



A quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme

Didier Bigo, Sergio Carrera, Elspeth Guild, Raluca Radescu

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POLICY DEPARTMENT

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

C



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**A quest for accountability? EU and
Member State inquiries into the
CIA Rendition and Secret Detention
Programme**

Study for the LIBE Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

**A quest for accountability? EU and
Member State inquiries into the CIA
Rendition and Secret Detention
Programme**

STUDY

Abstract

At the request of the LIBE Committee, this study assesses the extent to which EU Member States have delivered accountability for their complicity in the US CIA-led extraordinary rendition and secret detention programme and its serious human rights violations. It offers a scoreboard of political inquiries and judicial investigations in supranational and national arenas in relation to Italy, Lithuania, Poland, Romania and the United Kingdom. The study takes as a starting point two recent and far-reaching developments in delivering accountability and establishing the truth: the publication of the executive summary of the US Senate Intelligence Committee (Feinstein) Report and new European Court of Human Rights judgments regarding EU Member States' complicity with the CIA. The study identifies significant obstacles to further accountability in the five EU Member States under investigation: notably the lack of independent and effective official investigations and the use of the 'state secrets doctrine' to prevent disclosure of the facts, evade responsibility and hinder redress to the victims. The study puts forward a set of policy recommendations for the European Parliament to address these obstacles to effective accountability.

**DOCUMENT REQUESTED BY THE
COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

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LIST OF ABBREVIATIONS

AFSJ: Area of Freedom, Security and Justice

APPG: All-Party Parliamentary Group (UK Parliament)

CAT: United Nations Convention Against Torture

CIA: Central Intelligence Agency

CJEU: Court of Justice of the European Union

CLS: Council Legal Service

CoE: Council of Europe

COREPER: Permanent Representatives Committee (Council of the European Union configuration)

COSI: Standing Committee on Operational Cooperation on Internal Security

CPT: Council of Europe Committee for the Prevention of Torture

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EP: European Parliament

EU: European Union

Eurojust: European Judicial Cooperation Unit

EUCFR: Charter of Fundamental Rights of the European Union

FBI: Federal Bureau of Investigation

FRA: European Union Agency for Fundamental Rights

HVD: High-Value Detainees

ICRC: International Committee of the Red Cross

INTCEN EU: Intelligence Analysis Centre

ISC: Intelligence and Security Committee (UK Parliament)

LIBE: Civil Liberties, Justice and Home Affairs Committee

MI5: The United Kingdom Security Service, which supplies the British Government with internal British intelligence

MI6: The United Kingdom Secret Intelligence Service, which supplies the British Government with foreign intelligence

NATO: North Atlantic Treaty Organization

NGO(s): Non-Governmental Organisation(s)

NSA: National Security Agency

OSI: Open Society Institute

SISMI: Servizio per le Informazioni e la Sicurezza Militare (Military Intelligence and Security Service, Italy)

SSCI: Senate Select Committee on Intelligence (US)

SSD: Lithuanian Secret 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 European Union

TFEU: Treaty on the Functioning of the European Union

UDHR: Universal Declaration of Human Rights

UN: United Nations

EXECUTIVE SUMMARY

Although much has been done over the last ten years to overcome major obstacles to ensuring democratic and judicial accountability in respect of EU Member States' complicity in the unlawful US CIA-led extraordinary rendition and secret detention programme, much remains to be done to uncover the truth and hold those responsible accountable for their actions.

This study takes as a starting point two recent and highly significant developments that have helped to shed light on, and establish accountability for, the actions of EU Member States engaged in the Central Intelligence Agency (CIA) rendition and detention programme. The first is the U.S. Senate Intelligence Committee "Study of the Central Intelligence Agency's Detention and Interrogation Program" (also known as the Feinstein Report) published in December 2014, which provided further evidence of the nature of the relationship between the CIA and several European state authorities and their wrongdoing. The second is the collection of recent judgments of the European Court of Human Rights (ECtHR), particularly in the *Al Nashiri* and *Abu Zubaydah* cases, which have helped to provide substantive rule of law standards against which to measure national political inquiries and judicial investigations.

Through the prism of these two important recent developments, this study builds on the 2012 European Parliament study on "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". First (section 2), it pinpoints the critical findings of the Feinstein Report and their relevance for EU Member State inquiries, in particular the new revelations that: the CIA was isolated both nationally and internationally; European states that collaborated with the CIA were quick to withdraw assistance when scrutiny increased, leaving the CIA on the run; the UK failed to refute unfounded CIA claims about the intelligence value of information extracted by torture; and the CIA paid large sums of money to cooperative Member States. The study also examines the media controversy provoked by the release of the Feinstein Report and the efforts made by certain actors to undermine its findings.

The study then (section 3) offers an up-to-date account of political inquiries and judicial investigations in five Member States (Italy, Lithuania, Poland, Romania and the United Kingdom). It argues that, while political inquiries and domestic judicial investigations have been or are being conducted in all five Member States and there have been ECtHR cases regarding all but the UK, they have all been beset by obstacles to accountability. The response of the EU institutions is also analysed. While it is acknowledged that the European Commission has taken tentative steps to encouraging accountability (notably in sending letters to Member States in 2013 to request information on investigations underway), it is found that neither the Commission nor the Council have properly followed up on the European Parliament's recommendations.

After providing a detailed analysis of the recent ECtHR judgments in the *Al Nashiri* and *Abu Zubaydah* cases (section 4) and detailing the rule of law benchmarks against which the effectiveness of national investigations can be tested, the study then measures the national political inquiries and judicial investigations and finds them wanting, either because of a lack of independence or because national security or state secrets have been invoked to prevent disclosure of the facts (section 5).

Finally, the study examines what has prevented EU institutions from taking effective action in response to the CIA programme (section 6). It finds a general lack of political will exacerbated by an absence of a clear enforcement mechanism to ensure compliance with

the rule of law as laid down in Article 2 TEU, meaning that the important step taken by the Commission to send letters to Member States is bereft of a clear legal framework.

In light of the above considerations, the Study formulates the following **policy recommendations** to the European Parliament:

Recommendation 1: The Parliament, particularly the LIBE Committee, should establish regular structured dialogue with relevant counterparts in the U.S. Congress and Senate, which would provide a new framework for sharing information and cooperating more closely on interrelated inquiries in the expanding policy field of Justice and Home Affairs.

Recommendation 2: The Parliament should use the recent LIBE Committee decision to draw up a Legislative Own-Initiative Report on an EU mechanism on democracy, the rule of law and fundamental rights to develop and bring further legal certainty to the activation phases preceding the use of Article 7 TEU. Parliament should also insist that the Commission periodically evaluate Member States' compliance with fundamental rights and the rule of law under a new 'Copenhagen Mechanism' to feed into a new EU Policy Cycle on fundamental rights and rule of law in the Union.

Recommendation 3: The Parliament should adopt a Professional Code for the transnational management and accountability of data in the EU. The Code would outline where 'national security' and 'state secrets' cannot be invoked (i.e. define what national security is *not*). It would additionally lay down clear rules aimed at preventing the use and processing of information originating from torture or any related human rights violations.

Recommendation 4: The Parliament should demand that the Commission properly follow up on its resolutions and recommendations.

Recommendation 5: The Parliament should call on the President of the European Council to issue an official statement on the rendition programme to the Plenary, stating clearly the degree of Member States' complicity and detailing obstacles to proper accountability and justice for the victims.

Recommendation 6: The Parliament should call for effective judicial investigations into the Feinstein Report's findings that the CIA paid large sums of money to Member States for their complicity in the rendition programme, which amount to allegations of corruption.

1. INTRODUCTION

This Study provides an updated analysis of the 2012 European Parliament Study on “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”. It consists of an in-depth assessment of EU and Member State actions and efforts to ensure accountability and conduct effective investigations into their complicity with the U.S. Central Intelligence Agency (CIA) extraordinary rendition and secret detention programme. It takes stock of the latest developments in domestic, supranational and international arenas towards establishing the truth about, and attributing legal responsibilities for, allegations of serious human rights obligations as a result of Member States’ cooperation with the CIA in the programme.

1.1. The Path towards Accountability: A Background in Brief

This study comes about ten years after the first media revelations – on 7 November 2005 – of EU collusion in the CIA extraordinary rendition programme.¹ Since then, efforts to make the perpetrators accountable have been unprecedented and far-reaching.

The geography of the CIA programme received wider attention following the leak of the International Committee of the Red Cross (ICRC) Report on the detention conditions of 14 ‘high-value detainees’ (HVDs), which suggests that the CIA rendition programme took place between 2002 and 2006 and that, according to the US authorities, “no other people were held in the CIA detention program as of October 2006”.² Overall, 119 detainees have been involved in the renditions and, according to an inquiry³ by Dr Crofton Black for the Bureau of Investigative Journalism into the status of the prisoners’ detention, 33 are still detained,⁴ 52 have been released, 7 are deceased, and 39 are in an unknown situation.⁵

The investigations into Europe’s complicity in the CIA extraordinary rendition programme emerged in 2005 when Council of Europe (CoE) parliamentarians, led by Swiss Senator Dick Marty, started an inquiry into the alleged CIA renditions and the secret detention centres in Europe. The first Marty Report in 2006⁶ dealt with complicity at EU level regarding the rendition flights and cooperation in kidnapping suspected terrorists and identified a global ‘spider’s web’ of CIA detentions and transfers with the involvement of 14 Council of Europe Member States.

¹ D. Priest, 2005, “CIA Holds Terror Suspects in Secret Prisons”, *The Washington Post*, 2 November, available at www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html.

² ICRC Report, 2007, “ICRC Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody”, [www.therenditionproject.org.uk/pdf/PDF%20101%20\[ICRC,%20Feb%202007.%20Report%20on%20Treatment%20of%2014%20HVD%20in%20CIA%20Custody\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20101%20[ICRC,%20Feb%202007.%20Report%20on%20Treatment%20of%2014%20HVD%20in%20CIA%20Custody].pdf), p. 25.

³ C. Black, 2015, “Revealed: Only 29 detainees from secret CIA torture program remain in Guantánamo Bay”, available at www.therenditionproject.org.uk/prisoners/data.html and <https://www.thebureauinvestigates.com/2015/01/15/28-detainees-secret-cia-torture-program-quantanamo-bay/>.

⁴ Twenty-nine in Guantanamo, one in Israel, two in Afghanistan and one in a maximum security US prison; some of the remaining 29 Guantanamo prisoners have not been charged in over 13 years of detention, e.g. Abu Zubaydah; 16 of the 29 prisoners are considered high-value detainees (HVDs), the most wanted terrorist suspects of the CIA, according to the Bush administration.

⁵ According to this same study 15 people were “wrongfully detained” by the CIA over the course of four years, between 2002 and 2006.

⁶ Council of Europe, 2006, “Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states” (the ‘Dick Marty Report’).

A second report,⁷ released in 2007, reassessed the previous allegations but also presented further evidence to support the claim that Poland and Romania had hosted secret CIA prisons for the detention of HVDs between 2003 and 2005. These two reports combined with the 2011 Marty Report⁸ have been considered by the ECtHR as one of the most authoritative sources of knowledge and independent evidence on the issue of the CIA rendition programme and European states' complicity. All the Marty Reports expressed concerns and were critical of obstacles to his inquiries placed by the governments alleged to be complicit in the US programme. The reports were critical of the misuses of 'national security' arguments and the 'state secrecy doctrine' to evade accountability in countries such as Poland, the UK and Italy, and urged relevant state authorities to conduct effective investigations. The report considered that it is in fact feasible to put in place judicial and parliamentary accountability procedures which still protect 'legitimate' state secrets, while still holding state agents accountable for murder, torture, abduction or other human rights violations. A landmark passage of the last Dick Marty Report stated⁹:

Numerous European governments seem to have accepted the doctrine of the previous US Administration: terrorism is a phenomenon that cannot be dealt with by the judiciary and, to the extent that one claims to be at war, the Geneva Conventions are not or only very partially applicable. Worse: security must have precedence over freedom, as if the two concepts were irreconcilable. It is obvious that over the last years, also due to the over dramatization of the 'war against terrorism', the balance between the different powers of state has shifted in favour of the executive, to the detriment of parliament and of the judiciary. Parliaments are not without blame for this situation.

Numerous parliamentarians seem to give priority, all too often, to governmental and party-political solidarity rather than to their duty to assume their responsibility of critical scrutiny. Democracy, as we know, is based on a complex and delicate balance which must be protected carefully. I believe that it is precisely up to the parliamentarians who belong to this Assembly to be particularly vigilant on this point and to be at the forefront to defend the fundamental principles of the separation of powers and of 'checks and balances'. The systematic and arbitrary invocation of the state secrecy privilege, in particular for the purpose of ensuring the impunity of public officials, is a dangerous movement against which parliamentarians must be the first to react.¹⁰

The European Parliament, during its sixth and seventh legislatures, played a decisive role in, and made a proactive contribution to, the scrutiny of the alleged human rights violations resulting from Member States' active or passive complicity in the US CIA-led rendition and secret detention programme. The Parliament set up in 2006 the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (TDIP) chaired by Portuguese MEP Carlos Coelho, with former Italian MEP

⁷ Council of Europe, 2007, Report, "Secret detentions and illegal transfers of detainees, involving Council of Europe member states: second report".

⁸ Council of Europe, 2011, Report, "Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations", 6 September.

⁹ Ibid. p. 19.

¹⁰ Ibid, p. 19.

Claudio Fava as rapporteur. The Fava Report,¹¹ published in 2007, was an in-depth re-examination of the main facts and available evidence and reached the overwhelming conclusion that approximately 1,245 rendition flights used European airspace between 2001 and 2005.

Five years after the Fava Report the Parliament adopted the Flautre Report in 2012. With Green MEP Hélène Flautre as rapporteur, it expressly singled out Romania, Poland and Lithuania for their involvement in rendering detainees and even hosting on their territory CIA illegal secret detention centres. The Flautre Report brings to public attention the lack of accountability regarding these allegations within European Member States such as Finland, Denmark, Portugal, Italy, the UK, Germany, Spain, Ireland, Greece, Cyprus, Romania and Poland, all of which had been mentioned in the TDIP Report.

The Flautre Report raised serious concerns and deplored the existence of various obstacles to pursuing accountability in certain Member States, in particular those related to "lack of transparency, classification of documents, prevalence of national and political interests, narrow remits for investigations, restriction of victims' right to effective participation and defence and lack of rigorous investigative techniques and of cooperation between investigative authorities across the EU".¹² In her political statement after the Parliament's Justice and Civil Liberties Committee supported her report, Flautre blamed European governments for having "not properly fulfilled their obligation under international law to investigate serious human rights violations connected with the CIA programme".¹³ The Flautre Report also included a set of requests and recommendations addressed to national authorities of the relevant Member States, as well as to European institutions and agencies in order to ensure the establishment of the truth, prevent impunity and safeguard fundamental rights and rule of law obligations within the Union.

Some European Member States and candidate countries have been subject to supranational judicial oversight by the European Court in Strasbourg for their complicity in the CIA extraordinary renditions programme. In December 2012, the Grand Chamber of the ECtHR, which is specialised in judging extraordinary rendition cases, condemned the Former Yugoslav Republic of Macedonia for the arbitrary arrest, detention, interrogation and inadequate provision of effective remedies to Mr El-Masri. The ruling, the first of its kind, was of especial importance because it found that the allegations by the victim, including those of torture and other human rights violations, were established "beyond reasonable doubt".¹⁴

The 2013 European Parliament Resolution on "Alleged transportation and illegal detention of prisoners in European Countries by the CIA"¹⁵ is another step forward in achieving

¹¹ European Parliament, 2007, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 30 October (the 'Fava Report').

¹² European Parliament, 2012, Report on the alleged transportation and illegal detention of prisoners in EU countries by the CIA "follow-up of the European Parliament TDIP Committee Report", 2012/2003, 2.8.2012 (the 'Flautre Report'), and the Resolution which followed, available at www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0266&language=EN.

¹³ See EU Observer at euobserver.com/justice/116973.

¹⁴ ECtHR, Judgment: *Case of El-Masri v. The Former Yugoslav Republic of Macedonia* (Application No. 39630/09), Strasbourg, 13 December 2012, p. 80.

¹⁵ European Parliament, 2013, Resolution 2013/2702 on Alleged transportation and illegal detention of prisoners in European countries by the CIA.

accountability, since it pushed for Member States to conduct effective, independent and transparent investigations. More specifically, Lithuanian authorities were called to reopen the criminal investigations regarding the country's alleged involvement in the renditions and to support the investigations led by the ECtHR in the *Abu Zubaydah* case. In the case of Romania the Parliament Resolution calls for effective investigations into the country's involvement in hosting the secret detention site. The UK is also mentioned for failure to provide substantive support in ensuring the right to the truth in the civil claim of Abdel Hakim Belhadj.

Two rulings of the European Court of Human Rights were prominent in 2014, concerning Polish complicity in the CIA rendition and secret detention operations in the *Abu Zubaydah* and *Al Nashiri* cases (Section 4 of the study deals extensively with the ECtHR rulings and their impact on accountability). Three individual applications are currently pending against Italy, Lithuania and Romania. In the cases against Poland, the victims, still currently detained in Guantanamo Bay – Abd al-Rahim Al Nashiri and Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) – had claimed that they were secretly detained in Poland in 2002 and 2003, and that they were tortured by the CIA. The court found Poland guilty of having known the nature and purposes of the CIA's activities on its territory, and of having "cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations".¹⁶ The court found Poland guilty of violating the European Convention on Human Rights (ECHR) on various counts: Article 2 (right to life); Article 3 (prohibition of torture); Article 5 (right to liberty and security); Article 6 (right to a fair trial); Article 8 (right to respect for private and family life); and Article 13 (right to an effective remedy).

Released in December 2014, the redacted version of the executive summary of the U.S. Senate Select Committee on Intelligence (SSCI) Report ("Study of the Central Intelligence Agency's Detention and Interrogation Program"¹⁷), known as the Feinstein Report, has provided a full account of how the CIA's extraordinary rendition programme was developed and implemented across the world. From the European perspective the document provides incontestable evidence of the involvement of some European states and it backs up the allegations put forward, since 2006, by various European institutions and investigators. Although it proves that the allegations were correct and that some European states participated in the capture, detention, rendition and transfer of detainees, as well as the corruption of state officials (the report refers to large sums of money – "millions of dollars" given by the CIA authorities to the Member States in return for their support), no official investigation has followed the release of the redacted Feinstein Report.

Following up on the discoveries of the SSCI Study, Amnesty International released in early 2015 the "Breaking the Conspiracy of Silence"¹⁸ study, where the colour codes of the Feinstein Report are revealed for six European countries (Poland, Lithuania, the UK, Romania, Germany and Macedonia) in addition to an updated state of play. Indeed, the role that civil society organisations and non-governmental organisations such as Amnesty

¹⁶ECtHR, Press release, "Judgment: *Al Nashiri v. Poland*, Judgment: *Husayn (Abu Zubaydah) v. Poland*".

¹⁷ Feinstein Report, also known as the SSCI Study, available at www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program.

¹⁸ Amnesty International, 2015, "Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' must act after Senate Torture Report", available at www.amnesty.org/en/documents/EUR01/002/2015/en/.

International, Human Rights Watch, Helsinki Human Rights Council, Open Society Institute (OSI) etc. play in the process of public accountability should not be underestimated; their contribution show the central role they have in times of establishing the truth regarding governments' wrongdoing in a context of impunity and secrecy (see the bibliography of this study for a full list of reports and studies).

These non-governmental actors also provided evidence of central importance as third-party interveners in the above-mentioned cases before the ECtHR. Furthermore, the Universities of Kent and Kingston in the UK established a research project into the CIA extraordinary rendition programme, mapping the flights, detention centres and personnel involved.¹⁹

Graph 1 below provides a timeline showcasing how these investigations concerning EU involvement in the CIA rendition and detention programme have developed and progressed since 2005.

Against this backdrop - and with a focus on the ramifications of the Feinstein Report and ECtHR rulings - this study builds upon a 2012 European Parliament study on "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"²⁰, which assessed inquiries that had been conducted or were still ongoing in several European countries three years ago. That study directly fed into the preparation of the European Parliament's Report on the alleged transportation and illegal detention of prisoners in EU countries by the CIA "follow-up of the European Parliament TDIP Committee Report", also known as the 'Flautre Report', as it was led by former Member of the European Parliament (MEP) Hélène Flautre²¹.

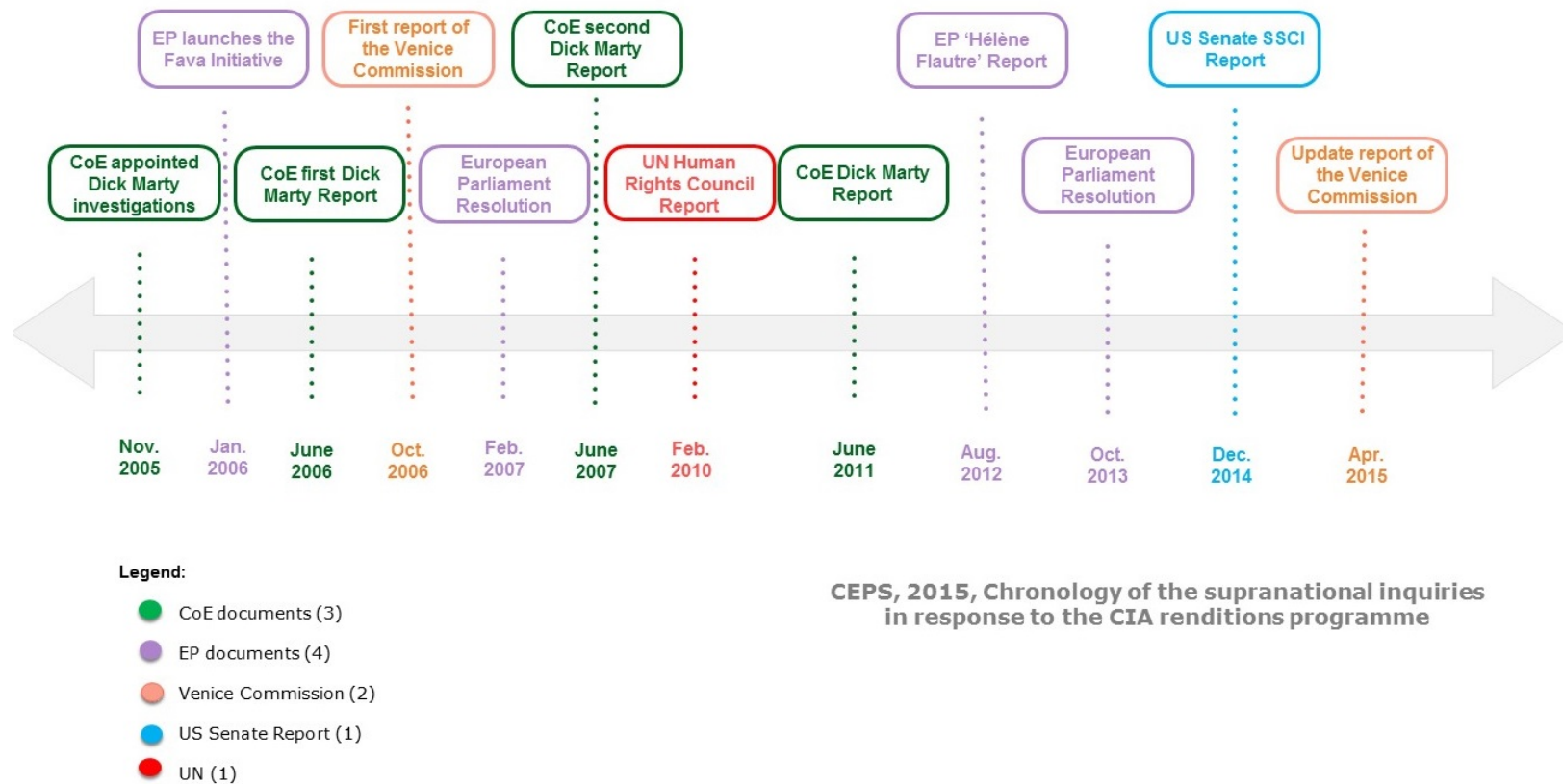
The study follows the logical structure of these developments, explaining firstly the findings of the Feinstein report, then assessing its impact in a broader political context. It moves on to address the state of play in terms of accountability in five European Member States. Last but not least, it evaluates the obstacles to accountability for the CIA renditions programme at national and European level before formulating some policy recommendations for the European Parliament.

¹⁹ See the results of "The Rendition Project", available at www.therenditionproject.org.uk/.

²⁰ S. Carrera, E. Guild, J. Soares da Silva and A. Wiesbrock, 2012, "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", DG IPOL, European Parliament, Brussels.

²¹ European Parliament, 2012, Report on the alleged transportation and illegal detention of prisoners in EU countries by the CIA "follow-up of the European Parliament TDIP Committee Report", 2012/2003, 2.8.2012 (the 'Flautre Report'), and the Resolution which followed, available at www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0266&language=EN.

Graph 1: Chronology of Supranational Inquiries and Reports in Response to CIA Rendition Programme and EU Member States' Complicity



1.2. Methodology

A few methodological considerations have been made in developing this study. The main research design follows closely the analytical framework and interdisciplinary approach of the previous 2012 study for the European Parliament²². This has now been updated with relevant national, European and international developments, which are examined in detail in the main corpus of the study.

The study covers what has come to be known as the 'CIA-led extraordinary rendition and secret detention (high-value detainee) programme'. There is no universally recognised legal definition of extraordinary rendition and secret detention.²³ According to the 2012 judgment provided by the ECtHR in the case of *El-Masri v. Macedonia*, extraordinary renditions have been defined as "extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment".²⁴ Furthermore, as we will develop below, the levels and kinds of complicity or activities by Member State governments and authorities have widely varied in nature and scope. These have included claims ranging from transiting a Member State by rendition flight for various reasons (transit, refuel, rest, transfer of prisoners, to create diversion – 'dummy' flights to conceal other flights in Finland and Lithuania), to hosting secret detention centres (Romania, Lithuania, Poland), to going as far as complicity in capture, abduction and interrogation under torture. For the purposes of this study, we will refer to the extraordinary rendition and secret detention programme or the detention and interrogation programme, which encompasses all these varying activities and degrees of involvement.

Regarding the obstacles faced in national and European accountability processes, the study takes as its starting point the concept and standards developed by the ECtHR when testing the effectiveness of investigations in cases of serious human rights violations. As we will study in detail in Section 5 below, these supranational rule of law standards insist on Member States' responsibility to conduct an "effective official investigation" in a "prompt and thorough" manner, with "independence" from the executive. The victim should be granted the possibility to participate in the investigation, "in one form or another", and when invoking the 'state secrets doctrine', the investigating authorities should not be allowed to refuse to disclose the information or evidence to the victim and the public. The Court has also invoked the so-called 'right to the truth' not only of the victims, but also of their families and the public at large, as an extra precondition for safeguarding the rule of law and preventing impunity for serious violations of human rights.

As illustrated in Graph 2 below, the study distinguishes between various types of accountability, at national and supranational levels, of democratic/political or judicial type. The results of the mapping exercise are summarised around these main categories, following a more specific distinction between political inquiries (of a parliamentary or

²² Carrera et al., op. cit.

²³ In ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, *Statement of Facts*, p. 3, rendition was defined as a "process of one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State". See also European Commission for Democracy through Law (Venice Commission) available at [www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf) for a definition of the concept.

²⁴ Ibid., paragraph 221. "*El-Masri*."

executive nature) and judicial investigations in Section 3. Because the 2015 mapping exercise revealed no evidence of inquiries being conducted by the ombudsman, this category has been eliminated.

Graph 2: Types and levels of Accountability



These levels of accountability have been indirectly studied and touched upon in a series of supporting investigations undertaken by the Council of Europe and the European Parliament, international organisations and even national investigations. The most important insights from these investigations are briefly outlined in the synthesis of existing evidence provided in Section 3 of the Study, which is in turn based on the more detailed account and overview presented in Annexes 1 and 2.

1.3. Understanding the Evidence of EU Collusion in the CIA Rendition Programme: The Five Selected EU Member States

The research and analysis provided in the study has been based on desk research and a detailed overview and assessment of key primary and secondary sources, providing updated information on international, regional and national inquiries and investigations into the CIA-led rendition and secret detention programme as well as the active/passive collaboration of European states. This has been complemented with a set of semi-structured interviews and informal discussions with a selection of policy-makers from key European institutions as well as representatives from civil society organisations, non-governmental organisations, investigative journalists and experts, which have provided extremely useful additional information and facts. In addition, CEPS organised a closed-door expert meeting in early July where the preliminary findings of the study were presented and discussed with a

selected group of experts and which contributed to fine-tuning and ensuring the relevance of our findings and policy recommendations.

Our assessment focuses in particular on the state of play of the accountability processes across various domestic arenas in the EU. The following five Member States have been selected for a more in-depth assessment: Italy, Lithuania, Poland, Romania and the UK. The selection criteria were based on the existing evidence of their degree of involvement/complicity in the CIA-led programme.

The information obtained in the aftermath of the 2012 Flautre Report²⁵ proves that the complicity of these Member States in the CIA rendition programme is no longer an 'allegation' but actually a corroborated fact. Since the European Parliament last visited this issue formally in February 2013, four black sites (illegal detention centres) in Europe have been clearly identified and their presence has been confirmed by former officials in public offices at the time the detentions occurred: one in Poland,²⁶ two in Lithuania²⁷ and one in Romania.²⁸ Two major breakthroughs or milestones have contributed to confirming, beyond reasonable doubt, the allegations regarding the involvement of some Member States in the implementation of the CIA rendition programme. First, the three ECtHR judgments, one against the former Yugoslav Republic of Macedonia²⁹ (2013) and two against Poland (the 2014 *Abu Zubaydah*³⁰ and *Al Nashiri*³¹ cases), and the three cases pending against Italy,³² Lithuania³³ and Romania,³⁴ respectively. Second, the above-mentioned U.S. Senate Feinstein Report acknowledging Europe's complicity in the CIA rendition programme.

The public sources and the cumulative evidence which contributed to shedding more light on European states' involvement in the CIA rendition programme have now been acknowledged by the ECtHR in Strasbourg as admissible evidence³⁵ to back up the allegations pertaining to

²⁵ European Parliament, 2012 ('Flautre Report'), op. cit.

²⁶ *Rzeczpospolita*, 2014, "Kwaśniewski i Miller o raporcie ws. tortur CIA", 10 December, available at www.rp.pl/arttykul/10,1163797-Kwasniewski-i-Miller-o-raporcie-ws--tortur-CIA.html.

²⁷ M. Cole, 2009, "Officials: Lithuania Hosted Secret CIA Prison to Get 'Our Ear'", *ABC News*, 20 August, available at <http://abcnews.go.com/Blotter/story?id=8373807>.

²⁸ K. Verseck, 2014, "Black Site", in Rumänien: Ehemaliger Spionagechef gibt Existenz von CIA-Lager zu, *Spiegel Online*, 13 December, www.spiegel.de/politik/ausland/rumaenien-ex-spionagechefspricht-ueber-black-site-der-cia-a-1008333.html; see also R.-S. Marinas and C. Lowe, 2014, "U.S. Torture Report Puts Romania's Role under Scrutiny," *Reuters*, 16 December, <http://www.reuters.com/article/2014/12/16/us-usa-cia-torture-romania-idUSKBN0JU29H20141216>.

²⁹ ECtHR, *El-Masri v. Macedonia*, Application No. 39630/09, 18 September 2009, 2012 final judgment released in 2012.

³⁰ ECtHR, *Abu Zubaydah v. Poland*, logged in March 2013 and judged on the 24 July 2014.

³¹ ECtHR, *Al Nashiri v. Poland*, logged on 6 May 2011 and sentenced in 2014.

³² ECtHR, *Nasr and Ghali v. Italy*, logged in 2009.

³³ ECtHR, *Abu Zubaydah v. Lithuania*, logged 28 October 2011.

³⁴ ECtHR, *Al Nashiri v Romania*, logged in 2012.

³⁵ In its judgments in the cases of *El-Masri v. Macedonia*, *Al Nashiri v. Poland* and *Abu Zubaydah v. Poland*, the the ECtHR acknowledged: "The difficulties involved in gathering and producing evidence in the present case caused by the restrictions on the applicant's communication with the outside world and the extreme secrecy surrounding the US rendition operations have been compounded by the Polish Government's failure to cooperate with the Court in its examination of the case. In consequence, the Court's establishment of the facts is to a great extent based on circumstantial evidence, including a large amount of evidence obtained through the international inquiries, considerably redacted documents released by the CIA, other public sources and evidence from the experts and the witness" (from *Abu Zubaydah v. Poland* Judgement, 24 July 2014, paragraph 400).

each case. These sources of information consist of: reports and evidence collected by international organisations such as the UN, Council of Europe, the European Parliament and civil society; first-hand testimonies provided by some prisoners to the International Committee of the Red Cross (ICRC); and information regarding CIA flights provided by the Dick Marty Reports³⁶ and investigations into the UK-based renditions programme. A new addition to the pool of evidence is represented by the redacted version of the executive summary of the U.S. Senate Intelligence Committee (SSCI) Report on the CIA extraordinary rendition programme.³⁷

Publicly available evidence is synthesised in Graph 3 below. In light of the above overview of the resources provided by investigations thus far, we developed a system for taking stock of the evidence available backing the allegations brought against each Member State in terms of the degree of complicity in the CIA rendition programme. In assessing the evidence, we attached greater weight to official sources (international and regional inquiry reports, court rulings and public statements made by officials) than to allegations and unofficial statements.

Second, we have examined the *degree of complicity* of Member States in the CIA renditions. Here complicity ranges from more direct (active) participation to more indirect (passive) involvement. Thus, at the lower end of the scale, Member States allowed transit rendition flights in national airspace (most European countries cooperated in this regard). Others provided intelligence leading to the rendition of individuals (e.g. Sweden) or assisted the CIA with intelligence in the capture, detention, interrogation and rendition of suspected terrorists (e.g. the UK allegedly providing Diego Garcia as an interrogation site). And others still hosted black detention sites for implementing the rendition mechanisms; collaborated in the use of so-called 'enhanced interrogation methods' (e.g. Poland, Lithuania and Romania); or wilfully failed to protect detainees from serious abuses suffered on their national territory and their transfer to other locations where they faced similar or worse treatment, and even the possibility of the death penalty.

In light of the above, three out of the five countries selected are Poland, Lithuania and Romania (although they denied their collusion with the CIA, these countries have not yet conducted any effective investigation into the allegations and have failed to provide evidence against the claims made by the Dick Marty, Fava and Flautre Reports). The last two countries selected are Italy and the UK. Italy has been chosen due to the case the country is facing before the ECtHR on the CIA rendition programme. The UK has faced an ongoing national judicial investigation in the rendition of two Libyan citizens. Moreover, recent reports in the press allege that the UK's Diego Garcia airport might have been more than a transit site for rendition flights – allegedly it was used by the CIA during renditions as a temporary interrogation site.³⁸

³⁶ Council of Europe, 2011, Report on the "Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations", doc. 12714, 16 September; Council of Europe, 2006, Report on the "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", Parliamentary Assembly, 12 June.

³⁷ Senate Select Committee on Intelligence, 2012, Committee Study on the CIA's Detention and Interrogation Program, available at www.therenditionproject.org.uk/documents/RDI/141209-SSCI-Torture_Report_Executive_Summary.pdf.

³⁸ Information provided by Laurence Wilkerson, Chief of Staff to former U.S. Secretary of State Colin Powell, 2002-05, to *Vice* magazine, available at <https://news.vice.com/article/exclusive-cia-interrogations-took-place-on-british-territory-of-diego-garcia-senior-bush-administration-official-says>.

The following Graph 3 has been designed in an attempt to assess the degree of evidence made available and to select five countries or cases to be mapped.

Graph 3: Overview of the evidence and information available by EU Member State

EU MEMBER STATE	CoE		European Parliament		National	ECtHR cases
	'Dick Marty' 1st Report	'Dick Marty' 2nd Report	'Fava' Report	'Flautre' Report Lack of effective investigation	Ongoing national judiciary inquiries	
Austria	X		X			
Belgium	X		X			
Bulgaria			X			
Croatia			X			
Cyprus	X		X	X+ RPE		
Czech Republic			X			
Denmark	X		X	X+ RPE		
Estonia			X			
Finland			X	X+ RPE		
France						
Germany	X	X	X	X+ RPE		
Greece	X		X	X+ RPE		
Hungary			X			
Ireland	X		X	X+ RPE		
Italy	X		X	X+ RPE	X	<i>Nasr and Ghali v. Italy</i>
Latvia			X			
Lithuania			X	X+ RPE	X	<i>Abu Zubaydah v.</i>

						<i>Lithuania</i>
Luxembourg			X			
Malta			X			
Netherlands			X			
Poland	✖	✖	✖	✖+ RPE	X	<i>Al Nashiri & Husayn (Abu Zubaydah) v. Poland</i>
Portugal	X		X	X+ RPE		
Romania	✖	✖	✖	✖+ RPE		<i>Al Nashiri v. Romania</i>
Slovakia			X			
Slovenia			X			
Spain	X		X	X+ RPE		
Sweden	X		X			
United Kingdom	X	X	X	X+ RPE	X	

✖: Black Sites

RPE: Request to Provide Evidence

2. THE U.S. SENATE SELECT INTELLIGENCE COMMITTEE REPORT ON THE CIA PROGRAMME – PERSPECTIVES FROM EUROPE

KEY FINDINGS

- The Feinstein Report provides insight into the cooperation of European and other states with the CIA in its detention and interrogation programme.
- It describes the programme as one of indefinite secret detention, and Senator Feinstein has categorised some of the interrogation techniques as torture.
- In the Feinstein Report the CIA operations appear to be highly unstable, with the CIA constantly on the run from international and national accountability and scrutiny.
- Countries such as the UK failed to refute unfounded CIA claims about the efficiency of the rendition and detention programme to prevent terrorist plots.
- The CIA isolated itself not only within its own administration and country but also internationally.
- The Feinstein Report reveals that the CIA offered and paid substantial sums of money to various Member State officials to secure compliance and participation in the implementation of the rendition programme.
- It acknowledges that both US and some European authorities were aware of the inhuman and degrading treatment the detainees were to be – and were - subjected to in EU States during rendition.
- Since its publication, minority voices have developed a narrative to de-legitimise the Feinstein Report's findings. Stopping short of justifying torture under certain conditions, they still invoke a 'situation of exception' as a justification for "privileges of the executive" to run clandestine programmes and enjoy immunity for their secret services.
- On both sides of the Atlantic, parliamentary and judicial inquiries have condemned the idea of specific privileges for the executive to conduct clandestine programmes that led to major breaches of fundamental rights.

This section provides an assessment of the most interesting aspects and implications of the U.S. Senate Select Intelligence Committee Report. Since the summaries of the report were published in December 2014, it has attracted widespread controversy and debate in the US and in Europe. What have been its main findings and relevance from an EU perspective? Secondly, it provides an assessment of the way in which the Feinstein report has been received by the global audience, while explaining the reasons for this reception and the way in which efforts have been made to undermine the findings of the Report.

2.1. Scope and Key Findings

The U.S. Senate Intelligence Committee initiated a review of the CIA detention and interrogation programme in March 2009 led by Chairwoman Senator Dianne Feinstein. The Committee approved the study on 13 December 2012 by a vote of nine members in favour to six against. Following further discussions, including with the CIA, the Committee voted 11 to three on 3 April 2014 to declassify the study. The executive summary of the report was approved at the highest levels of the US government for public disclosure on 11 December 2014. It comprises more than 500 pages. The report itself, which runs to 6,700 pages, has not been released to the public.

The report examines the CIA's extraordinary rendition and secret detention programme, instituted after the attacks in the US of 11 September 2001, as regards the capture of individuals outside the US, their transfer to various sites around the world and their interrogation. The executive summary describes the programme as one of indefinite secret detention, and Feinstein has categorised some of the interrogation techniques as torture. Both acts are contrary to US law and US international human rights obligations. Feinstein also condemns these acts as contrary to American values.

The executive summary attracted substantial political and press interest. The Committee's failure to reach a unanimous decision on the report has been widely used by the opponents of its conclusions to discredit it.³⁹ Those who have been vocal critics of the CIA-led programme welcomed the report. The Committee had access to all CIA information on the programme from its inception, though it quickly discovered there were substantial gaps, for instance videotapes of a number of interrogations had been destroyed.⁴⁰ Notwithstanding an agreement between Committee Chairwoman Feinstein and the then former director of the CIA that the Committee would have unfettered access to the CIA computer system, without surveillance, this agreement was breached on a number of occasions by the CIA, which searched Committee member and staff email exchanges and, according to Feinstein, leaked false information to the public and to the Department of Justice about the activities of the Committee and its staff. The report of the CIA Accountability Board exonerating the CIA regarding these activities triggered a new controversy.

The report's documentation of torture as an intended and planned activity carried out by CIA personnel and contractors with approval from the highest levels of government has been the important revelation in the US. It has dominated international discussion about the report, the CIA and the detention and interrogation programme. The US president admitted at the end of July 2014 that the CIA had tortured some people⁴¹, thus paving the way for the report's findings. However, these findings do not come as much of a surprise to an EU public where three Council of Europe (CoE) Member States have already been condemned by the Court in Strasbourg and by the UN Human Rights Committee for complicity in torture through their cooperation with the CIA in the detention and interrogation programme and cases against three more (Italy, Lithuania and

³⁹ See <http://www.politico.com/magazine/story/2014/12/dianne-feinsteins-travesty-113486.html#.Vd7BtPmqrp5>.

⁴⁰ Specifically, those of the interrogation of *Abu Zubaydah* and *Abd al-Rahim Al Nashiri*, which were destroyed by the CIA in 2005 according to the Chairwoman.

⁴¹ Foster, P., 2014, "President Barack Obama: the US 'used torture' after 9/11", *The Telegraph*, 1 August, available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11007320/President-Barack-Obama-the-US-used-torture-after-911.html>.

Romania) are still pending.⁴² As highlighted and analysed elsewhere in this study, the European Parliament and the CoE have both dedicated extensive resources to the investigation of European states' complicity in CIA-instigated torture and have underlined the lack of cooperation by governments and authorities of European states under investigation.

According to the executive summary, **the findings of the report fall into four main groups:**

- 1. The CIA's 'enhanced interrogation techniques' were not effective.**
- 2. The CIA provided extensive inaccurate information about the operation of the programme and its effectiveness to policy-makers and the public.**
- 3. The CIA's management of the programme was inadequate and deeply flawed.**
- 4. The CIA programme was far more brutal than the CIA represented to policy-makers and the American public.**⁴³

From a European perspective, it is surprising that a report which describes extreme torture carried out in the name of the state and with the knowledge of the highest authorities in the US, should have as its first finding a question of efficacy. While the Committee Chairwoman Feinstein describes the programme as 'a strain on our values and on our history'⁴⁴, from the perspective of a Europe deeply engaged with human rights (as enshrined in the ECHR and the EU Charter of Fundamental Rights) it seems odd that an indictment of the programme's effectiveness should be the first conclusion presented. The prohibition of torture is absolute, *ius cogens* and *inter omnes* not only for EU states but internationally. Whether 'useful' information was extracted from victims of torture is irrelevant to the starting position in international law that torture is always prohibited and must always be criminalised. Chairwoman Feinstein, however, was ultimately adamant that the activities of the CIA were normatively unacceptable, leaving aside any questions of efficiency or effectiveness.

The second finding, that **the CIA provided inaccurate information to US policy-makers and the public**, is of course a very important constitutional issue in the US. However, from the European perspective, as the CIA is under no legal duty to tell European governments or their public the truth about anything, this is of less interest.

The third finding is also of somewhat little interest to a European public – that **the programme was poorly managed and executed is a matter for US internal discussion about how intelligence agencies ought to carry out their activities**. It is more closely linked to issues of financial management and good value for expenditure rather than more normative issues of human rights.

⁴² Sweden by the UN Committee against Torture in *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) and by the UN Human Rights Committee in *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006); Macedonia by the European Court of Human Rights in *El-Masri v. The Former Yugoslav Republic of Macedonia* 13 December 2012; and Poland by the European Court of Human Rights in *Husayn (Abu Zubaydah) v. Poland* and *Al Nashiri v. Poland* both of 24 July 2014.

⁴³ See <http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>.

⁴⁴ Idem.

The fourth finding is more closely associated with European concerns: **the brutality of the CIA programme** is something which has been denied by a number of governments when required to explain the complicity of their agencies in it. In the three above-mentioned decisions of the ECtHR on the complicity of Macedonia and Poland in the CIA programme, those states argued, among other things, that they did not have sufficient knowledge of the brutality of the programme to make the assessment that it was contrary to the ECHR. Once again, though, as one would expect from a study designed primarily for an audience of US lawmakers, the focus is on what was revealed to them by the CIA and what was not disclosed.

2.2. Main Implications

Even for a European public already well aware of the profound human rights abuses carried out under the CIA's programme, **there is still substantial information about the nature of the relationship of the CIA with European state authorities** which merits further investigation. Three central issues which arise from the report are:

1. How intelligence agencies in EU states (primarily the UK) cooperated and provided 'cover' for the CIA regarding the effectiveness of the detention and rendition programme when it was under attack by other agencies in the US (such as the FBI).
2. The CIA's perception that the cooperation of their allies in Europe that provided sites for detention and torture was inherently unstable as a result of information leaks about the presence of the detention centres on their territory and the pursuit of the states by international organisations, such as the International Committee of the Red Cross (ICRC), which caused European states to withdraw their cooperation.
3. The relative and increased isolation of the CIA from other US bodies and agencies, such as the refusal of cooperation by the US military in the provision of detention sites and the contradiction of CIA claims by the FBI, which appears to have led to greater reliance on European counterparts.

2.2.1. European Cooperation with the CIA Extraordinary Rendition Programme – from the Feinstein Report

One of the aspects of the Feinstein Report which is particularly striking from a European perspective relates to **the committee's assessment of the effectiveness of the CIA programme**. The committee examined eight principal representations by the CIA that its programme had produced critical intelligence which 'saved' someone from a terrorist attack. The committee concluded that all the claims were false and that the CIA's claim that it extracted critical information from those they were torturing was untrue. On the contrary, **the committee found that all the critical information on the basis of which the eight representations were made came from other sources unrelated to torture**. Of the eight 'successes', three related to targets in the UK and plots primarily or exclusively carried out in the UK. This raises the fascinating question of whether the CIA was carrying out torture to keep London safe.

The three UK-based plots which the CIA claimed it uncovered were:

1. The UK Urban Targets Plot.
2. The arrest and conviction of Sajid Badat.

3. The Heathrow Airport and Canary Wharf Plot.

The first plot, which resulted in a UK criminal trial and conviction of the main participants, consisted of two parts. The first was known as the Gas Limos Plot, where the individuals planned to park explosives-laden courier vans or limousines in underground garages and then detonate them. The second part of the plot was to extract the radiation components from 10,000 smoke detectors in order to make a dirty bomb. The far-fetched quality of these plans is striking. Nonetheless, the instigator was sentenced to 30 years imprisonment by a UK court on the basis of evidence which the UK authorities told the CIA was mainly based on terrorist-related materials recovered during property searches before the arrests. The FBI's assessment was that "the main plot presented in the Gas Limos Project is unlikely to be successful as described..."

The second incident, the arrest of Sajid Badat, is rather complex. Badat was an associate of the 'shoe bomber' Richard Reid and had originally been involved in a plot to bomb a plane. But he withdrew from the operation in December 2001. In 2005 he pleaded guilty to conspiracy before a UK court which sentenced him to 11 years in prison (originally 13 years but reduced on appeal). He was released after five years under an agreement whereby he became a cooperating witness for the US and UK authorities, according to the Feinstein Report. Once again, the CIA's claims that their torture techniques had been central to obtaining information about Badat were dispelled by the committee which found that in fact the UK authorities provided central information about Badat to the CIA, not the other way around.

The third plot, which revolved around preparations for an attack on Heathrow Airport and Canary Wharf in London, never proceeded beyond the most preliminary discussions. The idea was to hijack multiple airplanes departing from Heathrow and crash them back into the airport itself. Then the plan changed as security at Heathrow was considered too efficient, and it was planned to hijack the airplanes leaving Eastern European airports and crash them into Heathrow. The plan never got beyond speculation, as the plotters could not find pilots willing to undertake the job. The four men considered to be responsible for the plot were captured mainly in Pakistan, handed over to US authorities, and eventually detained at the US base in Guantanamo Bay, according to the Feinstein Report. It also states, however, that the plot was known to the CIA before they commenced torturing the men.

The relatively amateur nature of the three UK-based plots is striking. But the evidence of their discovery is important. **It seems that when the CIA made their claims to have uncovered the plots through the use of torture, the UK authorities did not intervene to suggest an alternative narrative closer to the actual situation.** Indeed, it would seem that the UK authorities assisted the CIA in a variety of ways but never set the record straight. In particular, one UK intelligence agency was investigating a number of 'UK-based extremists' and providing extensive information to the CIA. These extremists included Moazzam Begg, who had already spent a substantial period of time at Guantanamo Bay.⁴⁵ His book store in Birmingham was the object of a raid by UK authorities in 2000, which revealed various invoices for copies of books which the authorities considered to be

⁴⁵M. Begg, 2007, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back*, London: Free Press.

extremist Islamist literature. Other sources in the UK indicate that the raid on the bookstore was instigated by the UK intelligence agency MI5.⁴⁶

From the Feinstein Report, **it appears that the CIA's claims regarding the effectiveness of extracting information by torture to prevent the UK-targeted plots were never contradicted by the UK intelligence agencies or police/criminal justice authorities** even when, as in the case of Sajid Badat, he was convicted at trial in the UK obviously on the basis of evidence unrelated to torture. It would seem that the CIA's efforts to justify torture on the basis of efficacy encountered resistance in the US from the FBI, but where such claims were made in respect of the UK, there was silence regarding their accuracy, leaving the impression that the CIA could justify the claim. The report shows that the CIA claims in respect of the UK targets were just as inaccurate as those regarding US targets.

2.2.2. The Instability of CIA Cooperation with European and Other Partners

As detailed in the introduction to this study, the cooperation of European countries with the CIA in its detention and interrogation programme has been the subject of detailed work by the CoE and the European Parliament. From the detailed work of the ECtHR in obtaining the facts of the decided cases, it is clear that the CIA moved prisoners from one country to another at short notice. However, **the Feinstein Report reveals a rather different picture of this instability regarding the places of detention.**

According to the report, initially the CIA considered that the best place to carry out the detention and interrogation programme was at US military bases (Finding 11). Indeed, it seems that the CIA attempted on numerous occasions to convince the Department of Defence to allow the relocation of their prisoners into US military custody (including in 2005 – Finding 19). However, the Department of Defence was reluctant to be implicated and refused to cooperate. It even refused CIA requests to provide medical care to detainees (Finding 19). One of the issues which the report reveals is that the Department of Defence appears to have refused to hide CIA prisoners at its bases from the ICRC (Finding 11). **So it appears that the CIA chose to negotiate with other countries to detain its prisoners on their soil as a second-best alternative and expressly to avoid the eye of the ICRC** (Finding 11).

The use of non-US territory was seen as a source of instability for the CIA-led programme. According to the report (Finding 19), the CIA was forced to relocate detainees out of every country in which it had established a detention facility because of pressure from the host government or public revelations about the programme. It would seem **there was a 'cat and mouse' game going on whereby the CIA would make an agreement to detain prisoners in one country only to have international organisations and the press 'spoil' the game and the authorities of the host country would withdraw their authorisation for the CIA presence rather than risk the opprobrium of public revelation of their complicity in torture.**

This nervousness on the part of potential host countries even went so far as to result in the mothballing of two facilities which the CIA had built but was never able to use at all (at great expense, though the actual figure is not revealed) because **the host country**

⁴⁶ See <http://www.newstatesman.com/politics/2015/01/mcbain-begg>.

became increasingly concerned about the potential political fallout (Finding 20). It seems the CIA had to pay millions of dollars in cash to foreign governments to encourage them to host clandestine CIA detention sites. To this end, CIA headquarters apparently encouraged CIA stations to construct 'wish lists' of proposed financial assistance to unnamed entities of foreign governments and to 'think big' in terms of that assistance (Finding 20).

From the perspective of the CIA, **relations with foreign countries regarding the hosting of detention centres were unstable and unreliable**. This was due to the reluctance of the authorities of those countries to withstand (potential) national and international condemnation regarding complicity in the CIA's torture activities. More than once in the report, the ICRC's vigilance in fulfilling its mandate to visit detainees wherever they are held⁴⁷ is referred to as an important risk to the CIA programme. This is particularly the case in respect of the willingness of foreign states to assist. For observers and activists this comes as something of a surprise as the power of the CIA to convince authorities in the potential host countries and to act in accordance with its plan is often accepted as 'obvious'.⁴⁸

The report shows that the CIA programme appeared rapidly to lose support both internationally and nationally and the efforts of some within the CIA to shore up the programme proved increasingly unsuccessful. Yet, the literature seems to suggest that the CIA had immense powers and the only solution to the ill of extraordinary rendition, detention and torture would come from better control by the US government.⁴⁹ While the Feinstein report shows that it lied systematically to Congress, the executive, the media and the public, in fact it was international organisations (and the refusal of cooperation by the US military) which caused instability to its programme. As the report states: "By 2006, press disclosures, the unwillingness of other countries to host existing or new detention sites, and legal and oversight concerns had largely ended the CIA's ability to operate clandestine detention facilities" (Finding 19).

2.2.3. The Isolation of the CIA

The CIA's use of torture isolated it not only from other agencies in the US but also abroad. According to the report, the FBI and the U.S. Department of Defence were among the first to withdraw cooperation with the CIA on this programme (Finding 8). The CIA refused to allow the FBI access to detainees or to share information with other US agencies, which did not help matters. Relations with the State Department appear to have been particularly poor, as the Feinstein Report reveals that the CIA asked local government officials in two countries with detention sites not to mention the fact to the US ambassadors to those countries (Finding 8). In one country, the State Department ordered its ambassador to deliver a *demarche* to the authorities of the country concerned demanding that the country allow full ICRC access to detainees, including, it would seem, those being held at a CIA site in that country (Finding 20). According to the Report, the CIA programme

⁴⁷ See <https://www.icrc.org/en/what-we-do/visiting-detainees>.

⁴⁸ Weissbrodt, D. and Bergquist, A., 2006, "Extraordinary Rendition: A Human Rights Analysis", *Harvard Human Rights Journal* 19: 123.

⁴⁹ L. N. Sadat, 2007, "Extraordinary rendition, torture and other nightmares from the war on terror" *George Washington Law Review* 75: 101; A. Singh, 2013, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition", Open Society Justice Initiative, Open Society Foundations.

created tensions with US partners and allies and both damaged and complicated intelligence relationships (Finding 20). By 2006 the CIA Director acknowledged that, without a decision by the US administration to do something with the detainees, the CIA was “stymied” and “the program could collapse under its own weight” (Finding 19).

2.2.4. The Dynamics of Power

The Feinstein Report also reveals the errors inherent in any narrative which exaggerates the unity of the locus of power. The description of the CIA’s race to find places/countries willing to host its programme, the fear of administrations in third countries that they would be discovered allowing the CIA free rein in their states, the struggles with other (US) agencies, and the CIA’s support being limited to the U.S. Secretary of State show that the ‘exception’ never produced a reconfiguration of the norms. **The allies and states complicit with the CIA have tried as far as possible to ‘pass the buck’ regarding their own responsibility to anyone else available. But they also tried to reduce as much as possible the CIA’s use of them for its rendition programme.**

Therefore, far from being the omnipotent armed guard of the all-pervasive state of exception, the CIA appears to act more like Tilly’s ‘mafia’⁵⁰, always fearful of being found out and punished. Immunity from prosecution for its agents became the obsession of all senior CIA officers. What the Feinstein Report shows is that **we have to think once again about the US state, not as a single actor, but as a realm of interlocking groups with very different views about the hierarchy of threats and risks and, to an even greater degree, about how to counter them.** Only such an approach can allow one to analyse the contradictions among the actors.

The CIA’s need to find complicit states all over the world because they were weak within their own state structures becomes understandable. The fact that the CIA never succeeded in persuading the Pentagon to participate in its programme becomes an important factor. It is clear that, in Europe, the CIA succeeded in gaining support for its narrative of prevention from some actors in the UK who accepted the argument that the CIA needed to have information ‘at whatever cost’. Yet the CIA does not appear to have succeeded in having its UK counterparts provide detention centres for torture.

The UK intelligence agencies seem to have been more uneasy about the CIA’s passage from an espionage to a detention and torture agency. Their advisors seem to have pointed out the risk of court action, including at the European level.

These new pieces of evidence enable us to study **the multiple instances of dispute and resistance** among some individual members of the U.S. Senate, the Judge Advocate General’s Corps of the U.S. Army, some circuit courts inside the US federal system, many US city administrations, and, of course, some actors in civil society, such as librarians, civil rights lawyers and many NGOs. Especially after the creation of the Department of Homeland Security under the Bush administration and influenced by the strong ideological impetus provided by neo-conservatives within the administration, in particular former Secretary of State Donald Rumsfeld and his ‘one per cent doctrine’, the US government and its executive branch were never in a position of absolute domination over other departments. The Justice Department, the State Department and others appear never to have been convinced about

⁵⁰ Tilly, C., 1985, “War Making and State Making as Organized Crime” in “Bringing the State Back”, in Evans, P., Rueschemeyer, D., Skocpol, T., Cambridge University Press.

the need and rationale for launching a war on terror in order to justify attacks on Afghanistan or Iraq. These other actors seem to have proposed other coercive alternatives, less costly in terms of international image and expenditure.

The U.S. Department of Justice, despite its successive neoconservative heads, has tried to keep intact, as far as possible, the boundaries of its responsibility inside the country – to the complete exclusion of the CIA. The FBI obediently followed the political line of the Bush administration. Yet it sought to counterbalance the weight of the CIA and NSA regarding the launch and development of the war on terror. The CIA, on the contrary, adopted wholeheartedly the neoconservative doctrine of a 'global civil' war implying a 'global counterterrorism approach'. For the agency, this was perhaps a chance to take the lead among the many US intelligence agencies with security responsibilities. The CIA is shown in the Report as considering itself the only agency with enough knowledge from sources outside the country to safeguard the US internally against both outside enemies and the potential enemy within.

The CIA Director perhaps saw it as an opportunity to become the right hand of the White House Defence Secretary at a time when the Pentagon and Chiefs of Staff (leaders of the army, navy and air force) were hostile or at least reluctant to place the armed forces into the position of 'remodelling the Middle East' welcomed by those close to the President. The CIA benefited from the clash between Rumsfeld's 'one per cent doctrine', justifying extracting information from every suspect, and the more legalistic approach of the Pentagon's generals, who worried that the strategy undermined the status of prisoner of war and thus threatened potential US prisoners. Some warned enhanced interrogation techniques would damage relations between the US and its allies and tarnish the image of US soldiers.

The CIA's inability to convince other agencies to participate in its programme of extraordinary rendition pushed the agency to 'take risks' in order to re-establish its legitimacy in the intelligence sector, notwithstanding the potential (and actual) trouble this would cause with the justice system. These internal problems, however, obliged the CIA to rely ever more on their connections outside US agencies, especially less legitimate connections (those with previous and present dictatorships) to extract information from their high- value detainees.

2.2.5. The Changing Nature of the Controversy

At least two reports have tried to limit the influence of the Feinstein Report. They have contested its findings by arguing it lacks an understanding of the context of 11 September 2001 and uses a narrow legalistic view. The first is the "Minority Views of Vice Chairman Chambliss Joined by Senators Burr, Risch, Coats, Rubio, and Coburn", ⁵¹ and the second is the "Overview of CIA-Congress Interactions Concerning the Agency's Rendition-Detention-Interrogation Program", ⁵² which reiterated the position of CIA officials of June 2013.

⁵¹ U.S. Senate Select Committee on Intelligence, 2014, "Minority Views of Vice Chairman Chambliss Joined by Senators Burr, Risch, Coats, Rubio, and Coburn," Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 159 pp.

⁵² CIA, 2014, "Overview of CIA-Congress Interactions Concerning the Agency's Rendition-Detention-Interrogation Program", 43 pp. One can also add CIA, 2014, "June 2013 Response to the SSCI Study on the Former Detention and Interrogation Program", 136 pp.

When reading these contributions it becomes clear that the emphasis is no longer so much on the tenuous distinction between 'enhanced interrogation techniques' and torture, or denying the malpractices of CIA agents as such. They have instead tried to convince their audience that the Feinstein Report constitutes de facto a recognition of the inherent difficulties of their jobs and of the need to use secret violent actions against state enemies in a context characterised by a 'global civil war'. That notwithstanding, **these narratives claim that the Feinstein Report is unfair because it is ideologically conditioned by the Democrats and that this majority report avoids fully addressing the question of the legitimacy of the role of the secret services in the struggle against terrorism.**

Tactically, CIA supporters also avoided the legal debate over the immunity of CIA personnel as soon as they received assurances that it was not one of the possible outcomes of the Report. They therefore tried with some success to temper the implications of the Report. **The strategy of the Report's opponents has been to consider that its authors "took things out of context" and made false accusations, thus devaluing the facts they "discovered" based on their ignorance of the broader situation leading to decisions in bureaucracies.**⁵³

The tentative shift to discredit the findings of the Report can be traced to **the attempt to replace a discussion focused on torture with another one, more general in nature, about the need for secret services in combatting violence in the world.** It has been argued that the Report ignores the post 9/11 context and thus why it became 'reasonable' to consider tough, possibly illiberal responses to terrorist violence and (real or perceived) threats, trumping democratic values in the name of security. Such arguments have sought to downplay the question of torture, immunity and human rights as secondary to the primary question of security.

Interestingly, Democrats and some NGOs that valued the Feinstein Report have fought back against this shift. However, such a 'fight-back' also seems to have been a way to 'forget' the immediate consequences of the Report for some members of the Obama administration and the European governments engaged in the fight against terrorism, leading them to downplay as much as possible the Feinstein Report and all the possible legal consequences of the complicity of their own secret services in the CIA extra-territorial operations of "clandestine state violence".⁵⁴

Far from recognising its importance and the fact that the Feinstein Report was itself a follow-up to the previous inquiries of the Council of Europe and the European Parliament, **EU governments have often relied on the opponents' arguments** in insisting that, while torture cannot be justified, the idea of a 'permanent state of exception' related to jihadist terrorism has to be accepted as a coherent framing of the last 15 years, and that anyone who refuses this 'evidence' is playing the fool.

Given that, for once, a committee with its own reason to conduct a rigorous investigation into its country's own secret service was ready to describe the latter's practices with a rare level of detail,⁵⁵ one would have expected international relations and political science

⁵³ www.reuters.com/article/2014/12/11/us-usa-cia-torture-idUSKBN0JM24I20141211.

⁵⁴ E.-P. Guittet, 2014, "Review of Donatella Della Porta (2013) *Clandestine Political Violence*, Cambridge: Cambridge University Press", *Critical Studies on Terrorism*.

⁵⁵ The CIA spied on the Senate Intelligence committee itself and on Dianne Feinstein herself to establish what the committee did and did not know, as well as to get their stories straight before the committee (Cf. Guittet).

specialists to be among the first to contribute to the analysis of the Report's significance and details. Surprisingly, this has not been the case at all. On the contrary, **the few scholarly articles have preferred to downplay the knowledge produced by the Report**, providing as a pretext that specialists knew already and were wise enough not to discuss these elements in public, as they may damage national security.

The publication of the Feinstein report led to a storm of media controversy, which was accompanied by widespread silence among concerned European governments regarding their complicity in serious human rights violations and the use of an unlawful security apparatus.⁵⁶

Key questions at the heart of this controversy have not only concerned the safeguarding of human rights recognised as *ius cogens* and the refusal of national security or state secrets exemptions, but have also concerned the changing relationship between liberal democracies, the rule of law and fundamental rights. In particular, is the immunity of government representatives and intelligence services agents possible in a democracy? Is the 'reason of state' and 'national security' as interpreted by a given government at a specific time,⁵⁷ or allegiance to political leaders, sufficient to exonerate persons who have been complicit in these forms of torture and other serious human rights violations?

While **the Feinstein Report** has not addressed directly these sensitive issues, its unequivocal conclusions send **a strong message that something needs to be done to restore justice and that a democracy cannot use torture or other related unlawful practices**. The Report reveals that torture is most of the time 'ineffective' in terms of finding any truth, and it entails huge political costs for any democracy, as other democracies and even different security actors within the same state tend to distance themselves from these practices.

The Feinstein Report has obliged those who are still defending the use of 'enhanced interrogation techniques' by the secret security services **to shift their arguments from the necessity of using torture to the necessity of 'state secrets' and the classification of information as 'closed evidence'**, allowing secret service communities to perform their activities in a manner in keeping with 'exceptional or emergency times' and to evade responsibility in cases of wrongdoing. This change of narrative ultimately downgrades, and to a certain extent prevents, **an open and detailed discussion of the importance of the Report's main findings and their legal consequences for the actors involved**.

The Study argues that despite the various limitations characterising the Feinstein Report, it constitutes a key tool for critically studying (both sociologically and historically) the strategies used to water down its findings and conclusions, as well as the struggles over how the security apparatus in liberal democracies works in practice. The Feinstein Report provides us with a clear picture of many otherwise invisible practices that shape the most fundamental assumptions of what it means for someone to be treated as a human being in a democratic society. The information it reveals is most valuable when describing the

⁵⁶ A. Leber, 2014, "A Resounding Silence: Regional Reactions to the Senate's Report on U.S. Use of Torture", available at www.brookings.edu/blogs/markaz/posts/2014/12/29-middle-east-reaction-torture-report.

⁵⁷ For a study on the notions of national security and 'reason of state', refer to European Parliament, 2014, Study on "National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges".

contested and unstable relationship of the CIA with all the other security agencies inside the US and with allies of the CIA's activities abroad. The details of these practices and the struggles which occurred between the relevant security services illustrate the limits of many academic contributions on these matters.

3. STATE OF PLAY ON NATIONAL INQUIRIES AND INVESTIGATIONS: A SCOREBOARD OF LATEST DEVELOPMENTS

KEY FINDINGS

- The national political inquiries and judicial investigations in the five Member States under assessment present a rather heterogeneous picture as regards the degree of effective accountability for alleged complicity with the CIA.
- In all five Member States, political inquiries have taken place, though their actual nature and scope has greatly differed.
- Most of the governments and relevant parliamentary bodies have by and large denied any involvement in the CIA rendition and detention programme (except Lithuania).
- Judicial investigations are/have been conducted in the five Member States and all but the UK have been or still are subject to proceedings before the ECtHR. In all five states, criminal investigations are being or have been conducted and face different challenges in terms of effectiveness, independence and impartiality.
- The responses provided by the European institutions (in particular the European Commission and the Council) concerning the Member States' complicity in the CIA operations have been mixed.

This section offers an update on Member States' domestic inquiries and judicial investigations into human rights violations resulting from complicity in the CIA-led extraordinary rendition and secret detention programme. It provides a scoreboard of the latest developments with direct relevance when assessing the degree and scope of accountability in the EU; builds on the analysis included in the previous 2012 Parliament Study⁵⁸ on the state of play of the inquiries conducted in Member States; and aims **to take stock of the new information that has emerged since then and highlight the most relevant developments in the five Member States under examination: Italy, Lithuania, Poland, Romania and the UK.** The analysis needs to be read in conjunction with Annexes 1 and 2, which give a detailed account of relevant domestic information.

Graph 4 below illustrates the inquiries and investigations. The resulting picture is one of **important divergences with regard to effective accountability across the Union depending on the Member State.** As will be illustrated below, a majority of political inquiries have been finalised at this stage, while some other domestic efforts to achieve accountability are still ongoing.

The results of the state of play exercise, summarised in an updated "Scoreboard of Inquiries and Investigations" in Figure 1 below, following Graph 4, can be grouped into political inquiries (Section 3.1) and judicial investigations (Section 3.2). The Study differentiates

⁵⁸ Carrera, S., E. Guild, J. Soares da Silva and A. Wiesbrock, 2012, "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", DG IPOL, European Parliament, Brussels.

between two types of 'political' inquiries: democratic, which are those conducted by parliaments or relevant parliamentary committees; and executive, which are driven by governmental bodies, ministries or agencies, and which therefore can be positioned more at a distance from effective accountability. The category for Ombudsmen inquiries has been removed since there are no ongoing initiatives of the kind. Furthermore, responses by the European institutions are also covered in Section 3.3.

Graph 4: State of Play in National and Supranational Inquiries

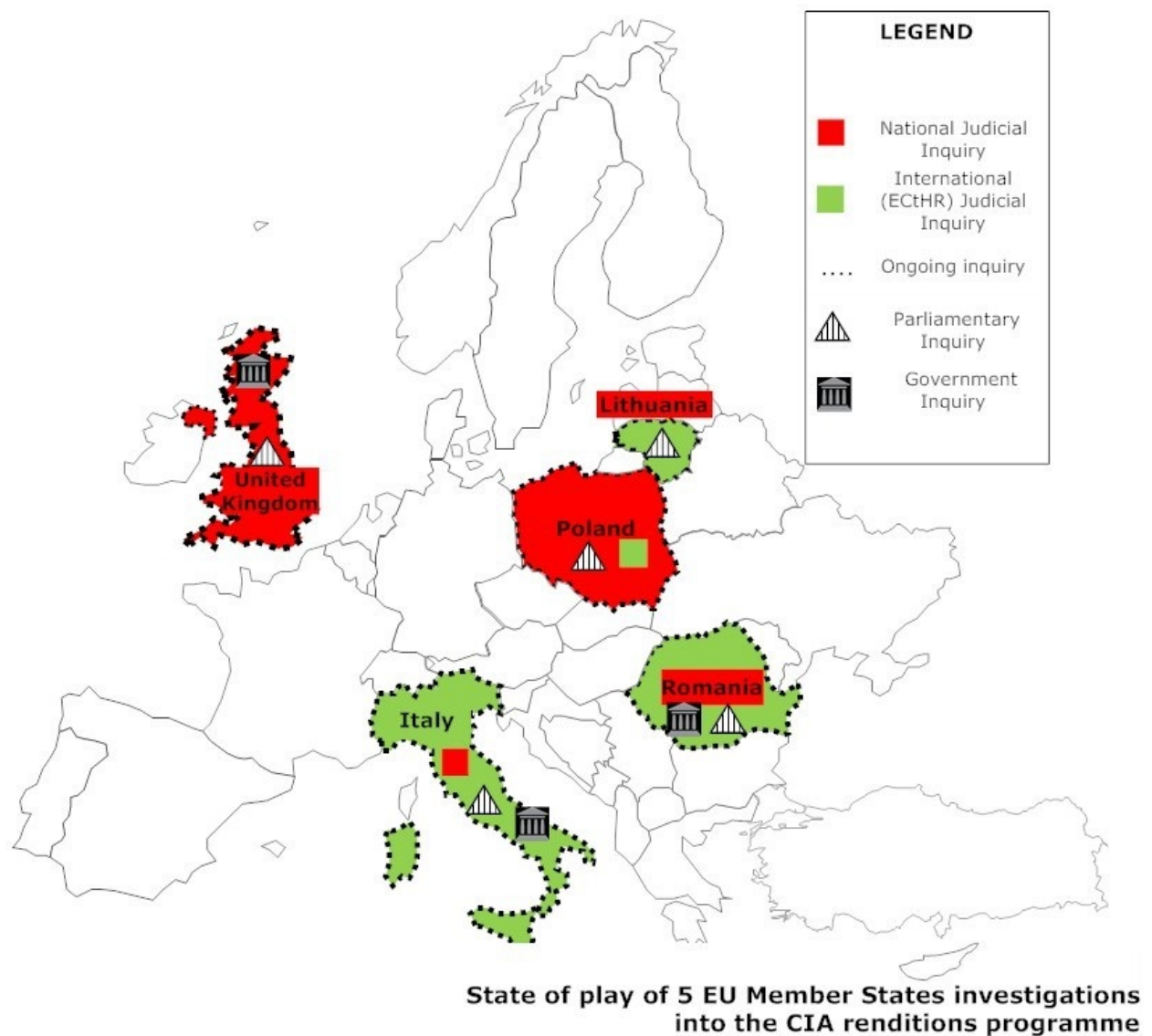


Figure 1 : Scoreboard of Inquiries and Investigations

	POLITICAL INQUIRIES			JUDICIAL INQUIRIES		REPARATION AND REMEDIES	VICTIM STATUS
	Parliamentary		Executive	National	ECtHR		
	Committee	Others					
Poland	X			X	X	X	X
UK	X	X	X	X		X	
Italy		X	X	X	X	X	
Lithuania	X			X	X		
Romania	X			X	X		

* Grey symbolises closed investigations, inquiries or remedies offered, while white stands for ongoing investigations.

3.1. Political (Democratic/Executive) Inquiries⁵⁹

Political inquiries have been conducted in the five selected Member States. The actual nature and scope of each inquiry diverged significantly from country to country. In two (the UK and Italy⁶⁰) of the five states, both governmental and parliamentary authorities have conducted investigations.

In the **UK**, as shown in Annexes 1 and 2, an All-Party Parliamentary Group on Extraordinary Rendition (APPG) was created in 2005. This cross-party group is actively contributing to the debate regarding the UK's involvement in the rendition programme. The committee in charge of the democratic control of intelligence services within the UK Parliament, the Intelligence and Security Committee (ISC), was also involved in the investigations and in 2007 it released a study⁶¹ that examined Britain's possible collusion in the extraordinary rendition programme. The results have been inconclusive according to the APPG.⁶² The

⁵⁹ See Annexes 1 and 2 for detailed information concerning the state of affairs regarding political inquiries in each country. See also Figure 1 ("Scoreboard of Inquiries and Investigations").

⁶⁰ Letter sent by the Romanian Prime Minister's Office to the European Parliament, 10 January 2006, available at www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf.

⁶¹ ISC Report, 2007, available at [www.therenditionproject.org.uk/pdf/PDF%2094%20\[UK%20ISC,%20Jul%202007.%20Rendition\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2094%20[UK%20ISC,%20Jul%202007.%20Rendition].pdf).

⁶² Sir Andrew Tyrie, founder of the APPG, in a public statement following the release of the Feinstein Report, available at www.extraordinaryrendition.org/document-library/finish/26/391.html.

Gibson/Detainee Inquiry, launched at the executive level by the British Prime Minister, was closed soon after its establishment due to allegations regarding its lack of independence.⁶³

In **Italy**⁶⁴ parliamentary inquiries were conducted in 2005 by the Senate and Chamber regarding the kidnapping of Abu Omar, the conduct of CIA agents and the position of the Italian government.⁶⁵ The Parliamentary Committee for Intelligence and Security Services and for State Secrecy conducted an internal investigation with the cooperation of the directors of SISMI and SISDE (Italian security services), the General Secretariat of the *Comitato Esecutivo per i Servizi di Informazione e Sicurezza* (CESIS, Executive Committee for the Intelligence and Security Services) and the Undersecretary of State responsible for the coordination of intelligence services.⁶⁶ The Italian government was also involved in the investigations, which are now closed.

In the case of **Romania**, the Parliamentary Senate Committee inquiry was established in 2005 with the mandate to investigate the claims of the 2006 Dick Marty Report on rendition flights and black sites. The Committee established was called the "Senate Committee of Inquiry to investigate the allegations regarding the use of Romanian territory for CIA detention facilities or flights by CIA-chartered aircraft" and was led⁶⁷ by Member of the Parliament Norica Nicolai and co-chaired by George Cristian Maior, who was head of the Romanian Intelligence Service from October 2006 to January 2015.⁶⁸ The composition of the parliamentary inquiry team was in this way very closely connected to the secret services, hampering the impartiality of the investigation. The Romanian government's 2007 secret inquiry also concluded that the accusations were groundless, while the Senate report remains classified.⁶⁹ In the case of Romania, more evidence was presented in a 2011 investigation by German media about a secret prison in Bucharest. The Romanian president at the time the renditions occurred, Ion Iliescu, first denied any knowledge of the subject.⁷⁰ Later, in 2015, he confirmed its existence, after former Head of the Secret Services, Ioan Talpes, admitted during testimony the presence of a secret rendition site in Bucharest. The detention site was operated in the basement of the government's National Registry Office for Classified Information in north-west Bucharest.⁷¹

⁶³ See www.amnesty.org.uk/detainee-inquiry?gclid=COnU8LeZpscCFTGWtAodwQULiQ#.VcygL_mgrp4.

⁶⁴ European Parliament, Questionnaire, National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at www.statewatch.org/rendition/rendition.html; European Parliament, Questionnaire, National Parliaments' activities on alleged CIA activities in European countries – Italy (Senate), available at www.statewatch.org/rendition/rendition.html.

⁶⁵ Ibid.

⁶⁶ Ibid., Italy (Chamber only).

⁶⁷ See http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.

⁶⁸ See <http://stirileprotv.ro/stiri/actualitate/george-maior-si-a-dat-demisia-din-functia-de-sef-al-sri.html>.

⁶⁹ Amnesty International, 2011, "Romania must come clean over secret prisons", 9 December, available at <https://www.amnesty.org/en/latest/news/2011/12/romania-must-come-clean-over-secret-prisons/> Amnesty International, 2015, "Romania Country Report", available at <https://www.amnesty.org/en/countries/europe-and-central-asia/romania/>.

⁷⁰ A. Goldman and M. Apuzzo, 2011, "AP Exclusive: Inside Romania's Secret CIA Prison," Associated Press, 8 December, <http://news.yahoo.com/ap-exclusive-inside-romanas-secret-cia-prison-050239912.html>.

⁷¹ Ibid.

The governments of UK, Romania⁷² and Italy⁷³ were also involved in the investigations, making the process less independent and transparent.

In **Lithuania** the investigations were more conclusive. In 2009 the Committee on National Security and Defence conducted a parliamentary inquiry.⁷⁴ The Committee released its findings the same year, recognising the existence of two black sites managed with the help of the Lithuanian Security Services (SSD).⁷⁵ The report was followed up by the Prosecutor General's Office, which began an official investigation into the complicity of the SSD.⁷⁶ In April 2012, Members of the European Parliament visited Lithuania to investigate the situation.⁷⁷ One of the Lithuanian detention centres, in a former riding school outside Vilnius, had been purchased by a mysterious company, Elite LLC, registered in Washington, D.C., and Panama and operated via power of attorney given to an individual named Wouter Scklauskas. It was alleged that the US embassy in Vilnius had purchased the company⁷⁸.

In **Poland** a parliamentary inquiry conducted by the Committee for Special Services (*Komisja do Spraw Służb Specjanych*) took place in November and December 2005. All allegations regarding the state's collusion in the CIA renditions were dismissed. The above-mentioned Marty Reports repeatedly state that the Polish authorities did not comply with their obligation to conduct an effective investigation.

Surprisingly, all of these political inquiries have been dismissed – in Italy, Lithuania,⁷⁹ Romania, Poland and the UK – without finding the governments of the Member States guilty of anything or involved in any way. All the governments and parliaments **denied any involvement or participation in the rendition and detention programme** – with the exception of Lithuania (e.g. see how the Romanian Prime Minister reacted to the claims⁸⁰). Following these inquiries some public authorities have been found guilty: CIA agents (Italy); intelligence services (Poland, the UK, Italy and Lithuania); military officials (Italy); former politicians (Poland) and private parties (Elite LLC).

⁷² Amnesty International, 2011, op. cit.

⁷³ Hopper, J., 2009, "Judges deal blow to CIA 'kidnap' trial", *The Guardian*, 12 March, available at <http://www.theguardian.com/world/2009/mar/12/cia-kidnaps-terrorism-suspect-trial/print>.

⁷⁴ C. Whitlock, 2009, "Lithuania investigates possible CIA black site", *The Washington Post*, 19 November, available at www.washingtonpost.com/wp-dyn/content/article/2009/11/18/AR2009111803994.html.

⁷⁵ Amnesty International, 2011, "Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes", 25 January, pp. 4-5.

⁷⁶ Ibid.

⁷⁷ Liberal Democrat Members of the European Parliament, 2012, "Ludford: Rendition inquiries in Lithuania positive but incomplete", 27 April, available at <http://libdemmps.com/?p=600>. See also 15min.lt, 2012, "After visit to Lithuania, EP delegates say there are unanswered questions about alleged CIA prison", 27 April, 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.

⁷⁸ I. Cobain, 2011, "Lithuania faces legal action over prisons set up for CIA rendition programme", *The Guardian*, 27 October, available at www.guardian.co.uk/world/2011/oct/27/lithuania-cia-rendition-prisons-european-court.

⁷⁹ Whitlock, op. cit.

⁸⁰ Letter sent by the Romanian Prime Minister's Office to the European Parliament, op. cit.

3.2. Judicial Investigations⁸¹

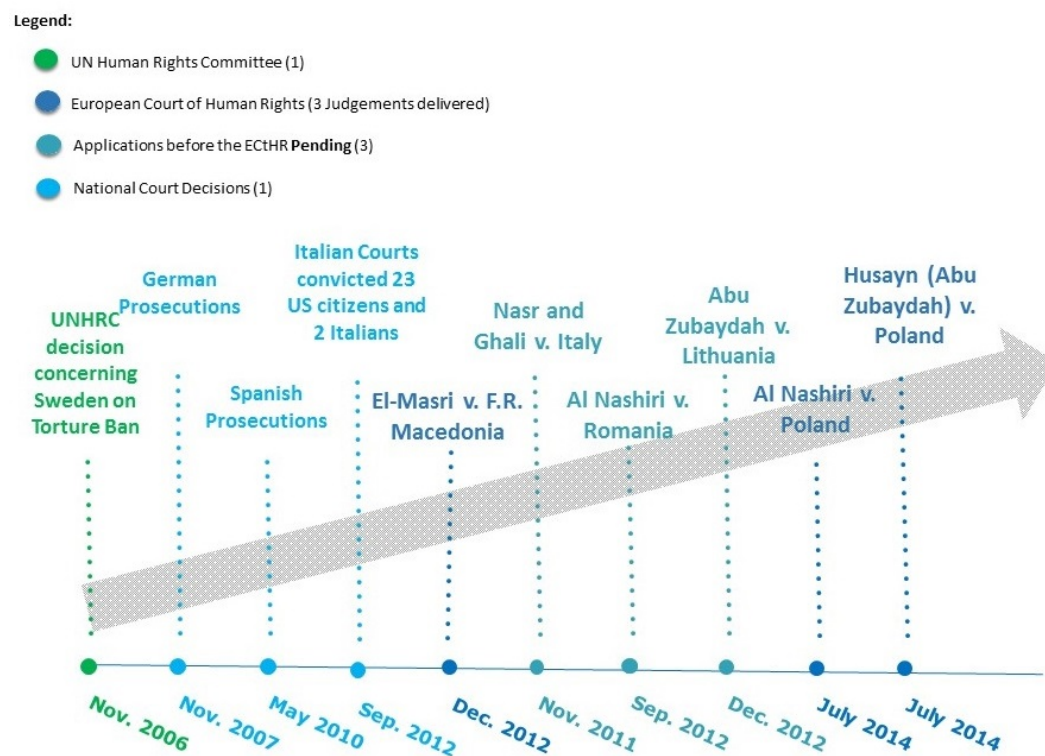
Since the analysis prepared in 2012, the situation of judicial investigations at national and international (ECtHR) levels has evolved considerably.

First, judicial inquiries have been/are being conducted at national level, and in four out of the five states, there have also been proceedings before the European Court of Human Rights (ECtHR) (Section 3.2.1).

Second, national judicial inquiries have been conducted in Poland, the UK, Italy and Lithuania. Meanwhile, in all five states, criminal investigations have been or are being conducted. Two investigations have been carried out by the Prosecutor General's Office (Lithuania and Italy). Civil claims have been filed in Romania⁸² and the UK. Poland launched an investigation but no effective progress has been made since its launch in 2008 (Section 3.2.2 below).

Graph 5 below presents a timeline of the proceedings before the ECtHR on European countries' complicity in the CIA's extraordinary rendition and secret detention programme, taking into account previous decisions upheld by the United Nations Human Rights Committee or national courts.

Graph 5: Chronology of Supranational Legal and Judicial Investigations



⁸¹ See Annexes 1 and 2 for detailed information concerning the state of affairs regarding judicial inquiries in each country. See also Figure 1 on "Scoreboard of Inquiries and Investigations".

⁸² Ibid.

3.2.1. ECtHR Cases

A total of six applications have been logged before the ECtHR in Strasbourg: two against Poland (Al Nashiri and Abu Zubaydah), one against Italy (Abu Omar), one against Macedonia (El-Masri), one against Lithuania (Abu Zubaydah) and one against Romania (Al Nashiri). Three rulings have been made at the time of writing this study. The claims against the Member States involved alleged violations of Articles 2, 3, 5, 6 § 1, 8 and 13 of the European Convention of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 6 to the Convention. The facts of the cases and the Court's main decisions can be summarised as follows:

- ***El-Masri v. Macedonia***:⁸³ In 2009 the Open Society Justice Initiative represented the German citizen Khaled El-Masri before the ECtHR in a case against the Former Yugoslav Republic of Macedonia concerning his kidnapping and rendition in Macedonia and Afghanistan. According to the proceedings of the case, the victim left Germany on 31 December 2003 and headed to Skopje, Macedonia, for a holiday. At the Serbian/Macedonian border crossing, at Tabanovce, he was stopped and questioned about possible ties with Islamic organisations. When the interrogation finished, he was taken to the Skopski Merak Hotel in Skopje where he was interrogated repeatedly and kept incommunicado, without access to a lawyer or judge and without being accused of anything. He was denied the request to contact the German embassy. On 23 January 2004 he was put in a car and taken to Skopje Airport and flown to Afghanistan where he was detained and tortured for four months before his release and return to Germany. The Macedonian state denied any involvement in the capture, detention and rendition of El-Masri. The ECtHR ruled in favour of El-Masri and found Macedonia responsible for multiple violations, such as: Article 3 (prohibition of torture), Article 5 (prohibition against arbitrary detention), failure to investigate (Articles 2, 3 and 5), Article 13 (right to an effective remedy) and the right to truth and compensation.
- ***Al Nashiri v. Poland***:⁸⁴ In October 2002 Abd al-Rahim Al Nashiri, a Saudi national and suspect in the terrorist attacks on both the US Navy destroyer USS Cole in the port of Aden, Yemen, and the French oil tanker MV Limburg in the Gulf of Aden, was captured in Dubai, United Arab Emirates, transferred to a secret CIA prison in Afghanistan, which was known as the "Salt Pit", and then to another black site prison in Bangkok, Thailand, where he was detained, interrogated and tortured. In December 2002 he was transferred to the Polish site of Stare Kiejkuty with the authorisation of the Polish authorities. In 2003 Al Nashiri was transferred out of Poland with the cooperation of the national authorities. The Polish authorities were accused of knowingly allowing Al Nashiri's rendition to Polish territory, of aiding and enabling the CIA agents to detain and torture him, and of allowing his transfer from Poland despite the real risk of his being tortured or tried before a military court and sentenced to death. The case is assessed in detail in Section 4 below. Suffice here to say that the ECtHR found Poland guilty on various counts, such as: a violation of

⁸³ Applications to European Court of Human Rights: *El-Masri v. Macedonia*, Application No. 39630/09, 18 September 2009, 2012 final judgement released in 2012 available at [http://hudoc.echr.coe.int/eng?i=001-115621#{"itemid":\["001-115621"\]}](http://hudoc.echr.coe.int/eng?i=001-115621#{).

⁸⁴ ECtHR, *Al Nashiri v. Poland*, Application lodged on 6 May 2011 and sentenced in 2014. See [http://hudoc.echr.coe.int/eng?i=001-146044#{"itemid":\["001-146044"\]}](http://hudoc.echr.coe.int/eng?i=001-146044#{).

Article 3 (prohibition of torture and inhuman or degrading treatment), in both its substantive and procedural aspects; a violation of Article 5 (right to liberty and security); a violation of Article 8 (right to respect for private and family life); a violation of Article 13 (right to an effective remedy); and a violation of Article 6 § 1 (right to a fair trial).

- ***Abu Zubaydah v. Poland***:⁸⁵ On 23 March 2013 the UK-based Interights Centre submitted a complaint before the ECtHR on behalf of Zayn al-Abidin Muhammad Husayn, known more widely as Abu Zubaydah, a stateless Palestinian born in Saudi Arabia, on account of his being rendered and tortured by the CIA with the help of the Polish authorities. According to the 2007 ICRC report on 14 high-value detainees, he was considered one of the most valuable terrorist suspects. He was captured in Faisalabad, Pakistan, on 28 March 2002 and rendered until September 2006, when he was transferred to the US detention facility in Guantanamo Bay, Cuba, where he still is today. He has never been charged with a crime, neither in proceedings before a military commission nor in a civilian court. The allegations against Poland state that the victim, between December 2002 and 22 September 2003, was transferred to the black site of Stare Kiejkuty, where he was subjected to enhanced interrogation techniques. As will be studied in more detail in Section 4 below, the ECtHR ruled in favour of Abu Zubaydah and found Poland in violation of: Article 3 (prohibition of torture and inhuman or degrading treatment); Article 5 (right to liberty and security); Article 8 (right to respect for private and family life); Article 13 (right to an effective remedy); and Article 6 § 1 (right to a fair trial).
- ***Abu Zubaydah v. Lithuania (pending)***:⁸⁶ In 2011 the UK-based Interights Centre submitted a complaint before the ECtHR against Lithuania on behalf of Abu Zubaydah. According to the allegations, the plaintiff was subjected to unlawful detention, torture and ill treatment at a secret detention facility in Lithuania, the deprivation of his right to private and family life, his unlawful transfer from Lithuania to an unknown detention centre where he was subjected to further violations and the ongoing denial of his right to any legal recourse. In February 2005, Abu Zubaydah was rendered to Lithuania where he was held in a secret detention facility near the capital, Vilnius. Abu Zubaydah was later transferred from Lithuanian territory to an unknown detention centre, from which he was then transferred to Guantanamo Bay, where he is currently detained.
- ***Al Nashiri v. Romania (pending)***:⁸⁷ The applicant, Al Nashiri, won a previous case against Poland before the ECtHR (see above). In the application against Romania, Al Nashiri claims to have been the victim of rendition to, and detention at, a secret black site in Romania provided by the state to CIA authorities. The claims allege that the Romanian state knowingly allowed the CIA to use a government building for rendition and detention and that the state was aware of the inhuman and degrading treatment that occurred during detention at the site. According to the applicant,

⁸⁵ *Abu Zubaydah v. Poland*, logged in March 2013 and judged on the 24 July 2014, available at [http://hudoc.echr.coe.int/eng?i=001-146047#{"itemid":\["001-146047"\]}](http://hudoc.echr.coe.int/eng?i=001-146047#{).

⁸⁶ *Abu Zubaydah v. Lithuania*, logged 28 October 2011, available at [http://hudoc.echr.coe.int/eng?i=001-115816#{"itemid":\["001-115816"\]}](http://hudoc.echr.coe.int/eng?i=001-115816#{).

⁸⁷ ECtHR, *Al Nashiri v. Romania*, logged in 2012 available at [http://hudoc.echr.coe.int/fre?i=002-7210#{"itemid":\["002-7210"\]}](http://hudoc.echr.coe.int/fre?i=002-7210#{).

Romania enabled the American authorities to transfer him to another location where there was an evident risk of being rendered again and where he could have faced the death penalty. The claims against Romania are violations of: Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 § 1 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression) and 13 (right to an effective remedy), and under Protocol No. 6 (abolition of the death penalty).

- ***Nash and Ghali v. Italy (pending)***:⁸⁸ In 2003 Egyptian imam Osama Mustafa Hassn Nasr, better known as Abu Omar, was abducted by CIA agents, allegedly with the cooperation of Italian nationals, transferred to Egypt and kept in secret detention and tortured over the next few months. The claims brought against Italy allege the following violations: abduction with the participation of the Italian authorities, ill treatment, impunity on grounds of state secrecy, and the failure to enforce the sentences passed on the convicted US nationals owing to the refusal of the Italian authorities to request their extradition. The claims fall under Articles 3 (prohibition of inhuman and degrading treatment), 5 (right to liberty and security), 6 § 1 (right to a fair trial), 8 (right to respect for private and family life in connection to his wife – Nabila Ghali) and 13 (right to an effective remedy). On 23 June 2015 the Court held the last hearing of the case and it entered the deliberation phase. A ruling is expected in the next few months.

3.2.2. National Judicial Investigations

The situation is even more complex regarding domestic judicial investigations in the Member States. Figure 2 provides an account of the remedies and reparations granted to the injured individuals. Since 2005, when the first allegations of **Romania** hosting a secret CIA black site were made public, very little has been done at national level in terms of effectively investigating the acts and prosecuting the responsible parties. Criminal proceedings have been initiated at national level and before the ECtHR on behalf of Abd al-Rahim Al Nashiri, who was secretly detained in the 'Bright Light' rendition site between 2004 and 2006. The Romanian investigations have not moved forward in any way,⁸⁹ according to APADOR-CH, the third party which brought the case before the Romanian authorities as part of the Open Society Justice Initiative. In 2015, Ion Iliescu, the Romanian President at the time of the renditions in Bucharest, and his then Head of Intelligence Services Ioan Talpes, recognised that Romania hosted CIA secret prisons on its territory but that it did so without knowing about the rendition programme taking place there. In the Amnesty International Report "Breaking the Conspiracy of Silence", whose authors claimed to have cracked the colour-coding system of the Feinstein Report's redacted executive summary, there is reference to Romania as being the "DETENTION SITE BLACK" (which Amnesty abbreviates to "DSBK").⁹⁰ The U.S. Senate Intelligence Committee Feinstein Report refers (on page 79)

⁸⁸ ECtHR, *Nasr and Ghali v. Italy*, Application no. 44883/09, logged in 2009 available at [http://hudoc.echr.coe.int/eng?i=001-113123#{"itemid":\["001-113123"\]}](http://hudoc.echr.coe.int/eng?i=001-113123#{).

⁸⁹ See http://apador.org/publicatii/raport_cia.pdf.

⁹⁰ See Amnesty International, 2015, op. cit., p. 14.

to the sums of money offered by the CIA authorities to the Romanian authorities in exchange for their support.⁹¹

In **Poland**, national judicial proceedings, launched in March 2008, have stalled, with yet no effective judicial investigation or prosecution taking place. However, the two claimants, Abd al-Rahim Al Nashiri and Abu Zubaydah, have received victim status. As explained in the ECtHR rulings, during the criminal proceedings the prosecutor was replaced and the case transferred from Warsaw's prosecutor's office to Krakow's, causing delays in the investigations. The Amnesty International 2015 Report⁹² refers to the comments provided by Adam Bodnar, Vice President of the Helsinki Foundation for Human Rights in Warsaw, that these changes in location and personnel are not coincidental but rather reflect the strategy of the Polish state to prolong the proceedings as much as possible.⁹³ Moreover, the ECtHR judgments in the cases of *Al Nashiri* and *Abu Zubaydah* refer to Polish prosecutors making several requests for Mutual Legal Assistance (MLA) to the US in an effort to seek more evidence on the CIA rendition programme in Poland. The requests went unanswered⁹⁴ since the US invoked state secrecy. This allowed the Polish authorities to delay the investigations even longer, while waiting for more evidence to turn up. However, as the ECtHR states in the previous cases against Poland mentioned above, the amount of existing evidence is, beyond reasonable doubt, sufficient to conduct an effective investigation. Testimonies such as those of former President Aleksander Kwasniewski and former Prime Minister Leszek Miller are reinforcing this⁹⁵.

In the **UK** some criminal investigations⁹⁶ are ongoing while others have been settled out of court.⁹⁷ Operation Hinton was Scotland Yard's criminal investigation into an MI5 agent accused of aiding and abetting the mistreatment of Binyam Mohamed al-Habashi (an Ethiopian national and British resident) during his interrogation and detention in Pakistan. The British government paid £1 million compensation in an out-of-court settlement.⁹⁸ In Operation Iden, a police investigation into the actions of the MI6 officer who interrogated suspects at the US-run prison at Bagram, Afghanistan,⁹⁹ no prosecution took place due to lack of evidence. Civil lawsuits have been launched by rendition programme victims (Binyam Mohamed, Bisher al-Rawi, Jamil el-Banna, Richard Belmar, Omar Deghayes, Moazzam Begg and Martin Mubanga) against the British authorities and most of them have settled out of court. Two cases remain open:

⁹¹ Ibid. "[D]etainees were first transferred to the DSBK in the fall of 2003; the CIA offered the authorities in that country millions of dollars to show their appreciation for their support, including an additional unsolicited subsidy in the million/s of dollars."

⁹² Amnesty International, 2015, op. cit., p. 10.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Al Jazeera, 2015, "Romania President admits allowing CIA site", 27 April, available at www.aljazeera.com/news/2015/04/romania-president-admits-allowing-cia-site-150427140351035.html.

⁹⁶ See Cobain, op. cit.

⁹⁷ See press release available at www.aljazeera.com/news/middleeast/2012/12/20121213144316327160.html.

⁹⁸ SSCI Study, pp. 238-239. In the SSCI Study, Binyam Mohamed's name is spelled Binyam Mohammad.

⁹⁹ See Cobain, op. cit.

- o Case of Yunus Rahmatullah (Pakistani national): captured by UK forces in Iraq in 2004, handed over to US forces and held at Bagram Airbase. In November 2014 the British High Court allowed the case against the UK government to proceed.¹⁰⁰
- o Operation Lydd (Libyan dissidents Abdul Hakim Belhaj and Sami al-Saadi): criminal investigation into two secret rendition operations mounted by MI6 in 2004 in cooperation with Muammar Gaddafi's intelligence service; the Appeal Court in London allowed the case to go to trial, overruling the state secrets doctrine.¹⁰¹

In **Lithuania**, as detailed in Annex 2 of this Study, the criminal proceedings started in January 2010 and were stopped by the General Prosecutor's office in 2011 for reasons of 'state secrecy'.¹⁰² In December 2014 the Vilnius Regional Court ruled that Mustafa al-Hawsawi had the right to an effective investigation despite the General Prosecutor's office having refused to investigate the case¹⁰³ in the first place, calling the evidence "groundless". The same 2015 Amnesty International Report¹⁰⁴ that deciphered the colour codes of the Feinstein Report concludes that Lithuania hosted the "DETENTION SITE VIOLET" (DSV). The Feinstein Report refers to the DSV and alleged sums of money passed by the CIA to local authorities.¹⁰⁵

In **Italy**, the national judicial investigation concerns the disappearance and extraordinary rendition of Osama Mustafa Hassan Nasr, alias Abu Omar. In February 2003 the Milan public prosecutor's office started to investigate the disappearance of Nasr. After significant efforts to conduct an effective investigation, such as tapping telephones, interviews and an Italian Military Intelligence Service inquiry, the authorities confirmed the actions leading to the abduction and rendition of Abu Omar. In 2009 the ruling in the case led to the conviction of 22 CIA officials, one US military official and two Italian agents.¹⁰⁶ The two Italian intelligence agents were sentenced to three years in prison for impeding the investigations. Investigations concerning five other members of the Italian Military Service (including former Head Pollari and Deputy Head Mancini) plus two others were abandoned due to claims of state secrecy. In total Italian prosecutors had charged the 22 American officials and seven members of the Italian military intelligence agency. The Italian court awarded €1 million in compensation to Nasr¹⁰⁷ and €500,000 to his wife Nabila Ghali, but these sums were never paid. With regard to the enforcement of the decision, it is important to mention that no effort was made to make the CIA agents involved accountable for their acts.

In 2009 the Milan Court decided to prosecute five Italian officials: Pollari, Mancini, Di Troia, Di Gregori and Ciorra. In 2012 the Court of Cassation rejected the decision of the Milan Court, invoking state secrets, and ordered a halt to the proceedings. On 12 February 2013

¹⁰⁰ See www.reprive.org.uk/case-study/yunus-rahmatullah/.

¹⁰¹ See www.amnesty.org/en/latest/news/2014/10/uk-notorious-rendition-torture-case-allowed-go-trial/.

¹⁰² Amnesty International, 2011, "Unlock the Truth in Lithuania: Investigate Secret Prisons Now", p. 5, available at www.amnesty.org/en/library/info/EUR53/002/2011/en.

¹⁰³ See www.amnesty.org/en/latest/news/2014/01/lithuania-court-decision-cia-detention/.

¹⁰⁴ Amnesty International, 2015, op. cit.

¹⁰⁵ Ibid., p. 17: "The CIA offered officials in the country that housed DSV an undisclosed number of millions of dollars to 'show appreciation' for support of 'the program' and developed 'complex mechanisms' for the delivery of money" (p. 99 of Feinstein Report).

¹⁰⁶ See www.statewatch.org/analyses/no-254-abu-omar-yasha.pdf.

¹⁰⁷ J. Hooper, 2009, "Italian court finds CIA agents guilty of kidnapping terrorism suspect", *The Guardian*, 4 November, available at <http://www.theguardian.com/world/2009/nov/04/cia-guilty-rendition-abu-omar>.

the Milan Court of Appeal convicted Pollari (and sentenced him to 10 years), Mancini (nine years), Di Troia, Di Gregori and Ciorra (six years). On 13 February 2013 the Constitutional Court annulled these sentences (see Annex 2 for more details). The 2014 European Parliament Study on National Security and States secrets¹⁰⁸ deals extensively with the Italian Abu Omar case and how the 'state secrets doctrine' was applied, reaching the conclusion that the Italian legal system does not allow the use of secret evidence and thus does not permit intervening in the investigations.

One striking finding of the Feinstein Report, which is of great relevance to this Study, is that the CIA had to pay millions of dollars in cash to foreign governments for their 'support' of its operations. The 2015 Amnesty Report authors, by decoding the redactions of the Feinstein executive summary, found that it makes two specific references to alleged bribes paid by CIA officials to Lithuanian¹⁰⁹ and Romanian¹¹⁰ officials in exchange for their cooperation. Moreover, information appeared in the press revealed that the Polish authorities were instructed by superiors to allow CIA rendition flight on the Szymany airport "at any cost"¹¹¹. In the face of such claims some questions arise: Where did the money come from and where did it go precisely? How was it possible for CIA officials to transfer money without being discovered? What institutions should monitor this kind of transaction?

Figure 2 : Reparation and Remedies

EU MEMBER STATE	VICTIM	REPARATIONS AND REMEDIES
POLAND	Abd al-Rahim Al Nashiri (Saudi Arabian national)	Following ECtHR ruling, financial compensation of €100,000 applied; granted victim status
	Abu Zubaydah (stateless Palestinian born in Saudi Arabia)	Following ECtHR ruling, financial compensation of €130,000 applied; granted victim status

¹⁰⁸ European Parliament, 2014, "National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges", Study, Italy country fiche, p. 112.

¹⁰⁹ See footnote 126 above.

¹¹⁰ Idem.

¹¹¹ Delgado, M., 2014, "'CIA paid me to use airstrip as rendition zone... and to look the other way': Former airport director reveals secret Polish staging post for U.S. torture programme", *Daily Mail*, 13 December, available at <http://www.dailymail.co.uk/news/article-2873010/CIA-paid-use-airstrip-rendition-zone-look-way-Former-airport-director-reveals-secret-Polish-staging-post-U-S-torture-programme.html>.

	Walid bin Attash (Yemeni national)	Granted injured person status
	Mustafa al-Hawsawi (Saudi Arabian national)	Seeking injured person status, rejected twice
UK	16 people, including Bisher al-Rawi, Jamil el-Banna and Binyam Mohamed	Friendly settlement with UK government
	Abdul-Hakim Belhaj and wife Fatima Boudchar	Offered to settle the case for the sum of £3 million and the recognition of the acts committed ¹¹²
ITALY	Abu Omar (Egyptian national with political refugee status in Italy)	€1 million compensation; ECtHR application
	Abu Omar's wife	€500,000 compensation
LITHUANIA	Abu Zubaydah	ECtHR application
ROMANIA	Abd al-Rahim Al Nashiri	ECtHR application

3.3. Responses by the European Institutions

The European institution which has taken its role most seriously when scrutinising allegations of Member States' cooperation with the CIA has been the European Parliament. The Parliament has repeatedly condemned the human rights violations resulting from the CIA rendition and secret detention programme and the passivity of relevant Member States. It has demanded effective national investigations and inquiries to ascertain the truth and to hold legally responsible those collaborated directly or indirectly with the CIA.¹¹³

The setting up in 2006 of a **special Parliament Committee (Temporary Committee on the Alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, TDIP)**, with then MEP Claudio Fava as rapporteur, and the publication of its final report in 2007 constituted key milestones in establishing democratic

¹¹² Barret, D., 2014, 'Libyan Rebel leader Abdul Hakim Belhaj wins latest stage in rendition payout bid', 30 October, *The telegraph*, available at <http://www.telegraph.co.uk/news/uknews/law-and-order/11197431/Libyan-rebel-leader-Abdul-Hakim-Belhaj-wins-latest-stage-in-rendition-payout-bid.html>

¹¹³ European Parliament, 2013, Press Release, op. cit.

accountability for Member States' actions. A key finding was the lack of cooperation by some Member States in the investigations conducted by the TDIP Committee, and a serious lack of concrete answers. The 2007 Fava Report also underlined that "the behaviour of Member States, in particular the Council and its Presidencies, has fallen far below the standard that Parliament is entitled to expect".¹¹⁴ The Parliament also denounced the Council's granting the US government request to keep information requested by Parliament confidential, and pointed out that these shortcomings implicated all Member State governments.¹¹⁵

The Fava Report called on the Parliament to follow up politically on the proceedings and requests, to closely monitor any important developments, and, "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".

During its seventh legislature the Parliament answered this 'follow-up' call with a 2012 report on the alleged transportation and illegal detention of prisoners in EU countries by the CIA. The 'Flautre Report', as it is known, was the work of rapporteur MEP Hélène Flautre, with MEP Sarah Ludford as the rapporteur for opinion in the Foreign Affairs Committee. The previously cited study conducted by CEPS fed into the background work of this report and was quoted in the Parliament Resolution adopted in 2012.¹¹⁶

The adoption of the Flautre Report marked a decisive political step forward in terms of democratic scrutiny. It dedicated a section to the "Response of the EU Institutions" that called on the EU to officially condemn "all abusive practices in the fight against terrorism"¹¹⁷ and highlighted a number of recommendations to each European institution.

Regarding its findings, the Flautre Report recognised **the few initiatives by the European Commission in response to previous Parliament Resolutions.** It acknowledged that the European Commission had issued several statements "on the need for the Member States concerned to conduct investigations into allegations of involvement in the CIA rendition and secret detention programme". The report also referred to the Commission's sending of four letters to Poland, four to Romania and two to Lithuania between 2007 and

¹¹⁴ European Parliament, 2007, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 30 October. Paragraph 13. The Report also deplored in paragraph 22 "the failure by the Council and its Presidency to comply with their obligations to keep Parliament fully informed of the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) and of work carried out in the field of police and judicial cooperation in criminal matters pursuant to Articles 21 and 30 of the Treaty on the European Union".

¹¹⁵ See Paragraphs 23-26 of the 2007 Fava Report.

¹¹⁶ Refer to Carrera et al., op. cit.

¹¹⁷ Paragraph 21.

2010.¹¹⁸ It, however, regretted that these initiatives had not been part of a wider agenda and strategy “to ensure accountability for human rights violations committed in the context of the CIA programme and the necessary redress and compensation for victims”.¹¹⁹

The Parliament put forward the following specific **requests to the Commission**:

1. Examine the extent to which Member States’ complicity has implied a breach of ‘EU obligations’ in the scope of asylum and judicial cooperation in criminal matters.¹²⁰ This recommendation needs to be read in the context of the 2007 Parliament Report that called on the Commission to conduct an evaluation of all anti-terrorist legislation (including both formal and informal arrangements between Member States and third-country intelligence services) from a human rights perspective and to present relevant proposals “to avoid any repetition of the matters”.¹²¹
2. Facilitate and support the national accountability processes and any investigations.¹²²
3. Adopt “within a year” a framework for monitoring and supporting national accountability processes, including adopting common EU guidelines on human rights-compliant inquiries, which would be based on the standards developed by the Council of Europe and the United Nations.¹²³
4. Adopt “measures aimed at strengthening the EU's capacity to prevent and redress human rights violations at EU level and to provide for the strengthening of Parliament’s role”.¹²⁴
5. Propose measures establishing permanent cooperation and information exchange between the Parliament and relevant parliamentary committees responsible for the oversight of intelligence communities of Member States.
6. Present proposals for developing common arrangements for ensuring democratic accountability for ‘cross-border intelligence activities’ in the context of EU counterterrorism policies. This recommendation corresponds to the request issued in the above-mentioned 2007 Parliament Report in which the Parliament called for the establishment of a “system for the democratic monitoring and control over the joint and coordinated intelligence activities at EU level”, and called for the Parliament to play an important role.¹²⁵

¹¹⁸ See for instance one of the letters sent to the Romanian government published by Statewatch at www.statewatch.org/cia/documents/romania-letter-PM-10-01-06.pdf. As stated in the previous CEPS study: “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 led to this conclusion’”. See page 41 of the study.

¹¹⁹ Paragraph 31.

¹²⁰ Paragraph 32.

¹²¹ Refer to paragraph 193 of the 2007 Parliament Report.

¹²² Paragraph 33 states that the Parliament “[c]alls on the Commission to facilitate and support human-rights-compliant mutual legal assistance and judicial cooperation between investigating authorities and cooperation between lawyers involved in accountability work in Member States, and in particular to ensure that important information is exchanged and to promote the effective use of all available EU instruments and resources”.

¹²³ Paragraph 34 of the Parliament Report.

¹²⁴ Paragraph 35.

¹²⁵ See paragraph 206 of the 2007 Parliament Report.

The Flautre Report also advanced a set of **specific actions for the Council**.¹²⁶

1. Issue a declaration acknowledging Member States' complicity in the CIA programme and referring to the "difficulties encountered" by Member States in their national investigations.¹²⁷
2. Apologise for having violated the principle of sincere and loyal cooperation enshrined in the EU Treaties "when it incorrectly attempted to persuade Parliament to provide deliberately shortened versions of the minutes of the meetings of COJUR (the Council Working Group on Public International Law) and COTRA (the Council Working Party on Transatlantic Relations) with senior North American officials; expects apologies from the Council".
3. Include the item of national accountability and inquiries on the agendas of JHA Council meetings "sharing all information, providing assistance to inquiries and, in particular, acceding to requests for access to documents".¹²⁸ This request relates to the recommendation issued in the 2007 Parliament Report which called on the Council to put pressure on all the relevant governments "to give full and thorough information to the Council and the Commission, and where necessary to start hearings and commission an independent investigation without delay".¹²⁹
4. Hold a meeting with relevant EU home affairs agencies such as the European Union's Law Enforcement Agency (Europol) and the European Union's Judicial Cooperation Unit (Eurojust), as well as the EU Counter-Terrorism Coordinator, to clarify their knowledge of the existence and running of the programmes.
5. Propose safeguards on human rights compliance in cross-border intelligence-sharing and cooperation "and a strict delimitation of roles between intelligence and law-enforcement activities so that intelligence agencies are not permitted to assume powers of arrest and detention", and report to the Parliament within a year on these points.¹³⁰
6. Encourage Member States to share 'best practices' on parliamentary and judicial supervision of their intelligence services.

The Flautre Report called on the European Ombudsman "to investigate the failures of the Commission, the Council and the EU security agencies, notably Europol and Eurojust, to respect fundamental rights and the principles of good administration and loyal cooperation in their response to the TDIP recommendations". It also instructed the LIBE Committee, together with the Human Rights Sub-Committee, to continue assessing the extent to which the Parliament's recommendations had been properly followed up and called on all the other

¹²⁶ The Flautre Report stated that "whereas the Council admitted on 15 September 2006 that 'the existence of secret detention facilities where detained persons are kept in a legal vacuum is not in conformity with international humanitarian law and international criminal law', but has so far failed to recognise and condemn the involvement of Member States in the CIA programme, even though the use of European airspace and territory by the CIA has been acknowledged by the political and judicial authorities of Member States".

¹²⁷ Paragraph 23.

¹²⁸ Paragraph 24.

¹²⁹ Paragraph 228 of the 2007 Parliament Report.

¹³⁰ Paragraph 26.

relevant institutional actors to keep the Parliament informed of any relevant developments.¹³¹

The Parliament followed up the Flautre Report with a 2013 Resolution which concluded that “there have been no substantive replies from the Council or the Commission to Parliament’s recommendations”.¹³² The Parliament reiterated the above-mentioned recommendations to both the Commission and the Council, and called for new EU measures to ensure the rule of law and accountability for fundamental rights violations, “especially by intelligence services and law enforcement authorities”. The Parliament also called for its powers to conduct effective inquiries (for investigating fundamental rights violations) to be reinforced, which should “include full power to hear under oath the people involved, including government ministers”. Resolution paragraph 24 called on the new Parliament (eighth legislature) “to continue to fulfil and implement the mandate given by the Temporary Committee and consequently to ensure that its recommendations are followed up, to examine new elements that may emerge and to make full use of, and develop, its rights of inquiry”.

Following the Flautre Report the Commission sent additional letters in 2013 to all Member States (in addition to those previously sent to Poland, Lithuania and Romania), requesting information on the state of their national investigations of alleged complicity in the CIA programme. The scope and relevance of these letters are assessed in Section 6 below. The 2013 Resolution acknowledged the non-country specific letters sent in March 2013 to all the Member States, “to which only a few Member States (Finland, Hungary, Spain and Lithuania) replied”. That notwithstanding, the Parliament was “deeply disappointed” by the Commission’s refusal to reply to the substance of the Flautre Report. It also deemed the letters insufficient “on account of their generic nature”.¹³³

It is important to note that, in a letter from the former European Ombudsman (Nikiforos Diamandouros) to the Finnish authorities dated 15 February 2013, it was stated that the European Ombudsman had not begun any inquiry in response to the 2012 Resolution “because the detailed criticisms of the EU institutions...seem primarily to concern failures to cooperate with that Committee’s investigations [which] is a matter for Parliament itself to

¹³¹ Paragraph 56 states that Parliament “[i]s determined to continue fulfilling the mandate given to it by the Temporary Committee, pursuant to Articles 2, 6 and 7 TEU; instructs its Committee on Civil Liberties, Justice and Home Affairs, together with the Subcommittee on Human Rights, to address Parliament in plenary on the matter a year after the adoption of this resolution; considers it essential now to assess the extent to which the recommendations adopted by Parliament have been followed and, where they have not been followed, to analyse why this is the case”. It also called on all the relevant institutions and actors addressed or covered in the Report to keep the Parliament informed of any relevant developments.

¹³² See Recital E of the 2013 European Parliament Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA. Paragraph 1 of that resolution stated that Parliament “[d]eeply deplores the failure to implement the recommendations contained in its aforementioned resolution of 11 September 2012, notably by the Council, the Commission, the governments of the Member States, the candidate states and the associated countries, NATO, and the United States authorities, especially in the light of the serious fundamental rights violations suffered by the victims of the CIA programmes”.

¹³³ Paragraph 10. The Parliament also referred to “the letters sent by the rapporteur to the Romanian, Polish and Lithuanian prosecutors and the Romanian, Polish and Lithuanian heads of state in November 2012 highlighting the country-specific recommendations made in Parliament’s resolution, to which none of the Member States concerned has replied” and to “Oral Questions 0079/2013 and 0080/2013 raised by its Committee on Civil Liberties, Justice and Home Affairs and its Committee on Foreign Affairs”.

deal with politically”.¹³⁴ The letter highlighted that an inquiry by the European Ombudsman, “who has no enforcement powers”, would serve no added value or purpose.

There has been no specific further action by the Council or any subsequent EU Presidency in answer to the Parliament’s recommendations. In a 17 December 2014 Plenary debate on the Feinstein Report,¹³⁵ the Council representative (representing the Italian presidency, which held office in the second half of 2014) stated generally that these techniques run counter to EU values and are not helpful in combatting terrorism and that they should not be used again. **The Council representative also stressed that the activities and cooperation of intelligence services remain under national competence, and that inquiries on the ‘alleged involvement’ of Member States in the CIA programme are equally under the exclusive competence of Member States and not the EU.**

On the same occasion, the Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, stressed during his speech before the Plenary that the EU condemns all forms of torture and ill treatment in “all circumstances” and that any efforts in the fight against terrorism have to conform to European values and comply with rule of law as well as international human rights, refugee and humanitarian law. He emphasised that all concerned Member States should conduct independent, impartial and in-depth investigations to establish the facts and responsibilities and provide remedies to the victims. Avramopoulos added that this had been stated in the set of letters sent by the Commission to all Member States in 2013. **The Commissioner confirmed that “the EU will keep on monitoring the situation”, yet did not add further details as to how it would do so.**

Parliament representatives stressed during this Plenary debate the central importance of accountability and the importance of preventing impunity in a democracy. The Parliament also expressed concerns about the input by the Council representative before the Plenary. One MEP even stressed that the Council had said nothing about its role and there had been no statement by the Council. As a follow-up to this discussion, a Parliament Resolution on the U.S. Senate Report was adopted on 11 February 2015.¹³⁶ It requested the **LIBE Committee to resume its inquiry into alleged transportation and illegal detention of prisoners in European countries by the CIA and report back to the Plenary within a year.**

The Resolution stipulated that “the report by the US Senate Select Committee on Intelligence reveals new facts that reinforce allegations that a number of Member States, their authorities and officials and agents of their security and intelligence services were complicit in the CIA’s secret detention and extraordinary rendition programme, sometimes through corrupt means based on substantial amounts of money provided by the CIA in exchange for their cooperation”. On this basis, and among the various follow-up measures

¹³⁴ See www.ombudsman.europa.eu/register/2013/OUT2013-001257/OUT2013-001257_M0.pdf; refer also to www.oikeusasiamies.fi/Resource.phx/pubman/templates/5.htx?id=1046.

¹³⁵ Available at www.europarl.europa.eu/ep-live/en/plenary/video?debate=1418825069831&streamingLanguage=en.

¹³⁶ Retrieval from www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0031+0+DOC+XML+V0//EN.

which were envisaged,¹³⁷ it called on Parliament to gather “all relevant information and evidence on possible bribes or other acts of corruption linked to the CIA”.

¹³⁷ The Resolution called on Parliament to: first, follow up on the recommendations made in its above-mentioned Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA (“follow-up of the European Parliament TDIP Committee Report”); second, facilitate and support human rights-compliant mutual legal assistance and judicial cooperation between investigating authorities and cooperation between lawyers involved in accountability work in Member States; third, organise a hearing involving national parliaments and practitioners to take stock of all past and ongoing parliamentary and judicial inquiries; fourth, organise a Parliamentary fact-finding mission involving all interested political groups to the Member States where CIA secret detention sites allegedly existed; and finally, gather all relevant information and evidence on possible bribes or other acts of corruption linked to the CIA programme. See Points 10 and 11.

4. SUPRANATIONAL JUDICIAL ACCOUNTABILITY AND EXTRAORDINARY RENDITION: AN APPRAISAL OF THE *AL NASHIRI* AND *ABU ZUBAYDAH* CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

KEY FINDINGS

- The relevance of the ECtHR landmark judgments in the the *Al Nashiri* and *Abu Zubaydah* cases against Poland in July 2014 is central to the debate on accountability and the rule of law.
- The Court found Poland in violation of various human rights laid down in the Convention, chiefly the prohibition against torture and inhuman and degrading treatment and lack of effective remedies to the victims (Articles 3 and 13 ECHR).
- The two rulings concerning Poland's complicity in the CIA programme are also important because they show the lack of compliance by the Polish government with the obligation laid down in Article 38 ECHR to cooperate fully with an investigation conducted by the Court.
- In these cases the ECtHR further developed the rule of law standards necessary to ensure "effective official investigations" into alleged serious human rights violations.

The European Court of Human Rights (ECtHR) delivered in July 2014 two landmark judgments against Poland for its alleged complicity in the CIA secret detention and extraordinary rendition programme, in the *Al Nashiri* and *Abu Zubaydah* cases.¹³⁸ The ECtHR examined them simultaneously due to their intrinsic factual and practical linkages. Both applicants alleged that Poland had helped the CIA to detain them secretly in its territory as part of the 'high-value detainee' (HVD) programme, and to subsequently transfer them to Guantanamo Bay. By doing so Poland had allowed the CIA to subject them to serious human rights violations which included torture, incommunicado detention as well as deprivation of any access to their families. They also submitted that Poland had failed to conduct an effective investigation into their allegations.

The ECtHR found that Poland was responsible for these human rights violations due to its complicity in the CIA-led extraordinary rendition programme.¹³⁹ It concluded that despite the lack of direct knowledge, there were numerous public sources alluding to the actual risks of ill treatment and abuse of suspects of terrorism by the CIA. The Strasbourg Court concluded that in both cases Poland knew of the scope and purposes of the CIA's activities, and ought to have known that by helping the CIA to transfer and

¹³⁸ See footnote 106 above. The judgments became final the 16 February 2015 after the ECtHR Grand Chamber rejected the Polish government appeal. See <https://www.thebureauinvestigates.com/2015/02/17/polands-complicity-in-cia-torture-programme-confirmed-as-european-court-rejects-warsaws-appeal/>

¹³⁹ See ECtHR definition of "extraordinary renditions" as "extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" in Case *El-Masri v. Macedonia*, Application No. 39630/09 of 13 December 2012.

detain these suspects they would be directly exposed to treatments which are in direct contravention to ECHR.¹⁴⁰

The Court found Poland in violation of Articles 2 and 3 ECHR.¹⁴¹ It called on the Polish government to seek to remove the risk of the death penalty faced by *Al Nashiri* in the US as soon as possible, "by seeking assurances from the USA authorities that he will not be subjected to the death penalty".¹⁴² Reportedly, Poland did so by sending an official note to US authorities in March 2015.¹⁴³ In the *Al Nashiri* case, the Court held that Poland had to pay the applicant an award of €100,000. In the case of *Abu Zubaydah*, the Court awarded the applicant €130,000.¹⁴⁴ A Polish government representative declared to the press: "This is very sad news and a shameful event for Poland. It not only means financial costs for Poland, but also a very significant blow to its image".¹⁴⁵

This section provides a critical appraisal of the main implications stemming from these two judgments.

4.1. Poland's Compliance with Article 38 ECHR

A first common feature in both cases is that the ECtHR found **a lack of compliance by the Polish government with the obligation laid down in Article 38 ECHR**.¹⁴⁶ This provision requires any state party to furnish the ECtHR with all the necessary facilities and information/documentary evidence for a proper and effective examination of a pending case¹⁴⁷. **Such an obligation is particularly central in cases entailing far-reaching and serious human rights obligations** enshrined in the Convention, and allegations concerning the lack of effective and independent investigations (Articles 3 and 13 ECHR).¹⁴⁸

¹⁴⁰ Refer to § 441 *Al Nashiri* Case and § 511 *Abu Zubaydah* Case. The Court concluded, "[T]here were good reasons to believe that a person in US custody under the HVD Programme could be exposed to a serious risk of treatment contrary to those principles". See § 441 *Al Nashiri* Case. For a discussion see www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/#comments.

¹⁴¹ In combination with Article 1 of Protocol No. 6 to the Convention.

¹⁴² § 589 *Al Nashiri* Case.

¹⁴³ Refer to <http://uk.reuters.com/article/2015/03/31/uk-usa-cia-torture-poland-idUKKBN0MR1RJ20150331>.

¹⁴⁴ § 571 *Abu Zubaydah* Case.

¹⁴⁵ G. Steinhäuser and J. Bravin, 2014, "European Court Assails Poland over Role in CIA 'Black Sites'", *The Wall Street Journal*, 24 July, available at www.wsj.com/articles/eu-court-rules-against-poland-in-cia-rendition-case-1406193988.

¹⁴⁶ Article 38 ECHR states, "The Court shall examine the case together with the representatives of the parties and if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities".

¹⁴⁷ In § 400 of the *Al Nashiri* judgment the Court states that "...the difficulties involved in gathering and producing evidence in the present case caused by the restrictions on the applicant's communication with the outside world and the extreme secrecy surrounding the US rendition operations have been compounded by the Polish Government's failure to cooperate with the Court in its examination of the case. In consequence, the Court's establishment of the facts is to a great extent based on circumstantial evidence, including a large amount of evidence obtained through the international inquiries, considerably redacted documents released by the CIA, other public sources and evidence from the experts and the witness". The relevant paragraphs where the Court assesses the facts and evidence related to the *Al Nashiri* case are 401-439.

¹⁴⁸ The Court underlined in § 362 of the *Al Nashiri* judgment that: "The obligation laid down in Article 38 is a corollary of the undertaking not to hinder the effective exercise of the right of individual application under Article 34 of the Convention. The effective exercise of this right may be thwarted by a Contracting Party's failure to assist the Court in conducting an examination of all circumstances relating to the case...Both provisions work together to

The judgments are comprehensive and exemplary in terms of providing evidence on the Polish government's failure to comply with the evidential requests issued on several occasions by the Strasbourg Court.¹⁴⁹ As laid down in the judgments, **the Polish government attempted to justify its lack of cooperation in its internal (and still pending after more than six years) criminal investigations** into the Al Nashiri and Abu Zubaydah allegations¹⁵⁰ **on the grounds of the national investigation's secrecy and need to maintain confidentiality**. In addition to these domestic legal impediments, the Polish government argued that the ECtHR Rules of Procedure do not provide for any special procedure or sufficient safeguards for handling 'classified documents' submitted by state parties, or the exact ways in which these documents will be used so as to guarantee confidentiality.¹⁵¹

The ECtHR did not accept the Polish government views on this matter and held Poland in violation of Article 38 ECHR.¹⁵² It underlined that it was mindful of the sensitivity and particular circumstances of the case, and that the information requested of Poland "was liable to be of a sensitive nature or might give rise to national-security concerns".¹⁵³ In light of these considerations, the Court had given the government an explicit guarantee of confidentiality, and emphasised that "the Convention institutions have established sound practice in handling cases involving various highly sensitive matters, including national-security related issues".¹⁵⁴ Furthermore, it held that the government's plea on **the secrecy of the investigation could not be accepted as a reason for not complying with the Court's evidential request**.¹⁵⁵ It also underlined that Poland's conduct during relevant international inquiries demonstrated denial and a lack of cooperation characterised by a "marked reluctance" to disclose information on the CIA rendition activities in the country.¹⁵⁶

4.2. Rule of Law Standards for an Effective Investigation

When examining the ECHR violations by the Polish government the ECtHR used **a set of rule of law standards for determining the 'effectiveness' of national investigations**

guarantee the efficient conduct of the judicial proceedings and they relate to matters of procedure rather than to the merits of the applicants' grievances under the substantive provisions of the Convention or its Protocols". See a replica in § 354 of the *Abu Zubaydah* judgment.

¹⁴⁹ This took place between July 2012 and on 20 March and 25 April 2014 respectively in each of the cases. During this time the current President of the European Council Donald Tusk was Prime Minister of Poland. It was for this reason that the ECtHR also asked all the relevant parties in the proceedings to comment on the governments' compliance with this obligation. Refer to § 17-40 of the *Al Nashiri* Case.

¹⁵⁰ § 346 of the *Al Nashiri* Case. A similar paragraph appears in § 340 of the *Abu Zubaydah* case.

¹⁵¹ § 348 of *Al Nashiri* case; § 342 of the *Abu Zubaydah* case.

¹⁵² Refer to § 374 and 376 of the *Al Nashiri* Case. Moreover, the Polish government did not affirm or deny any of the facts submitted by Al Nashiri and Abu Zubaydah, nor did it contest the admissibility, accuracy or credibility of the testimonies. Refer to § 377-378 of the *Al Nashiri* case. The ECtHR stated, "It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for. In addition, any material requested must be produced promptly and, in any event, within the time-limit fixed by the Court, for a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing." See § 364 of the *Al Nashiri* judgment.

¹⁵³ § 367 *Al Nashiri* case.

¹⁵⁴ § 371 *Al Nashiri* case.

¹⁵⁵ § 373 in *Al Nashiri* case.

¹⁵⁶ §433 *Al Nashiri* case.

developed previously in various cases.¹⁵⁷ These standards were also followed closely in the previous ECtHR judgment in the *El-Masri* case of 13 December 2012 against Macedonia, a country which was held responsible for its complicity in the CIA secret rendition programme.¹⁵⁸ These standards are fundamental when determining whether a state party has complied with its legal commitments under the Convention. They can be summarised as follows:

1. In cases where an individual alleges violations of Article 3 ECHR (absolute prohibition to subject someone to torture or inhuman/degrading treatment or punishment), which according to the Court enshrines one of the most fundamental values of democratic societies,¹⁵⁹ there should be an "effective official investigation".¹⁶⁰ The investigation should enable the identification and potential punishment of those held responsible for the human rights violations (Article 13 ECHR).¹⁶¹
2. The investigation should be "prompt and thorough". This means that the authorities should take all reasonable steps available and "must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions".¹⁶² Such an obligation needs to be read in combination with the interpretation given to Article 13 ECHR which requires "a rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3".¹⁶³
3. The investigation should be "independent" from the executive. It should not include any hierarchical or institutional link or any practical/informal connections.¹⁶⁴ In the above-mentioned *El-Masri* case against Macedonia, the ECtHR held that the rejection by the relevant public prosecutor of the case for lack of evidence fell short of what would have been expected from an independent authority. It concluded that the public prosecutor had ruled on the sole basis of papers submitted by the Macedonian

¹⁵⁷ E. Guild (ed.), 2009, *War or Crime? National Legal Challenges in Europe to the War in Iraq*, Nijmegen: Wolf Legal Publishers.

¹⁵⁸ Case of *El-Masri v. Macedonia*, op. cit., § 3. In this case the applicant alleged Macedonia to be complicit with the CIA, namely that agents from this country "had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months".

¹⁵⁹ The Court stated in § 507 of the *Al Nashiri* case that: "Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in time of war or other public emergency threatening the life of the nation. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned".

¹⁶⁰ § 485 *Al Nashiri* Case, and § 479 *Abu Zubaydah* case. See also *El-Masri*, §182.

¹⁶¹ Article 13 ECHR stipulates: "Everyone whose rights and freedoms are set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

¹⁶² § 486 *Al Nashiri* case and § 480 *Abu Zubaydah* case. See also *El-Masri*, §183.

¹⁶³ § 549 *Al Nashiri* case, and § *Abu Zubaydah* case.

¹⁶⁴ § 486 *Al Nashiri* case and § 480 *Abu Zubaydah* case. See *El-Masri*, §184.

Ministry of Interior and did not consider going beyond these assertions by undertaking any other investigations.¹⁶⁵

4. The victim should be granted the possibility to participate in the investigation “in one form or another”.¹⁶⁶
5. In cases related to national-security issues or a government’s reliance on ‘state secrets’ and ‘confidentiality’, the investigating authorities should not have complete discretion in refusing the disclosure of the information or evidence to the victim and the public.¹⁶⁷ The ECtHR held that

“even if there is a strong public interest in maintaining the secrecy of sources of information or material, *in particular in cases involving the fight against terrorism*, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests”¹⁶⁸ [emphasis added].

The Court made also reference to the ‘right to the truth’ not only of the victims in the case at hand, but also other victims facing similar realities as well as the public at large. In the words of the Court, intense public scrutiny of the investigations and their results is essential in securing accountability, which in turn “is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts”.¹⁶⁹ The ECtHR highlighted that a key challenge in these cases related to improper democratic accountability of intelligence services, which called for appropriate safeguards (in law and practice) against intelligence services violating ECHR rights, “notably [in] the pursuit of their covert operations”.¹⁷⁰

6. The Court restated its “clear, constant and unequivocal position” in respect of the admission of torture evidence in judicial proceedings. This constitutes a flagrant violation of international standards on the right to a fair trial and the rights of the defence. It was held that

No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric

¹⁶⁵ § 188 and 189 of *El-Masri* judgment. The Court stated: “The complexity of the case, the seriousness of the alleged violations and the available material required independent and adequate responses on the part of the prosecuting authorities”.

¹⁶⁶ *Ibid.*, *El-Masri* § 185.

¹⁶⁷ § 494 *Al Nashiri* case, and § 488 *Abu Zubaydah* case.

¹⁶⁸ *Ibid.* See also § 529 *Al Nashiri* case, which states: “Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have carte blanche under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention’s supervisory institutions, whenever they consider that there has been a terrorist offence”.

¹⁶⁹ § 495 *Al Nashiri* case, and § 530 *Abu Zubaydah* case. See also *El-Masri*, § 192, where the ECtHR quoted the Council of Europe Guidelines of 30 March 2011 on eradicating impunity for serious human rights violations; see also § 105 of the same judgment.

¹⁷⁰ The Court stated: “The circumstances of the instant case may raise concerns as to whether the Polish legal order fulfils this requirement”. See § 498 *Al Nashiri* Case, and the replica in § 492 *Abu Zubaydah* Case.

practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; *it substitutes force for the rule of law and taints the reputation of any court that admits it*. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself. The prohibition of the use of torture is fundamental¹⁷¹ [emphasis added].

In light of the above, the ECtHR concluded in both the *Al Nashiri* and *Abu Zubaydah* cases that the Polish authorities failed to comply with these standards and that the investigations were inadequate and ineffective.¹⁷² This corresponded with the views and concerns expressed by international organisations that carried out independent investigations/inquires, and which alluded to the non-cooperative attitude of the Polish government as well as the national investigations' lack of transparency, obscurity of the exact investigative scope/coverage, and the lengthy delays, secrecy and negative implications for the rights of the defence.¹⁷³ Moreover, the Court held that:

"...this failure to inquire on the part of the Polish authorities, notwithstanding the abundance of publicly accessible information of widespread ill-treatment of al'Qaeda detainees in US custody emerging already in 2002-2003, could be explained in only one conceivable way. As shown by the sequence of the subsequent events, the nature of the CIA activities on Polish territory and Poland's complicity in those activities were to remain a secret shared exclusively by the intelligence services of the two cooperating countries."¹⁷⁴

¹⁷¹ § 564 *Al Nashiri* case, and the replica can be found in § 554 in *Abu Zubaydah* Case.

¹⁷² Also in § 492 *Al Nashiri* case, the Court held that: "Poland's denial of any complicity in the CIA operations and failure to cooperate at international level cannot be seen in isolation from an officially undeclared but, for all practical purposes, perceptible lack of will to investigate at domestic level the allegations that they were denying. The authorities decided not to carry out any further domestic inquiry from November-December 2005 until March 2008. This resulted in the opening of any proper investigation being delayed by nearly two and a half years. Having regard to the exceptional gravity and plausibility of the allegations, encompassing crimes of torture and undisclosed detention, such delay must be considered inordinate. As pointed out by the applicant, it inevitably undermined the Polish prosecution authority's ability to secure and obtain evidence and, in consequence, to establish the relevant facts". On the parliamentary inquiry and criminal investigation in Poland as regards *El-Masri*, see § 128-140 and 550 of the *El-Masri* judgment. Related information in the case of *Abu Zubaydah* is provided in § 122-166 of the judgment.

¹⁷³ In § 490 *Al Nashiri* case, the Court states: "Nor did the inquiries instituted by the Council of Europe and the European Parliament prompt the Polish State to probe into those widely disseminated assertions of human rights violations. Indeed, the only response of the Polish authorities to the serious and prima facie credible allegations of their complicity in the CIA rendition and secret detention was to carry out a brief parliamentary inquiry in November-December 2005. The inquiry produced no results and was held behind closed doors. None of its findings have ever been made public and the only information that emerged afterwards was that the exercise did not entail anything 'untoward'". See also § 173-176 *Al Nashiri* case.

¹⁷⁴ Refer to § 490 *Al Nashiri* case.

5. AN ASSESSMENT OF THE MAIN CHALLENGES IN NATIONAL INQUIRIES

KEY FINDINGS

- Our assessment has concluded that no national official investigation has been conducted in compliance with the ECtHR rule of law standards highlighted above.
- The main obstacles to accountability consist of the lack of independence and impartiality of the judicial investigations; and the use of the 'state secrets doctrine' or classified information arguments to evade responsibilities and disclosure of the facts concerning the allegations.

This section addresses the main challenges to accountability at national levels. The major obstacles in achieving accountability for the CIA rendition programme in Europe, and particularly in the five Member States under investigation, can be summarised as: **first, the lack of independence and impartiality of the judicial investigations (Poland, Lithuania, Italy, UK and Romania); and second, the use of the 'state secrets doctrine' or classified information arguments to evade responsibilities and disclosure of the facts concerning the allegations (Poland, Italy, UK and Lithuania).**

No Member State under examination in this study has conducted an investigation fully complying with the rule of law standards developed by the ECtHR in the cases against Macedonia and Poland assessed in Section 5.2 above. The lack of effective investigations constitutes a worrying challenge to the rule of law and fundamental rights protection in the EU. All major supranational investigations carried out so far, whether by the CoE, the European Parliament, or latterly the ECtHR in respect of Poland, have clearly signalled the lack of willingness by the concerned Member States' governments to cooperate in the investigations and meet their obligations under the ECHR in providing effective remedies to the victims and establishing the truth.

Although Section 3 above showed that there have been some national inquiries conducted by Member States resulting in some evidence being disclosed, **no government or public official has so far been held accountable.** Some inquiries such as these conducted in Italy, Germany, Denmark, Finland and Lithuania made some progress in achieving accountability. Yet **they all failed to enforce the decisions of their national courts.** Despite sustained efforts from 2005 onwards to shed more light on the EU's complicity in the CIA rendition programme, **no effective investigations have taken place at national judicial level,** perhaps with the sole exception of Italy, which managed to convict some guilty parties but where the decision of the Milan Court was overruled by the Constitutional Court. In the Abu Omar case in Italy, reasons of state secrecy in the defence of national security and foreign affairs were invoked in order to ensure that, during the criminal proceedings, no sensitive information was disclosed. In 2010 the Milan Court of Appeal accepted the claims of state secrets privilege in the case of Nicolo Pollari and Marco Mancini. They were not asked to testify, since, under Italian law, punishment for the disclosure of state secrets is very severe. In 2012 the Supreme Court of Cassation disagreed with the previous judgment on the grounds that SISMI (Italian Military Intelligence and Security Service) claimed not to be involved in Abu Omar's kidnapping. The Supreme Court

interpreted this as a proof that the Italian officials acted without mandate. Therefore, the Court overruled the Court of Appeal's judgment and called for a retrial of Pollari and Mancini. In 2013 they were sentenced by the Milan Court to 10 and nine years in prison. In 2014 the Constitutional Court acquitted them both on grounds of state secrets privilege.¹⁷⁵

Although most political inquiries and judicial investigations have cleared the public authorities involved, **most of the processes of investigation had accountability challenges which did not comply with the ECtHR rule of law standards.** As previously mentioned in Section 4, this benchmark includes criteria for ensuring a fair and effective investigation, such as ensuring the investigation is prompt, thorough and independent from the executive. The ECtHR has also not accepted that states parties to the ECHR may cite 'state secrets' as grounds to refuse disclosure of information or evidence to the Court, the victim and the public at large.

Regarding the criterion of prompt and thorough investigation, it is now possible to conclude that in the face of incontestable evidence of involvement in the CIA renditions, **a majority of the Member States analysed in this Study have failed to carry out a 'prompt and thorough' investigation.** In Poland and Romania the investigations have never reached the trial phase, while in Lithuania and the UK the trials have recently restarted (2014) after having been stopped for lack of evidence/state secrets. Under the Cooperation and Verification Mechanism Romania is still monitored by the European Commission in order to assess its progress in the field of judicial reform and the fight against corruption.¹⁷⁶ However, none of the yearly reports on the issue have touched on the topic of renditions, despite the fact that criminal claims have been raised on behalf of torture victim Al Nashiri and despite the fact that former Romanian public officials have admitted that Romania allowed the CIA to run a secret detention centre in Bucharest.

In some Member States there have been aggravating factors in the lack of compliance with their obligation to conduct effective investigations. In the political inquiries conducted by the five Member States under investigation, either the parliamentary bodies cleared the authorities involved (Poland, Italy, Romania, the UK) or the executive bodies of the government intervened in the investigations, or both. In the UK, the first inquiry was led by the Intelligence Service Committee within the Parliament. There were allegations questioning the impartiality and independence of the democratic oversight exercised by this Committee.¹⁷⁷

The UK Prime Minister later commissioned the 'Gibson Inquiry', which was supposed to be a judge-driven independent investigation into the allegations. However, after its establishment many international organisations questioned the independence of the investigation.¹⁷⁸ The investigation was dismissed in 2012. In Romania, the independence of

¹⁷⁵ See www.statewatch.org/analyses/no-254-abu-omar-yasha.pdf.

¹⁷⁶ S. Carrera, E. Guild and N. Hernanz, 2013, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU – Towards an EU Copenhagen Mechanism*, DG IPOL, European Parliament, Brussels available at [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET\(2013\)493031_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf).

¹⁷⁷ The Venice Commission raised concerns about this legislative body and its ties to the executive, see www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/23110.htm, paragraph 11. For further details and analysis on this the Thematic Contribution by Ivanova in Annex 3 of the 2013 Parliament study deals with the topic extensively.

¹⁷⁸ See Annexes 1 and 2, pp. 51, 66-69.

the 2007 Senate Committee of Inquiry was questionable given that the two lead investigators running the Committee were close to the intelligence community. It is therefore no surprise that the Committee found that Romanian authorities had no involvement in the CIA operations. Ever since, the authorities have systematically denied their involvement in the CIA rendition programme, despite clear declarations and incontestable evidence of a black site in Romania.

In terms of **governmental interference** in national inquiries, although several countries have held some form of inquiry in connection with their collusion in the CIA rendition programme (Italy, Lithuania and the UK), the investigations had often been biased because of various degrees of involvement by executive bodies. In Italy, the public prosecution claimed that the investigations have been undermined by Italian and American governments that tried to influence the investigations.¹⁷⁹ In the Abu Omar case, where, thanks to the efforts of Italian journalists and Prosecutor Armando Spataro in Milan, the investigations advanced to the benefit of the truth, American diplomats intervened when information about CIA operations were to be disclosed. In May 2006, the American ambassador in Rome even mentioned that any arrest warrant issued against CIA officials might lead to diplomatic disputes and would jeopardise bilateral relations between the two countries. Most of the public authorities directly involved in the collusion with the CIA have not been held liable for the serious human rights violations (e.g. Poland and Italy have started criminal investigations against public officials belonging to the intelligence community and allegedly guilty of involvement in the CIA rendition programme, but the investigations have either not reached the prosecution stage or have been arbitrarily suspended). A Polish criminal investigation started in 2008, but as shown in Annex 2, the investigations have been delayed by the authorities for seven years and the ECtHR in its joint decision in the *Al Nashiri* and *Abu Zubaydah* cases found Poland in violation of Article 38 of the ECHR for not complying with the request of the Court to provide the necessary facilities and information/documentary evidence for a proper and effective examination of a pending case.

Regarding the additional criterion put forward by the ECtHR in defining what an effective investigation consists of – its refusal to accept the ‘**state secrets doctrine**’¹⁸⁰ or **privilege** (the classification of information as ‘state secrets’ in the name of ‘national security’ or state interests) – it is clear that this has constituted **one of the main obstacles to effective democratic and judicial accountability in all states under analysis**. It is worth mentioning that four of the five countries investigated have raised this argument for not providing evidence or for preventing a court from judging the acts (e.g. Italy, the UK in the Belhaj case, Poland before the ECtHR,¹⁸¹ etc.). In addition to these obstacles, the 2011 Dick Marty Report and information gathered during interviews held for the purposes of this study have revealed that in some cases lawyers’ access to evidence has been fundamentally obstructed, which poses **fundamental challenges to the rights of the defence and fair trial principles**. Immunity for government agents, such as in Italy and the UK, is an additional concern in terms of effective and independent inquiries.

¹⁷⁹ J. Goetz and M. Gebauer, 2010, “US pressed Italy to influence the judiciary”, *Der Spiegel*, 17 December, available at www.spiegel.de/international/europe/0,1518,735268,00.html.

¹⁸⁰ European Parliament, 2014, op. cit., see Section 2.6 on the different meanings of national security in each Member State.

¹⁸¹ § 373 *Al Nashiri* Case.

6. ASSESSING THE CHALLENGES IN EUROPEAN INSTITUTION RESPONSES TO ACCOUNTABILITY

KEY FINDING

- There is an absence of political will within the other European institutions to follow up on the findings and recommendations put forward by the Parliament, and more generally to ascertain the truth and ensure proper accountability.
- The lack of independence in judicial investigations and other obstacles to effective inquiries raise profound challenges to Article 2 TEU.
- A new Copenhagen Mechanism could be built upon the current Article 7 TEU to develop the practical phases of its implementation. This would not require Treaty change, but could take the form of a Commission legislative proposal, which should primarily focus on the ways in which this Article is to be activated.
- Judicial scrutiny still applies to Member States' action or inaction even in cases involving state secrets and national security.

Section 3.3 above on "Responses by European Institutions" has illustrated the scope and nature of the complaints expressed by the Parliament about the lack of "appropriate follow-up actions" by the European Commission and the Council on the basis of the findings and recommendations of various Parliament reports, and in particular the 2012 Flautre Report and subsequent 2013 and 2015 Resolutions. Interviews conducted for the purposes of this study have revealed **a general absence of political will at the highest levels of the other European institutions to follow up the findings and recommendations put forward by the Parliament, and more generally to ascertain the truth and ensure proper accountability for the illegal activities at issue.** Obstacles to EU accountability do not only raise political issues, however. There are also far-reaching legal considerations which need to be taken into account when assessing this climate.

The following arguments have often been advanced to by the relevant European institutions to justify their current inaction. The first argument relates to the timing of the events and the tendency to frame these events as 'something of the past' – that the fundamental human rights violations at stake are not ongoing but rather happened 'in the past'. The second argument concerns the weakness of EU law in force when the events actually occurred, which alludes to the limited competence enjoyed by the European Commission to act against relevant Member States. A third argument for European institution inaction is linked to the commonly unchallenged mantra that transnational intelligence services activities and cooperation in the fight against crime and terrorism fall by and large within national competence, as they take us close to the concept of 'national security'.

This section studies these arguments in light of the responses of the European Commission during the last three years, and the current state of EU Justice and Home Affairs law in a post-Lisbon Treaty framework. The following questions are addressed: How can the lack of appropriate and further actions by relevant EU actors be understood? What are the main obstacles facing the EU's accountability and possible ways forward concerning Member States' active/passive complicity with the CIA-led extraordinary rendition programme?

6.1. The Commission Letters to Member States

One of the main responses by the previous Commission to the 2012 Resolution was to send letters to all Member States. At the time of writing, these letters and any responses remain confidential and not accessible to the authors. A request for public disclosure of information was submitted to the European Commission yet no answer has been received so far. A few letters have been leaked to civil society actors and were made available to the authors of this study.

What is their main content? The Commission letters reminded Member States of their obligation to conduct impartial, independent, effective and in-depth investigations into allegations in light of the ECHR and ECtHR jurisprudence on effective investigations.¹⁸² The letters stated that “in no circumstance should secrecy take priority over inalienable fundamental rights or limit states’ legal obligations to conduct effective investigations”. They also referred to the relevant paragraphs of the 2012 Parliament Resolution related to the specific Member States concerned (Finland, Denmark, Portugal, Italy, the United Kingdom, Germany, Spain, Ireland, Greece, Cyprus, Romania and Poland). The Commission asked the country involved to provide information on the state of play of all the investigations. They equally underlined Member States’ obligation to ensure that these events do not occur again. The Commission added that in recent years the EU has developed several legal instruments which have reinforced its collective capacity to fight terrorism while respecting human rights. Particular reference was made to the existence and entry into force of the EU-US agreements on Mutual Legal Assistance and extradition, “which clarify and unify the legal framework of judicial cooperation in criminal matters”, and that the Commission “is determined to ensure that all Member States actually use, where they apply, all relevant European Union instruments, and that Member States comply with the Charter of Fundamental Rights when they implement those instruments”.

As indicated in section 3 above, the Parliament reiterated **concerns about the Commission’s response to its requests, not least the lack of a substantive discussion of the Flautre Report**. The Parliament also signalled that the sending of the letters has not been part of a wider Commission agenda and strategy. Indeed, the sending of letters can be seen as an ‘ad hoc’ and rather self-constraining exercise both in nature and scope. Interviews for this study revealed **a lack of clarity as regards the actual legal value of the letters by the current Commission** and a great degree of obscurity concerning any potential follow-up in cases where Member States have replied unsatisfactorily or not at all to the letters.

That notwithstanding, the significance of these letters should not be underestimated. They deal with and raise **far-reaching issues related to Member States’ compliance with the rule of law and their respective obligations**, not least those derived from the standards developed by the Strasbourg Court in its recent jurisprudence related to effective investigations following allegations of serious human rights violations. This has been one of the few occasions where the Commission has formally demanded Member States to provide detailed information on the conduct of effective and independent domestic investigations in an area of particular sensitivity for Member State government sovereignty. Also, the 2013 letters are clear that, when it comes to the Member States’ cooperation with the US in the

¹⁸² ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/ 09.

fight against terrorism and judicial cooperation in criminal matters, the EU now has a specific Union legal framework of multilateral agreements which Member States are under an obligation to use and duly implement in compliance with the EU Charter of Fundamental Rights, and through which the Commission has proper enforcement powers (see Section 6.3 below).

Our interviews have additionally confirmed that the new Commission does not see the letters as part of a pre-Article 7 TEU procedure, therefore they are most centrally related to the protection of rule of law and fundamental rights as legal foundations enshrined in Article 2 TEU. That notwithstanding, and as has been studied in section 4 above when dealing with the latest ECtHR rulings against Poland, **a wealth of evidence now shows that certain Member States have failed in their duty to cooperate in good faith with inquiries conducted by supranational actors (e.g. the United Nations or the Council of Europe), and perhaps most gravely, in the conduct of investigations by the ECtHR in direct contravention of Article 38 of the ECHR.** This constitutes undisputed evidence that certain Member States are not complying with the rule of law. The ECtHR has also accepted as fact that some Member States have failed to ensure in their domestic arenas effective and independent investigations into the alleged human rights violations.

6.2. Rule of Law Challenges

Obstacles to effective investigations and the lack of judicial independence indeed raise profound challenges to Article 2 TEU, which the European institutions, in particular the Commission, have the obligation to duly monitor and safeguard under Article 7 TEU. The extent to which the EU has the necessary instruments and powers to monitor and safeguard Member States' compliance with these founding principles after they accede to the Union has been subject to increasing EU inter-institutional debate over the past five years.¹⁸³ This has been especially so since the entry into force of the Lisbon Treaty at the end of 2009, when the Union's competences on fundamental rights and Justice and Home Affairs (Area of Freedom, Security and Justice, AFSJ) were reinforced.¹⁸⁴ The only preventive and sanctioning instrument in the hands of the Union to deal with these matters is laid down in Article 7 TEU. This provision, however, has never been used due to its

¹⁸³ J. Barroso, 2013, State of the Union Address, 11 September, European Parliament, Speech/13/684. In March 2013 the Ministries of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the Commission calling for the EU values of the rule of law, democracy and fundamental rights to be more vigorously protected and calling for a new 'mechanism' to safeguard them.

¹⁸⁴ As regards fundamental rights protection, the Treaties have conferred the value of EU primary law, and therefore attributed a legally binding nature to the EU Charter of Fundamental Rights. The Lisbon Treaty has also scrapped the former Pillar divide, which used to characterise Justice and Home Affairs (JHA) cooperation, and brought judicial cooperation in criminal matters and policing generally under the Community method of cooperation. Since the end of 2014, and following the end of the transitional period envisaged in Protocol 36 of the Lisbon Treaty, the European Commission and the Court of Justice of the European Union have been recognised as possessing full enforcement powers to ensure Member States comply and implement EU criminal justice and policing legislation. For a detailed analysis see Mitsilegas, V., Carrera, S., and Eisele, K., 2014, "The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who Monitors Trust in the European Criminal Justice Area?" DG IPOL, European Parliament, Brussels.

predominant political nature, the elevated threshold necessary for its activation and the significant room for manoeuvre at the Council's disposal to decide when to use it.¹⁸⁵

The previous European Commission tried to address some of these challenges through the adoption in 2014 of the so-called 'EU Framework to Strengthen the Rule of Law'.¹⁸⁶ The Commission Communication states that its purpose is "to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a 'clear risk of a serious breach' within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched".¹⁸⁷

This could be seen as one of the few tangible responses by the Commission to the Parliament's and other key EU actors' calls to reinforce the Union's capacity to prevent and address rule of law/human rights deficits in Member States at EU level. However, a key weakness of the proposed framework is **the absence of any role for the Parliament in supervising (it is only to be informed) or in carrying out high-level inquiries into Member States' compliance with the rule of law and fundamental rights.**¹⁸⁸

The Communication envisaged a procedure where the Framework would be activated in practice. This would cover cases where Member States are in the process of adopting measures or tolerating situations which could be expected to systematically and adversely affect or constitute a threat to the integrity, stability and proper functioning of their institutions in safeguarding the rule of law. Such situations would cover questions concerning their constitutional structures and separation of powers, their systems of judicial scrutiny and the independence of the judiciary.¹⁸⁹

The EU Framework to Strengthen the Rule of law would be operationalised in cases where there is a 'systemic threat' to the rule of law in one Member State. The Communication did not provide any clear and concise definition of what 'systemic' actually means. This is problematic as it leaves the activation of the Framework entirely in the hands of the Commission, which, as we have mentioned above, seems to lack any political appetite to pursue this dossier.

The Communication authors formulated a general procedure through which the situation would be handled in practice with the Member State concerned. This procedure would take the form of a 'structured exchange' or 'dialogue' between the Commission and the national government involved. The exchange would be organised in the following three phases:

¹⁸⁵ For an analysis of Article 7 TEU and the currently fragmented and incomplete toolbox of instruments and tools currently in the hands of the European institutions in monitoring, assessing and/or evaluating rule of law-related domains, refer to Carrera et al., 2013, op. cit.

¹⁸⁶ European Commission, 2014, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014; see also http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm.

¹⁸⁷ Ibid., p. 6.

¹⁸⁸ As regards the role of the Parliament and the Council, the Communication highlights that they would be kept "regularly and closely informed of progress made in each of the phases".

¹⁸⁹ Ibid., p. 7. The Communication states: "The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats". For an assessment of the Communication and its deficits refer to S. Carrera and E. Guild, 2015, "Implementing the Lisbon Treaty: Improving the Functioning of the EU on Justice and Home Affairs", DG IPOL, European Parliament, Brussels.

First, the Commission would carry out an assessment, which would result in a 'rule of law opinion', giving substance to its concerns and granting the Member State the possibility to respond.

Second, the Commission would issue a 'rule of law recommendation' in cases where the controversy is not resolved. The recommendation would provide a fixed time period or deadline for addressing the Commission's concerns and provide specific indications on ways and measures to address them.

Third, a follow-up or monitoring of the rule of law recommendation would ensue, which, if not satisfactorily carried out by the Member State(s), could create the possibility for activating Article 7 TEU.

The Communication was acknowledged by the General Affairs Council meeting of 18 March 2014.¹⁹⁰ Yet it has not been effectively followed up by Council. Several questions were posed within the Council as regards institutional and procedural issues that the Commission's initiative for an EU Framework on the Rule of Law would pose from an institutional and procedural viewpoint and in light of the current Treaty arrangements. The Council Legal Service (CLS) issued an Opinion about these matters in May 2014¹⁹¹ that stated that a violation of Article 2 TEU may only be invoked against a Member State when acting in a subject matter where the EU has a conferred legal competence. The CLS held the opinion that "the respect of the rule of law by the Member States cannot be the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described in Article 7 TEU". It added that Article 7 TEU does not establish any appropriate basis for further developing or revising/amending the procedure.

The CLS Opinion was an important reminder that the recommendations issued in the context of the Article 7 TEU procedure do have specific legal effects, and therefore the Court of Justice of the European Union (CJEU) could supervise their legality and interpret them via preliminary rulings and actions for damages. The Opinion also disregarded Article 70 of the Treaty on the Functioning of the European Union (TFEU) as a possible legal basis for a new mechanism, as this provision could not cover Member States' actions/omissions falling outside Title V of the Treaties (AFSJ) or secondary legislation developed on this basis.¹⁹² In light of this, the CLS concluded that the Commission's proposal was not compatible with the principle of conferral and stated, in paragraph 24,

"It follows that there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, either to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis".

¹⁹⁰ Council of the EU, 2014, Press Release on General Affairs Council meeting, 3306th, Brussels, 18 March.

¹⁹¹ Council of the EU, 2014, Commission's Communication on a new EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May.

¹⁹² Similarly, the CLS concluded that Articles 241, 337 and 352 TFEU could not offer a legal basis independent from Article 7 TEU.

As an alternative, the CLS proposed an intergovernmental international agreement (agreed by the Member States and not adopted by the Council) designed to supplement EU law and to ensure the respect of the Union's values. Such an agreement "could" allow for the participation of EU institutions, and lay down the specific consequences that Member States would encounter from such a 'review system'. This possibility would clearly not affect the powers provided for in Article 7 TEU or those stipulated in Articles 258, 259 and 260 TFEU, but it would altogether disregard the Community method of cooperation and supranational accountability by the Commission and the European Parliament. The CLS Opinion has been criticised by authors such as Kochenov & Pech (2015), who convincingly asserted:

"One may on the contrary assert that since the Commission is one of the institutions empowered, under Article 7 TEU, to trigger the procedure contained therein, it should in fact be commended for establishing clear guidelines on how such triggering is to function in practice. In other words, a strong and convincing argument can no doubt be made that Article 7(1) TEU already and necessarily implicitly empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. Moreover, given the overwhelming level of interdependence between the EU Member States and the blatant disregard for EU values in at least one EU country, the Commission fulfilled its duty as Guardian of the Treaties by putting forward a framework that would make Article 2 TEU operational in practice."¹⁹³

One can only agree with these concerns. We have previously argued that **a new Copenhagen Mechanism could be legally built upon current Article 7 TEU in order to develop the phases preceding its preventive and coercive arms. Treaty change would not be an absolute must for this to take the form of a legislative proposal by the Commission,¹⁹⁴ which should mainly focus on the ways in which this Article is to be activated.** Its actual functioning and operability could be developed in a soft law or policy instrument which would present the periodic evaluation/coordination system on the rule of law according to the model already used in fields such as anti-corruption policy¹⁹⁵ or the so-called 'EU Justice Scoreboard'.¹⁹⁶

¹⁹³ See D. Kochenov and L. Pech, 2015, "Upholding the Rule of Law in the EU: On the Commission's Pre-Article 7 Procedure as a Timid Step towards the Right Direction", EUI Working Papers, RSCAS 2015/24, Florence, p. 11.

¹⁹⁴ Carrera et al., 2013, op. cit., p. 39. Here we also argued, "In a longer-term perspective, other measures could be taken that would require an amendment of the current normative configurations delineating the EU Treaties. The activation phase of the Copenhagen mechanism in cases of alleged risk or existence of serious/persistent breach of Article 2 TEU could be improved by liberalising its current form and threshold, which remain too burdensome in practice. A revised Copenhagen mechanism should focus on ensuring its own rule-of-law compliance by guaranteeing a high degree of democratic accountability and judicial control during the various phases comprising the procedure and supervision processes, as well as the substantive decisions potentially taken against member states".

¹⁹⁵ European Commission, 2014, EU Anti-Corruption Report, COM(2014)38 final, 3.2.2014. For more information refer to http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm.

¹⁹⁶ European Commission, 2015, Communication, EU Justice Scoreboard, COM (2015)116 final. See http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

Since then, regrettably, the Commission's proposal has not been effectively followed up by the Council. Instead, the General Affairs Council of 16 December 2014 adopted conclusions on "ensuring respect for the rule of law".¹⁹⁷ The Council called for the establishment of an annual dialogue among Member States to promote and safeguard the rule of law "in the framework of the Treaties", which will be organised around thematic subject areas.¹⁹⁸ The limited reaction by the Council has been qualified by Kochenov & Pech (2015) as a "façade action", meaning the Council is "in denial about the internal challenges faced by the EU or no other compromise could perhaps be found within an institution which represents the Member States".¹⁹⁹

It would be difficult not to legally link the sending of the above-mentioned letters with Article 7 TEU and even more so with the proposed EU Framework to Strengthen the Rule of Law. The current Commission's position on their value or relevance, as well as its current lack of action on any follow-up measure, raises a number of important questions, particularly with respect to how the activation phase of any EU action against Member State threats to the rule of law and fundamental rights takes place in practice. The legal and political meaning of the sending of the letters would make sense as a phase preceding the launch of the EU Framework's 'structured dialogue'. However, the lack of any follow-up action by the Commission in light of the limited or non-existent nature of Member States' responses to the letters calls for careful reconsideration of the activation of the three procedural steps envisaged by the EU Framework, which should be more carefully designed for future reference and made subject to proper legal/judicial scrutiny and democratic control.

Another challenge which the Commission might cite as a reason 'not to act' is the extent to which a Member State's complicity in the CIA rendition and secret detention programme falls within the scope of a *current* 'risk of a serious breach' or even 'a persistent serious breach' of the Union's values enshrined in Article 2 TEU and as envisaged in Article 7 TEU, or a 'systemic' threat to the rule of law (which could later on develop into a risk of a serious breach) as framed in the Commission's EU Framework to Strengthen the Rule of Law. In fact, the EU Framework gives very little information as regards the notion or material scope of 'what' makes a threat to the rule of law 'systematic'.²⁰⁰

As evidenced in this study, the fact that certain Member States have been held in violation of their obligations to cooperate with the Strasbourg Court proceedings

¹⁹⁷ www.consilium.europa.eu/en/meetings/qac/2014/12/16. The Council also agreed that this dialogue will take place once a year in the Council General Affairs configuration and prepared by COREPER (Presidency). By the end of 2016, the General Affairs Council will evaluate the experience.

¹⁹⁸ The Conclusions highlighted that the annual dialogue would be based on the principles of objectivity, equality and non-discrimination. It would operate in accordance with an evidence-based and non-partisan approach.

¹⁹⁹ See www.robert-schuman.eu/en/european-issues/0356-upholding-the-rule-of-law-in-the-eu-on-the-commission-s-pre-article-7-procedure-as-a-timid-step.

²⁰⁰ The few details provided by the Communication can be found in footnote 18 of the Commission Communication which states: "With regard to the notion of 'systemic deficiencies' in complying with fundamental rights when acting within the scope of EU law, see, for example, Joined Cases C-411/10 and 493/10, N.S., not yet published, paragraphs 94 and 106; and Case C-4/11, Germany v. Kaveh Puid, not yet published, paragraph 36. With regard to the notion of 'systemic' or 'structural' in the context of the European Convention of Human Rights, see also the role of the European Court of Human rights in identifying underlying systemic problems, as defined in the Resolution Res(2004)3 of the Committee of Ministers of 12 May 2004, on Judgments Revealing an Underlying Systemic Problem."

or to conduct supranational inquiries constitutes a current rule of law deficit that has little to do ‘with the past’. Allied to this, ongoing **obstacles to effective investigations that comply with ECtHR legal standards are also sound evidence of current breaches of the rule of law and the fundamental rights** of individuals, some of whom have received victim status, which now falls within the scope of EU law (see Section 6.3 below).

Therefore, the current state of Commission inaction on Member States’ complicity in the extraordinary rendition and secret detention programme illustrates the key deficits in the proposed 2014 EU Framework on the Rule of Law. It also demonstrates that **a purely intergovernmental framework on the rule of law would not be conducive to properly and effectively addressing threats posed by national governments to fundamental rights.**

6.3. EU Law in a Post-Lisbon Treaty Context

Beyond important questions formally related to rule of law considerations, there are also open EU law issues which challenge the European Commission’s inaction on the basis of the Flautre Report. The Commission has so far failed to convincingly comply with the Parliament’s recommendation to examine carefully the extent to which Member States’ complicity in the CIA-led rendition and secret detention programmes undermined their legal obligations under the EU Treaties, their founding values and legal principles, the EU Charter of Fundamental Rights and relevant EU secondary legislation. This is indeed surprising in a post-Lisbon Treaty context.

The Lisbon Treaty gives the Commission new powers and re-positions it in a new institutional and legal landscape. True, as the Commission insisted in its 2013 letters to Member States, the legislative instruments that the EU has given itself during the last decade leave limited grounds for arguing that, as EU law stands at present, the Commission would not be entitled to act and enforce fundamental rights. **The EU Criminal Justice Area is now composed of various secondary law instruments setting up common rules on extradition and surrender of suspected criminals, the exchange and processing of evidence and the rights of suspects in criminal proceedings.**²⁰¹ This has come in parallel to the emergence of an **international framework of multilateral agreements**, including with the US on questions related to Mutual Legal Assistance (MLA) and extradition since 2003.²⁰²

²⁰¹ Mitsilegas, V., 2009, *EU Criminal Law*, Oxford: Hart Publishing.

²⁰² Agreement on extradition between the European Union and the United States of America, OJ L181, 19 July 2003, p. 27; Agreement on mutual legal assistance between the European Union and the United States of America, OJ L181, 19 July 2003, p. 34. See also the Council Decision, on the basis of Articles 24 and 38 TEU, concerning the signature of these agreements: OJ L181, 19 July 2003, p. 25; House of Lords Select Committee on the European Union, EU-US Agreements on Extradition and Mutual Legal Assistance, 38th Report, session 2002-03, HL Paper 153; Mitsilegas, V., 2003, “The New EU-US Co-operation on Extradition, Mutual Legal Assistance and the Exchange of Police Data”, *European Foreign Affairs Review*, Vol. 8, pp. 515-536. S. Carrera, E. Guild, G. Gonzalez and Mitsilegas, V., 2015, *Access to Electronic Data by Third-Country Law Enforcement Authorities: Challenges to EU Rule of Law and Fundamental Rights*, Paperback, Brussels: Centre for European Policy Studies.

The EU also has a body of European legislation covering **the status of victims of crime**.²⁰³ The EU Directive 2012/29²⁰⁴ has established minimum EU standards and rights in order “to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings”.²⁰⁵ These EU rights include victims’ participation in criminal proceedings (Articles 10-17), the provision of information and support (Articles 3-9) as well as specific protection needs for certain individuals. While Recital 28 of the Directive enables Member States not to withhold information when this could “affect the proper handling of a case or harm a given case or person, or if they consider it contrary to the essential interests of their security”, this exception is now subject to EU supervision by the Commission and potential judicial scrutiny by the CJEU. As has been illustrated in section four on the state of play of Member States’ accountability processes, some of the individuals who alleged their human rights were violated as a consequence of certain Member States’ cooperation with the CIA have been given victim status, which brings them within the personal scope of Directive 2012/29 and therefore under EU legal supervision.

Furthermore, EU law in the domain of judicial cooperation in criminal matters is based on **the principle of mutual trust** both between Member States²⁰⁶ and between Member States and the European institutions, the assumption being that they comply with the rule of law and fundamental rights in their national realms. The EU Criminal Justice Area is founded on and operates under the premise of the **principle of mutual recognition**, according to which Member State authorities accept each other’s judicial decisions as their own. In cases of allegations of serious fundamental rights violations, the CJEU has held that a rebuttable presumption exists and that the relevant domestic authority still needs to carefully examine these allegations before ‘mutually recognising’ the extradition request and rendering the suspect to that legal system.²⁰⁷ If, in light of the evidence provided by supranational human rights monitoring actors and the judicial investigations by the ECtHR, **it is now beyond doubt that relevant Member States have obstructed justice and not ensured independent judicial review of individual’s allegations of human rights abuses, how can mutual trust remain valid?**

²⁰³ For a general explanation of the current framework refer to http://ec.europa.eu/justice/criminal/victims/rights/index_en.htm.

²⁰⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. See also the European Commission Guidance Document for its implementation and transposition available at: http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

²⁰⁵ Article 1 of the Directive also states, “Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings.” On the personal scope of who is a ‘victim’ for the purposes of EU law, refer to Article 2 of the Directive.

²⁰⁶ Mitsilegas, V., 2012, “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice. From Automatic Interstate Cooperation to the Slow Emergence of the Individual”, *Yearbook of European Law* 2012, Vol. 31, pp. 319-372; see also W. van Ballegooij, 2015, *The Nature of Mutual Recognition in European Law: Re-examining the Notion from an Individual Rights Perspective with a View to its Further Development in the Criminal Justice Area*, Maastricht: Intersentia.

²⁰⁷ Refer to Judgment of the Court (Grand Chamber) of 21 December 2011. N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform. The CJEU held in paragraph 104: “In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.”

Finally, and as argued and examined in a previous Parliament study,²⁰⁸ **Member States' action or inaction (even in cases related to state secrets and national security) are still subject to judicial scrutiny.** The CJEU has considered effective judicial accountability a key principle in the EU legal system. This principle acquires especial importance in cases where individuals allege serious human rights violations by Member States' governments and/or authorities. This includes state practices said to fall within national security or state secrets, which, according to both the ECtHR and the CJEU, must still be subject to independent judicial review. **Judicial scrutiny is designed to ensure that EU Member States cannot invoke 'national security' and 'state secrets' in order to avoid supranational accountability or to otherwise evade their legal responsibilities.** Anything else would undermine the effectiveness of EU law and Member States' compliance with the principle of loyal and sincere cooperation enshrined in Article 10 TEU.

²⁰⁸ European Parliament 2014, op. cit.

7. CONCLUSIONS AND RECOMMENDATIONS

The analysis conducted in the Study leads to the following **key conclusions, which have informed the policy recommendations formulated below.**

Firstly, the Feinstein Report provides a particularly important insight into the cooperation of European and other states with the CIA in its detention and interrogation programme. While it is difficult to determine the exact identities of the countries referred to,²⁰⁹ **the Report has revealed three main aspects of European involvement in the programme.**

The first involves remaining silent in the face of unfounded CIA claims as to the efficacy of the torture programme in generating important information to prevent terrorist attacks. This appears to relate primarily to the UK authorities and agencies with knowledge of the situation, which kept silent in the face of CIA claims about providing intelligence on threats to the UK – claims that were obviously unfounded. **Second**, the Report reveals that the CIA's arrangements with countries to host detention sites were highly unstable. The CIA was constantly on the run from the ICRC, and states which entered into agreements with the CIA invariably withdrew sooner or later (in some cases even before the sites came into use) because of the problems which complicity in torture creates. States appear to have been much more sensitive to their own publics and international institutions, which condemn torture and secret detention, than to the wishes of the CIA. **Third**, the CIA, through its use of torture and secret detention, isolated itself not only within its own administration and country but internationally. The more information that became available regarding the torture programme, the greater the distance former allies wished to put between themselves and the CIA.

Secondly, the degree of effective accountability for alleged complicity with the CIA varies considerably across the five Member States under examination. While political inquiries have taken place in all five Member States, their nature and scope have differed considerably. Moreover, in Italy, Romania and the UK there is evidence of government involvement in the inquiries, which has fundamentally jeopardised their effectiveness and independence. All the political inquiries have been dismissed, having found no authorities guilty of any act. All government-led or parliamentary inquiries have by and large rejected any claims of involvement in the CIA rendition and detention programme.

The analysis has revealed that national criminal investigations have been/are being conducted in the five Member States. Four of them (with the exception of the UK) have been subject to closed or still pending proceedings before the ECtHR. As a consequence of these supranational and national judicial investigations, some of the affected individuals have been granted victim status and received financial reparations.

The responses by the European Commission and the Council have been mixed. By and large they have not fully followed the requests and recommendations put forward by the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (TDIP) or the subsequent 2012 Flautre Report on the alleged transportation and illegal detention of prisoners in EU countries by the CIA "follow-up of the European Parliament TDIP Committee Report". The most concrete response by the European Commission was the sending in 2013 of a set of letters to all Member States requesting information on their obligation to conduct effective

²⁰⁹ The actual names have been removed and replaced with a colour code which Amnesty International has managed to decipher in their 2015 report "Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' must act after Senate Torture Report", op. cit.

investigations into these allegations. The actual legal value of this correspondence (if any) remains unclear. There has been no specific further action by the Council or any of the subsequent EU Presidencies in response to the Parliament's recommendations.

Third, in July 2014, the ECtHR issued two landmark judgments against Poland in the *Al Nashiri* and *Abu Zubaydah* cases. The rulings provide a wealth of evidence concerning Poland's complicity in the CIA programme, as well as the lack of compliance by the Polish government with the obligation laid down in Article 38 ECHR to cooperate fully with ECtHR investigations. The Strasbourg Court found Poland in violation of various human rights enshrined in the Convention, chiefly the prohibition against torture and inhuman and degrading treatment and the lack of effective remedies to the victims (Articles 3 and 13 ECHR).

Both cases are in effect test cases in assessing the legality of Member States' complicity with the CIA. In particular, the ECtHR gave further substance to the set of rule of law standards necessary to ensure "effective official investigations" into alleged serious human rights violations. The standards include, inter alia: the need for a prompt and thorough investigation; independence and impartiality from the executive and secret services; participation in the proceedings and access to information for the victims and families, and public scrutiny of the main facts and findings; and the fact that governments may not invoke 'state secrets' to keep out of judicial scrutiny evidence deemed fundamental to examining the case at hand.

Fourth, the study has paid special attention to the existence of challenges and barriers to accountability, and examined their nature and scope in the Member States under investigation. Our assessment has concluded that no official national investigation has been conducted in compliance with the ECtHR rule of law standards highlighted above. The two primary obstacles identified are the lack of independence and impartiality of the judicial investigations and the use of the 'state secrets' or 'classified information' doctrine to evade responsibilities and prevent disclosure of the facts. These have in turn posed profound challenges to the rights of the defence and fair trial principles.

Fifth, the study also explores the arguments advanced by the European Commission and the Council to justify not taking action against the concerned Member States. The European Parliament has reiterated concerns that the European Commission has not fully or duly responded to the actual substance of its reports and resolutions on the matter. It has welcomed the letters sent by the Commission, but regretted that they have not been part of a wider enforcement agenda and strategy to ensure the rule of law and an effective application of EU legislation.

In our analysis, the importance of the Commission's decision to sending letters to Member States should not be underestimated, either legally or politically. They constitute a tangible step that requires Member States to provide information on their human rights obligations and thereby promote independent investigations into alleged wrongdoing, which lies at the heart of safeguarding the rule of law as enshrined in Article 2 TEU. The letters should constitute a first step towards the activation of the 2014 Commission proposal for an EU Framework to Strengthen the Rule of Law and, where required, the more powerful sanctions laid down in Article 7 TEU.

There is now evidence validated by the ECtHR that certain Member States have deliberately not complied with their duty to cooperate in the administration of justice and provision of effective remedies to victims, including before the Strasbourg Court. This constitutes a serious threat to the rule of law which needs to be debated and properly addressed at the

EU level. The Council's failure to act in the wake of any of the European Parliament's requests shows that a purely intergovernmental EU rule of law framework would not satisfactorily address fundamental rights threats.

These observations are of particular importance in the post-Lisbon European Criminal Justice Area. The principle of mutual recognition in judicial cooperation in criminal matters is based on the 'mutual trust' that all Member States comply with fundamental rights protection. The current state of investigations into certain Member States' complicity in the CIA-led programme and, most important, the impunity of the perpetrators and the obstacles to effective national and supranational political and judicial inquiries profoundly undermine this trust. Allied to this, the failure of Member States to deliver proper remedies and protection to affected individuals is at odds with the EU legal framework on the protection of victims.

In light of the key findings of the Study, the following **Policy Recommendations** can be formulated:

- **Recommendation 1:** More effort should be invested in reinforcing regular and structured dialogue between the Parliament, particularly the LIBE Committee, and relevant counterparts in the U.S. Congress and Senate. Such a dialogue would not only further facilitate the existing Transatlantic Legislators' Dialogue (TLD),²¹⁰ but also ongoing Parliament delegations to Washington. It would also constitute a new framework for sharing information and cooperating more closely on interrelated inquiries in the expanding policy field of Justice and Home Affairs. A collaborative approach to inquiries into the CIA-led programme would have enhanced their effectiveness.
- **Recommendation 2:** The Parliament should build upon its previous work on ways to properly ensure the democratic rule of law and fundamental rights in the EU. This is particularly relevant where Member States' action and inaction may fall outside the scope of EU law, yet have profound repercussions on the EU legal principles enshrined in Article 2 TEU. In this regard, the decision taken by the LIBE Committee to draw up a Legislative Own-Initiative Report on an EU mechanism on democracy, the rule of law and fundamental rights under the rapporteurship of Ms In't Veld is an important step²¹¹. The focus of the Legislative Own-Initiative Report should be mainly on developing and bringing further legal certainty to the activation phases preceding the use of Article 7 TEU.

This would provide a concise and secure legal framework to exercises such as the 2013 letters sent by the Commission to all Member States, requesting information on the state of play regarding investigations into their alleged complicity in CIA-led extraordinary rendition and secret detention programmes. It would also facilitate more effective follow-up where Member States act (or fail to act) unlawfully to hamper accountability.

²¹⁰ For more information see www.europarl.europa.eu/intcoop/tld/default_en.htm.

²¹¹ See www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+RULE-046+DOC+XML+V0//EN&language=EN&navigationBar=YES.

Contrary to the Council's Legal Service Opinion on the Commission's Proposal for an EU Framework to Strengthen the Rule of Law, which argued that there is no legal basis empowering the EU institutions to create a new supervisory mechanism for the rule of law, Article 7 TEU in fact grants powers not only to Member States to monitor/launch the procedure, but also to the Commission and the Parliament when monitoring rule of law threats²¹². The Parliament is also called on to give its consent to a reasoned proposal stating that one or several Member States are putting at risk Article 2 TEU legal principles. The Council retains considerable discretion when it comes to censuring or sanctioning a Member State. Therefore, a purely intergovernmental treaty would be contrary to the powers currently granted to the Commission and the Parliament in Article 7 TEU.

Moreover, and in parallel to this legislative framework, the Parliament should insist that the Commission develops a 'policy' coordination framework of periodic evaluation of Member States' compliance with fundamental rights and the rule of law in the form of a 'Copenhagen Mechanism'.²¹³ The already proposed EU Framework on the Rule of Law should be properly followed up and implemented, while ensuring more efficient democratic and judicial scrutiny of its activation and implementation phases. The Parliament should remind Member States of their duty of loyal and sincere cooperation and ensure that the Annual Dialogue in the General Affairs Council forms part of a wider EU Policy Cycle where both the Parliament and the Commission play specific and active roles in ensuring legal and democratic accountability.

- **Recommendation 3:** The Parliament should call for the adoption of a Professional Code for the transnational management and accountability of data in the EU.²¹⁴ The Code would bring together existing supranational legal and judicial standards applicable to transnational intelligence communities' cooperation in the EU, standards on the conduct of effective investigations as well as guidelines when 'national security' and 'state secrets' are invoked by national governments and authorities. It would lay down the basis on which 'national security' and 'state secrets' could not be invoked (i.e. define what national security is *not*) in the EU legal system. These would include grounds such "as personal interests, official wrongdoing, poor quality of the law, interference with freedom of expression and information, and absence of sufficient and effective judicial controls".²¹⁵

The Parliament could lead cooperation with national parliaments in identifying 'promising' and 'bad' practices in the scrutiny of law enforcement authorities and

²¹² In the Communication COM (2014) 158 final of the Commission to the European Parliament and the Council on a new EU Framework for the Rule of Law, the role the European Commission is playing in the field of ensuring effective and equal protection of the rule of law in all Member States is strengthened.

²¹³ As recommended and further developed in Carrera et al., 2013, op. cit.

²¹⁴ As already proposed in European Parliament 2014, op. cit.

²¹⁵ Ibid. p. 50.

intelligence services in the EU.²¹⁶ Cooperation with national parliaments could lead to guidelines for cross-border security cooperation, fundamental rights guarantees and accountability standards in the fight against terrorism.

The Code would also pay particular attention to ways of enhancing current systems and instruments of accountability in relation to the work of EU Home Affairs bodies (such as Europol, Eurojust, the Standing Committee on Operational Cooperation on Internal Security (COSI), the EU Intelligence Analysis Centre,²¹⁷ etc.) so as to ensure that the information and 'intelligence' that is exchanged and processed does not originate from torture or inhuman/degrading treatment. The Professional Code would in this way be imbued with the necessary legal certainty, which is at present lacking. As we have previously proposed, a 'yellow card, red card system' should be adopted. This system should guarantee that any exchange or processing of tainted information in breach of the common accord would first be signalled by a warning ('yellow card') and, if repeated, would entail exclusion ('red card') from the information-sharing network.²¹⁸

- **Recommendation 4:** There are two key 'lessons learned' from the previous European Parliament contributions to achieving accountability for Member States' complicity in the CIA renditions are. The first is that Member States and European institutions and agencies should always have the duty, 'in the spirit of loyal and sincere cooperation', to collaborate fully and provide all necessary evidence and information, even in cases where national security is invoked by national authorities. The second is that the recommendations and substantive requests for action issued by a parliamentary committee (whether or not a committee of inquiry in formal terms) should be discussed in depth and properly followed up/implemented by relevant European and domestic actors. The Parliament should demand proper and swift follow-up by the Commission on the substance and recommendations included in its Reports and Resolutions from 2007 through 2015. The Commission should:
 1. report back to Parliament on the state of play with regard to the 2013 sending of letters to all Member States and carry out a proper follow-up in the context of the EU Framework on the Rule of Law;
 2. formally address non-compliance by certain Member States with their obligations under the European Convention of Human Rights and the EU Charter to cooperate with relevant human rights inquiries and the

²¹⁶ This recommendation was also adopted by the Parliament in the 2012 Flautre Report, which, in paragraph 55, "[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, 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."

²¹⁷ See www.statewatch.org/analyses/no-223-eu-intcen.pdf.

²¹⁸ F. Geyer, 2007, "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; D. Bigo, 2006, "Intelligence Services, Police and Democratic Control: The European and Transatlantic Collaboration", in D. Bigo and A. Tsoukala (eds), *Controlling Security*, Paris: Centre d'Etudes sur les Conflits/L'Harmattan, pp. 163-82. This has already been proposed in Carrera et al., 2012, op. cit.

judicial investigations carried out by the European Court of Human Rights in compliance with Article 38 ECHR;

3. properly enforce existing EU secondary law with direct relevance in this matter, such as the EU legal framework on the rights of victims; and
 4. ensure an independent and objective evaluation and detailed assessment of the functioning/use of the EU-US agreements on Mutual Legal Assistance (MLA) and Extradition (and parallel bilateral agreements between Member States and the US) so as to ensure consistent and uniform application in compliance with the EU Charter of Fundamental Rights and existing EU legal standards in the sharing of evidence in criminal proceedings.²¹⁹
- **Recommendation 5:** In light of the findings of the U.S. Senate Intelligence Committee Report and the recent rulings by the European Court of Human Rights, the Parliament should call on the President of the European Council to issue an official statement to Plenary on the matter. The Council should issue an official Declaration on Member States' complicity in the CIA-led programme as well as the obstacles to accountability, truth-seeking and the delivery of justice to victims in various Member States. The Council should also commit unconditionally to preventing impunity from serious fundamental rights violations and to supporting supranational human rights monitoring, and to ensuring judicial/democratic supervision in the fight against terrorism and crime.
 - **Recommendation 6:** The Feinstein Report has also provided evidence on the existence of considerable funds provided by the CIA to some EU governments to encourage them to host clandestine CIA detention sites. The Parliament should call for an effective investigation into these allegations of possible bribes or other acts of corruption linked to the CIA. Judicial investigations should be launched in relevant Member States as well as in the US. Eurojust could be called on to encourage and coordinate potential cooperation between EU and US judicial authorities and the effective use of the existing EU-US MLA Agreement to investigate these matters. This would also require proper and enhanced protection of whistle-blowers so that the origin and destination of this money can be ascertained.

²¹⁹ As proposed in Carrera et al., 2015, op. cit.

ANNEX 1: THE STATE OF PLAY OF INQUIRIES IN FIVE EUROPEAN COUNTRIES

STATE	Nature of inquiries (political/ judicial)	Current status (open/ closed)	Results	Alleged participation	State reaction to allegations	Sanctions /judicial redress/ reparation(to authorities/ individuals)	Parties involved (intelligence, military, private sector)	Main obstacles (excluding diplomatic assurances)
POLAND	Judicial – national International ECtHR	Ongoing Closed	Two persons granted victim status; ²²⁰ One person granted injured person status; investigations ongoing; operation of CIA secret prison	Rendition flights; ²²¹ complicity in torture, detention and prisoner transfer; black sites	Government officials acknowledge the existence of Stare Kiejkuty CIA prison ²²²	ECtHR rulings of June 2014 not complied with	Former head and deputy head of the secret service, former prime minister ²²³	US authorities do not offer mutual legal assistance, secrecy issues (classified information); prosecutor removed from the case; delays; lack of political will ²²⁴
UK	Political and	Ongoing	APPC ongoing;	Complicity in interrogation	UK Government denied knowing about secret	Compensation paid to	MI5 and MI6 officers	Gibson Inquiry

²²⁰ Open Society Justice Initiative, 2010, "Polish Prosecutor Recognizes Guantánamo Prisoner as Victim in CIA Black Site Investigation", Press Release, Open Society Foundations, 27 October, available at www.soros.org/initiatives/justice/news/poland-cia-nashiri-20101027.

²²¹ Amnesty International, 2011, "Current evidence: European Complicity in the CIA Rendition and Secret Detention Programmes".

²²² *Rzeczpospolita*, op. cit.

²²³ A. Rettman, 2012, "Poland indicts former spymaster over CIA renditions", *EU Observer*, 29 March, available at <http://euobserver.com/22/115745>.

²²⁴ A. Singh, 2011, "As Poland's Legacy of CIA Torture Erupts, Europe's Human Rights Court Must Act", Open Society Foundations, available at <https://www.opensocietyfoundations.org/voices/poland-s-legacy-cia-torture-erupts-europes-human-rights-court-must-act/>.

	judicial ²²⁵		ISC non-effective; Gibson Inquiry abandoned; insufficient evidence to press criminal charges; out-of-court settlements	and mistreatment; knowledge of illegal transfers; Diego Garcia interrogation site	prisons	several victims ²²⁶		secretive and not independent; insufficient evidence for criminal charges; MI6 officers protected for acts abroad in specific cases; state secrets doctrine; lack of sufficient evidence in two pending cases due to the British government invoking state secrets doctrine ²²⁷ .
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²²⁵ See www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide?intcmp=239.

²²⁶ P. Wintour, 2010, "Guantánamo Bay detainees to be paid compensation by UK government", *The Guardian*, 16 November, available at www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-compensation-claim.

²²⁷ In the case *Belhaj v. former MI6 Agents*, the High Court ruled against the UK government and called for the "act of state" and "state immunity" doctrine to be lifted in order to ensure efficient and effective criminal proceedings. For more information, see Neutral Citation Number EWCA Civ 1394/ 2014 in the case no. A2/2014/0596 between Abdul-Hakim Belhaj and Fatima Boudchar v. the RT. Hon. Jack Straw MP, Sir Mark Allen CMG, the Secret Intelligence Service, the Security Service, the Foreign and Commonwealth Office.

ITALY	Political ²²⁸ and judicial ²²⁹	Political: closed; judicial: national closed; ECtHR ongoing	Court judgment <i>in absentia</i> of CIA, Italian and US military for the kidnapping of Abu Omar	Involvement and/or knowledge of CIA's intention to abduct Abu Omar ²³⁰	Government denied any knowledge of the case ²³¹	Italian court convicted <i>in absentia</i> 22 CIA agents and one US military official, as well as two Italian intelligence operatives (SISMI); ²³² compensatio n unpaid ; no arrest warrants issued; ECtHR application ²³³ waiting final ruling, reached last hearing on 23 June 2015	CIA agents, US military official and Italian intelligence operatives (SISMI)	Prosecution's effectiveness undermined by successive Italian governments ²³⁴ ; 'state secrets' privilege invoked by appeal court; ²³⁵ alleged US pressure; state intervening in judiciary
LITHUA- NIA	Political ²³⁶ and	Political: closed;	Judicial	Two secret detention	Parliamentary inquiry acknowledged presence	Abu Zubaydah ²⁴¹	American company	Halting of judicial

²²⁸ Statewatch, Italy's reply to European Parliament TDIP questionnaire (both Senate and Chamber) in *European Parliament, Questionnaire - National Parliaments' activities on alleged CIA activities in European countries* – Italy (Senate), available at <http://www.statewatch.org/rendition/rendition.html>.

²²⁹ BBC, 2009, "CIA agents guilty of Italy kidnap", 4 November, available at <http://news.bbc.co.uk/2/hi/8343123.stm>.

²³⁰ 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>.

²³¹ Ibid.

²³² BBC, 2009, op. cit.

²³³ *Nasr and Gali v. Italy* (Pending), Communicated 22.11.2011.

²³⁴ Amnesty International, 2013, Press release, available at <https://www.amnesty.org/en/press-releases/2013/09/italy-must-not-pardon-former-cia-agent-involved-rendition/>

²³⁵ Amnesty International, 2011, "Current evidence: European Complicity in the CIA Rendition and Secret Detention Programmes".

	judicial ²³⁷	judicial: reopened; ECtHR ongoing	inquiry halted in January 2011 on "dubious" grounds and state secrets ²³⁸ and relaunched in December 2014 by Vilnius Regional Court; ECtHR application ongoing	sites; ²³⁹ rendition flights; ²⁴⁰ aiding and abetting CIA in renditions	of two CIA rendition sites	v. Lithuania ongoing	(Elite LLC); ²⁴² Lithuanian secret services (SSD)	inquiry in January 2011 on "dubious" grounds, including 'state secrets' privilege; ²⁴³ Lithuanian customs officials prevented from inspecting flights ²⁴⁴
ROMANIA	Political ²⁴⁵ and judiciary	Political: closed; Judicial: ongoing at national and	Senate report adopted in 2007 concluded accusations were	Hosting a secret detention facility ²⁴⁷	Romanian authorities still deny many allegations despite compelling evidence; no effective investigation started			Senate report coordinated by people with close connections to Romanian

²³⁶ Ibid., p. 4-5.

²⁴¹ Cobain, op. cit.

²³⁷ Ibid.

²³⁸ Amnesty International, 2013, Report, "Unlock the Truth: Poland's involvement in CIA secret detention", p. 5.

²³⁹ L. Phillips, 2009, "Secret CIA prison revealed in Lithuania", *EU Observer*, 20 November, available at <http://euobserver.com/13/29029>.

²⁴⁰ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Amnesty International, 2011, "Romania must come clean...", op. cit.; Letter sent by the Romanian Prime Minister's Office to the European Parliament, op. cit.; Letter sent by Romanian Senator Nicolai to the European Parliament, 12 January 2006, available at 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 www.statewatch.org/cia/documents/letter-romania-perm-rep.pdf.

		ECtHR levels	groundless; ²⁴⁶ new evidence on CIA black site in Bucharest					intelligence community; lack of effective investigation ; lack of political will; no parliamentar y oversight of intelligence services since committee responsible has ties to intelligence community
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²⁴⁷ Amnesty International, 2011, "Romania must come clean...", op. cit.

²⁴⁶ Ibid.; Amnesty International *Romania – AI Romania Country Report 2010*, op. cit.

ANNEX 2: A DETAILED OVERVIEW OF INQUIRIES BY COUNTRY

POLAND

Nature of inquiries

Political: - Parliamentary, in Nov. - Dec. 2005. Ended briefly with no results.

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 into Polish officials' role in the CIA programme and in rendition flights that transported Abu Zubaydah into and out of Poland.²⁴⁸
- Case of Abd al-Rahim Al Nashiri (Saudi Arabian national): investigation into 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 there.²⁴⁹
- ECtHR *Al Nashiri* and *Abu Zubaydah* cases (closed); the Court found Poland guilty of failure to investigate detention and torture in a prison facility operated by the CIA on Polish territory.

Current status:

- *Al Nashiri* and *Abu Zubaydah* cases: ongoing (granted victim status in January 2011 and in October 2010).
- ECtHR *Al Nashiri* and *Abu Zubaydah* cases: closed.
- Criminal charges against the former Polish head of security Zbigniew Siemiatkowski²⁵⁰ charges have been dropped.²⁵¹

Outcomes

- ECtHR rulings in the *Al Nashiri* and *Abu Zubaydah* cases.

²⁴⁸ Interights, *Abu Zubaydah v. Poland*, available at <http://www.interights.org/abu-zubaydah/index.html>.

²⁴⁹ See <http://jurist.org/paperchase/2012/03/poland-former-head-of-intelligence-faces-possible-charges-for-involvement-in-secret-cia-prison.php>.

²⁵⁰ See <https://euobserver.com/justice/116088> and <http://www.reuters.com/article/2013/02/19/us-poland-cia-siemiatkowski-idUSBRE91I10F20130219>.

²⁵¹ See www.rt.com/news/poland-drops-charges-investigation-136/.

State's alleged participation

- Rendition flights.
- Stare Kiejkuty secret detention site.
- Complicity in torture, detention and prisoner transfer.

State's reaction to allegations

- Poland has consistently denied any complicity in the CIA rendition and secret detention programme and has even refused to disclose case evidence to the ECtHR.

Sanctions / judicial redress / reparation

- Abu Zubaydah and Al Nashiri: granted victim status.
- Financial reparations: paid.

Parties held accountable / under investigation

- Former head of the Polish secret service, and former interior minister, Zbigniew Siemiatkowski;²⁵² charges dropped in 2013.²⁵³

Main obstacles

- Lack of political will to conduct effective investigations. Interference with the judiciary by changing prosecutors, offices, delaying the proceedings on grounds that MLA requirements not fulfilled by the American authorities.²⁵⁴
- 'State secrets doctrine' invoked in the criminal proceedings against former head of the security services.

²⁵² Rettman, op. cit.

²⁵³ See www.rt.com/news/poland-drops-charges-investigation-136/.

²⁵⁴ Singh, 2011, op. cit.

The UK

Nature of inquiries

Political:

- All-Party Parliamentary Group on Extraordinary Rendition (APPG): ongoing investigations.
- Intelligence and Security Committee (ISC): 2007 inquiry not conclusive.
- Executive Gibson Inquiry/Detainee Inquiry 2010-12 abandoned²⁵⁵ because of lack of independence and transparency; the UK government decided that all matters raised by the Detainee Inquiry's report would be addressed by the ISC.²⁵⁶
- New claims concerning the Diego Garcia interrogation site.

Judicial:

- Closed: Operation Hinton, Operation Iden: police investigation into the actions of the MI6 officer who interrogated suspects at the US-run prison at Bagram, Afghanistan.²⁵⁷
- Reopened by Court of Appeal: Operation Lydd and the Yunus Rahmatullah case.
- In the case of Abdul-Hakim Belhaj and Fatima Boudchar against Rt. Hon. Jack Straw MP, Sir Mark Allen CMG, the Secret Intelligence Service, the Security Service, the Attorney General, the Foreign and Commonwealth Office and the Home Office, in the ruling of December 2013, the High Court upheld the "act of state" doctrine.²⁵⁸ The practice refers to a rule of common law, which prevented a court from judging the acts of foreign states committed on their own territory. In October 2014 the London Court of Appeal ruled against this decision and allowed the case to continue.²⁵⁹

Current status

- Executive Gibson Inquiry/Detainee Inquiry: inconclusive.²⁶⁰
- APPG: ongoing.
- ISC: ongoing.
- Case of Yunus Rahmatullah: ongoing.
- Operation Lydd: ongoing.

Outcomes

²⁵⁵ See Amnesty International, 2012, "UK: Detainee Inquiry Closure Presents an Opportunity for Real Accountability," EUR 45/005/2012, 18 January, www.amnesty.org/en/library/info/EUR45/011/2011/en.

²⁵⁶ See decision www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120118/debtext/120118-0001.htm.

²⁵⁷ See www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide?intcmp=239.

²⁵⁸ See www.justsecurity.org/wp-content/uploads/2013/12/Belhaj-Judgement-UK.pdf.

²⁵⁹ See www.reprive.org.uk/press/2014_10_30_court_of_appeal_belhadi_libya/.

²⁶⁰ See www.bbc.co.uk/news/world-16614514.

- Gibson Inquiry: abandoned due to ongoing criminal investigations.
- ISC 2007 report: inconclusive.
- Operation Hinton: members of the Security Service provided information to the US authorities about Binyam 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.²⁶¹
- Operation Iden: unsuccessful in getting statements from a person allegedly mistreated in the presence of an MI6 interrogator; not possible to ascertain individual's identity.²⁶²
- Case of 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 more.²⁶³ In November 2014 a UK High Court decided that the case against the British government could proceed²⁶⁴.
- 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 detailing the US interrogation techniques that were previously redacted from the Divisional Court judgment had to be made public.²⁶⁵
- 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.²⁶⁶

State's alleged 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 Mr Mohamed in Pakistan and at the US-run prison in Bagram, Afghanistan.

State's reaction to allegations

- 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.

²⁶¹ Cobain, op. cit.

²⁶² Ibid.

²⁶³ Court of Appeal [2012] EWCA Civ 182.

²⁶⁴ See <http://www.telegraph.co.uk/news/uknews/defence/11241339/Man-detained-by-US-for-10-years-can-sue-Britain-for-damages-says-High-Court.html>

²⁶⁵ *R. (on the application of Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 6.

²⁶⁶ Ibid., Annex.

- 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 facilities.²⁶⁷

Sanctions / judicial redress / reparation

- Settlement: millions of pounds paid in compensation to former Guantanamo 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 court.²⁶⁸

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.
- State secrets doctrine.
- Settlements out of court.

²⁶⁷ APPG, 2009, "Extraordinary Rendition: Closing the Gap: A Proposal to Criminalise UK Involvement", available at www.statewatch.org/news/2009/nov/uk-apg-extraordinary-rendition-closing-the-gap.pdf.

²⁶⁸ Wintour, op. cit.

ITALY

Nature of inquiries

Political:

- Parliamentary inquiry.
- Italian security services inquiry.²⁶⁹

Judicial:

- *In absentia* judicial investigation and trial by Milan Prosecutor's Office about the abduction of Nasr Osama Mustafa Hassan, alias 'Abu Omar'.²⁷⁰
- ECtHR Application *Nasr and Ghali v. Italy*:²⁷¹ pending.

Current Status

Political inquiries: closed

Judicial inquiries:

- National judicial investigation and trial: closed.
- ECtHR application: expecting ruling.

Results

Judicial

- November 2009: The 4th Criminal Section of the Milan Ordinary Court convicted 22 CIA agents, one US military official and two Italian intelligence (SISMI) operatives, Nicolo Pollari and Marco Mancini, for involvement in the abduction of Abu Omar.²⁷² However, it dismissed cases against five high-ranking Italian and three US officials on the basis of 'state secrets' and diplomatic immunity.²⁷³ The Constitutional Court upheld the claims of state secrets privilege.
- 2010: following the decision of the Constitutional Court, the Milan Court of Appeal increased the lengths of the sentences of the CIA agents and of the US military official but it dropped the charges against Mr Pollari and Mr Mancini.
- 2012: The Supreme Court overturned the decision of the Court of Appeal. It decided to reopen the trial, provided that SISMI denied involvement in the operations and therefore the Court concluded that the Italian officials involved in the kidnapping acted without an official mandate.
- 2013: The Court of Appeal sentenced Mr Pollari and Mr Mancini to 10 and 9 years respectively (Judgement 985/2013).

²⁶⁹ European Parliament, Questionnaire, National Parliaments' activities on alleged CIA activities in European countries – Italy (Chamber), available at www.statewatch.org/rendition/rendition.htm.

²⁷⁰ Tribunale di Milano, Sezione Giudice per le indagini preliminari, n. 10838/05 and n. 1966/05.

²⁷¹ ECtHR, Terrorism Factsheet – April 2012, Press Unit.

²⁷² BBC, 2009, op. cit.

²⁷³ Amnesty International, 2010, "Italy Prevents trial of intelligence agents over Abu Omar rendition", 16 December, available at www.amnesty.org/en/news-and-updates/italy-prevents-trial-intelligence-agents-rendition-abu-omar-2010-12-16.

- 2014: The ruling is dismissed once again by the Constitutional Court on the basis of the state secrets privilege and the Court of Cassation acquits the two Italian officials.²⁷⁴

State's alleged 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.²⁷⁵
- The Italian government may have known about Abu Omar's abduction by CIA agents.²⁷⁶
- There was interference in the national judicial proceedings from higher-ranking authorities²⁷⁷ when, for example, Italian President Giorgio Napolitano decided on 5 April 2013 to pardon US Colonel Joseph Romano for his involvement in the abduction of Abu Omar in Italy²⁷⁸.

State's reaction to allegations

Political inquiries:

- Ineffective.

Judicial:

- Not entirely effective: financial reparations have not been paid, arrest warrants have not been issued and the decisions of the Court have not been enforced.

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 *in 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.²⁷⁹
- A Milan Court of Appeal subsequently lengthened the sentences of the 22 CIA agents and one US military official to seven and nine years respectively.²⁸⁰
- The Court of Cassation upheld the guilty verdicts.²⁸¹
- Abu Omar was awarded €1 million in damages. His wife was awarded €500,000 in damages.²⁸²

²⁷⁴ See www.statewatch.org/analyses/no-254-abu-omar-yasha.pdf.

²⁷⁵ D. Priest, 2005, "Italy knew about plan to grab suspect", *The Washington Post*, 30 June, available at www.washingtonpost.com/wp-dyn/content/article/2005/06/29/AR2005062902971.html.

²⁷⁶ Ibid.

²⁷⁷ See <http://jurist.org/paperchase/2014/03/italy-high-court-upholds-convictions-of-cia-agents-in-extraordinary-rendition.php>.

²⁷⁸ See <http://www.bbc.com/news/world-europe-22048932>

²⁷⁹ Hooper, op. cit.

²⁸⁰ Amnesty International, 2010, op. cit.

²⁸¹ See <http://jurist.org/paperchase/2014/03/italy-high-court-upholds-convictions-of-cia-agents-in-extraordinary-rendition.php>.

- The ECtHR application by Abu Omar and his wife is pending.

Main obstacles

- 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.²⁸³
- In 2009 the Italian Constitutional Court also invoked the 'state secrets' privilege to justify the impossibility of ruling against high-level officials of SISMI. The Milan Court of Appeal gave the same justification in dismissing the cases against five high-ranking Italian officials in December 2010.²⁸⁴
- The US allegedly pressured the Italian government to influence the judiciary.²⁸⁵

²⁸² Hooper, op. cit.

²⁸³ Amnesty International, 2011, "Current evidence: European Complicity in the CIA Rendition and Secret Detention Programmes" p. 4.

²⁸⁴ Ibid.

²⁸⁵ Goetz & Gebauer, op. cit.

LITHUANIA

Nature of inquiries

Political:

- 5 November 2009: Parliamentary inquiry concluded that two secret sites were prepared to receive suspects with the help of the Lithuanian Secret Services (SSD).²⁸⁶

Judicial:

- January 2010: the Lithuanian Prosecutor General's Office opened a criminal investigation.²⁸⁷ However, this investigation was suddenly halted in January 2011 due to the 'state secrets' privilege.²⁸⁸
- December 2014: Vilnius Regional Court upheld the previous ruling and restarted the investigation.
- ECtHR *Abu Zubaydah v. Lithuania*: ongoing.

Current Status

- Political: closed.
- Judicial: reopened.

Results

Political:

- 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 could not find any evidence about the second site. It requested the General Prosecutor's Office to investigate the SSD's possible abuse of authority.²⁸⁹

Judicial:

- No outcomes so far.

State's alleged participation

- In 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'.²⁹⁰ The Baltic News Agency (BNS) reported that two CIA-chartered aircraft, a Boeing and a Gulfstream5, traversed Lithuanian airspace "dozens of times between 2001 and 2003" en route to Poland and Afghanistan. Lithuanian air traffic officials referred to the Gulfstream5 as the 'Guantanamo Express'.²⁹¹

²⁸⁶ Amnesty International, 2011, "Current Evidence...", op. cit., p. 4-5.

²⁸⁷ Ibid.

²⁸⁸ Amnesty International, 2011, "Unlock the Truth in Lithuania...", op. cit., p. 5.

²⁸⁹ Amnesty International, "Current Evidence...", op. cit., p. 4-5.

²⁹⁰ Phillips, op. cit.

²⁹¹ Daily Kos, *Tail Number Watch*, 17 November 2005. Available at: <http://www.dailykos.com/story/2005/11/17/165806/-Tail-Number-Watch>.

State's reaction to allegations

- The Lithuanian government admitted the existence of two secret detention sites.

Sanctions

- The Lithuanian government is currently facing legal action in the ECtHR, pursued by Abu Zubaydah.²⁹²

Parties involved

- 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 established.²⁹³
- Lithuanian Secret Services (SSD)

Main obstacles

- State secrets doctrine.²⁹⁴
- Lithuanian customs officials were prevented from inspecting CIA flights.²⁹⁵
- Lack of effective investigations.

²⁹² Cobain, op. cit.

²⁹³ Ibid.

²⁹⁴ Amnesty International, 2011, "Unlock the truth in Lithuania...", op. cit., p. 5.

²⁹⁵ Ibid., p. 10.

ROMANIA

Nature of inquiries:

Political:

- 2007 parliamentary inquiry: ineffective, denied any involvement in the CIA rendition programme.²⁹⁶
- Former officials acknowledged the existence of the 'Bright Light' detention site in Bucharest.

Judicial:

- 2012: APADOR-CH, as part of the Open Society Justice Initiative, filed a civil case against the Romanian state.²⁹⁷
- ECtHR *Al Nashiri v. Romania*: ongoing.

Current Status

- Political: closed.
- Judicial: ongoing both at national level and at the ECtHR.

Results

- None so far.

State's reaction to allegations

- The new evidence was considered pure speculation. Deputy Head Adrian Camarasan of ORNISS (The National Registry Office for Classified Information, where the Black Rendition Site was allegedly hosted) dismissed the allegation.²⁹⁸ Former Romanian President Traian Băsescu denied any knowledge of the subject.²⁹⁹ Former Romanian President at the time of the detentions, Ion Iliescu, acknowledged, in April 2015, the existence of CIA black sites in Romania.³⁰⁰

²⁹⁶ ECtHR, *Al Nashiri v. Romania*, Application, paragraphs 101, 102: The relevant parts read as follows: "To the question whether secret American bases exist or existed in Romania, the Investigation Committee replies negatively. To the question whether in Romania, in the researched period, there exist or existed facilities for the detention of prisoners, other than penitentiary ones (real, secret, ad-hoc, buildings usable in the form improvised for this purpose), potentially in the proximity of airports Timișoara, Bucharest – Henri Coanda or Baneasa, and Constanta, the Investigative Committee replies negatively. (...) 8. To the question whether the purpose of the stops in Romania of the flights presented at chapter 5, the Investigative Committee has solid grounds to reply that they had nothing to do with potential illegal transports of prisoners on the territory of Romania."

²⁹⁷ ECtHR, *Al Nashiri v. Romania*, Application, paragraph 105 states: "No official decision to open a criminal investigation was communicated up to date".

²⁹⁸ Ibid.

²⁹⁹ Goldman & Apuzzo, op. cit.

³⁰⁰ See www.aljazeera.com/news/2015/04/romania-president-admits-allowing-cia-site-150427140351035.html.

Sanctions / judicial redress / reparation

None.

Parties involved

Romanian Secret Services.

Main obstacles

- Lack of a formal inquiry, both at the judicial and political levels, specifically regarding the new evidence that was recently revealed by the public declarations of former President Ion Iliescu and former Head of the Secret Services Mr. Ioan Talpeș, in office when the renditions took place in Bucharest.

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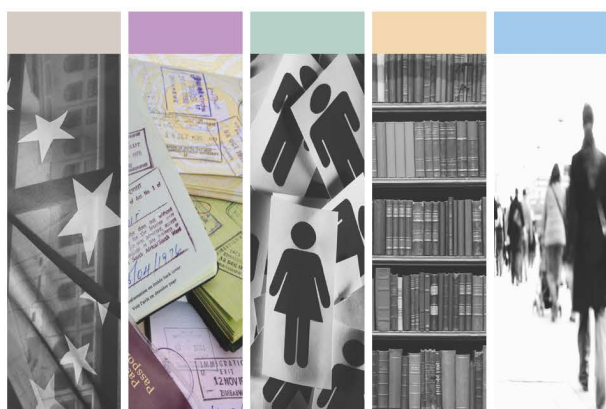
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