



## Extraordinary rendition of terrorism suspects The EU Member States' alleged assistance to the CIA

**SUMMARY** *Following 9/11, the Bush Administration established an "extraordinary rendition" system, whereby terrorism suspects were transferred, secretly detained and interrogated outside the US.*

*There has been growing evidence of EU Member States' (MS) collaboration with the US, allegedly including stopovers by US aircraft at European airports and the setting up of secret detention sites in three MS. This would arguably amount to serious violations of international human rights law.*

*The European Parliament and the Council of Europe (CoE) have investigated those allegations and initiated judicial and parliamentary investigations in individual MS. However, the investigators' work was hindered by the refusal of both the US and European governments to disclose information, in most cases on grounds of "state secrecy".*

*No criminal proceedings against agents involved in extraordinary rendition could be initiated in the US. Those in the EU have not led to the extradition of American agents.*

*Amongst the EU institutions, the European Parliament has been the major proponent of holding MS accountable for their participation in irregular rendition. It severely criticised the Council and MS governments for not doing enough to shed light on the actions of their secret services.*

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### Context

The term "extraordinary rendition" denotes the extra-judicial transfer of a suspect between countries, in contrast to the formalised process of extradition, i.e. the universally accepted form of rendition regulated by bilateral agreements.<sup>1</sup>

In November 2005, Human Rights Watch (HRW), the *Washington Post* and ABC television reported that, following 9/11, the CIA had been running an extraordinary rendition programme for terrorism suspects outside the US. These allegations were soon corroborated by other disclosures by press and NGOs. In September 2006, President George W. Bush [confirmed](#) the existence of such a programme.

### Secret transfers

The US programme involved illegally abducting or arresting individuals in one state and transferring them by military or CIA flights to the Guantánamo facility or to "black sites" (secret prisons) located in third countries, many of them with no legal protection against torture.

The suspects were typically held in secret and "incommunicado" detention (the authorities denied or refused to confirm the detention, and detainees had no access whatsoever to the outside world, including to family, judicial authorities and legal



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counsel). Those “ghost detainees” were also subjected to practices referred to by President Bush as “enhanced interrogation techniques” or “an alternative set of procedures”, some of which are widely believed to amount to torture.

### MS' alleged complicity

Whilst MS governments have consistently denied such allegations, there has been growing evidence of MS' cooperation with the US authorities in extraordinary rendition. As early as 2006 and 2007, the CoE Special Rapporteur, Dick Marty, and the European Parliament issued reports providing a detailed account of this cooperation. Further evidence was presented in the 2010 [UN Joint Study on Global Practices in Relation to Secret Detention](#) and two other CoE reports.<sup>2</sup>

The evidence gathered strongly suggests that, between the end of 2001 and the end of 2005, at least 1 245 flights operated by the CIA and an unspecified number of military flights entered European airspace or stopped over at airports in MS and some other European countries.

The MS concerned were Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Lithuania, Poland, Portugal, Romania, Spain, Sweden and the UK. With respect to

Poland, Romania, and subsequently also Lithuania, evidence was found of the existence of secret detention sites set up for use by the CIA. Moreover, officials of some MS allegedly interrogated prisoners at Guantánamo and other secret detention facilities.

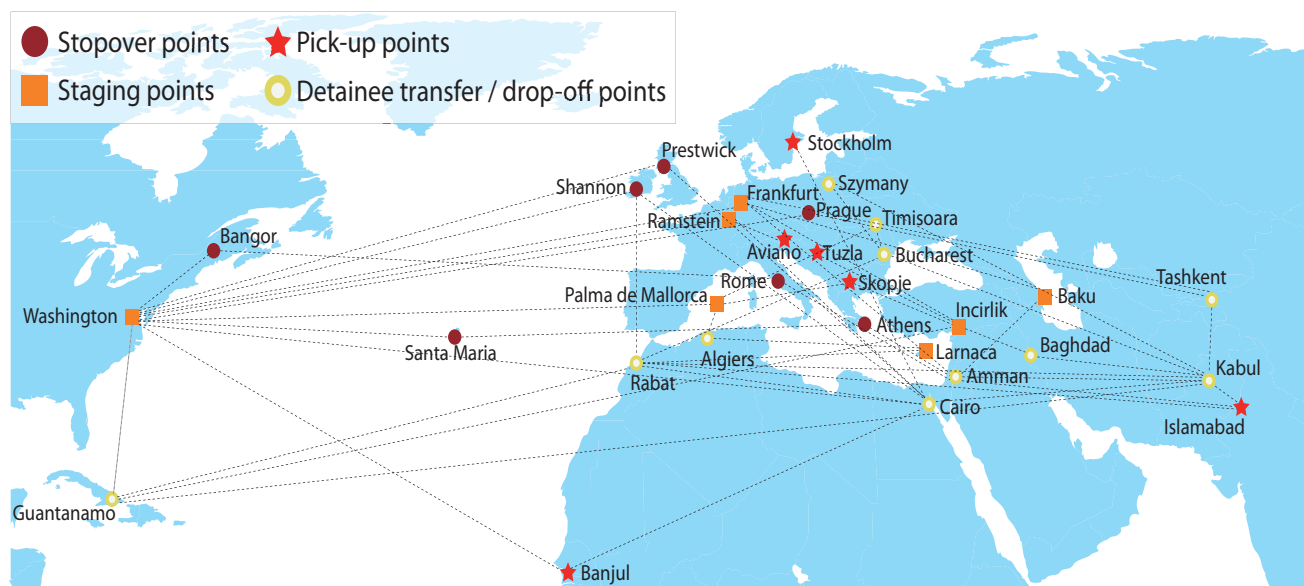
If these allegations are true, it would mean that several MS have seriously breached their obligations as regards the protection of human rights stemming from both international and EU law. Such a conclusion would be given further weight by the fact that some of the detainees were EU citizens or individuals legally resident in the EU.

### Human rights issues

Several elements of the extraordinary rendition programme raise doubts as to MS' compliance with international human rights instruments. This seems particularly the case with respect to the way suspects were abducted, their ill-treatment in detention, and their transfer to countries in which they were likely to be subjected to torture.

The norms of human rights law which could be applied with respect to extraordinary renditions include the prohibition of:

**Figure 1 - The global "spider's web" of secret detention and unlawful inter-state transfers**



Source: [Council of Europe Parliamentary Assembly](#), 2006.

- inhuman or degrading treatment
- torture
- *refoulement* (transfer to a country where a risk of torture exists), and
- enforced disappearances (deprivation of liberty, followed by the concealment of the detainee's fate or whereabouts and placing them outside the protection of law).

The fact that MS agents were not directly involved in most of the alleged acts would not appear to waive their responsibility for breaches of human rights which reportedly occurred.

In this connection, it is widely held that in case of surrender of a person, diplomatic assurances of the receiving state are insufficient to guarantee the sending state's compliance with human rights law. Moreover, it is argued that the activities of foreign intelligence services operating in the EU may be subject to less stringent legal provisions than those of the MS and should thus be monitored. This was not the case for American military bases located in the EU.<sup>3</sup>

### International law instruments

#### *The UN instruments*

Relevant UN instruments include:

- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), and in particular Article 3 which prohibits the transfer of individuals to states where they would be in danger of being subjected to torture.
- [International Covenant on Civil and Political Rights](#), and in particular Article 7 prohibiting torture and cruel or degrading treatment.

- The 2007 [International Convention for the Protection of All Persons from Enforced Disappearance](#).

There are no mechanisms however to guarantee the enforcement of these conventions.

#### *The Council of Europe*

EU MS are all members of the CoE, and so the [European Convention on Human Rights](#) applies to them. Therefore, non-compliance with Articles 2, 5 and 6, and, most importantly, Article 3 ECHR may lead to cases before the European Court of Human Rights (ECtHR). These provisions are enforceable however only to the extent that CoE members are willing to implement the ECtHR judgements.

### US position on extraordinary rendition and international law

Following 9/11, the US argued that neither the traditional instruments of criminal law nor the laws of war (including the [Geneva Conventions](#)) applied to terrorism. The category of "unlawful enemy combatant" was introduced with respect to terrorism suspects who could thus be detained for indefinite time without any access to the US judicial system. Moreover, the US consistently held that human rights conventions only apply to the territory of the ratifying state and therefore cannot be invoked in respect of the programme operating outside the US.

Several detainees have filed cases before the ECtHR (e.g. [Al Nashiri v. Poland](#), [Othman \(Abu Qatada\) v. the UK](#), [Babar Ahmad and others v. the UK](#), and [Abu Zubaydah v. Lithuania](#)). The applicants claim the responsibility of MS for participation in violations of human rights and for failure to conduct effective investigations.

### EU law and human rights

The Lisbon Treaty has changed the human rights architecture of the EU, by giving the [EU Charter of Fundamental Rights](#) binding force equal to the Treaties. Its provisions may therefore be enforced by the Court of Justice of the European Union (CJEU).

This does not however open the door for individuals to hold MS accountable for their past actions in the area of secret services' cooperation, which is outside EU competence.

## Obstacles to investigation

In the MS concerned, various state and non-state actors tried to shed light on the MS' role in extraordinary rendition. MS' authorities have however denied their participation, in many cases without conducting any formal inquiries. In MS in which investigations were carried out, many commentators pointed to their lack of independence, ineffectiveness and insufficiently public character.

The unwillingness of the American side to cooperate has been a major obstacle. Not only did the US authorities announce that any extradition request would be refused on national security grounds, they also consistently refused to grant any form of legal assistance to European investigators.

The competent authorities in Europe also invariably blocked the disclosure of information. One argument put forward was that such disclosure could lead to the denial of terrorism-related intelligence sharing with the US, as illustrated by the position of the UK Foreign Secretary in the Binyam Mohamed case.

The MS authorities invoked "state secrecy" and the protection of national security without any further explanations. Such a general refusal of disclosure by German authorities in the Khaled El Masri case led a group of Bundestag members to request a ruling of the Federal Constitutional Court to assert the parliament's right to information. The Court stated that the government's interest in protecting its internal decision-making process must always be weighed against parliament's interest in being informed. The executive branch cannot refer in general terms to state secrecy as justification for withholding information from the legislative branch. Specific and detailed reasons for refusal have to be given in each individual case. Parliamentary oversight is one of the most important prerogatives of the parliament. For it to be effective, the government must not be in a

position to determine the scope of a parliamentary investigative mandate. Otherwise, it would take control over its own overseers. The Court further argued that parliaments have their own rules which guarantee the protection of state secrets.<sup>4</sup>

The European Parliament and the CoE Special Rapporteur also considered that national governments have not cooperated with them to a satisfactory level. They thus had to rely to a large extent on information provided by "whistle-blowers" and non-state actors.

### Accountability of perpetrators

In the US no criminal proceedings have been initiated against agents involved in extraordinary renditions. Nor could redress be sought in civil courts, as illustrated by the dismissal of El Masri's action for damages for acts of torture on the grounds of the so-called "state secrets privilege".

In the EU some attempts were made to bring the perpetrators of illegal acts to justice, but these have been unsuccessful.

The Abu Omar case in Italy has been the only case so far to lead to convictions of officials engaged in irregular rendition. 25 individuals, including 22 CIA agents, were sentenced to lengthy imprisonment. The judgement was delivered *in absentia*, which has been criticised by some commentators.<sup>5</sup> The extradition of the American citizens charged or convicted was never officially requested by the Italian government.

In a German investigation into the abduction of El Masri, arrest warrants were issued against 13 CIA agents. Again, there was no follow-up by the executive branch, as those warrants were never transmitted to the American authorities. A complaint aimed at obliging the government to request the extradition of the American agents was rejected by the competent German court.

Two criminal complaints were also filed with the German Federal Prosecutor, based on the principle of universal jurisdiction, in an



attempt to hold high-ranking US officials accountable for "war crimes" committed in the "War on Terror". The Prosecutor announced however that he would not open an investigation, using his discretionary power in this respect.<sup>6</sup>

In the UK, 16 people were granted significant financial compensation for alleged ill-treatment by the secret services. The UK Government arguably agreed to such a settlement to avoid long-lasting court cases and being forced to divulge intelligence in court. It did not admit however to any wrongdoing by its secret services.

### Inquiries in Member States suspected of secret detention

#### *Poland*

In Poland, the allegations were first addressed by the parliamentary commission responsible for oversight of the secret services. The commission, which worked in camera and without minutes, held a one-day meeting in December 2005, following which it denied the existence of any CIA prison in Poland.

However, in March 2008, the Polish Public Prosecutor launched an official investigation, which led to the identification of "high-value detainees" who had been secretly held in Poland. Two of them – Abd al-Rhim al-Nashiri and Abu Zubaydah (both currently incarcerated in Guantánamo) – were granted victim status. Despite repeated requests by the Polish prosecutor, American authorities refused to assist him.

The information from the prosecution was made public mainly thanks to Polish NGOs, which repeatedly addressed requests for information to the prosecution on the basis of the Polish Freedom of Information Act.

The evidence gathered by various actors strongly supports the hypothesis that a black site was run by the CIA in the village of Stare Kiejkuty, where several detainees were interrogated and subjected to torture.

Moreover, the Polish Intelligence Agency confirmed that between 2002 and 2004, CIA flights landed at the nearby Szymany airport.

An application against Poland was recently lodged at the ECtHR on Al Nashiri's behalf.

#### *Romania*

The Romanian government has consistently denied allegations of the existence of black sites in Romania, and of CIA planes having landed in Kogalniceanu military airfield. The inquiry conducted by the Romanian Parliament has been criticised by the CoE Special Rapporteur as "superficial".

#### *Lithuania*

The inquiry by the *Seimas*, initiated in November 2009, concluded that two secret detention centres existed in Lithuania. However, it did not establish whether anyone had been detained in those facilities. Therefore the parliamentary committee recommended a criminal investigation. The latter was started in January 2010 only to be suspended in January 2011 due to "information shortages". This decision was justified by the statute of limitations as well as the refusal of the American authorities to provide legal assistance.

### European Parliament's position

The Parliament has played a bigger role than any other EU institution in investigating the allegations.<sup>7</sup> To this end a special committee – the Temporary Committee on the Alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (TDIP) – was [set up](#) in 2006. The Committee's [report](#) was published in 2007.

In its [2007 resolution](#) the Parliament formulated 46 detailed recommendations to MS, the Council and the Commission. It endorsed the TDIP Committee's report and denounced the lack of cooperation of many MS and the Council with the Committee. It also requested that a "clear and forceful declaration" be issued by both the Council and the MS calling on the US Government to

put an end to the practice of extraordinary rendition. It further encouraged national parliaments to continue or to launch investigations, in particular through the setting up of parliamentary committees of inquiry.

A [2009 resolution](#) reiterated some of those recommendations and stressed that the EU institutions and bodies involved in the transatlantic dialogue should share information with Parliament. It was not the first time the latter problem had been raised, as the Parliament had consistently complained about the unwillingness of the Council to answer information requests from the TDIP Committee.<sup>8</sup>

The EP itself has also been subjected to criticism for having abandoned its investigation following the TDIP report.<sup>9</sup>

## Main references

[Torture and secret detentions: the UN perspective and the role of the European Union](#) / Nowak, M. and Hall, J. European Parliament, 2011.

[Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations](#) / Parliamentary Assembly of the Council of Europe (PACE), 2011.

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## Endnotes

<sup>1</sup> Such as the [Agreement on extradition between the European Union and the United States of America](#).

<sup>2</sup> [Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States](#) / PACE, 2006; [Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report](#) / PACE, 2007; [Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners](#) / European Parliament, 2007, and [Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations](#) / PACE, 2011.

<sup>3</sup> Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners / European Parliament, 2007.

<sup>4</sup> [PACE, 2011](#), op. cit. pp. 14–15.

<sup>5</sup> [All human rights are equal, but some are more equal than others: the extraordinary rendition of a terror suspect in Italy, the NATO SOFA, and human rights](#) / Jenks, Ch. and Talbot Jensen, E. Harvard National Security Journal, 12 November 2010.

<sup>6</sup> [CIA – 'Extraordinary Rendition' flights, torture and accountability – a European Approach](#) / ECCHR, January 2009, pp. 127–131.

<sup>7</sup> Besides the resolutions analysed in this section, the Parliament addressed extraordinary rendition in its [2005 resolution](#) on presumed use of European countries for the transportation and illegal detention of prisoners by the CIA, as well as the [2006](#) and [2009](#) resolutions on Guantanamo prisoners and the [2010 resolution](#) on the fundamental rights in the European Union.

<sup>8</sup> e.g. Parliament criticised the Council for withholding information on the December 2005 informal transatlantic meeting of EU and NATO foreign ministers, as well as for not providing a full dossier from the meetings of two Council working parties with senior representatives of the US Department of State in early 2006.

<sup>9</sup> [Torture and secret detentions: the UN perspective and the role of the European Union](#) / Nowak, M. and Hall, J., European Parliament, p. 8.