/27/lithuania-cia-rendition-prisons-european-court.

1.2. *Judicial Investigations and Inquiries*⁴⁶

- In nine of the 12 States (Italy, Spain, Lithuania, Macedonia, Portugal, Germany, the UK, Poland and Sweden) judicial inquiries were conducted either by the State's own judicial authorities or by the European Court of Human Rights (ECtHR). In Sweden, two UN Committees launched a quasi-judicial adversarial procedure about the rendition of two Egyptian asylum seekers from Sweden to Egypt and found that Sweden had breached its treaty obligations under the UN Convention against Torture (CAT) and the International Covenant of Civil and Political Rights (ICCPR).⁴⁷ The findings of the two UN Committees emphasised that authorities in Sweden had breached the absolute prohibition on torture, as well as the principle of *non-refoulement*.⁴⁸ In several EU Member States, more than one inquiry was conducted (Germany, Poland, the UK, Sweden and Spain). In eight States, criminal investigations were conducted (the exception being Macedonia, where a criminal claim was presented by Khaled el-Masri, but allegedly was not followed up by the Office of the Skopje Prosecutor.⁴⁹ Three investigations were conducted by the Prosecutor General's Office (Portugal, Lithuania and Sweden). Civil claims were filed in the Swedish, Macedonian⁵⁰ and British courts.
- Four applications have been filed before the ECtHR in Strasbourg, where the role of human-rights civil society organisations in bringing the case and evidence before the Court has been decisive: two against Poland (Al-Nashiri and Abu Zubaydah), one against Italy (Abu Omar), and one against Macedonia (El-Masri). The cases can be summarised as follows:⁵¹

El-Masri v Macedonia – On behalf of German citizen Khaled el-Masri, in 2009 the Open Society Justice Initiative lodged a claim against Macedonia before the ECtHR.⁵² In January 2012, the case was referred to the Court's Grand Chamber, which deals only with exceptional cases of alleged human rights violation. In December 2003 Khaled el-Masri was seized by Macedonian agents and accused of being a member of Al-Qaida. Held incommunicado in Skopje for 23 days, he was subsequently handed over to CIA agents and transferred to Kabul, Afghanistan, where he was detained and interrogated over four months. Macedonia denies any involvement in El-Masri's detention and rendition. The Open Society Justice Initiative argues on behalf of El-Masri that the government of Macedonia violated Article 5 ECHR by illegally detaining El-Masri in Skopje without charging him or bringing him before a judge, and Articles 3 and 5 ECHR for knowing but not interfering with his ill-treatment at the hands of the CIA rendition team, as well as by handing him over to the CIA authorities knowing that there was a real risk of him being detained in inhuman conditions without a trial in Kabul. Furthermore, the alleged failure to conduct a proper investigation into El-Masri's detention and transfer to the CIA agents fails to comply

⁴⁶ See Annexes 1 and 2 for detailed information concerning the state of affairs regarding judicial inquiries in each country. See also Table 2 ('Accountability Scoreboard').

⁴⁷ *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC) and *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005). For more information see Annexes 1 and 2.

⁴⁸ AI, *Open Secret. Mounting evidence of Europe's complicity in rendition and secret detention*, p. 32.

⁴⁹ Open Society Justice Initiative, *El-Masri v Macedonia*, available at: <http://www.soros.org/initiatives/justice/litigation/macedonia>

⁵⁰ *Ibid.*

⁵¹ Applications to European Court of Human Rights: *El-Masri v Macedonia*, Application No. 39630/09, 18 September 2009; *Al Nashiri v Poland*, filed 6 May 2011; and *Abu Zubaydah v Lithuania*, filed 28 October 2011.

⁵² *Khaled el-Masri v Macedonia*, Application 39630/09, lodged on 20 July 2009.

with the requirement to investigate Article 3 violations. Since no criminal court in Macedonia is willing to hear his case, the Open Society Justice Initiative also alleges that El-Masri's right to a remedy under Article 13 ECHR was violated. It further considers that the public's right to know the truth was violated. A hearing was held by the Grand Chamber on 16 May 2012.⁵³

Al-Nashiri v Poland⁵⁴ - In May 2011, the Open Society Justice Initiative submitted a second application to the ECtHR on behalf of Abd al-Rahim al-Nashiri, who was said to be held incommunicado and tortured in a secret CIA prison in Poland. The Polish government is alleged to have enabled CIA rendition operations on its territory and actively assisted the CIA in transferring Al-Nashiri in and out of the country. Poland is also accused of having violated Articles 3 and 8 ECHR by enabling Al-Nashiri's torture, ill-treatment and incommunicado detention on Polish territory, Article 5 by permitting his incommunicado detention; and Articles 2, 3, 6 and Protocol 6 to the ECHR by assisting in his transfer from Poland despite a real risk of him being subjected to further ill-treatment (Article 3), further incommunicado detention (Article 5), a flagrantly unfair trial (Article 6), and the death penalty (Articles 2, 3 and Protocol 6) under US custody. Furthermore, the failure to conduct an effective investigation into the violation of Al-Nashiri's rights is considered to amount a violation of Articles 2, 3, 5 and 9, as well as the right to an effective remedy under Article 13 ECHR.

Abu Zubaydah v. Lithuania - In October 2011 the human rights group, Interights, filed a complaint against Lithuania before the ECtHR on behalf of Abu Zubaydah,⁵⁵ who alleges that he was detained and tortured in a secret CIA prison in Lithuania. A criminal investigation into secret prisons there was closed in 2011. Lithuania is alleged to have violated Articles 3, 5, 6 and 8 ECHR by failing to provide basic safeguards such as protection against torture and ill-treatment on its soil and because Abu Zubaydah was removed from Lithuania despite a real risk of torture and flagrant breaches of Articles 5 and 6. It is further alleged that Lithuania violated and continues to violate Articles 3, 5 and 8 as well as Zubaydah's right to an effective remedy under Article 13 by failing to conduct an effective investigation into Abu Zubaydah's enforced disappearance, secret detention, torture and ill-treatment.

- Most of the cases at the national level have been closed (Germany, Sweden, Lithuania, Italy and Portugal). Some remain open in the UK. In Poland, all judicial inquiries are ongoing. Moreover, with the case still ongoing, both Al-Nashiri and Abu Zubaydah have been granted victim status according to Polish law. The other criminal investigations either found that the respective States and/or individuals had not acted illegally (Germany and Sweden), or did not find evidence to prosecute or condemn the parties involved (the investigation of flights that landed on Mallorca and the Canary Islands in Spain,⁵⁶ the UK,⁵⁷ Lithuania⁵⁸ and Portugal⁵⁹). In Macedonia's

⁵³ Open Society Justice Initiative, *El-Masri v Macedonia*, available at <http://www.soros.org/initiatives/justice/litigation/macedonia>.

⁵⁴ ECtHR, *Al Nashiri v Poland*, Application lodged on 6 May 2011.

⁵⁵ Interights, *Abu Zubaydah v Lithuania*, lodged on 27 October 2011, available at <http://www.interights.org/document/181/index.html>.

⁵⁶ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>, p. 3

⁵⁷ Cobain, I., *Police to investigate MI6 over rendition and torture of Libyans*, The Guardian, 2012, available at <http://www.guardian.co.uk/world/2012/jan/12/libya-rendition-torture-abduction-mi6>.

⁵⁸ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, pp. 4-5.

case, after Khaled el-Masri made a request to the Office of the Skopje Prosecutor to carry out a criminal investigation of his illegal detention and abduction and to bring criminal proceedings against those responsible, the prosecutor supposedly took no action until the statutory time limit for launching a criminal investigation had expired in early 2009.⁶⁰ Regarding the criminal investigations, in Italy *ad absentia* convictions were made. In Germany, an arrest warrant was filed against CIA agents, but not delivered.⁶¹ In Spain, the judicial investigation led to a request for the detention of 13 members of the crew on the plane used in El-Masri's abduction.⁶² In Lithuania, the judicial enquiry by the General Prosecutor's Office was halted in 2011 for reasons of 'state secrecy'.⁶³

- Regarding civil claims, so far the UK has reached some friendly settlements and Sweden has provided reparations of approximately EUR 300,000 to the victims of torture and/or inhuman and degrading treatment suffered in Egypt and at the Bromma Airport.⁶⁴ In Italy, Abu Omar and his wife were granted reparations for his abduction: Abu Omar was granted EUR 1 million and his wife, EUR 500,000.⁶⁵ The civil claim made by Khaled el-Masri at the Macedonian court in 2009 is still pending.⁶⁶ The various reparations and remedies attributed to the individuals who suffered human rights violations are listed in Table 1.

⁵⁹ DN, *PGR recusa reabrir inquérito aos voos da CIA*, 4 December 2010, available at: http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1726960

⁶⁰ Open Society Justice Initiative, *op. cit.*

⁶¹ Verwaltungsgericht Köln, Urteil vom 07.12.2010, 5 K 7161/08.

⁶² El País, *El fiscal solicita el arresto de 13 espías de EE UU que tripularon los vuelos de la CIA*, 12 May 2010.

⁶³ AI, *Unlock the truth in Lithuania – Investigate Secret Prisons now*, p. 5, available at: <http://www.amnesty.org/en/library/info/EUR53/002/2011/en>.

⁶⁴ Aftonbladet, *Miljonskadestånd till Agiza*, 19.09.2008, available at: <http://www.aftonbladet.se/nyheter/article11516060.ab>

⁶⁵ The Guardian, *Italian court finds CIA agents guilty of kidnapping terrorism suspect*, 4 November 2009, available at: <http://www.guardian.co.uk/world/2009/nov/04/cia-guilty-rendition-abu-omar>.

⁶⁶ Open Society Justice Initiative, *op. cit.*

Table 1 : Reparation and Remedies

STATE	VICTIM	REPARATION AND REMEDIES
POLAND	Al-Nashiri (Saudi Arabian national)	ECtHR application; granted victim status
	Abu Zubaydah (stateless Palestinian born in Saudi Arabia)	ECtHR application; granted victim status
UNITED KINGDOM	16 people, including Bisher al-Rawi, Jamil el-Banna and Binyam Mohamed	friendly settlement with the UK Government
SWEDEN	Ahmed Agiza (Egyptian asylum seeker)	financial compensation (approximately EUR 300,000)
	Mohammed Alzery (Egyptian asylum seeker)	financial compensation (approximately EUR 300,000)
ITALY	Abu Omar (Egyptian national with political refugee status in Italy)	financial compensation (EUR 1 million); ECtHR application
	Abu Omar's wife	financial compensation (EUR 500,000)
LITHUANIA	Abu Zubaydah	ECtHR application
MACEDONIA	Khaled el-Masri (German citizen)	ECtHR application; civil claim filed for damages against Macedonian Government (pending)

Source: Compiled by the authors

1.3. Ombudsmen⁶⁷

- Ombudsmen have carried out investigations in two countries: Sweden⁶⁸ and Finland.⁶⁹ In the case of Sweden, the Parliamentary Ombudsman investigated the behaviour of the Swedish security services (Sapö) in enforcing the decision to expel Agiza and Alzery. It reached the conclusion that the treatment of the detainees was degrading and may have been intended to humiliate, a possible breach of Article 3 ECHR. It concluded that, in any case, the enforcement was carried out in an inhuman and unacceptable manner. Both men received reparations and the Ombudsman took no further action. In Finland, the Parliamentary Ombudsman is currently investigating the use of Finnish airports by CIA rendition flights.⁷⁰

1.4. Accountability challenges

- The main accountability obstacles which have affected inquiries and investigation processes in European countries can be summarized as follows: (1) lack of a formal Government investigation (Finland, Macedonia and Portugal); (2) invocation of state secrecy or classified information (Poland, Italy and Lithuania); (3) lack of sufficient evidence (Germany and the UK); (4) lack of transparency (the UK and Romania); (5) lack of cooperation between the Government and Parliamentary Committees (Germany); and (6), lack of, or reduced, cooperation by the US authorities (Germany, Poland, Denmark and Spain).
- To these obstacles can be added those highlighted in the Council of Europe's 2011 report, which identified obstacles at the national level mostly related to lawyers being restricted from making an effective defense and victims from effectively participating in the investigation; narrow remits for inquiries; immunity for government agents; a focus on national rules rather than an international human rights law; a lack of rigorous investigative techniques and of cooperation between and among prosecutors and other investigative authorities.⁷¹
- Overall, **the lack of independence and impartiality** – which mainly results from uneven degrees of scrutiny and transparency in the political inquiries, especially those of a governmental nature – has created accountability obstacles that undercut the effectiveness and adequacy of the inquiries in all the European countries under investigation, with 'politics' and state secrecy playing fundamental roles in preventing disclosure of the truth and access to justice. In our view, this poses critical questions about the level of implementation of the recommendations made by the TDIP in 2007.⁷²
- Other, more country-specific, obstacles became evident during our research.⁷³ In Denmark, the second inquiry was limited to an alleged previous collusion with the US. In Poland, the first Prosecutor was called off the case. In Sweden, according to

⁶⁷ See Annexes 1 and 2 for detailed information concerning the state of affairs regarding ombudsmen inquiries in each country. See also Table 2 ('Accountability Scoreboard').

⁶⁸ Swedish Ombudsman, *Review of the enforcement by the security police of a Government decision to Expel Two Egyptian citizens*, Adjudication No. 2169-2004, available at <http://www.statewatch.org/cia/documents/sweden-parl-ombuds-expulsion-Egyptians.pdf>

⁶⁹ For more information, see Annexes 1 and 2, pp. 52, 72-73.

⁷⁰ Ibid.

⁷¹ Council of Europe, *Report on the Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, op. cit.

⁷² European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)). Op. cit., paragraphs 187 to 196.

⁷³ See Annexes 1 and 2.

Human Rights Watch, it was never fully explained the extent of Sweden's knowledge or involvement in the the transfer of Ahmed Agiza and Mohammed Alzery to Egypt.⁷⁴ Furthermore, according to the Council of Europe, the Swedish Government did not cooperate sufficiently with external actors (in this case, the UN Committee against Torture).⁷⁵ Romania did not undertake a formal parliamentary inquiry in response to accusations that it hosted a secret detention centre in Bucharest.⁷⁶ As for Finland, it relied on a distinction between 'civil' and 'state' aircraft to claim that all flights but one were civilian in nature and therefore not connected to US transit flights, despite the fact that the CIA allegedly contracted with private aviation companies to conduct renditions.⁷⁷ In Italy, the public prosecution allegedly was undermined by successive Italian governments, with the US Government allegedly attempting to use diplomatic pressure to influence the investigations.⁷⁸ In Spain, a similar situation occurred, with the media reporting that the Government was being pressured diplomatically by the US to influence the judiciary inquiries.⁷⁹ In Lithuania, border customs officials were prevented from inspecting flights that were allegedly transferring detainees.⁸⁰ In Macedonia, during a European Parliament visit to that country, there were claims of newspaper censorship, control of the judiciary by political parties and lack of clarity in the inquiry procedures.⁸¹ Finally, in Portugal, the Government rejected a proposal to appoint a formal Parliamentary Committee to investigate the allegations that CIA flights had landed in Portuguese airports.⁸² The Portuguese Prosecutor General also refused to re-open the judicial inquiry despite the WikiLeaks' disclosure of new information regarding Portugal's involvement.⁸³

⁷⁴ Human Rights Watch, *Europe: Pending Questions on CIA Activities in Europe*, 21 February 2006, available at: <http://www.hrw.org/news/2006/02/20/europe-pending-questions-cia-activities-europe>

⁷⁵ Council of Europe, Report on the Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Parliamentary Assembly, 12 June 2006, p. 35.

⁷⁶ Associated Press, *AP Exclusive: Inside Romania's secret CIA prison*, 8 December 2011, available at: <http://news.yahoo.com/ap-exclusive-inside-romania-secret-cia-prison-050239912.html>; BBC News, CIA 'secret prison' found in Romania – media reports, 8 December 2011, available at: <http://www.bbc.co.uk/news/world-europe-16093106>

⁷⁷ AI, *Finland must further investigate USA rendition flights*, op. cit.

⁷⁸ Der Spiegel, *US pressed Italy to influence the judiciary*, 17 December 2010, available at: <http://www.spiegel.de/international/europe/0,1518,735268,00.html>.

⁷⁹ The Guardian, *Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture*, 1 December 2010, available at: <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>.

⁸⁰ AI, *Unlock the truth in Lithuania – Investigate Secret Prisons now*, p. 10, available at: <http://www.amnesty.org/en/library/info/EUR53/002/2011/en>.

⁸¹ European Parliament, *Minutes trip to Macedonia – 27-29 April 2006*, available at: <http://www.statewatch.org/cia/documents/macedonia-note-on-visit.pdf>

⁸² RTP, *Governo diz que comissão inquérito sobre voos da CIA é "inoportuna e inútil"*, available at: <http://www.rtp.pt/noticias/?article=56655&layout=121&visual=49&tm=8&>

⁸³ DN, *PGR recusa reabrir inquérito aos voos da CIA*, 4 December 2010, available at: http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1726960. For more information see Annexes 1 and 2, pp. 57, 92-94.

Table 2: Scoreboard of Inquiries and Investigations

	POLITICAL INQUIRIES			JUDICIAL INQUIRIES		OMBUDSMEN INQUIRIES	REPARATION AND REMEDIES	VICTIM STATUS
	Parliamentary		Executive	National	ECtHR			
	Committee	Others						
Germany	X (2)			X				
Poland				X	X			X
UK	X	X	X	X			X	
Denmark			X (2)					
Finland			X			X		
Sweden			X	X		X	X	
Italy		X	X	X	X		X	
Spain		X	X	X				
Lithuania	X			X	X			
Romania	X		X					
Macedonia	X			X	X			
Portugal		X		X				

Source: Compiled by the authors

2. THE EU FUNDAMENTAL RIGHTS ARCHITECTURE: INNOVATIONS AND LIMITS FOLLOWING ADOPTION OF THE TREATY OF LISBON

How are we to understand the extraordinary renditions and secret detentions practices in light of the legal and institutional components of the EU's Area of Freedom, Security and Justice (AFSJ) following the entry into force of the Treaty of Lisbon? Does the fundamental rights architecture of this new Post-Lisbon era provide an answer to the dilemmas surrounding the linkages between extraordinary renditions and EU law and competence?

- The Treaty of Lisbon has introduced a **new fundamental rights architecture** at the level of the European Union, which comprises a Treaty framework that embeds fundamental rights as common values of the Union (Articles 2 and 6 of the EU Treaty); an EU Charter of Fundamental Rights with the same legally binding value as the Treaties (Article 6.1 of the EU Treaty); the possibility of the Union acceding to the European Convention of Human Rights and Fundamental Freedoms (ECHR) (Article 6.2 of the EU Treaty), now in an advanced stage of negotiations; and the protection of fundamental rights as an explicit objective of EU external policies (Articles 3.5 and 21 of the EU Treaty).⁸⁴ The new legal framework also favours the emergence of a reconfigured institutional setting regarding fundamental rights at the EU level, with the setting up of the European Agency for Fundamental Rights (FRA), as well as a new Directorate General (DG) on Justice, Fundamental Rights and Citizenship in the European Commission. However, the EU's post-Lisbon fundamental rights architecture exhibits several shortcomings and dilemmas in cases of extraordinary renditions and secret detentions, especially when trying to ascertain their relationship with the EU and the responses to be expected from EU institutional instances from the viewpoint of European law.
- The Union, and its fundamental rights system, is founded on the **presumption that Member States comply with and respect fundamental human rights both inside and outside the scope of EU law**. Most of the EU's AFSJ policy components are anchored in, and function on, the assumption that Member States will respect human rights '*outside the scope of EU law*' – as enshrined in their respective constitutional traditions and legal systems, and based on their obligations in international and regional human rights instruments such as the European Convention on Human Rights (ECHR).
- The EU Charter of Fundamental Rights also makes that assumption. Article 51 of the Charter states that its provisions are addressed to EU Member States "*only when they are implementing Union law*". This provision is regularly quoted by European institutions, and in particular, the European Commission's DG for Justice, when it

⁸⁴ Article 3.5 of the EU Treaty stipulates:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and *the protection of human rights*, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. (Emphasis added).

seeks to justify a 'lack of action' at the EU level in cases of alleged breaches of human rights considered to fall outside the implementation of EU law. As the Commission's 2011 Annual Report on the Implementation of the EU Charter of Fundamental Rights underlines,

The Commission cannot examine complaints which concern matters outside the scope of EU Law. This does not necessarily mean that there has not been a violation of fundamental rights. If a situation does not relate to EU law, it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected. Member States have extensive national rules on fundamental rights, which are guaranteed by national judges and constitutional courts. Accordingly, complaints need to be directed to the national level in the first instance.⁸⁵

- However, beyond the formal limitations of the material scope of the EU Charter of Fundamental Rights, instances of systematic fundamental human rights violations that present a 'European dimension', such as those examined in this note, challenge our understanding of **fundamental rights as autonomous and self-standing general principles of the EU legal order**, as developed by the European Court of Justice (CJEU) since the 1970s. The main driving force for the CJEU to develop the doctrine of fundamental rights as general principles of the EU legal system was to respond to challenges from national constitutional courts (in particular, that of Germany) that questioned the supremacy of EU law.⁸⁶ For a Community act to take preference over one originating from national law means that judicial review of European measures should take place at the EU level (not only in the national arena), and that fundamental rights should be ensured already within the framework of the structure and objectives of the European legal system.
- Fundamental rights as general principles are substantiated not only by national constitutional traditions, but also by international and regional human rights treaties such as the ECHR, which the CJEU recognizes as one of the key source of standards when examining how the EU legal order safeguards fundamental rights.⁸⁷ The doctrine of fundamental rights as general principles could also indicate how the CJEU should use the ECHR and other relevant international human rights instruments when examining the negative repercussions of alleged human rights violations *over the general principles of mutual confidence, loyal cooperation and fundamental rights*. This is particularly necessary in those EU AFSJ policy domains where **mutual recognition of decisions** plays a role, such as judicial cooperation in criminal matters and asylum policy. (See Section 3 below).
- **Fundamental rights as general principles of EU law**, which are basic to the EU's AFSJ, presume that the national level assures human rights protection in those areas outside the scope of European legislation or having indirect linkages with the latter.

⁸⁵ European Commission, Annual Report on the Implementation of the EU Charter of Fundamental Rights, 2012.

⁸⁶ Case 29/69, *Stauder*, 12 November 1969, ECR 00419. Case 11/70 *Internationale Handelsgesellschaft*, 17 December 1970, ECR 01125. Refer also to Case: BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*, 29 May 1974; Case: BVerfGE 73, 339 2 BvR 197/83 *Solange II-decision*, 22 October 1986. See Weiler, J., *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1113 (1986).

⁸⁷ *Ibid.*

Especially during the last 15 years, the EU has moved towards the establishment of an AFSJ, which now has a number of legal, institutional and budgetary components, and presumes that the Member States' domestic arenas will comply with the shared values enshrined in Article 2 of the EU Treaty, in particular, the respect for human rights. AFSJ policies have profound implications for individuals' liberty and security, as well as rights and freedoms that extend beyond purely economic considerations. The large body of law and policy that has been made in these areas and the practices of actors and agencies at the EU level are founded on **trust and confidence between the EU and its Member States**.

- Unlike the period of European integration in the 1970s, human rights violations such as those evidenced in extraordinary renditions and secret detentions send now the pressure back to the national level, i.e. Member States. If national legal systems cannot ensure proper human rights protection in areas that are formally outside of EU jurisdiction but that indirectly affect its functioning and effectiveness, then the EU should be in a position to expand its remit to include Member States' compliance with human rights outside the scope of EU law. In particular, the failure of several national governments to conduct effective, impartial and objective investigations on extraordinary renditions and secret detentions represents a fundamental obstacle to effectively addressing the alleged violations of fundamental rights, creating an unacceptable barrier to justice and violating their legal commitments and obligations to seek the truth. **This also have negative implications over mutual trust in inter-Member States relations**. The constitutional courts of those Member States not implicated in extraordinary renditions could use this 'mistrust' as grounds to challenge the supremacy of EU AFSJ law, especially in those EU law domains where the principle of mutual recognition applies, as we discuss below.
- The obstacles to democratic and judicial accountability for alleged breaches of fundamental human rights in the context of extraordinary renditions and secret detentions **create profoundly negative effects in the EU's AFSJ, and for the general principles upon which the latter was founded and functions**. *They also challenge a Member States' duty to abstain from any measure jeopardizing the attainment of the Treaty objectives and those of the AFSJ*.
- The presumption that Member States will comply with EU values as stated in Articles 2 and 6 of the EU Treaty and, in particular, in terms of respect for human rights, has been subject to increased attention and pressure from European supranational courts and tribunals in those cases with obvious European dimensions. Both the European Court of Human Rights (ECtHR) in Strasbourg⁸⁸ and the European Court of Justice (CJEU)⁸⁹ in Luxembourg have recently confirmed the rebuttable nature of such an assumption in asylum cases, whose *nature affects other AFSJ policies*. The CJEU has ruled that **European Union law precludes the application of a conclusive presumption that Member State always observe the fundamental rights of the EU and 'its common values'**. In *N.S. and M.E.* Joined Cases C-411/10 and C-493/10, the CJEU held:

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, *based on mutual confidence and a presumption of*

⁸⁸ ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011.

⁸⁹ CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, 21 December 2011.

compliance, by other Member States, with European Union law and, in particular, fundamental rights...[T]o require a conclusive presumption of compliance with fundamental rights, *it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States...* [T]hat would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting *a conclusive presumption not admitting of any evidence to the contrary*. (Emphasis added).⁹⁰

- The recent case *Hirsi v Italy*⁹¹ has gone even further by saying that EU Member States are supposed to comply with that 'presumption' even when they have exercised their jurisdiction outside their national territories – which is of particular relevance to the issues and events examined in this note. The Court held that whenever the State, through its agents operating outside its territory, exercises control and authority, and thus jurisdiction, over an individual, the State is obliged under Article 1 to secure the rights and freedoms of the ECHR. The ECtHR also reminded that:

...expulsion, extradition or another measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.⁹²

It needs to be stressed that in its arguments against Italy, the ECtHR invoked the EU Charter of Fundamental Rights and a letter issued by the former Commissioner for Freedom, Security and Justice and Vice-President of the European Commission, Jacques Barrot. The ECtHR emphasised that:

135. That *non-refoulement* principle is also enshrined in Article 19 of the Charter of Fundamental Rights of the European Union. In that connection, the Court attaches particular weight to the content of a letter written on 15 May 2009 by Mr Jacques Barrot, Vice-President of the European Commission, in which he stressed the importance of compliance with the principle of *non-refoulement* in the context of operations carried out on the high seas by Member States of the European Union.⁹³

⁹⁰ Paragraphs 83, 100 and 101 of the judgment.

⁹¹ ECtHR, *Hirsi v Italy*, Application No. 27765/09, 23 February 2012.

⁹² Here the ECtHR made reference to the following judgments: see *Soering*, cited above, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v France*, 29 April 1997, § 34, Reports 1997-III; *Jabari v Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v the Netherlands*, no. 1948/04, § 135, 11 January 2007.

⁹³ Barrot's letter issued on 15 July 2009:

According to the case-law of the European Court of Justice, Community obligations must be applied in strict compliance with the fundamental rights forming part of the general principles of Community law. The Court has also clarified that the scope of application of those rights in the Community legal system must be determined taking account of the case-law of the European Court of Human Rights (ECHR).

- These judgments have profound implications for the ways in which the EU AFSJ operates in terms of its premises and scope of application. They also reveal crucial deficits in the foundation and the *raison d'être* of European cooperation on these policy aspects, which include issues that formally fall outside the scope of EU legislation. This is where the **EU law's general principle of 'mutual confidence and trust'** amongst Member States, and most importantly for our the purpose of our examination, between the latter and the EU, plays a determinant role and is also key to its success. For the EU AFSJ to function, the participating States' respect and practical delivery of the 'common values' enshrined in the Treaties is crucial. This could even be said to be a necessary precondition conditional in a large number of **policy and legal areas of European cooperation that are regarded as being more fundamentally rights-sensitive.**
- **The general principle of loyal and sincere cooperation** stipulated in Article 4.3 of the EU Treaty, according to which Member States shall, in full mutual respect, assist each other in carrying out the tasks envisaged in the Treaties, is particularly relevant when reviewing EU Member States' reactions (or lack of them) to extraordinary renditions and secret detentions. One could argue that the lack of cooperation by a particular Member State regarding its accountability questions the basic premise of the EU AFSJ, as well as mutual obligations in the context of general principles of EU law and Union values. A similar position was taken by the 2007 EP TDIP Report, which concluded that the principle of 'loyal cooperation' – "*which requires Member States and the EU institutions to take measures to ensure the fulfilment of their obligations under the Treaties, such as the respect of human rights, or resulting from action taken by the EU institutions, such as ascertaining the truth about alleged CIA flights and prisons, and to facilitate the achievement of EU tasks and objectives*" – had not been respected.⁹⁴
- Both the Treaty of Lisbon and the Stockholm Programme⁹⁵ emphasise the need to ensure 'objective and impartial evaluation' of **the implementation** of EU AFSJ policies by Member States' authorities as one way of facilitating full application of the '**principle of mutual recognition**' (Article 70 of EU Treaty).⁹⁶ This general principle of EU law plays a fundamental role in areas such as the Common European Asylum System (CEAS) and judicial cooperation in criminal matters, as well as in other migration and border control-related domains, such as the Schengen system. It is also increasingly central to cross-border police and law enforcement cooperation, in particular the security agenda (the European Internal Security Strategy (ISS)) that

The principle of *non-refoulement*, as interpreted by the ECHR, essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment.

Having regard to the foregoing concerning the scope of Community jurisdiction, the Commission has invited the Italian authorities to provide it with additional information concerning the actual circumstances of the return of the persons concerned to Libya and the provisions put in place to ensure compliance with the principle of *non-refoulement* when implementing the bilateral agreement between the two countries.

⁹⁴ Paragraph 227 of the Report.

⁹⁵ European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/01, 04.05.2010, pts. 1.2.4, 3.2.2 and 4.3.1; see also European Commission, *Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme*, COM (2010) 171, Brussels, 20 April 2010(b), p. 6.

⁹⁶ Battjes, H. et al, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights*, Meijers Committee, December 2011.

calls for the increased exchange of intelligence or information between law enforcement authorities at the EU level in order to combat crime and terrorism. What is at stake here is not so much the correct and timely implementation by national authorities of their obligations *within the scope of EU law*, but rather the extent to which **the rule-of-law conditions/safeguards and human-rights standards** are 'in place' (in Member States' national legal, administrative and law enforcement systems) so that, in practice, these **European policies and regulations can be legitimate and fully effective.**

3. EXTRAORDINARY RENDITIONS AND SECRET DETENTIONS: THE DEBATE ABOUT EU COMPETENCE

What are the specific 'connecting factors' that link extraordinary renditions and the unlawful detention of prisoners to the European Union? Which EU legal and policy domains are most directly affected by the negative repercussions of these practices on the principles of mutual confidence, loyal cooperation and fundamental rights?

- As discussed in Section 2, when examining the role of European institutions and agencies in seeking accountability in alleged breaches of fundamental human rights, the most direct and sound legal arguments address **the relevance of the principle of mutual trust and confidence in European cooperation in policies related to freedom, security and justice**. Without an EU response, the challenges to fundamental rights posed by extraordinary renditions and secret detentions create mistrust amongst Member States and between these and European institutions. **The principle of loyal cooperation enshrined in the Treaties is also undermined.**
 - **Extraordinary renditions and secret detentions**, and the failure of certain EU Member States to take steps to address the practice, find the truth and ensure justice (effective remedies) for the victims, directly conflict with fundamental human rights as general principles of EU law and Union values. The latter transcend Member States' obligations to implement EU law in a timely manner and go beyond the limits inherent to the material scope of the EU Charter of Fundamental Rights. **These human rights violations challenge the very basis of European cooperation, which is founded on the trust that the national arenas are expected to have efficient standards and conditions to guarantee that alleged human rights breaches will be effectively investigated and brought to justice.** Lack of cooperation by Member States constitutes a profound barrier towards their duty to ensure compliance with fundamental rights as general principles of EU law, since this notion of general principles not only constitutes one of the pillars of the EU's AFSJ but is also a precondition for the effectiveness of its law in these policy areas.
 - There are in **five main areas or 'EU law angles' that demonstrate a high degree of proximity between the human rights violations as a consequence of alleged transportation and unlawful detention of prisoners and EU law, competences and actions**: (1) EU law domains that are driven by the principle of mutual recognition or anchored in mutual confidence regarding both systems; (2) the internal security strategy, and information exchange and processing for law enforcement purposes in the fight against terrorism; (3) individuals falling within the scope of EU citizenship and EU law statuses, such as asylum seekers, refugees and long-term residents; (4) the EU's accession to the ECHR; and (5) Article 7 of the EU Treaty.
- 3.1. *Mistrust vs. Mutual Recognition in Judicial Cooperation in Criminal Matters***
- The practice of extraordinary renditions and secret detentions indicates **that the national systems of several Member States cannot be trusted over their shared commitment to respect human rights**. This creates negative

repercussions for EU-level policies, laws and practices that are based on the principle of mutual recognition (Battjes, Brouwer, de Morree and Ouwerkerk, 2011), especially those where mutual confidence about fundamental rights compliance is crucial for their effectiveness, added value and practical application. Of particular concern are those fields of cooperation falling within the scope of the former EU Third Pillar (formerly Title VI of the EU Treaty), which now corresponds to Chapters 4 (Judicial Cooperation in Criminal Matters) and 5 (Police Cooperation) of the Treaty on the Functioning of the European Union (TFEU), which covers European cooperation on internal security more broadly.

- One case in point is judicial cooperation in criminal matters, which is based on **the presumption that Member States are required to accept foreign judicial decisions as having the same legal effects as their own** (Peers, 2004; Guild and Geyer, 2008). The mistrust regarding Member States' compliance with fundamental rights creates barriers to European cooperation in the domain of criminal justice, in particular **in the field of extradition and surrender procedures** in the context of the European Arrest Warrant (EAW), which presents a limited number of grounds for refusal – unlike traditional extradition. Extraordinary renditions reveal that **there are no guarantees that the requesting or receiving Member State will not send the person to torture or to ill or degrading treatment– either in that country or another**. It also shows that existing supranational legal frameworks regarding extradition and mutual legal assistance such as the ones agreed with the USA in the aftermath of '9/11' will not be used by national authorities for the purposes of security cooperation.⁹⁷ This can **further exacerbate the resistance of certain national constitutional courts and other national authorities to recognize and enforce foreign judicial decisions**, e.g. as regards application of the EAW because of concerns related to respect for suspects' fundamental rights and larger issues such as prison conditions in specific Member States.

3.2. *The European Internal Security Strategy (ISS): Information Exchange and Home Affairs Agencies in the Fight against Terrorism*

- One of the top priorities in the European Internal Security Strategy (ISS)⁹⁸ is to establish a "comprehensive model for information exchange" at the EU level (Guild and Carrera, 2010). **Information exchange and processing have been identified as central priorities** for preventing or 'fighting terrorism' at the EU level. The ISS considers that the 'European Security Model' should "increase substantially the current levels of information exchange" between European internal security agencies and bodies. Increasing the exchange of information is supposed to contribute to the development of "a stronger focus on the prevention of criminal acts and terrorist attacks before they take place".

⁹⁷ Council, Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America, OJ L 291/40, 7.11.2009.

⁹⁸ European Parliament, *Developing an EU Internal Security Strategy, Fighting Terrorism and Organised Crime*, LIBE, November 2011; Carrera, S. and Guild, E., *Towards an Internal (In)security Strategy?*, CEPS Papers in Liberty and Security in Europe, January 2011, available at: <http://www.ceps.eu/book/towards-internal-insecurity-strategy-eu>. Refer to Council, *Draft Internal Security Strategy for the European Union: Towards a European Security Model*, 5842/2/10, Brussels, 23 February 2010; See also European Commission, *Communication on the EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe*, COM (2010) 673 final, Brussels, 22 November 2010, p. 4.

- **The EU counter-terrorism discussions are centred on the need to foster exchange and information processing.** These debates have not been accompanied by careful reflection about the kind of 'information' which is being exchanged and transferred, nor on the sources of that information and the extent to which it can be assumed to not have been obtained through torture, inhuman or degrading treatment (foreign torture information) or other fundamental human rights violations. The issue here is also the '**mutual confidence and trust amongst national and EU security law enforcement actors about the quality and reliability of the sources of that information**', in particular, that the latter will act in compliance with fundamental human-rights principles and the law. This does not only have implications at the level of supranational (cross-border) cooperation between national law enforcement authorities, but also for EU Home Affairs agencies. Actors like Europol, Eurojust and, to a lesser extent, FRONTEX have been increasingly involved – unilaterally or through inter-agency cooperation⁹⁹ – in the exchange and processing of information and personal data, some of which could be even labelled as 'intelligence' (Guild et al., 2011).
- There are currently **no ways to ensure that EU Home Affairs agencies will not receive, process and use information or 'intelligence' illegally obtained by the relevant communicating national and/or third country authorities** for the purposes of 'fighting terrorism'. As a way of example, Europol's mainly facilitates the exchange of information between Member States and develops criminal intelligence. Europol's principal information-related tasks are collecting, storing, processing, analysing and exchanging information and intelligence, notifying Member States of any information on criminality concerning them, and developing strategic analyses, including threat assessments.¹⁰⁰ To facilitate the exchange of information, each Member State has established a Europol National Unit (ENU) on their territory which functions as the liaison between Europol and its national law enforcement authorities. In turn, Europol liaison officers are seconded from the ENUs to Europol.¹⁰¹ Because of national authorities' reluctance to share intelligence more widely, a lot of information is exchanged only bilaterally – between national liaison officers stationed at Europol.¹⁰²
- Europol's mandate is currently being negotiated, which might present the opportunity to address *the outstanding accountability issue raised above*. The EU Charter of Fundamental Rights applies to EU bodies, including the EU Home Affairs agencies.¹⁰³ **An independent evaluation must be conducted about the extent to which any EU agencies may have known or received any sort of information about the extraordinary renditions and secret detentions practices** (in particular, Europol, Eurojust and SitCen, the EU Joint Situation Centre). The agencies should be scrutinized to learn if they are at the disposal of, or

⁹⁹ Council, *The Joint Report by EUROPOL, EUROJUST and FRONTEX on the State of Internal Security in the EU*, 9359/10, Brussels, 7 May 2010, p. 1; Council, *Report on the Cooperation between JHA Agencies in 2010*, 5675/11, Brussels, 25 January 2011.

¹⁰⁰ Art. 5 of the Europol Council Decision. Council, Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121/37, 15.05.2009(a).

¹⁰¹ *Ibid.*, Arts. 8 and 9.

¹⁰² European Parliament, *Developing an EU Internal Security Strategy, fighting terrorism and organised crime*, PE 462.423, November 2011.

¹⁰³ See European Parliament, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies*, LIBE, October 2011.

cooperating with, national law enforcement authorities implicated in the unlawful actions and authorities of third countries, such as the US¹⁰⁴ or Russia.

- To understand the risks of EU Home Affairs agency involvement in the programme of extraordinary renditions and secret detentions requires a **clear and definitive mapping of the points of intersection** of national (intelligence) law enforcement agencies which may have been involved, or are accused of involvement, in extraordinary renditions and secret detentions and EU-related Home Affairs agencies – that is, **the EU intelligence or information exchange architecture**. These points of intersection should be subjected to very sensitive, democratic, legal and judicial controls: first, it is critical to examine what (including the existence of potential victims' confidential dossiers) passed (if anything) through these points of intersection during the relevant periods; second, it is necessary to create a mechanism to effectively control the fundamental rights grounds of these points of intersection in order to eliminate the risk of EU agencies being contaminated when national agencies are implicated in unlawful acts of the sort assessed in this note.
- Overall, there is a need for **independent and constant evaluation/assessment** of how current EU 'anti-terrorism' laws and policies, and the activities and practices of EU security agencies and home affairs actors, affect the EU's general principles of proportionality and fundamental human rights. This was pointed out by the 2007 EP TDIP Report¹⁰⁵ as well as the 2011 EP Resolution on EU-Counterterrorism Policy, which called for improved evaluation to ensure that EU counter-terrorism policies meet fundamental rights standards.¹⁰⁶

3.3. *The individual falling within the Scope of EU Law:*

- The cases of extraordinary renditions and unlawful detentions undermine confidence regarding EU Member States' capacity to deliver the substance of the set of rights, freedoms and administrative guarantees which have been carefully attached to EU-level statuses, starting with Union citizenship, as well as those related to asylum seekers, refugees and certain categories of third country nationals that now fall

¹⁰⁴ Heimans, D., The External Relations of Europol – Political, Legal and Operational Considerations, in B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels: VUB Press, 2008. Agreement between the United States of America and the European Police Office, 6 December 2001. Refer to D. Heimans, The External Relations of Europol – Political, Legal and Operational Considerations, in B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels: VUB Press, 2008.

¹⁰⁵ 2007 TDIP report (paragraph 193).

¹⁰⁶ European Parliament, Resolution on EU-Counterterrorism Policy: Main Achievements and Future Challenges, 2010/2311, 7.12.2011. The EP paid particular attention to the need for a better "Evaluation and mapping exercise". Paragraph 25:

Stresses that a proper evaluation of ten years of counter-terrorism policies should focus on examining whether the measures taken to prevent and combat terrorism in the EU have been evidence-based (and not based on assumptions), needs-driven, coherent and part of a comprehensive EU counter-terrorism strategy, based on an in-depth and complete appraisal, to be carried out in line with Article 70 of the TFEU, with the Commission reporting back to a Joint Parliamentary Meeting of the European Parliament and national parliamentary committees responsible for overseeing counter-terrorism activities within six months of the study being commissioned, drawing upon reports to be requested from relevant organisations and agencies such as Europol, Eurojust, the Fundamental Rights Agency, the European Data Protection Supervisor, the Council of Europe and the United Nation.

The European Parliament called:

...on the Commission to draw up a complete and detailed map of all existing counterterrorism policies in Europe, with a special focus on EU legislation and how it has been transposed and implemented at EU level; at the same time, calls on the Member States to carry out a comprehensive evaluation on their counter-terrorism policies, with a particular focus on interaction with EU policies, overlap and gaps, in order to cooperate better in the evaluation of EU policies

within the scope of EU citizenship, immigration and asylum legislations. **Some of the individuals who were subjected to extraordinary renditions and secret detentions were in fact covered by EU law** and as such, fell within the personal scope of its application – which strongly suggests EU competence in these affairs.

- **Union Citizenship** is supposed to be the fundamental status of nationals of EU Member States (Kostakopoulou, 2007).¹⁰⁷ The case of *El-Masri v Macedonia*, which now stands before the ECtHR (see Section 1 above), concerns a German citizen who was living with his wife and five children in Germany and who held a valid German passport. As the CJEU held in the *Dereci* case (C-256/11) of 15 November 2011,¹⁰⁸

...[T]he criterion relating to *the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status* refers to situations in which the Union citizen has, in fact, to leave the territory of the Member State of which he is a national but also the territory of the Union as a whole....[A] right of residence may not be refused to a third country national, who is a family member of a Member State national, as *the effectiveness of Union citizenship* enjoyed by that national would otherwise be undermined. (Emphasis added)

The key issue in this case was the **denial of genuine enjoyment of the substance of rights conferred by virtue of the victim's status as a citizen of the Union**. The abduction and unlawful transfer of a national of an EU Member State to another country for detention and interrogation, and the victim's inability to challenge the expulsion decision, constitutes a direct challenge to the institution of European citizenship, and the effectiveness of its substance.¹⁰⁹ Moreover, as regards the discussion of the extent to which a particular situation falls within the scope of EU law, the reasoning of the Court in the *Dereci* case can be helpful because it clarified that in those cases of alleged fundamental rights violations that are not formally covered by EU law, the relevant Court can examine their lawfulness with regard to their human rights in the scope of the ECHR. The Court held that,

...if the referring Court considers, in light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. *On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8 ECHR...* All the Member States are, after all, parties to the ECHR, which enshrines the right to respect for private and family life in Article 8. (Emphasis added.)

- A number of individuals who were victims of unlawful renditions and detentions hold legal status that falls within the scope of the EU asylum and/or immigration law. The

¹⁰⁷ CJEU, Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.

¹⁰⁸ CJEU, C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, 15 November 2011.

¹⁰⁹ European Parliament and Council, Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30.04.2004.

case of *Abu Omar* is a good example, as he was an Egyptian citizen who had been granted political asylum by the Italian authorities in 2001. The affair of *Abdul Hakim Belhaj* also has linkages with EU asylum law – in particular, the Procedures Directive 2005/85¹¹⁰ and the Qualifications Directive 2004/83/EC¹¹¹ – since Belhaj was planning to fly to the UK and apply for political asylum there. If some of the victims were long-term residents of the EU, they could be said to fall within the remits of **EU immigration law** and the personal scope of application of Directive 2003/109 on the status of third-country nationals who are long-term residents.¹¹² These Directives have special conditions and rules that apply to the security of residence and protection against unlawful expulsion from the EU, which of course also includes criteria determined by the ECtHR.

3.4. Implications of the EU's Accession to the European Convention of Human Rights (ECHR)

- In addition to their obligations under EU law, the Member States concerned may face charges of fundamental rights violations before the ECtHR. As outlined in Section 1 above, three such cases are currently before the Court: *el-Masri v Macedonia*,¹¹³ *Al-Nashiri v Poland*¹¹⁴ and *Abu Zubaydah v Lithuania*.¹¹⁵ The two Member States are accused of having violated multiple ECHR Articles: for failing to prevent instances of torture and ill-treatment on their respective territories; for allowing or being involved in the removal of persons faced with the real risk of torture; as well as for failing to conduct an effective investigation into the victim's enforced disappearance, secret detention, torture and ill-treatment. The accession of the EU to the ECHR is not likely to lead to any changes in the assessment of ECtHR cases against individual Member States.
- At present **it is not clear if ECHR accession would engender the EU being held responsible for a violation of fundamental rights within the context of extraordinary renditions and secret detentions**. It is certain, though, that upon accession to the ECHR, **the EU will be directly answerable to the ECtHR regarding its actions and failures to act**. Individuals who consider that their fundamental rights have been breached by EU (in)action will be able to bring cases before the ECtHR. Upon EU accession, the ECtHR will have jurisdiction to review applications against the Member States, the EU, and jointly against the EU and the Member States, including for (in)action by EU Home Affairs agencies. This could include a claim against the European Commission and/or an EU security agency for having failed to effectively investigate allegations or other indications of ill-treatment of an individual within the EU's jurisdiction.
- Such a scenario could face **a number of procedural and substantial hurdles**. In principle, individuals would have to comply with the requirement that they first

¹¹⁰ Council, Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005

¹¹¹ Council, Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, OJ L 304/12, 30.9.2004

¹¹² Council, Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

¹¹³ ECtHR, *Khaled el-Masri v Macedonia*, App. 39630/09, lodged on 20 July 2009.

¹¹⁴ ECtHR, *al-Nashiri v Poland*, Application lodged on 6 May 2011.

¹¹⁵ ECtHR, *Abu Zubaydah v Lithuania*, lodged on 27 October 2011, available at: <http://www.interights.org/document/181/index.html>.

exhaust the domestic remedies. In the EU context, this probably means that victims of extraordinary renditions and secret detentions must have either obtained a preliminary ruling from the CJEU stating that the Commission's failure to act in such cases is in accordance with EU law including the Charter of Fundamental Rights, or the injured parties must have failed to obtain a reference for a preliminary ruling before their national courts. However, the ECtHR has recently developed a doctrine which states that if the remedy enabling an applicant to lodge a complaint under **Article 3 ECHR and Article 4 of Protocol No. 4** with a competent authority is not practically accessible, then the individual cannot be expected to have first exhausted the domestic remedies route.¹¹⁶

- Besides individuals, it might also be possible for Member States to bring complaints under Article 33 ECHR about the EU's failure to act. An eventual stumbling block here would be the so-called Bosphorus presumption that the EU legal system protects fundamental rights at a level equivalent to the ECHR.¹¹⁷ Under the Bosphorus case-law, the presumption of equivalence can only be rebutted in cases where the EU level of protection in a particular situation was 'manifestly deficient'. There are different opinions about the fate of the Bosphorus presumption upon accession – that it should either be extended to EU secondary law or abolished.¹¹⁸ Nevertheless, the ECtHR recently determined that the doctrine did not apply to the Dublin Regulation in the *MSS v Belgium and Greece* case.¹¹⁹ Finally, it is not clear if, after accession, the Convention rights could be invoked retroactively to challenge past EU actions or failures to act, since the ECtHR has consistently held that the Convention can only be applied with respect to a new Member State after the date of its accession.¹²⁰

3.5. On Article 7 of the EU Treaty¹²¹

- The Nice Treaty (1 February 2003) revised Article 7 of the EU Treaty, granting it a preventive focus, that is, the capacity to act preventively in the event of a clear threat of a serious breach of the common values which differs from the previous version in the Treaty of Amsterdam that only provided remedial action after the fundamental rights breach had occurred. According to the Commission Communication on Article 7 of the EU Treaty – *Respect and Promotion of the Values on which the Union is based* COM (2003) 606 final, 15.10.2003, Article 7 of the EU Treaty is 'horizontal' and general in scope. It is not confined to areas covered by EU law, which means that the EU could act not only in *the event* of a breach of 'common

¹¹⁶ Refer to paragraph 206 of the *Hirsi* case. ECtHR 23 February 2012, Judgment, *Hirsi Jamaa and others v Italy*, Application no. 27765/09.

¹¹⁷ ECtHR, *Bosphorus Airways v Ireland*, Application No. 45036/98, Judgment of 30 June 2005.

¹¹⁸ See Groussot, X. and Pech, L., *Fundamental Rights Protection in the European*

Union post Lisbon Treaty, Foundation Robert Schuman Policy Paper, No. 173, 14 June 2010, p. 13.

¹¹⁹ See *MSS v Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011, para 338 – 340

¹²⁰ See the landmark case *Šilih v Slovenia*, App. 71463/01, judgment of 9 April 2009.

¹²¹ Article 7, paragraph 1 of the EU Treaty states:

On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

values' within the scope of application of EU law, but also in those cases of fundamental rights violations where Member States act autonomously.

- Article 7 of the EU Treaty seeks to secure respect for the conditions of EU membership. The Commission's explanation brings us back to the principle of mutual confidence and trust as the basis of the EU's AFSJ:

If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.¹²²

- Since the EP Resolution of 2007, the Commission has sent confidential letters to Poland, Romania and Lithuania as a 'pre-Article-7-of-the-EU-Treaty' exercise in the context of political dialogue with the respective governments (four letters to Romania, four to Poland and two to Lithuania).¹²³ In Romania's case, and in light of the 2007 Inquiry Commission's decision that the allegations could not stand, the European Commission requested more detailed information "*in particular, concerning the concrete steps taken during the investigation, the authorities involved and the material findings which lead to this conclusion*". The follow-up letters sent to these countries expressed that:

[t]he Commission has indeed continuously stressed the need for the Member States concerned to commence or continue in-depth, independent and impartial investigations and is reassured by your stern commitment to establish the truth.

It is not known if any of these Member States have replied to the Commission's letters or taken any concrete action.

¹²² Page 5 of the Communication.

¹²³ The European Commission also presented a communication in January 2008 on an agenda for a sustainable future in business and general aviation, European Commission, *Communication on an Agenda for sustainable future in general and business aviation*, COM (2007) 869 final, 11.01.2007. The Communication made explicit reference to the CIA rendition flights, highlighting the need for a clear distinction between the definitions of 'civil' and 'State' aircraft. However, since then there has been no follow-up to this particular point in the legislative package, which was subsequently adopted. Rules on the procedures applicable to flight plans for the Single European Sky came into force on January 2009. These entail "additional means of monitoring of the actual movement of aircraft in the single European sky and solutions for situations in which aircraft entering the European sky do not have flight plans".

4. POLICY RECOMMENDATIONS

- The European Parliament should request the European Commission's DG on Justice, Fundamental Rights and Citizenship to follow up the 2003 Communication on the implementation and conditions for activating **Article 7 of the EU Treaty**. This article calls for a substantial **revision in order to ensure more independence, impartiality and democratic accountability** in its use.¹²⁴ It should be further developed regarding **the procedures preceding and surrounding the phases prior to its full activation**. In particular, the European Commission should improve the regular monitoring and independent expertise dimensions of 'the common values' at the level of the Member States. The revision should be carried out in close collaboration with relevant European institutions, bodies and agencies, including those that coordinate European networks of national authorities (e.g. the European Ombudsman and the European Data Protection Supervisor) as well as relevant international organisations and civil society actors.
- The procedure in Article 7 of the EU Treaty should not only include a preventive mechanism (in cases about the risk of breaches) and a penalizing mechanism (where breaches have already occurred). **A 'retroactive dimension' should be also envisaged** and strengthened for those cases where human rights violations have already occurred but the truth has not yet been revealed or justice granted to the aggrieved persons.¹²⁵
- The revised Article 7 of the EU Treaty should ensure **increased democratic and judicial accountability for the various decisions about its procedures and application**. The final decision should not be left entirely to the discretion of the Council and its 'political assessment'. The new version could envisage a stronger role for the European Parliament (not merely assenting – or not – to the Council's decisions). The CJEU should be granted the express power of (accelerated) judicial review of the final decision, and the European Union Fundamental Rights Agency (FRA) should be allowed to give an opinion on any affair. Close cooperation with the Council of Europe and the Commissioner for Human Rights should also be foreseen.
- **A new network of scholars with expertise on fundamental rights should be established** to build on the work of the previous Network of Independent Experts on

¹²⁴ The EP Report on the situation of fundamental rights in the EU called for a follow-up of the Commission Communication of 2003 on Article 7 of the EU Treaty in order to "*define a transparent and coherent way to address possible violations of human rights and make relevant use of Article 7 of the EU Treaty on the basis of the new fundamental-rights architecture*". See the EP Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), 1 December 2010.

¹²⁵ This point was made in the EP Draft Report on alleged transportation and illegal detention of prisoners in European countries by the CIA of 23.4.2012 which, in paragraph 17,

[c]alls on the Commission, in light of the institutional deficiencies revealed in the context of the CIA program, to adopt within a year a communication reviewing the mechanism set out in Article 7 of the EU Treaty; considers that the reform should be aimed at strengthening the EU's capacity to prevent and redress human rights violations at EU level when Member States are unable to meet their obligations at national level and should provide for the strengthening of Parliament's role and a greater degree of independence as regards conditions for its activation.

Fundamental Rights.¹²⁶ This new European network, unconnected to the Commission and the EP, would ensure independent review of the state of fundamental rights in all EU Member States. Each national expert would provide an up-to-date synthesis of data and analyses by relevant international and regional organisations (e.g. the UN, the Council of Europe, etc.) regarding each EU Member State's performance, assessed with international and European human rights instruments. It would also ensure interdisciplinary coverage of issues beyond the legal questions and implications. The network would provide the European Commission and the European Parliament with essential information on an annual basis, and in close cooperation with relevant civil society organisations, could signal cases where Europe's values were at stake in a particular Member State. The scientific analysis of the network could complement the FRA's data and policy work.

- **The EP should establish a special (permanent) inter-parliamentary committee on EU regulatory agencies, with special focus on EU Home Affairs agencies working in the field of security and information exchange for law enforcement purposes.**¹²⁷ This committee could be run by the European Parliament's LIBE, with the participation of other relevant committees and representatives from corresponding committees of national parliaments. The inter-parliamentary body would organize regular meetings and hearings focused on the EU Home Affairs agencies.¹²⁸ Its mandate should foresee the possibility of setting up 'confidential working groups' that would have access to and could assess the secret/non-publicly disclosed information. It should have the power, resources and expertise to initiate and conduct its own investigations and inquiries, as well as full and unhindered access to the information, officials and installations necessary to fulfil its mandate. One of the special committee's mandates could be to implement a set of procedures and reporting requirements for investigating suspected abuses.
- **The participation of national parliaments should be also foreseen**, in light of the Brussels Declaration that emphasised the need to create a "European Intelligence Review Agencies Knowledge Network" (EIRAN), with the main goal of improving democratic accountability of the intelligence and security services in Europe.¹²⁹ The European Parliament could **use the EP's inter-parliamentary arrangement with national parliaments for sharing information on 'good' and 'bad' practices** in the scrutiny of law enforcement authorities and intelligence services and the state of affairs in domestic inquiries.¹³⁰ Cooperation with national parliaments could also

¹²⁶ For more information on the previous network see http://cridho.uclouvain.be/en/eu_experts_network. See in particular EU Network of Independent Experts on Fundamental Rights, *The Human Rights Responsibilities of EU Member States in the context of the CIA Activities in Europe (Extraordinary Renditions)*, Opinion n. 3-2006, 25 May 2006, available at: <http://cridho.uclouvain.be/documents/Avis.CFR-CDF/Avis2006/CFR-CDFopinion3-2006.pdf>

¹²⁷ This idea was already foreseen in several previous studies for the European Parliament. See footnote 127 below.

¹²⁸ These recommendations were made in different studies, notably Scheinin, M., *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, United Nations, 17 May 2010; European Parliament, *Developing an EU Internal Security Strategy, Fighting Terrorism and Organised Crime*, op. cit., p. 118, recommendation n.1; European Parliament, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies*, op. cit., p. 113, recommendation n. 3.

¹²⁹ *Declaration of Brussels*, 6th Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States, Brussels, 1 October 2010.

¹³⁰ This recommendation has been also adopted by the EP Draft Report of 23.4.2012 which in paragraph 19 emphasises that it:

[u]ndertakes to devote its next Joint Parliamentary Meeting with national parliaments to reviewing the role of parliaments in ensuring accountability for human rights violations in the context of the CIA programme,

serve to develop a set of common European guidelines for security cross-border cooperation, fundamental rights guarantees and accountability standards in the fight against terrorism. This would constitute a unique occasion for establishing close contacts and enhanced cooperation with the Council of Europe and the UN that would also envisage input from the FRA and the new network of independent experts on fundamental rights. The European Network of Ombudsmen¹³¹ and other national bodies on fundamental rights could present the challenges they have faced or are facing in dealing with topics of this nature at the inter-parliamentary meeting.

- The EP could recommend that **the European Ombudsman should open an inquiry on the ways in which EU Home Affairs agencies implement their fundamental rights obligations in the context of information exchange and processing**. Amongst the questions to be asked of agencies such as Europol, would be how these European actors guarantee compliance with the EU Charter of Fundamental Rights in information-exchange activities, specifically regarding the quality of the processed and/or exchanged data and how they can assure that data has not been tainted with torture-led information, comes from unreliable sources or has been used for purposes of deportation or any sort of action. The European Ombudsman could also **question Europol what it might know about the unlawful renditions and detentions and if it had (or currently holds) individual dossiers** on the victims of these human rights violations. Similarly, it could ask whether agencies such as **Europol and Eurojust had any kind of knowledge or privileged (secret) data** regarding those cases that is based on information and/or intelligence exchanged with national authorities and/or third countries that might have led to the flagrant denial of justice for some of the victims.¹³²
- The EP could also request the European Commission to investigate and perhaps launch infringement proceedings against EU Member States that were directly or indirectly involved (complicit) in extraordinary renditions and secret detentions in light of their obligations in the context of EU citizenship, asylum and immigration law.¹³³

and to promoting stronger cooperation and regular exchange between national oversight bodies in charge of scrutinizing intelligence services, in the presence of national authorities, EU institutions and agencies.

¹³¹ European Ombudsman, The European Network of Ombudsmen, available at: <http://www.ombudsman.europa.eu/activities/network.faces>

¹³² This would be in contradiction with the human rights obligations enshrined in the ECHR and recently interpreted by the ECtHR in the case *Othman (Abu Qatada) v The United Kingdom* (Application no. 8139/09) of 17 January 2012, where the Court held in paragraph 282:

The Court has found that a flagrant denial of justice will arise when evidence obtained by torture is admitted in criminal proceedings. The applicant has demonstrated that there is a real risk that Abu Hawsher and al-Hamasher were tortured into providing evidence against him and the Court has found that no higher burden of proof can fairly be imposed upon him. Having regard to these conclusions, the Court, in agreement with the Court of Appeal, finds that there is a real risk that the applicant's retrial would amount to a flagrant denial of justice.

¹³³ This issue has also been welcomed by the EP Draft Report which states in paragraph 14:

Calls on the European Commission to investigate whether EU provisions, in particular on asylum and judicial cooperation, have been breached by collaboration with the CIA programme.

- The so-called 'European exchange model of information' should be amended as soon as possible in order to ensure **trusted sources of information both at the national and EU levels**.¹³⁴ The democratic oversight of EU institutions and agencies which may have been engaged and are duty-bound to tell the truth - e.g. Europol, Eurojust, Sitcen, etc. – should be foreseen. After a certain period of time, these agencies should be required to disclose documents previously considered to be 'sensitive'. They should also be required to publicly disclose all the information of a non-sensitive nature – in order to ensure the public accountability of their work, progress and results.
- There should be **a common model of European cooperation on intelligence exchange and sharing** between EU Member States and with third countries, which would be particularly concerned with **refusing to cooperate in cases where the information was obtained through torture or unlawful treatment of the individual**. The model should also foresee more **legal certainty** concerning the kind of information that is exchanged, and the parameters for it to be considered as 'intelligence', as well as a common legal definition of 'law enforcement authorities' that would clearly differentiate the roles of intelligence services and other law enforcement (police) authorities. This common model should be closely, carefully and democratically monitored at both the national and European levels. As previous CEPS research has proposed,¹³⁵ a **'yellow card, red card system'**¹³⁶ could be adopted, in which transmission of tainted information in breach of the common accord would first be signalled by a warning (a 'yellow card') and if repeated, by exclusion (a 'red card') from the information-sharing network.
- The European Parliament should call on the European Commission and the EU Counter-terrorism Coordinator to issue a **joint information paper** on the state of affairs of EU Member States' following up on inquiries and investigations of their complicity with the CIA programme of extraordinary renditions and secret detentions and the EU's position on the matter.¹³⁷ The paper should outline the linkages of the affair with EU law and the fundamental human rights context, and also propose an EU (multi-strategy) approach of 'next steps' to be built on recommendations in this note, as well as those highlighted by the EP Draft Report of 23 April 2012, in order to prevent a similar recurrence of human rights violations. This should be followed by a **Joint Statement** by the European Union and its Member States that condemns the human rights violations that resulted from the extraordinary renditions and secret detentions programme and their commitment to the general principles of mutual trust and sincere and loyal cooperation, as well as fundamental rights with respect to European cooperation in security matters.

¹³⁴ This recommendation was also made on the 2007 TDIP report, notably in paragraph 206. The UN Special Rapporteur, Martin Scheinin, repeated it in his report regarding the promotion and protection of human rights and fundamental freedoms while countering terrorism. Practice n. 31 states that "intelligence sharing between intelligence agencies of the same State or with the authorities of a foreign State is based on national law that outlines clear parameters for intelligence exchange, including the conditions that must be met for information to be shared, the entities with which intelligence may be shared and the safeguards that apply to exchanges of intelligence.

¹³⁵ Geyer, F., *Fruit of the Poisonous Tree - Member States' Indirect Use of Extraordinary Rendition and the EU Counter-Terrorism Strategy*, Centre for European Policy Studies, 3 April 2007.

¹³⁶ Bigo, D., *Intelligence services, police and democratic control: the European and transatlantic collaboration*, Briefing paper, 13.07.2006, p. 13.

¹³⁷ The Joint Information Paper could grasp inspiration from the Joint Commission/Counter-Terrorism Coordinator Information Paper on the Closure of the Guantánamo Bay detention centre, 27 February 2009, 7038/09, Brussels.

5. ANNEXES

5.1. ANNEX 1: THE STATE OF PLAY OF INQUIRIES IN EUROPEAN COUNTRIES

STATE	Nature of inquiries (political/ judicial)	Current status (open/ closed)	Results	State-imputed participation	State reaction to imputation	Sanctions /Judicial redress/ reparation (to authorities/ individuals)	Parties involved (intelligence, military, private sector)	Main obstacles (excluding diplomatic assurances)
GERMANY	Political ¹³⁸ and Judicial ¹³⁹	Closed	Parliament found no human rights violations by the German Government. ¹⁴⁰ None of the court cases was successful. ¹⁴¹	Provision of information to CIA; involvement in interrogation; knowledge of torture, mistreatment by German soldiers.	Government denied any involvement in human rights abuses.	Arrest warrant against CIA agents (not delivered) ¹⁴²	CIA agents, German intelligence service, Public Prosecutor, German Special Force soldiers	Lack of Government cooperation with parliamentary inquiry, lack of cooperation by US authorities; insufficient evidence; committee report and investigation

¹³⁸ Deutscher Bundestag, Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes, Drucksache 16/13400, 18.06.2009; Deutscher Bundestag, Beschlussempfehlung und Bericht des Verteidigungsausschusses als 1. Untersuchungsausschuss gemäß Artikel 45a Abs. 2 des Grundgesetzes, Bundestags Drucksache 16/10650. 15.10.2008.

¹³⁹ Verwaltungsgericht Köln, Urteil vom 07.12.2010, 5 K 7161/08.

¹⁴⁰ Deutscher Bundestag, Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes, op. cit.; Deutscher Bundestag, Beschlussempfehlung und Bericht des Verteidigungsausschusses als 1. Untersuchungsausschuss gemäß Artikel 45a Abs. 2 des Grundgesetzes, Bundestags Drucksache 16/10650. 15.10.2008.

¹⁴¹ C. Rath, 'Wenig zu befürchten. CIA Agenten bleiben unbehelligt.', taz, 06.11.2009, available at: <http://www.taz.de/!43465/>

¹⁴² M. Slackman, 'Officials Pressed Germans on Kidnapping by CIA', The New York Times, 8.12.2010, available at: <http://www.nytimes.com/2010/12/09/world/europe/09wikileaks-elmasri.html>

								not made public.
POLAND	Judicial	Ongoing	Two persons granted victim status ¹⁴³ ; investigations ongoing; operation of CIA secret prison	Polish airports used as landing sites ¹⁴⁴ ; complicity in torture, detention and prisoner transfer	Government denies any responsibility or knowledge of CIA prisons.	-	Former head of the secret service and secret service deputy, former Prime Minister ¹⁴⁵	US authorities refuse assistance, secrecy issues (classified information); prosecutor removed from the case ¹⁴⁶
UK	Political and Judicial ¹⁴⁷	Partly closed, partly ongoing	Gibson Inquiry abandoned; insufficient evidence to press criminal charges; friendly settlement	Complicity in interrogation and mistreatment; knowledge of illegal transfers.	UK Government denied knowing about secret prisons.	Compensation paid to several victims. ¹⁴⁸	MI5 and MI6 officers	Gibson Inquiry secretive and not independent; insufficient evidence for criminal charges; MI6 officers protected for acts abroad in specific cases
DENMARK	Political	First inquiry closed, second	DK had no knowledge of CIA flights; impossible to	Knowledge of CIA flights, transfer of	Government denies knowledge of and	-	-	Inadequate response from the US to inquiries;

¹⁴³ Open Society Foundations, *Polish Prosecutor Recognizes Guantánamo Prisoner as Victim in CIA Black Site Investigation*, available at <http://www.soros.org/initiatives/justice/news/poland-cia-nashiri-20101027>

¹⁴⁴ Al, *Current evidence: European complicity in the CIA rendition and secret detention programmes*, 25 January 2011.

¹⁴⁵ EU Observer, *Poland indicts former spymaster over CIA renditions*, available at: <http://euobserver.com/22/115745>

¹⁴⁶ Singh, A., *As Poland's Legacy of CIA Torture Erupts, Europe's Human Rights Court Must Act*, Open Society, available at <http://blog.soros.org/2011/05/as-polands-legacy-of-cia-torture-erupts-europes-human-rights-court-must-act/>

¹⁴⁷ See: www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide?intcmp=239

¹⁴⁸ Wintour, P., *Guantánamo Bay detainees to be paid compensation by UK government*, The Guardian, 16 November 2010, available at: www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-compensation-claim

		ongoing ¹⁴⁹	confirm or deny use of Danish airspace	prisoners in Danish airspace; US-Danish collusion to prevent effective investigation	involvement in rendition flights.			second inquiry limited to collusion in 2008 inquiry
FINLAND	Political ¹⁵⁰ and Ombudsman	Both ongoing	Clarification from US authorities will be sought on one aircraft. ¹⁵¹	Alleged complicity in rendition and secret detention ¹⁵² ; links between Finland and CIA detention sites in Lithuania ¹⁵³ ; dummy flights to Finland to conceal flights to Lithuania. ¹⁵⁴	All but one flight 'civilian' in nature; not connected to unlawful activities ¹⁵⁵		-	Distinction between civilian and state aircrafts; no proper investigation by Finnish authorities ¹⁵⁶
SWEDEN	Political, ¹⁵⁷ Judicial ¹⁵⁸	All closed	Ombudsman: Operation	Involve-ment in	Government denies	Reparations awarded to	Security Service	Sweden did not send CAT all

¹⁴⁹ Available at: <http://um.dk/da/politik-og-diplomati/retsorden/cia-overflyvninger/>

¹⁵⁰ Finland Ministry for Foreign Affairs, op. cit.

¹⁵¹ AI, *Finland must further investigate USA rendition flights*, op. cit.

¹⁵² AI, *Submission to the UN Universal Periodic Review*, May-June 2012, <http://www.amnesty.org/ar/library/asset/EUR20/002/2011/en/02e5bc8f-3fc2-48ee-b7d0-dae8f2368e7c/eur200022011en.pdf>

¹⁵³ AI, *Lithuania: Unlock the truth: Investigate secret prisons now (Index EUR 53/002/2011)*, op. cit.

¹⁵⁴ UN Joint Study on Secret Detention, op. cit., par. 120; AI, *Submission to the UN Universal Periodic Review*, op. cit.

¹⁵⁵ AI, *Finland must further investigate USA rendition flights*, op. cit.

¹⁵⁶ Amnesty slams Finland for alleged CIA rendition flights, available at http://yle.fi/uutiset/news/2012/03/amnesty_slams_finland_for_alleged_cia_rendition_flights_3365196.html

¹⁵⁷ K. Rasmusson & O. Jordan, Jäv när S-regeringen utredde CIA-flygen, <http://www.newsmill.se/artikel/2011/12/26/j-v-n-r-s-regeringen-utredde-cia-flygen>

	and Ombudsman		carried out in an inhumane and therefore unacceptable manner ¹⁵⁹ ; no criminal offences ¹⁶⁰ ; breach of prohibition of torture and <i>non-refoulement</i> ¹⁶¹	prisoner transfers; ill-treatment at Bromma Airport; knowledge about CIA flights landings	Sweden's participation in any way in extraordinary renditions. ¹⁶²	two victims. ¹⁶³	(Sapö)	relevant information; doubts about impartiality of investigations ¹⁶⁴ ; immediate execution of deportation order; slack implementation of follow up clauses
ITALY	Political ¹⁶⁵ and Judicial ¹⁶⁶	Political: closed; Judicial: one closed, one ongoing	Court judgment <i>ad absentia</i> of CIA, Italian and US military for the kidnapping of Abu Omar	Involve-ment and/or knowledge of CIA's intention to abduct Abu Omar ¹⁶⁷	The Government fully rejected any knowledge of the case. ¹⁶⁸	Italian court convicted <i>ad absentia</i> 22 CIA agents and one US military official, as well as two Italian intelligence operatives ¹⁶⁹ ; ECtHR	CIA agents, US military official and Italian intelligence operatives (SISMI)	Prosecution's effectiveness undermined by successive Italian governments; 'state secrecy' privilege invoked by appeal court ¹⁷¹ ; alleged US

¹⁵⁸ Swedish Ombudsman, *Review of the enforcement by the security police of a Government decision to Expel Two Egyptian citizens*, op.cit.; Aftonbladet, Miljonskdestånd till Agiza, 19.09.2008, available at <http://www.aftonbladet.se/nyheter/article11516060.ab>

¹⁵⁹ Swedish Ombudsman, *Review of the enforcement by the security police of a Government decision to Expel Two Egyptian citizens*, op.cit.

¹⁶⁰ Ibid.

¹⁶¹ AI, Open Secret. *Mounting evidence of Europe's complicity in rendition and secret detention*, op. cit.

¹⁶² Memorandum from Swedish Ministry of Foreign Affairs, Government of Sweden's Response to CAT Recommendations, 3 June 2009, <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.SWE.CO.5.Add.1.pdf>

¹⁶³ Aftonbladet, Miljonskdestånd till Agiza, 19.09.2008, available at <http://www.aftonbladet.se/nyheter/article11516060.ab>

¹⁶⁴ Rasmusson, K. and Jordan, O., op. cit.

¹⁶⁵ Statewatch, Italy's reply to EP TDIP questionnaire (both Senate and Chamber).

¹⁶⁶ BBC, *CIA agents guilty of Italy kidnap*, 4 November 2009, available at: <http://news.bbc.co.uk/2/hi/8343123.stm>

¹⁶⁷ European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at <http://www.statewatch.org/rendition/rendition.html>; European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Senate), available at <http://www.statewatch.org/rendition/rendition.html>

¹⁶⁸ Ibid.

¹⁶⁹ BBC, *CIA agents guilty of Italy kidnap*, op. cit.

						Application 170		pressure
SPAIN	Political ¹⁷² and Judicial ¹⁷³	Political: closed; Judicial: two closed, one ongoing, but data not clear in this last case	No evidence was found that the flights that landed in Spanish territory carried any prisoners or had infringed the Spanish law. ¹⁷⁴	Spanish airports and airspace allegedly used for transit of CIA detainees to other countries. ¹⁷⁵	The Government asked US official who claimed not to have any information. ¹⁷⁶	None referenced	-	Alleged US pressure on Spanish judicial investigations; ¹⁷⁷ lack of US cooperation; ¹⁷⁸ lack of willingness by Spanish authorities to investigate properly ¹⁷⁹

¹⁷⁰ *Nasr and Gali v Italy* (Pending), Communicated 22.11.2011.

¹⁷¹ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit.

¹⁷² Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>, p. 3

¹⁷³ Ibid.

¹⁷⁴ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>, p. 3

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ The Guardian, *Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture*, 1 December 2010, available at: <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>

¹⁷⁸ El País, *Los españoles no ponen reparos a los vuelos secretos*, 1 December 2010, available at: http://www.elpais.com/articulo/espana/espanoles/ponen/reparos/vuelos/secretos/elpepuesp/20101201elpepunac_36/Tes?print=1

¹⁷⁹ Ibid.

<p>LITHUANIA</p>	<p>Political¹⁸⁰ and Judicial¹⁸¹</p>	<p>Political: closed. Judicial: closed, but Prosecutor willing to reopen if new evidence is presented¹⁸²</p>	<p>The judicial inquiry was halted in January 2011 due to dubious grounds and state secrecy.¹⁸³</p>	<p>Harbouring secret detention sites where detainees, including Saudi Arabian citizen Abu Zubaydah, were tortured by the CIA¹⁸⁴, participating in CIA's renditions and secret detentions programme¹⁸⁵, use of Lithuanian airspace for prisoner transport.¹⁸⁶</p>	<p>The Government dismissed the allegations.¹⁸⁷</p>	<p>The Lithuanian Government is currently facing legal action at the ECtHR, pursued by Abu Zubaydah.¹⁸⁸</p>	<p>An American company (Elite LLC)¹⁸⁹ ; the LT secret services (SSD)</p>	<p>Halting of the judicial inquiry in January 2011 on "dubious" grounds, including 'state secrets' privilege¹⁹⁰; Lithuanian customs officials prevented from inspecting flights¹⁹¹</p>
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¹⁸⁰ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit. pp. 4-5

¹⁸¹ Ibid.

¹⁸² AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit., pp. 4-5

¹⁸³ AI, *Unlock the Truth in Lithuania – Investigate Secret Prisons now*, op. cit., p. 5.

¹⁸⁴ EU Observer, *Secret CIA prison revealed in Lithuania*, 20 November 2009. Available at: <http://euobserver.com/13/29029>

¹⁸⁵ AI, *Unlock the truth in Lithuania – Investigate Secret Prisons now*, op. cit., p. 10

¹⁸⁶ Ibid.

¹⁸⁷ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit., pp. 4-5

¹⁸⁸ The Guardian, *Lithuania faces legal action over prisons set up for CIA rendition programme*, 27 October 2011. Available at: <http://www.guardian.co.uk/world/2011/oct/27/lithuania-cia-rendition-prisons-european-court>

¹⁸⁹ Ibid.

¹⁹⁰ AI, *Unlock the truth in Lithuania – Investigate Secret Prisons now*, op. cit., p. 5

¹⁹¹ Ibid.

ROMANIA	Political ¹⁹²	Closed	Senate report adopted in 2008 concluded accusations were groundless ¹⁹³ ; new evidence considered speculative	Hosting a secret detention facility ¹⁹⁴	The Romanian Senate established an enquiry committee to assess the allegations.	None referenced	-	Non-disclosure of the Senate report; lack of a formal inquiry after new evidence was revealed
MACEDONIA	Political ¹⁹⁵ and judicial ¹⁹⁶	Political: closed; Judicial: civil and ECtHR pending	The Macedonian parliamentary committee concluded that the security services had not overstepped their powers. ¹⁹⁷	Abduction of German citizen (El-Masri) by the CIA with the help of Macedonian authorities and subsequent transfer to Afghanistan ¹⁹⁸	The Government denied the accusations. ¹⁹⁹	ECtHR application filed by El-Masri ongoing; civil claim against Macedonian Ministry of Interior pending ²⁰⁰	Macedonian security services (SSD)	Lack of will to investigate; former Soviet-country behaviour; newspaper censorship; control of the judiciary and other state powers by political parties and lack of clarity regarding the

¹⁹² AI, *Romania must come clean over secret prisons*, op. cit.; Letter sent by the Romanian Prime Minister's Office to the European Parliament, 10 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf>; Letter sent by Romanian Senator Norica Nicolai to the European Parliament, 12 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-parl-committee.pdf>; Letter sent by the Ambassador of the EU's Romanian Mission to the European Parliament, 28 February 2006, available at: <http://www.statewatch.org/cia/documents/letter-romania-perm-rep.pdf>

¹⁹³ AI, *Romania must come clean over secret prisons*, op. cit., 9 December 2011; AI, *Romania – AI Romania Country Report 2010*, op. cit.

¹⁹⁴ AI, *Romania must come clear over secret prisons*, op. cit., 9 December 2011

¹⁹⁵ AI, *State of Denial – Europe's role in Rendition and Secret Detention*, op. cit., p. 31

¹⁹⁶ Open Society Justice Initiative, op. cit.

¹⁹⁷ AI, *State of Denial – Europe's role in Rendition and Secret Detention*, op. cit., p. 31; AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit.

¹⁹⁸ EP, *Alleged CIA detainee gives evidence to European Parliament*, 14 March 2006. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20060314IPRO6166>; See also: Statewatch, EP Minutes trip to Macedonia – 27-29 April 2006, available at: <http://www.statewatch.org/cia/documents/macedonia-note-on-visit.pdf>.

¹⁹⁹ Statewatch, EP Minutes trip to Macedonia – 27-29 April 2006, available at: <http://www.statewatch.org/cia/documents/macedonia-note-on-visit.pdf>.

²⁰⁰ Open Society Justice Initiative, *El-Masri v Macedonia*, available at : <http://www.soros.org/initiatives/justice/litigation/macedonia>.

								necessary procedures for the establishment of an inquiry ²⁰¹
PORTUGAL	Political ²⁰² and Judicial ²⁰³	Closed	No evidence regarding any crime found by the Portuguese Public Prosecutor's Office (PPPO) ²⁰⁴	Transit site for CIA planes allegedly carrying detainees	The Government refuted the accusations.	None referenced	-	Parliament rejection of Government proposal to open an inquiry claiming it would be "inopportune and useless" ²⁰⁵

²⁰¹ For instance, when interviewing MPs, several mentioned that they required a formal complaint by El-Masri, although this formal requirement is dismissed by other interviewees, who stated that Parliament could start the procedure on its own. See: Statewatch, EP Minutes trip to Macedonia – 27-29 April 2006, available: <http://www.statewatch.org/cia/documents/macedonia-note-on-visit.pdf>.

²⁰² Jornal de Noticias, *Luis Amado fala sobre voos da CIA*, available at: http://www.jn.pt/PaginaInicial/Interior.aspx?content_id=567866

²⁰³ TSF, *Ministério Público abre inquérito sobre alegados voos*, available at: http://www.tsf.pt/paginainicial/interior.aspx?content_id=774175&page=-1

²⁰⁴ Diario de Noticias, *PGR recusa reabrir inquérito aos voos da CIA*, 4 December 2010, available at: http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1726960

²⁰⁵ Ibid.

5.2. ANNEX 2: A DETAILED OVERVIEW OF INQUIRIES BY COUNTRY

GERMANY

Nature of inquiries:

Political:

- Parliamentary Commission of Inquiry²⁰⁶: alleged involvement of State actors in the CIA-led renditions and secret detention programmes.
- Parliamentary Committee for Defence²⁰⁷: alleged mistreatment of Murat Kurnaz by German Special Forces soldiers and their knowledge of US agents' torture.

Judicial:

- German Constitutional Court²⁰⁸: failure of the German Government to cooperate with the parliamentary inquiry.
- Case of Khaled el-Masri (Munich/Cologne)²⁰⁹: non-enforcement of arrest warrants against 13 former CIA officials involved in El-Masri's abduction in Skopje and transfer to Kabul.
- Case of Abu Omar (Zweibrücken): abduction by CIA agents.
- Case of Murat Kurnaz (Tübingen): mistreatment by German soldiers during detention in Afghanistan.

Current status:

Parliamentary inquiry: closed.

Committee for defence: closed.

²⁰⁶ Deutscher Bundestag, Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes, Drucksache 16/13400, 18.06.2009.

²⁰⁷ Deutscher Bundestag, Beschlussempfehlung und Bericht des Verteidigungsausschusses als 1. Untersuchungsausschuss gemäß Artikel 45a Abs. 2 des Grundgesetzes, Bundestags Drucksache 16/10650. 15.10.2008.

²⁰⁸ BVerfG, 2 BvE 3/07, Urteil vom 17.06.2009.

²⁰⁹ Verwaltungsgericht Köln, Urteil vom 07.12.2010, 5 K 7161/08.

Court cases:

- German Constitutional Court: closed.
- Case of Khaled el-Masri: closed.
- Case of Abu Omar: closed.
- Case of Murat Kurnaz: closed.

State's imputed participation

Political:

- Khaled el-Masri (German citizen): allegations of involvement by members of the German intelligence service or the Public Prosecutor in the interrogation.
- Mohammed Zammar (German citizen): German authorities allegedly played a role in providing relevant information on his biography, relatives and travel itinerary to the US and Syrian intelligence services; German agents' interrogated Mr Zammar in Syria despite knowing that instances of torture had occurred in Syrian prisons.
- Murat Kurnaz (Turkish citizen, legal resident of Germany): information originating from German sources allegedly facilitated his arrest; allegedly he was mistreated by German Special Forces soldiers and tortured by US agents with the knowledge of German soldiers.
- Abdel Halim Khafagy (Egyptian citizen, long-term resident of Germany): knowledge of the detention conditions at the US base camp in Tuzla.

Judicial:

- El-Masri: decision not to request the extradition of CIA agents responsible for his ill-treatment by US authorities.

State's reaction to imputation

- Khaled el-Masri: no evidence that members of the German intelligence service or the Public Prosecutor were involved in the interrogation.
- Mohammed Zammar: no evidence that Germany provided relevant information to US and Syrian intelligence services; no concrete evidence on the detention conditions or Mr. Zammar's alleged torture in Syria

- Murat Kurnaz: information originating from the German intelligence service (BKA) could not have contributed to the arrest, imprisonment and detention of Mr. Kurnaz; interrogations at Guantánamo were necessary to fight terrorism; committee for defence: insufficient evidence of Mr. Kurnaz's ill-treatment by German Special Forces soldiers
- Abdel Halim Khafagy: His human rights were not violated by the German intelligence service since agents refused to interrogate Mr. Khafagy after learning of the detention conditions at the US base camp.

Results

Parliamentary inquiry:

- The German Government is not responsible for any human rights violations that occurred within the context of the international 'war on terrorism'.
- The German government and its employees, as well as the employees of subordinate authorities, are considered to have acted within the boundaries of fundamental rights and basic principles of law in all cases.
- Opposition parties claim that the former German Government was co-responsible for the human rights violations since it failed to criticise, stop or make public the inhumane practice of rendition flights, despite having been aware of the CIA renditions programme as early as September 2001, as well as having known of the detention and torture of the victims and their lack of access to a fair trial.²¹⁰

2010 UN Study on Secret Detention:

- Germany was complicit in the secret detention of persons by knowingly taking "advantage of the situation of secret detention by sending questions to the State detaining the person or by soliciting or receiving information from persons who are being kept in secret detention".²¹¹

German Constitutional Court:

- By failing to cooperate with the inquiry, in violation of the German Constitution, the German Government impeded Parliament's right as an oversight body to investigate the Government.

Court cases

²¹⁰ Deutscher Bundestag, *Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes*, op. cit., 18.06.2009, pp. 430, 431.

²¹¹ UN Human Rights Council, *Joint study on secret detention of the Special Rapporteur on torture & other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights & fundamental freedoms while countering terrorism, the Working Group on Arbitrary Detention & the Working Group on Enforced or Involuntary Disappearances*, 19 February 2010, A/HRC/13/42, available at: <http://www.unhcr.org/refworld/docid/4bbef04d2.html>, p. 82.

- El-Masri: An arrest warrant against CIA agents was issued in 2007; the Administrative Court of Cologne ruled that the German Government did not transgress the limits of its margin of discretion by deciding to take no further action to enforce the arrest warrant.
- Abu Omar: Investigations against unknown persons were closed in February 2009 (no prospects of success).
- Murat Kurnaz: The proceedings were closed; no mistreatment by German soldiers could be proven.

Sanctions / Judicial redress / reparation

- El-Masri: An arrest warrant against CIA agents was issued, but not enforced.

Parties involved

- CIA agents, German intelligence service, Public Prosecutor, German Special Forces soldiers, the German Government.

Main obstacles

- The German Government did not sufficiently cooperate with the parliamentary inquiry, in particular by failing to disclose crucial documents and information, and by limiting the authorisation of some of the witnesses to testify.
- US authorities did not cooperate.
- Investigations and report of committee for defence were not made public.
- Court cases had insufficient evidence.

POLAND

Nature of inquiries

Political: none

Judicial:

- Case of Abu Zubaydah (stateless Palestinian born in Saudi Arabia): transferred from Thailand to Poland by the CIA on 5 December 2002 and held there for nine or ten months; investigation of Polish officials' role in the CIA programme and in rendition flights that transported Abu Zubaydah into and out of Poland.²¹²
- Case of Abd al-Rahim al-Nashiri (Saudi Arabian national): investigation of secret detention and alleged ill-treatment in Poland in 2002 and 2003.
- Charges against the former head of the Polish Intelligence Agency and his deputy: assisting the CIA in operating a secret prison in Poland and allegations of torture that occurred there.²¹³
- ECtHR Al-Nashiri case²¹⁴: failure to investigate detention and torture in a prison facility operated by the CIA on Polish territory.

Current status:

- Abu Zubaydah case: ongoing (granted victim status in January 2011).
- Abd al-Rahim al-Nashiri case: ongoing (granted victim status in October 2010).
- ECtHR Al-Nashiri case: ongoing; Al-Nashiri has requested a fast-track procedure.
- Criminal charges against the former Polish head of security: ongoing.

Results

²¹² Interights, *Abu Zubaydah v Poland*, op. cit.

²¹³ See: <http://jurist.org/paperchase/2012/03/poland-former-head-of-intelligence-faces-possible-charges-for-involvement-in-secret-cia-prison.php>

²¹⁴ See: www.soros.org/initiatives/justice/litigation/nashiri/echr-al-nashiri-application-20110506.pdf

- December 2009: The Polish Air Navigation Services Agency (PANSAs) released flight data revealing that Polish airports, in particular the Szymany Airport, had been used as landing sites for CIA planes operating as part of the US extraordinary renditions and secret detentions programme.²¹⁵
- Evidence on cooperation between PANSAs and the CIA in covering up the destinations of some of the flights that had landed at Szymany by listing Warsaw as the destination.
- July 2010: Information provided by the Polish Border Guard Office revealed seven planes operating in the CIA's rendition programme landed at Szymany Airport between December 2002 and September 2003; some of them arrived with passengers and left empty whilst others landed empty and left with passengers on board.²¹⁶
- Abd al-Rahim al-Nashiri: substantial evidence that he was detained in Poland before being transferred to Guantánamo Bay²¹⁷

State's imputed participation

- Polish airports were used as landing sites.
- A secret CIA prison was operated at Stare Kiejkuty.
- Complicity in torture, detention and prisoner transfer

State's reaction to imputation

- Poland has consistently refused any complicity in the CIA rendition and secret detention programme.

Sanctions / Judicial redress / reparation

- Abu Zubaydah and Al-Nashiri granted victim status

Parties held accountable / under investigation

²¹⁵ Al, *Current evidence: European complicity in the CIA rendition and secret detention programmes*, op. cit.

²¹⁶ Ibid.

²¹⁷ See UN Joint Study on Secret Detentions, op. cit., paragraph 116.

- Former head of the Polish secret service.
- Former deputy of Polish secret service.
- Former Prime Minister of Poland²¹⁸

Main obstacles

- The head prosecutor in rendition cases allegedly was removed for political reasons and to prevent the high-ranking officials being charged with crimes against humanity and human rights violations, including torture and holding suspects incommunicado.²¹⁹
- Criminal proceedings were stalled for some time due to the US authorities' refusal to grant judicial assistance (October 2009).
- 'State secrecy' issues: everything Al-Nashiri says is kept classified.

²¹⁸ EU Observer, *Poland indicts former spymaster over CIA renditions*, available at: <http://euobserver.com/22/115745>

²¹⁹ Singh, A., *As Poland's Legacy of CIA Torture Erupts, Europe's Human Rights Court Must Act*, op. cit.

The UK

Nature of inquiries:

Political:

- All Party Parliamentary Group on Extraordinary Rendition (APPG) established in December 2005 to examine extraordinary rendition and related issues
- Intelligence and Security Committee (ISC): inquiry into British authorities' knowledge of, and possible collusion in, the American programme of renditions
- Gibson Inquiry: announced in July 2010 by the Prime Minister to examine Britain's possible involvement in the improper treatment of detainees held by other countries

Judicial:

- Operation Hinton: criminal proceedings against MI5 agent alleged to have aided and abetted the mistreatment of Binyam Mohamed al-Habashi (Ethiopian national, British resident) during his interrogation and detention in Pakistan
- Operation Iden: police investigation into the actions of the MI6 officer who interrogated suspects at the US-run prison at Bagram, Afghanistan²²⁰
- Operation Lydd (Libyan dissidents Abdul Hakim Belhaj and Sami al-Saadi): criminal investigation into two secret renditions operations mounted by MI6 in 2004 in cooperation with Muammar Gaddafi's intelligence service
- Case Yunus Rahmatullah (Pakistani national): captured by UK forces in Iraq in 2004, handed over to US forces and held at Bagram Airbase
- Civil claims brought against the government by alleged torture victims

Current status

²²⁰ See: <http://www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide?intcmp=239>

- Gibson Inquiry: When Scotland Yard announced that it was launching a criminal investigation of the Libyan renditions, the Government halted the inquiry. The Government says another inquiry will be held in the future – after all police investigations have concluded.²²¹
- APPG: continues to be active. On 18 April 2011 the Information Tribunal invalidated the Ministry of Defence's refusal to deliver information to the APPG on agreements concerning the treatment of prisoners.²²²
- ISC: report presented to Parliament in July 2007; reinvestigation following High Court judgment of August 2008; report on further investigations sent to Prime Minister in March 2009
- Operation Hinton: closed
- Operation Iden: closed
- Case Yunus Rahmatullah: closed
- Operation Lydd: ongoing
- Civil claims: friendly settlement; other claims ongoing

Results

- Gibson Inquiry: abandoned due to ongoing criminal investigations
- ISC 2007 report: reasonable probability that intelligence passed by Security Service was used in subsequent interrogation of Mr Mohamed
- Operation Hinton: Members of the Security Service provided information to the US authorities about Mr Mohamed and supplied questions for US authorities to put to Mr Mohamed while he was detained between 2002 and 2004, but the evidence does not suffice to prosecute any individual.²²³
- Operation Iden: unsuccessful in getting statements from a person allegedly mistreated in the presence of an MI6 interrogator; not possible to ascertain individual's identity²²⁴

²²¹ See: www.bbc.co.uk/news/world-16614514

²²² *All Party Parliamentary Group on Extraordinary Rendition (APPG) v The Information Commissioner and the Ministry of Defence*, available at: <http://www.judiciary.gov.uk/media/judgments/2011/appger-v-the-ic>

²²³ Cobain, I., op. cit.

²²⁴ Ibid.

- Case Yunus Rahmatullah: Court of Appeal order of December 2011 to return him to UK custody; request to the US to return him was refused; in February 2012 the Court of Appeal decided it could do no more²²⁵
- Civil claims: 'friendly settlement'; compensation for the victims
- The High Court is dealing with Mr Mohamed's request for documents from the British intelligence service to be used in his trial in the US; seven paragraphs elaborating the US interrogation techniques that were previously redacted from the Divisional Court judgment had to be made public.²²⁶
- The Divisional Court is considering certificates of public interest immunity lodged by the Foreign Secretary regarding the disclosure of documents to Mr Mohamed (*obiter dictum*): Mr Mohamed had been subjected – at the very least – to cruel, inhuman and degrading treatment by the US authorities, and the UK secret services were aware of this.²²⁷

State's imputed participation

- MI5 and MI6 agents are alleged to have aided and abetted torture, war crimes, false imprisonment, assault and misconduct in public office during the interrogation and detention of Binyam Mohamed in Pakistan and at the US-run prison in Bagram, Afghanistan.
- The British Government is alleged to have known that terror suspects were being illegally transferred to Guantánamo Bay but failed to prevent it.

State's reaction to imputation

- The UK government denies any knowledge of secret prisons.
- In February 2008 the Foreign Secretary confirmed that two rendition flights with detainees on board refuelled on the British island of Diego Garcia.
- February 2009: confirmation by the Defence Secretary that two detainees captured by UK forces in Iraq and transferred to US forces had been rendered to Afghanistan; proposal to criminalise the use of British facilities for extraordinary rendition flights and the failure to prevent extraordinary rendition flights using those facilities²²⁸

²²⁵ Court of Appeal, [2012] EWCA Civ 182.

²²⁶ *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 6.

²²⁷ *Ibid.*, Annex.

²²⁸ APPG, *Extraordinary Rendition: Closing the Gap*, 2009, available at <http://www.statewatch.org/news/2009/nov/uk-apg-extraordinary-rendition-closing-the-gap.pdf>.

Sanctions / Judicial redress / reparation

- Settlement: millions of pounds paid in compensation to former Guantánamo Bay detainees (including Binyam Mohamed, Bisher al-Rawi, Jamil el-Banna, Richard Belmar, Omar Deghayes, Moazzam Begg and Martin Mubanga) who alleged UK complicity in torture and extraordinary renditions in order to protect the security service's methods from scrutiny after High Court ruling that confidential documents would have to be released in court²²⁹

Parties involved

- MI5 and MI6 officers

Main obstacles

- Gibson Inquiry: too secretive and lacks independence; government decides which documents remain unpublished
- Criminal investigations: insufficient evidence
- MI6 officers are protected from liability for criminal acts abroad as long as their actions were authorised by a cabinet minister.

²²⁹ Wintour, P., op. cit.

DENMARK

Nature of inquiries

Political:

- Inter-ministerial working group: 2008 investigation into the use of Danish and Greenlandic airports and airspace by CIA to transfer prisoners as part of its renditions programme
- Following WikiLeaks' disclosure suggesting that Denmark was complacent about investigating CIA rendition flights in Danish and Greenlandic airspace: at Danish Government's request, Danish Institute for International Studies (DIIS) investigates collusion of the USA and Denmark in the 2008 Danish inquiry²³⁰

Current status

- The inter-ministerial working group's investigation of the CIA's use of Danish and Greenlandic airports and airspace to transfer prisoners as part of its renditions was closed in 2008.
- May 2012: The investigation into the collusion of US and Danish authorities in the 2008 inquiry is ongoing.

Results

- Inter-ministerial working group's final report of 23 October 2008: Danish authorities had no knowledge of the CIA flights; it is impossible to confirm or deny illegal transport of prisoners in Danish, Greenlandic or Faroese airspace, mostly because of inadequate response from the US regarding the case.
- The Human Rights Committee expressed its concerns at allegations that Danish airspace and airports were used for renditions flights and Denmark requested provide the Committee with the inter-ministerial working group's report and establish an inspection system to ensure against the use of its airspace and airports for such purposes.²³¹

²³⁰ See: <http://um.dk/da/politik-og-diplomati/retsorden/cia-overflyvninger/>

²³¹ Human Rights Committee, Concluding observations on Denmark, CCPR/C/DNK/CO/5, 16.12.2008.

- Doubts were expressed about an open and transparent investigation of CIA renditions during the Universal Period Review of Denmark on 2 May 2011; a recommendation was made to assess the landings and overflights of Danish territory in the CIA extraditions programme.²³²

State's imputed participation

- Knowledge of CIA flights using Danish and Greenlandic airports and airspace
- No independent inquiry; inter-ministerial working group's report does not accurately reflect the Government's knowledge of and involvement in the renditions programme

State's reaction to imputation

- Danish Government denies knowledge of, and involvement in, renditions flights.
- The Danish Government denies collusion with US authorities with respect to 2008 inquiry.

Sanctions / Judicial redress / reparation

Parties involved

Main obstacles

- The 2008 inquiry was carried out by an inter-ministerial working group without the participation of independent experts or civil society to insure a transparent process.
- There was inadequate response from the US to inquiries about the case.

²³² Denmark, List of Issues Prior to Reporting & an assessment of the Implementation of the International Covenant on Civil and Political Rights, Jointly reported by Women's Council in Denmark, Rehabilitation and Research Centre for Torture Victims (Denmark), Save the Children, Denmark, 19 August 2011, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/Joint_WCD_RRCTV_SaveTheChildren_Denmark103.pdf

- The DIIS investigation was limited to flights only involving Greenland and not all of Danish territory, and the DIIS was only allowed to review documents from the 2008 inquiry, not to compel witness testimony or request any new information.

FINLAND

Nature of inquiries

Political:

- Ministry of Foreign Affairs report: information on 250 landings in Finland by aircraft linked to the CIA renditions programme²³³

Ombudsman:

- Parliamentary Ombudsman: investigation of CIA renditions flights using Finnish airports

Current status

- The Finnish Government will seek clarification from US authorities on one aircraft.
- Ombudsman investigation: ongoing

Results

- The Finnish Government will seek clarification from US authorities about one aircraft operated by Miami Air (tail number N733MA) that flew between the Manas US Air Force transit base in Kyrgyzstan and Finland in December 2002.²³⁴

State's imputed participation

- According to Amnesty International, information on CIA landings in Finland suggests that Finland was an active part of the CIA's programme of extraordinary renditions and secret detentions.²³⁵
- Links have been found between Finland and CIA secret detentions sites in Lithuania.²³⁶

²³³ Finland Ministry for Foreign Affairs, op. cit.

²³⁴ AI, *Finland must further investigate USA rendition flights*, op. cit.

²³⁵ AI, *Submission to the UN Universal Periodic Review*, op. cit.

²³⁶ AI, *Lithuania: Unlock the truth: Investigate secret prisons now* (Index EUR 53/002/2011), op. cit.

- 'Dummy' flights were made to Finland in order to conceal flights to Lithuania.²³⁷

State's reaction to imputation

- All but one of the flights in the data set were 'civilian' in nature and therefore not connected to unlawful activity by the USA or any other state.²³⁸

Sanctions / Judicial redress / reparation

Parties involved

Main obstacles

- A distinction was made between 'civilian' and 'state' aircrafts by Finnish authorities, even though the CIA contracted with private carriers to conduct renditions.
- Amnesty International has criticised Finland for failing to initiate a proper investigation despite ample evidence of alleged CIA renditions flights using Finland as a transit point,²³⁹ that is, flights carrying persons detained in other countries were transported via Finland.

²³⁷ UN Joint Study on Secret Detention, op. cit., paragraph 120; AI, *Submission to the UN Universal Periodic Review*, op. cit.

²³⁸ AI, *Finland must further investigate USA rendition flights*, op. cit.

²³⁹ Amnesty slams Finland for alleged CIA rendition flights, available at http://yle.fi/uutiset/news/2012/03/amnesty_slams_finland_for_alleged_cia_rendition_flights_3365196.html

SWEDEN

Nature of inquiries

Political:

- CIA aircraft landed at Swedish airports in 2002, 2004 and 2005: The Swedish Government requested the Swedish Aviation Administration and Civil Aviation Authority to review media accounts that the CIA had chartered aircraft and landed at Swedish airports between 2002 and 2005.²⁴⁰
- UN Committee against Torture (*Agiza*)²⁴¹ and UN Human Rights Committee (*Alzery*)²⁴²: renditions in 2001 of Egyptian asylum seekers Ahmed Agiza and Mohammed Alzery from Sweden to Egypt, where they were subjected to torture and ill-treatment

Judicial:

- Public Prosecutor: investigation of possible crimes committed by the Security Service (Sapö) in connection with the enforcement of the Government's expulsion order²⁴³
- Swedish parliamentary ombudsman investigation into Sapö behaviour in enforcing the decision to expel Agiza and Alzery²⁴⁴
- Claim for damages before Swedish Chancellor of Justice for torture suffered in Egypt and ill-treatment at Bromma Airport²⁴⁵

Current status

- Civil Aviation Administration and Civil Aviation Authority: final report in 2005
- Ombudsman investigation: finished, no further action will be taken
- Criminal investigation into Sapö activities: closed

²⁴⁰ Rasmusson, K. and Jordan, O., op. cit.

²⁴¹ *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

²⁴² *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC).

²⁴³ Ombudsman Report.

²⁴⁴ Adjudication No. 2169-2004, available at <http://www.statewatch.org/cia/documents/sweden-parl-ombuds-expulsion-Egyptians.pdf>

²⁴⁵ Aftonbladet, Miljonskadestånd till Agiza, 19.09.2008, available at <http://www.aftonbladet.se/nyheter/article11516060.ab>

Results

- UN Committee against Torture and UN Human Rights Committee: Swedish authorities breached the absolute prohibition on torture and the principle of *non-refoulement*; diplomatic assurances did not provide a sufficient safeguard against the manifest risk of torture or other ill-treatment.²⁴⁶
- Public Prosecutor: There are no grounds to suspect that any member of the Swedish police force, any foreign personnel or the captain of the foreign aircraft committed any offence subject to criminal prosecution.
- Ombudsman: The detainees' treatment was degrading and may have been intended to humiliate, may constitute a breach of Article 3 ECHR, and in any case, enforcement was carried out in an inhuman and unacceptable manner.
- Swedish Chancellor of Justice: Ahmed Agiza and Mohammed Alzery were each awarded approximately EUR 300,000 in reparations for torture suffered in Egypt and ill-treatment at Bromma Airport.²⁴⁷
- Swedish Government: Ahmed Agiza and Mohammed Alzery's appeals regarding the denial of residence permits were dismissed.²⁴⁸
- Swedish Civil Aviation Administration and Civil Aviation Authority final report (December 2005): It is impossible to conclude if the flights were conducted on behalf of the CIA.

State's imputed participation

- Involvement of Swedish authorities in Agiza's and Alzery transfer to Egypt where they were subject to torture
- Ill-treatment at Bromma Airport in the presence of the Swedish security service
- Knowledge of CIA flights landing at Swedish airports

State's reaction to imputation

- The Swedish Government denies that Sweden has participated in extraordinary renditions in any way.²⁴⁹

²⁴⁶ AI, Open Secret. *Mounting evidence of Europe's complicity in rendition and secret detention*, op. cit., p. 32.

²⁴⁷ Aftonbladet, Miljonskadestånd till Agiza, 19.09.2008, available at <http://www.aftonbladet.se/nyheter/article11516060.ab>

²⁴⁸ Gösta Hultén, Regeringen avgör Agizas öde, SvD Opinion, 17.08.2011, available at: http://www.svd.se/opinion/brannpunkt/regeringen-avgor-ahmed-agizas-ode_6393821.svd

²⁴⁹ Memorandum from Swedish Ministry of Foreign Affairs, op. cit.

- Authorities refuse to provide data on air traffic that could show the routes used by CIA planes to transfer terrorism suspects.

Sanctions / Judicial redress / reparation

- Agiza and Alzery each received reparations of approximately EUR 300,000.
- The Ombudsman will take no further action.

Parties involved

- Sapö

Main obstacles

- Immediate execution of victims' deportation orders following dismissal of application for asylum, no possibility of appeal, including under the UN Convention against Torture (CAT)
- Slack implementation of follow-up clause regarding diplomatic assurances obtained prior to extradition.
- Sweden did not send CAT all the relevant information.
- Doubts about impartiality of the investigations: Anders Lundblad, formerly communications director of the Swedish Civil Aviation Authority, was CEO and local manager of the Örebro Airport when CIA planes landed there.²⁵⁰

²⁵⁰ Rasmusson, K. and Jordan, O., op. cit.

ITALY

Nature of inquiries

Political:

- Inquiries were made at the Senate and Chamber levels regarding the kidnapping of Abu Omar, the conduct of CIA agents and the position of the Italian Government (2005). This was done through oral questions and debates.²⁵¹
- The Parliamentary Committee for Intelligence and Security Services and for State Secrecy questioned the directors of SISMI and SISDE (Italian security services), the General Secretariat of the *Comitato Esecutivo per i Servizi di Informazione e Sicurezza* CESIS and the Undersecretary of State responsible for the coordination of intelligence services in July 2005.²⁵²
- US ambassador in Rome called by the Prime Minister to provide more information,
- Italian Government pressed countries that had could have been involved to provide evidence.

Judicial:

- Judicial investigation and trial: Milan Prosecutor Armando Spataro conducted the investigation and prosecution about the abduction of Nasr Osama Mustafa Hassan, alias 'Abu Omar' – forcibly apprehending him und pushing him into a van, taking him first to the US Aviano Air Base (where the United States of America Air Force 31st FW (Fighter Wing) is stationed), and then to Egypt on 17 February 2003.²⁵³
- ECtHR Application (*Nasr and Ghali v Italy*), communicated on 22.11.2011 concerns 'extraordinary rendition': The applicant, Imam Abu Omar, an Egyptian national with political refugee status in Italy, alleges that he was kidnapped and transferred to Egypt where he was secretly in inhuman conditions for several months. The second applicant, his wife, charges that the Italian authorities kept her ignorant about her husband's fate. The Council of Europe's Parliamentary Assembly and the European

²⁵¹ European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at <http://www.statewatch.org/rendition/rendition.html>; European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Senate), available at <http://www.statewatch.org/rendition/rendition.html>

²⁵² European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at <http://www.statewatch.org/rendition/rendition.html>

²⁵³ Tribunale di Milano, Sezione Giudice per le indagini preliminary, n. 10838/05 and n. 1966/05.

Parliament have discussed this case that violated Articles 3 (prohibition of inhuman and degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy).²⁵⁴

Current Status

Political inquiries: closed

Judicial inquiries:

- Judicial investigation and trial: closed
- ECtHR application: pending

Results

Judicial

- November 2009: The 4th Criminal Section of the Milan Ordinary Court judged 22 CIA agents, one US military official and two Italian intelligence operatives for involvement in the abduction of Abu Omar.²⁵⁵ However, it dismissed cases against five high-ranking Italian and three US officials on the basis of 'state secrecy' and diplomatic immunity.²⁵⁶
- 2010: The Milan Appeals Court increased the lengths of the sentences of the CIA agents and of the US military official.

State's imputed participation

- Before Abu Omar's abduction, the CIA's station chief in Rome allegedly briefed and sought approval from his Italian counterpart – according to three CIA veterans with knowledge of the operation, and a fourth who reviewed the matter after it took place.²⁵⁷
- The Italian Government may have known about the Abu Omar's abduction by CIA agents.²⁵⁸

²⁵⁴ ECtHR, Terrorism Factsheet – April 2012, Press Unit.

²⁵⁵ BBC News, *CIA Agents guilty of Italy kidnap*, op. cit.

²⁵⁶ Al, *Italy Prevents trial of intelligence agents over Abu Omar rendition*, 16 December 2010, available at: <http://www.amnesty.org/en/news-and-updates/italy-prevents-trial-intelligence-agents-rendition-abu-omar-2010-12-16>

²⁵⁷ Washington Post, *Italy knew about plan to grab suspect*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/29/AR2005062902971.html>

²⁵⁸ Ibid.

State's reaction to imputation

Political inquiries:

- The Government, represented by the Minister for Parliamentary Affairs, Carlo Giovanardi, replied to the requests of the Italian chamber regarding the Italian Government's alleged involvement in the Abu Omar case, fully rejecting any knowledge of the case, not only on the part of the Government's side, but also from any national institution.²⁵⁹
- He added that the Italian Prime Minister had called the US ambassador in Rome and that the Government was pressing the countries allegedly involved to provide all pertinent elements.²⁶⁰
- The intelligence directors questioned by the Parliamentary Committee for Intelligence and Security Services and for State Secrecy denied having received any information from foreign intelligence agencies regarding the abduction of Abu Omar.²⁶¹

Sanctions / Judicial redress / reparation

- A Milan court convicted 22 CIA agents, one US military official and two Italian intelligence operatives for their involvement in the abduction of Abu Omar. The 22 CIA agents were sentenced *ad absentia* to five years in prison, and the CIA station chief in Milan was sentenced to eight years in prison. The Italian intelligence agents were given three years in prison each.²⁶²
- A Milan Appeals Court subsequently lengthened the sentences of the 22 CIA agents and one US military official to seven and to nine years respectively.²⁶³
- Abu Omar was awarded EUR 1 million in damages. His wife was awarded EUR 500,000 in damages.²⁶⁴
- The ECtHR application by Abu Omar and his wife is pending.

Main obstacles

²⁵⁹ European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), p. 58 of annexed communication, available at <http://www.statewatch.org/rendition/rendition.html>

²⁶⁰ Ibid.

²⁶¹ European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at <http://www.statewatch.org/rendition/rendition.html>.

²⁶² The Guardian, *Italian court finds CIA agents guilty of kidnapping terrorism suspect*, op. cit.

²⁶³ Al, *Italy Prevents trial of intelligence agents over Abu Omar rendition*, op. cit.

²⁶⁴ The Guardian, *Italian court finds CIA agents guilty of kidnapping terrorism suspect*, op. cit.

- The effectiveness of the prosecution was undermined by the refusal of successive Italian governments to transmit the extradition warrants for the US nationals to the US government.²⁶⁵
- In 2009 the Italian Constitutional Court also invoked the 'state secrets' privilege to justify the impossibility of ruling against high-level officials of the Italian spy agency (SISMI). The Milan Appeal court gave the same justification in dismissing the cases against five high-ranking Italian officials in December 2010.²⁶⁶
- The US allegedly pressured the Italian Government to influence the judiciary.²⁶⁷

²⁶⁵ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit., p. 4

²⁶⁶ Ibid.

²⁶⁷ Der Spiegel, *US pressed Italy to influence the judiciary*, 17 December 2010, available at: <http://www.spiegel.de/international/europe/0,1518,735268,00.html>

SPAIN

Nature of inquiries

Political:

- In 2005, the Foreign Affairs Minister (Moratinos Cuayube) was called to give evidence by the Spanish Parliament (Congreso de los Diputados).
- The Foreign Affairs Minister requested the *Director General for Europe and North America* for Foreign Policy to clarify the exact details of flights to Mallorca and the Canary Islands with Mr J. Robert Manzanares, the US Chargé d'affaires.²⁶⁸
- In 2008, the Foreign Affairs Minister launched an investigation after it became known that the Aznar Government had allowed CIA planes to land in Spain.²⁶⁹

Judicial:

- 15 March 2005: A group of citizens submitted a formal complaint to the Mallorcan authorities ('julgado de Mallorca') regarding CIA flights in Mallorca and a second complaint was later presented by a Spanish MP regarding two other flights. No evidence was found in either case. On 17 November 2005, a similar investigation was ordered in the Canary Islands.²⁷⁰
- Judicial investigation about CIA flights conducted by Prosecutor Vicente González Mota, including investigation about the use of fake passports by CIA 'civil' flight crews²⁷¹

Current Status

²⁶⁸ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>

²⁶⁹ Telegraph, *Spain 'authorised' CIA rendition flights*, 1 December 2008, available at: <http://www.telegraph.co.uk/news/worldnews/europe/spain/3538908/Spain-authorized-CIA-rendition-flights.html>

²⁷⁰ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>

²⁷¹ El País, *La fiscalía investiga a pilotos de la CIA por falsear su identidad en España*, 14 December 2008, available at: http://elpais.com/diario/2008/12/14/espana/1229209207_850215.html; El País, "Los españoles no ponen reparos a los vuelos secretos", 1 December 2010, available at: http://www.elpais.com/articulo/espana/espanoles/ponen/reparos/vuelos/secretos/elpepuesp/20101201elpepunac_36/Tes?print=1

Political inquiries: closed

Judicial:

- Investigation regarding Mallorca and the Canary Islands: closed
- Investigation into fake passports: appears to be ongoing (information is unclear)²⁷²

Results

Political:

- Mr Manzanares replied that according to his diligences to the US authorities, no information indicated the presence of clandestine or illegal passengers on board the flights when they landed in Spain. The same request was made regarding stopovers at the Canary Islands; US authorities again argued that they were unaware of any prisoners on board or of any infringements of Spanish law.²⁷³
- The Foreign Affairs Minister admitted that Spain may have been a stopover for secret CIA flights, but that there is no evidence of violations of international law on its soil.²⁷⁴ It was revealed that the US had requested authorisation to transport prisoners in 2002.²⁷⁵

Judicial:

- No evidence was found of any illegal activities during the flight's landing period in Mallorca; the Mallorca court (Fiscalia) decided to archive the complaints.²⁷⁶

²⁷² El País, *El arenque rojo y los vuelos de la CIA*, 5 February 2012, available at: http://politica.elpais.com/politica/2012/02/05/actualidad/1328456232_560747.html

²⁷³ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>

²⁷⁴ Times of Malta, *Spain may have been CIA flight stopover*, 15 September 2006, available at: <http://www.timesofmalta.com/articles/view/20060915/local/spain-may-have-been-cia-flight-stopover.41385>

²⁷⁵ TopNews.in, *Controversy continues in Spain over flights to Guantánamo*, available at: <http://www.topnews.in/controversy-continues-spain-over-cia-flights-guantanamo-295147>

- The investigation about fake passports led to a request for the detention of the plane's 13 crew members who could have been involved in El-Masri's abduction.²⁷⁷ In May 2010, the Spanish prosecution office requested that the NGO 'Reprieve' reveal the names of the 13 crew members.

State's imputed participation

- Use of Spanish airports and airspace by CIA flights and agents with knowledge and consent of the Spanish Government (Aznar Government)²⁷⁸

State's reaction to imputation

- The Foreign Affairs Minister requested the Director General for Europe and North America for Foreign Policy to clarify the exact details of flights to Mallorca and the Canary Islands with Mr J. Robert Manzanares, the US Chargé d'affaires.
- The Foreign Affairs Minister (Moratinos) admitted that Spain might have been a stopover for CIA flights, but there was no evidence of violations of international law.

Parties involved

Main obstacles

- Alleged US pressure on the Spanish judicial investigation²⁷⁹
- Lack of US cooperation: According to *El País*, the US Embassy never facilitated the Spanish Government's access to information.²⁸⁰

²⁷⁶ Letter sent by the Spanish Permanent Representative to the European Parliament (with evidence), 22 March 2006 p. 3, available at: <http://www.statewatch.org/rendition/rendition.html>

²⁷⁷ *El País*, *El fiscal solicita el arresto de 13 espías de EE UU que tripularon los vuelos de la CIA*, 12 May 2010.

²⁷⁸ *El País*, *Los españoles no ponen reparos a los vuelos secretos*, op. cit.

²⁷⁹ The Guardian, *Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture*, 1 December 2010, available at: <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>

²⁸⁰ *El País*, *Los españoles no ponen reparos a los vuelos secretos*, op. cit.

- Spanish authorities were unwilling to properly investigate (the Defence Ministry refused to inspect US military planes that landed on Spanish bases; Spanish authorities never formally requested the information that was promised to the Spanish First Vice President, Maria Teresa Fernandez de la Vega, by the US Ambassador in Spain, Eduardo Aguirre).²⁸¹

²⁸¹ Ibid.

LITHUANIA

Nature of inquiries

Political:

- 5 November 2009: Parliamentary inquiry ordered by the Lithuanian Parliament and conducted by the Committee on National Security and Defence.²⁸² The inquiry's final report of 22 December 2009, concluded that two secret sites were prepared to receive suspects with help of the Lithuanian security services (SSD).²⁸³

Judicial:

- January 2010: The Lithuanian Prosecutor General's Office opened a criminal investigation into a state actor's alleged involvement in the establishment and operation of the sites.²⁸⁴ However, this investigation was suddenly halted one year later (January 2011), with the Prosecutor General justifying the termination on "highly dubious grounds", according to Amnesty International, including reliance on the 'State secrets' privilege.²⁸⁵

Current Status

- Political: closed
- Judicial: halted

Results

Political:

²⁸² Washington Post, *Lithuania investigates possible CIA black site*, 19 November 2009. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/18/AR2009111803994.html>

²⁸³ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit., pp. 4-5.

²⁸⁴ Ibid.

²⁸⁵ AI, *Unlock the Truth in Lithuania – Investigate Secret Prisons now*, op. cit., p. 5.

- The Lithuanian Parliament Committee's report indicated that two sites were prepared to receive prisoners. It determined that one of them had not held any prisoners and couldn't find any evidence about the second site. It requested the General Prosecutor's Office to investigate the SSD's possible abuse of authority.²⁸⁶

Judicial:

- The Public Prosecutor announced that the pre-trial investigation of the three SSD officials for "abuse of authority" had come to a close.²⁸⁷

State's imputed participation

- On November 2009, an American broadcasting channel (ABC) revealed that Lithuania had harboured secret black sites where detainees were interrogated by the CIA in the framework of the 'Global War on Terror'.²⁸⁸ The Baltic News Agency (BNS) reported that two CIA-chartered aircraft, a Boeing and a Gulfstream 5, traversed Lithuanian airspace "dozens of times between 2001 and 2003" en route to Poland and Afghanistan. Lithuanian air traffic officials referred to the Gulfstream 5 as the 'Guantánamo Express'.²⁸⁹

State's reaction to imputation

- The Lithuanian Government dismissed the allegations.²⁹⁰

Sanctions

- The Lithuanian Government is currently facing legal action in the ECtHR, pursued by Abu Zubaydah, who was held by the CIA in secret detention centres around Europe for allegedly belonging to Al Qaida. The Lithuanian Government is accused of having allowed the CIA to transfer and detain Abu Zubaydah in one of their secret detention centres in Lithuania.²⁹¹

Parties involved:

²⁸⁶ Al, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit, pp. 4-5

²⁸⁷ Ibid.

²⁸⁸ EU Observer, *Secret CIA prison revealed in Lithuania*, 20 November 2009. Available at: <http://euobserver.com/13/29029>

²⁸⁹ Daily Kos, *Tail Number Watch*, 17 November 2005. Available at: <http://www.dailykos.com/story/2005/11/17/165806/-Tail-Number-Watch>

²⁹⁰ Al, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit, pp. 4-5

²⁹¹ The Guardian, *Lithuania faces legal action over prisons set up for CIA rendition programme*, 27 October 2011. Available at: <http://www.guardian.co.uk/world/2011/oct/27/lithuania-cia-rendition-prisons-european-court>

- A now-defunct American company (Elite LLC), registered in Delaware and Panama, which allegedly purchased the riding school where one of the secret detention centres was established²⁹²
- The Lithuanian Secret Services (SSD)

Main obstacles

- The judicial inquiry started by the Lithuanian General Prosecutor in 2010 was halted one year later on what Amnesty International termed were "dubious grounds", including 'State secret' privileges.²⁹³
- Lithuanian customs officials were prevented from inspecting CIA flights.²⁹⁴

²⁹² The Guardian, *Lithuania faces legal action over prisons set up for CIA rendition programme*, op. cit.

²⁹³ AI, *Unlock the truth in Lithuania – Investigate Secret Prisons now*, op. cit., p. 5

²⁹⁴ *Ibid.*, p. 10

ROMANIA

Nature of inquiries:

Political:

After the 2007 Council of Europe report accused Romania of operating a secret prison:

- 1) A secret internal inquiry was conducted by the Romanian Government in 2007.²⁹⁵
- 2) A committee of inquiry was set up by the Romanian Senate to investigate the allegations.²⁹⁶ The Committee was chaired by Senator Norica Nicolai, Vice Chair of the Committee on Defence, Public Order and Security, and composed of representatives of all political groups in the Senate of Romania.²⁹⁷
- 3) Several Romanian authorities conducted official investigations without any results.²⁹⁸

Current Status

- Closed

Results

- A 2007 secret enquiry concluded that the accusations were groundless.²⁹⁹ The conclusions of the Senate's report remain classified.³⁰⁰
- Recent evidence produced by German media has not produced any results.

²⁹⁵ AI, *Romania must come clean over secret prisons*, op. cit.

²⁹⁶ Letter sent by the Romanian Prime Minister's Office to the European Parliament, 10 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf>

²⁹⁷ Letter sent by Romanian Senator Norica Nicolai to the European Parliament, 12 January 2006, available at: <http://www.statewatch.org/cia/documents/romania-letter-parl-committee.pdf>

²⁹⁸ Letter sent by the Ambassador of the EU's Romanian Mission to the European Parliament, 28 February 2006, available at: <http://www.statewatch.org/cia/documents/letter-romania-perm-rep.pdf>

²⁹⁹ AI, *Romania must come clean over secret prisons*, op. cit.

³⁰⁰ AI, *Romania – AI Romania Country Report 2010*, op. cit.

State's imputed participation

- New evidence provided by CIA officials and revealed by the German *Süddeutsche Zeitung* newspaper and the ARD television channel, along with the Associated Press, indicated that Romania had a detention centre in the middle of Bucharest, codenamed "Bright Light".³⁰¹ This prison is located in the Romanian National Registry Office for Classified Information (ORNISS).³⁰²

State's reaction to imputation

- The new evidence was considered pure speculation. ORNISS deputy head, Adrian Camarasan, dismissed the allegation.³⁰³ Romanian President Traian Băsescu denied any knowledge of the subject.³⁰⁴

Sanctions / judicial redress / reparation

Parties involved

Main obstacles

- Lack of a formal inquiry, both at the judicial and political levels, specifically regarding the new evidence that was recently unveiled.

³⁰¹ AI, *Romania must come clean over secret prisons*, op. cit.

³⁰² BBC News, CIA 'secret prison' found in Romania – media reports, 8 December 2011, available at: <http://www.bbc.co.uk/news/world-europe-16093106>

³⁰³ Ibid.

³⁰⁴ Associated Press, *AP Exclusive: Inside Romania's secret CIA prison*, 8 December 2011, available at: <http://news.yahoo.com/ap-exclusive-inside-romanias-secret-cia-prison-050239912.html>

MACEDONIA

Nature of the inquiries

Political:

- 18 May 2007: In a closed hearing, a Macedonian parliamentary committee analysed the Ministry of the Interior's written statements.³⁰⁵

Judicial:

- Application filed by El-Masri at the ECtHR
- Formal request for criminal investigation made at the Office of the Skopje Prosecutor against Macedonian Minister of Interior in 2008³⁰⁶
- January 2004 : Civil charges filed for damages against the Macedonian Interior Ministry in relation to Khaled el-Masri's unlawful abduction and ill- treatment; the civil case is still pending³⁰⁷

Current status

- Political: closed
- Judicial:
 - o ECtHR application: pending
 - o Civil charges: pending³⁰⁸
 - o Criminal investigation request: statute of limitation expired in 2009³⁰⁹

³⁰⁵ Al, *State of Denial – Europe's role in Rendition and Secret Detention*, op. cit., p. 31

³⁰⁶ Open Society Justice Initiative, op. cit.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

Results:

- Political: The Macedonian Parliamentary Committee concluded that the security services had not overstepped their powers in detaining El-Masri in a Skopje hotel before unlawfully transferring him to the US authorities at the Skopje airport.³¹⁰
- Judicial:
 - o Khaled el-Masri has filed a complaint with the ECtHR holding the Macedonian Government accountable for its role in his unlawful detention and subsequent CIA-led rendition to Afghanistan in 2004.³¹¹
 - o Criminal investigation request: statute of limitation expired in 2009 without any action being taken by the Office of the Skopje prosecutor³¹²
 - o The civil lawsuit filed by El-Masri is still pending at the Basic Court Skopje II.³¹³

State's imputed allegations

- The case relates to the CIA's 2004 abduction of a German citizen, Khaled el-Masri, on Macedonian soil, with the alleged help of the Macedonian secret services.³¹⁴

State's reaction to imputation

- The Macedonian Government denied the accusations and claims that El-Masri entered Macedonia and left 23 days later by crossing the border into Kosovo.³¹⁵

Sanctions /Judicial redress / reparation

³¹⁰ AI, *State of Denial – Europe's role in Rendition and Secret Detention*, op. cit., p. 31

³¹¹ AI, *Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes*, op. cit.

³¹² Open Society Justice Initiative, op. cit.

³¹³ Ibid.

³¹⁴ EP, *Alleged CIA detainee gives evidence to European Parliament*, 14 March 2006. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20060314IPRO6166>; See also: EP, Minutes trip to Macedonia – 27-29 April 2006.

³¹⁵ Statewatch, *EP Minutes trip to Macedonia – 27-29 April 2006*, op. cit.

- Pending judicial procedure at the ECtHR

Parties involved

- Macedonian security services

Main obstacles

- The Macedonian authorities' lack of willingness to investigate³¹⁶
- Newspaper censorship³¹⁷
- Political party control of the judiciary and other state powers; lack of clarity about the necessary procedures for making an inquiry³¹⁸

³¹⁶ For instance, several MPs interviewed mentioned that they required El-Masri's formal complaint, although this formal requirement was dismissed by other interviewees, who stated that the Parliament could start the procedure on its own. See: EP, Minutes trip to Macedonia – 27-29 April 2006

³¹⁷ Statewatch, *EP Minutes trip to Macedonia – 27-29 April 2006*, op. cit.

³¹⁸ *Ibid.*

PORTUGAL

Nature of the inquiries:

Judicial:

- February 2007: Inquiry opened by the Portuguese Public Prosecutor's Office because of a complaint by Ana Gomes (MEP) and a Portuguese journalist³¹⁹

Political:

- A Parliamentary Commission questioned the Foreign Affairs Minister, Luis Amado, three times: in September 2006, in February 2007 and in December 2010.³²⁰
- 2008: The opposition parties' proposal to open a parliamentary inquiry was rejected by a majority vote in the Portuguese Parliament.³²¹

Current status

- Judicial: closed
- Political: closed

Results

Judicial:

- The Portuguese Public Prosecutor's Office (PPPO) found no evidence of any crime, and refused to reopen the case even after Wikileaks leaked documents, stating that no new evidence was available.³²²

³¹⁹ TSF, *Ministério Público abre inquérito sobre alegados voos*, available at: http://www.tsf.pt/paginainicial/interior.aspx?content_id=774175&page=-1

³²⁰ Jornal I, *Amado sob pressão. Voos da CIA podem acelerar substituição*, 3 Dezembro 2010, available at: <http://www1.ionline.pt/conteudo/91902-amado-sob-pressao-voos-da-cia-podem-acelerar-substituicao>

³²¹ RTP, *Governo diz que comissão inquérito sobre voos da CIA é "inoportuna e inútil"*, available at: <http://www.rtp.pt/noticias/?article=56655&layout=121&visual=49&tm=8&>

³²² DN, *PGR recusa reabrir inquérito aos voos da CIA*, 4 December 2010, available at: http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1726960

Political:

- The Foreign Affairs Ministry three times dismissed allegations that CIA planes headed to and from Guantánamo that were illegally transferring CIA detainees used Portuguese airspace or airports .

State's imputed participation

- Portugal was a transit site for CIA planes carrying detainees with the Portuguese Government's knowledge. Planes illegally transporting detainees overflew and stopped in Portugal.³²³

State's reaction to imputation

- Portugal has consistently denied knowledge of any of the accusations.

Sanction / judicial redress / reparation

Parties involved

Main obstacles

- The Portuguese Public Prosecutor's Office refused to reopen the judicial investigation after the Wikileaks revelations.³²⁴

³²³ Jornal I, *Amado sob pressão. Voos da CIA podem acelerar substituição*, op. cit.

³²⁴ DN, *PGR recusa reabrir inquérito aos voos da CIA*, op. cit.

- The Portuguese Parliament refused to open a parliamentary inquiry, with the Government claiming that is only used on specific occasions to gather evidence that the Parliament could not gather any other way. The Minister for Relations with Parliament deemed this attempt to start a parliamentary inquiry as "inopportune and useless".³²⁵

³²⁵ RTP, *Governo diz que comissão inquérito sobre voos da CIA é "inoportuna e inútil"*, op. cit.

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS C

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- Constitutional Affairs
- Justice, Freedom and Security
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