



The Role of Human Rights in EU-US bilateral Relations

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Executive Summary

This report provides an analysis of the major questions relating to the relationship between the European Union and the United States of America in the field of human rights. It is the fifth Deliverable in Work Package 6 of the FRAME project. FRAME is a research project funded under the EU's Seventh Framework Programme (FP7) focusing on the impact of the EU's internal and external policies on human rights worldwide. Within FRAME, the focus of Work Package 6 is on Regional Partnerships and Bilateral Cooperation. Consequently, this report is one of the case studies on European Union's external relations. Other similar case studies deal with countries in the European Neighbourhood Policy, ACP countries and bilateral cooperation with emerging economies.

This report aims to analyse the different dimensions and levels of EU-US relations, to survey the instruments the EU uses in this relation and to provide some recommendations for future EU actions. It provides an overview of the main similarities and differences between the EU and the US regarding human rights, and measures the influence of the EU on the state and practice of human rights in the United States. Likewise, this report analyses how the United States may affect human rights in the EU and its Member States, notably in light of US policies that are strongly criticised by the EU from a human rights-based perspective.

To conduct this analysis, the authors selected three case-studies: 1) capital punishment 2) data protection and surveillance programmes and 3) the problem of extraordinary rendition. Beyond the public attention they received, the reason behind this choice is the fact that the EU's position and available space for action is different in all of these fields. Regarding capital punishment, the EU has a firm and standard position, and the report analyses the EU's one-way impact on US legal evolution. Analysing data protection and surveillance programmes shows a two-way impact, since actions of the US, the EU and EU Member States have had impacts and consequences on the legislative developments on both sides of the Atlantic. Finally, extraordinary rendition shows the US' direct and strong impact on EU Member States. Thus, in this latter case, the authors had to provide an analysis of the relating case law of the European Court of Human Rights as well.

The Introduction of this report (Chapter I) gives a detailed description of the methodology used, which is based on an analysis of adopted legislation and other relevant policy documents. It introduces those general aspects of EU foreign policy that can be important regarding the topics at hand, including relevant policy documents like the Strategic Framework and Action Plan on Human Rights and Democracy and the US-related parts of the EU's reports on human rights worldwide. It surveys existing US-specific EU actions, dialogues and meetings as well. This part of the report also analyses the US' participation in international human rights covenants, and tries to make the reader understand US exceptionalism as well as the many factors that influence human rights in the US political system. This chapter shows that there are divergent factors that make US policy making in the field of human rights different in some instances from the European approaches.

Chapter II deals with the topic of capital punishment and explains the EU's position on the death penalty in detail. This chapter consists of a European and a US part. First, it reviews the relevant international agreements, general EU legislation and policy papers like the EU Strategic Framework and Action Plans

on Human Rights and Democracy (2012-2014, 2015-2019) or the EU Guidelines on Death Penalty. It also measures the influence and effects of EU actions in the US, which contain targeted actions, public criticism, direct actions and sanctions. Finally, this chapter addresses the US legal background by explaining the most important laws and landmark cases. It also analyses the most important concerns that are regularly raised in EU documents, in the press and in academia regarding the death penalty in the US. The chapter shows that EU actions in this field were only partly successful, and also that we find inconsistencies among these actions.

Chapter III summarises the background of personal data protection and EU-US policies on surveillance. This chapter explains the controversies surrounding US surveillance programmes like UPSTREAM or PRISM, and sheds some light on similar programmes or legislation of EU Member States. It explains the relevant rules and policies of the EU in detail, and also the EU's answers to public criticism. It places special attention to the latest legislative developments, the Schrems judgment of European Court of Justice and the notions behind the EU-US Privacy Shield. Furthermore, it summarises the most important US laws, as well as the problem of applying international agreements regarding surveillance and private data in the US. Finally, it gives a summary of related issues. The chapter raises some concerns about whether cooperation with the US in this field would grant safe protection of EU citizens' data in the future. Moreover, the report highlights the fact that the record of some Member States also raise serious concerns.

Chapter IV deals with the practice of extraordinary rendition and the 'war on terror'. This chapter focuses more closely on the European human rights effects of the war on terror. This chapter comprises two parts, a general part and specific section on the EU-US extradition treaty. The first explains the general context, including EU Member States' participation in extraordinary rendition. It also focuses on specific issues such as the participation in rendition, facilitating air travel, interrogation, creation of secret prisons, and the EU's relevant responses, and on proactive measures to prevent extraordinary rendition. The second part puts the related EU-US relations into a context, and also deals with special topics like irreducible life sentences, detention conditions and non-refoulement guarantees, among others. This chapter concludes that European States were not proactive enough to protect human rights within their jurisdictions in relation to extradition.

The last chapter (Chapter V) summarises the key findings of the report and formulates recommendations for future EU actions.

List of abbreviations

| | |
|----------|--|
| ABA | American Bar Association |
| ACLU | American Civil Liberties Union |
| AMA | American Medical Association |
| ATCA | Alien Tort Claims Act of 1789 |
| ATSA | Aviation and Transportation Security Act of 2001 |
| CAT | UN Committee against Torture |
| CALEA | Communications Assistance for Law Enforcement Act of 1994 |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CFSP | Common Foreign and Security Policy |
| CIA | Central Intelligence Agency |
| CJEU/ECJ | Court of Justice of the European Union |
| CoE | Council of Europe |
| COHOM | Working Party on Human Rights |
| CPT | European Committee for the Prevention of Torture |
| DEA | Drug Enforcement Administration |
| DPIC | Death Penalty Information Center |
| EAW | European Arrest Warrant |
| ECA | European Court of Auditors |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EEAS | European External Action Service |
| EIDHR | European Instrument for Democracy and Human Rights |
| EP | European Parliament |
| EU | European Union |
| EUCFR | Charter of Fundamental Rights of the European Union |
| EUROMED | Euro-Mediterranean partnership |
| FBI | Federal Bureau of Investigation |
| FISA | Foreign Intelligence Surveillance Act of 1978 |
| FISC | United States Foreign Intelligence Surveillance Court |
| FRA | European Union Fundamental Rights Agency |
| HOM | Head of Mission |
| HR/VP | High Representative of the Union for Foreign Affairs & Security Policy/Vice-President of the European Commission |
| IACtHR | Inter-American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| LIBE | Committee on Civil Liberties, Justice and Home Affairs of the European Parliament |
| LGBTI | Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed |
| LWOP | Life imprisonment without parole |
| MS | Member State |
| NAFTA | North American Free Trade Agreement |

| | |
|-------------|---|
| NATO | North Atlantic Treaty Organisation |
| NATO SOFAs | North Atlantic Treaty Organisation Status of Forces Agreements |
| MEP | Member of the European Parliament |
| NSA | National Security Agency |
| NGO | Non-governmental organisation |
| NTA | New Transatlantic Agenda of 1995 |
| OSCE | Organization for Security and Cooperation in Europe |
| PATRIOT ACT | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 |
| PNR | Passenger Name Record |
| PPD-28 | Presidential Policy Directive on Signals Intelligence Activities |
| PSP | President's Surveillance Program |
| RUD | Reservations, Understandings and Declarations |
| RWAs | Right-wing wuthoritarians |
| TD | Transatlantic Declaration of 1990 |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TIDTP | Torture, inhuman and degrading treatment or punishment |
| SCOTUS | Supreme Court of the United States |
| SF/AP | EU Strategic Framework and Action Plan on Human Rights and Democracy |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCAT | United Nation Convention Against Torture |
| UN ECOSOC | United Nations Economic and Social Council |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| US/USA | United States of America |
| WP | Work package |

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I. Introduction

'...[W]e, the leaders of the European Union and the United States, reaffirm our historic partnership. Our relationship is founded on strong and enduring ties between our peoples and shared fundamental values, including respect for human rights and individual liberty, democratic government and economic freedoms. What unites us far outweighs that which divides us.'¹

A. General remarks

Both the European Union and the United States of America are built on the fundamental principles of the Enlightenment, namely on the guaranteeing of basic human rights and self-governance (democracy). Today, both Unions are leading economic powers in the world, and they – with the exception of some EU Member States² - maintain the NATO, the strongest defence community in the world. The common constitutional origins and the continuous and close cooperation since the 2nd world war, and their mutual commitment to foster democracy and human rights in the world by their external policy are widely elaborated.

However, this cooperation raises the question of how these two powers affect each other in the field of their internal human rights systems and practices. Although both of them share the same commitment towards freedom, equality and democracy, one may ask whether these mutual commitment to these values and principles eventuate the same result in practice or not. The eminent purpose of this report is to provide an insight into the critical points of the relationship between the EU and the US with regard to human rights principles, providing additional means to the relevant EU actors to support their human rights enforcement efforts. Therefore, the report elaborates three different fields – the death penalty, data protection and surveillance activities, and extraordinary rendition – where the EU-US relations are problematic, or, in other words, the above mentioned mutual commitment towards human rights seems controversial.

The report focuses on three research questions in the selected three fields of human rights:

- What are the main similarities and differences between the EU and US principles and policies in regards of human rights mainstreaming in general, and in the researched topics?

¹ 'Göteborg Statement', adopted at the Göteborg EU-US summit, 14 June 2001 <http://europa.eu/rapid/press-release_PRES-01-245_en.htm> accessed 1 August 2016

² Austria, Cyprus, Finland, Ireland and Sweden are not members of the NATO.

- How if at all does the EU affect the condition and practice of human rights in the United States?
- How if at all do the US' actions and human rights violations affect the condition of human rights in the EU and its Member States due to US policies that are strongly criticised by the EU from a human rights-based perspective?

The methodology of the report is partly a comparative, partly a factual analysis. In the introductory chapter, we compare the manifest proofs of commitments to human rights of the EU and the US regarding the relevant and relating legal and policy documents, like founding treaties and the US Constitution, international treaties, agreements, documents of EU-US cooperation, and so on. All three case study chapters are based on the relevant EU, US and MS documents (primary and secondary legislation, communications of the EU institutions, reports and briefs, US legislation, presidential actions, US jurisprudence) and if needed, the ECtHR decisions. The case studies also rely on the most relevant NGOs' reports, especially in the case of the death penalty, and whenever needed, the report cites the academic literature as well. Nevertheless, as all three case studies analyse very actual topics, the authors refer to news media, if needed, for a better understanding of the circumstances. As several other Frame FP7 reports have been already published on relevant subjects like mapping legal and policy instruments of the EU's external policy, or on the conceptualisation of human rights, democracy and the rule of law, this report does not repeat the analysis of these questions, but will only refer to the relevant Frame Deliverables.

The report consists of 5 parts. The introductory chapter gives an overview of the human rights objectives of the EU in its external policy and its actions in general, and also elaborates the commitment of the US towards human rights regarding its participation in the international human rights covenants and their implementations. The aim of this introduction is framing the institutional settings and contexts of EU-US relations, their approaches to mainstreaming human rights in external policies, and explaining the challenge of American exceptionalism as the greatest burden on the US' participation in international human rights regimes. The next three chapters are case studies of three different specific issues. The second chapter analyses the presence and the effectiveness of the EU in the fight to abolish capital punishment in the US. The third chapter deals with the case of data protection, namely the US surveillance systems and their effects on EU legislation on privacy protection on the one hand, and on the mutual data sharing projects and their consequences, on the other. The fourth chapter elaborates the European effects of the US war on terror, regarding the human rights contexts and impacts of extraordinary rendition cooperation between the US and the EU. The final, fifth chapter concludes with key findings and recommendations.

One may suppose that the selection of the subject of these three case studies seems arbitrary: the authors of this report must agree. As the purpose of this report is to analyse the EU-US relations regarding human rights, the authors decided to select those topics that have remarkable impact on contemporary EU-US relation, on the one hand, and that provide a multidimensional

analysis, on the other. This multidimensional analysis means that the report focuses on different levels of impacts on the EU-US relations. In the case of the first topic (capital punishment) the EU has a firm and standard position, and the report studies the EU's one-way impacts on the US' legal and practical evolution in the given issue. The second case study (data protection and surveillance programmes) shows a two-way impact, analysing the US' and EU's legal backgrounds and practices, and their impacts and consequences on the legislative developments on both sides of the Atlantic. The third and final case study (extraordinary rendition) elaborates the US' direct impact on EU Member States, providing an analysis of the relating ECtHR cases, and highlights the challenge of the lack of EU law primacy in the given human rights topic.

B. EU external policy and EU-US relations in the light of human rights

In this section, the report expounds the frame and basic patterns of the EU-US transatlantic relationship with regard to the EU's human rights objectives. First, it gives a general overview about the role of human rights in the EU's founding treaties and also about the relevant and grounding documents of the EU's external relations. Second, it elaborates the evolution of the EU-US relationship and the EU's human rights objectives and aims articulated towards the US. Accordingly, this section is neither a comparative study of the foreign policy making processes in the EU and the US, nor a profound analysis of the EU-US foreign policy cooperation towards third countries or in international organisations, but a brief introduction to the understanding and significance of human rights in the EU's external policy and its objectives in EU-US relations.³

1. The role and significance of human rights in EU law and policies

In the first four decades of the European integration only a small number of human rights principles were set out in the founding treaties (like the work related anti-discrimination rules between men and women), and most of the human rights rules were established step-by-step by the ECJ in (mostly commercial) cases⁴ like the text book cases *Internationale Handellsgesellschaft*,⁵ *Stauder*,⁶ *Nold*,⁷ *Costa*.⁸ In this phase, the EEC foreign policy was in its initial phase: although Member States met regularly, their meetings were informal, and their cooperation was not set in a framework. An exception was the common commercial policy, which

³ For a comparative study of EU-US foreign policy making, see Jan Wouters, Laura Beke, Anna-Luise Chané, David D'Hollander, Kolja Raube, 'A comparative study of EU and US approaches to human rights in external relations' Directorate Generale for External Policies, Policy Department, 2014. <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU\(2014\)534981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU(2014)534981_EN.pdf)> accessed 1 August 2016

⁴ See Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *'The EU and Human Rights'* 859 (Philip Alston ed., 1999).

⁵ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 112

⁶ Case 29/69 *Stauder v. City of Ulm* 1969 ECR 419

⁷ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* 1974 ECR 491

⁸ Case 6/64, *Flaminio Costa v. E.N.E.L.* 1964 ECR 585.

regulated commerce (trade) relations with third countries: the fundamentals of this area were created in the 1970s.

Major change happened in 1993, with the amendment of the founding treaties and the adoption of the Treaty on the European Union (TEU). The TEU introduced the principles of human rights and democracy into EU law, and also set up the 2nd pillar of the EU, the Common Foreign and Security Policy (CFSP), providing an institutional background and rules for MSs to coordinate and establish an embryonic form of a common foreign policy. Another cornerstone was the call and work of the European Convention in 1999-2000, which drafted the Charter of Fundamental Rights of the EU (CFR) – this document has become legally binding only with the entry into force of the Treaty of Lisbon in 2009.

a) Democracy and human rights as principles of the EU

When it comes to the principles of human rights and democracy, Articles 2, 6 and 7 of the TEU regulate the EU's fundamental functioning rules and the obligations of Member States, like Article 21 defines the general regulations of the EU's external policies and the CFSP in the light of the EU's commitment to human rights. According to this, Article 2 says that

[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In Article 6 we find three important references. First, a reference to the Charter of Fundamental Rights, which became binding after the entry into force of the Treaty of Lisbon, and could function (only regarding EU law) as an EU Bill of Rights. Second, it refers the European Convention for the Protection of Human Rights and says its rules constitute general rules of EU law, also claiming the EU 'shall accede' to the convention (although this has not happened so far).⁹ Third, it also mentions fundamental rights as results from the constitutional traditions 'common to the Member States', which also constitute general principles of EU law.

As an extra, a special procedure was implemented into Article 7 TEU by the Treaty of Amsterdam and clarified by the Treaty of Nice in 2003, which ensures available actions against Member States in which there is a clear risk of a serious breach by a Member State of the values referred to in Article 2, or in which such breaches occur. However, this procedure, which can be called – according to former Commission president Jose Manuel Barroso – the 'nuclear option' for

⁹ As the European Council states, '[t]he accession would complete the protection of fundamental rights of EU citizens and would strengthen fundamental values. It would also improve the effectiveness of EU law and enhance the consistency of fundamental rights protection in Europe.' However, the Court of Justice of the EU 'gave a negative opinion on the compatibility of the draft agreement with the EU treaties'. See European Council, 'Protection and promotion of human rights' <<http://www.consilium.europa.eu/en/policies/human-rights/>> accessed 27 July 2016

guaranteeing the EU's principles, has not been applied so far. In this context, one cannot assume how this procedure would function in reality and whether it is an eligible safeguard for Article 2 or not.

The internalisation of human rights principles into the EU took place together with the institutionalisation of EU foreign policy. As of 1993, the Maastricht Treaty created a Common Foreign and Security Policy (CFSP), with special legal sources and special (limited) ECJ powers. According to Article 21 (1) of the TEU,

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article 21 (2) and (3) call on the EU that in its external relations it shall safeguard and respect its values and it must also consolidate and support the implementation of them, including democracy, human rights, and the rule of law.

A result of this progress in EU law is that human rights have become part of the EU's external relations. An example of the aim of the European Neighbourhood policy was to create a ring of countries around the EU with which it could associate more closely, notably around values such as democracy, the rule of law and human rights. Other similar notions exist with different areas of the world like EUROMED for North Africa and the Middle East, or the cooperation with African, Caribbean and Pacific Countries (Frame Deliverables 6.3 and 6.4 deal with these areas).

b) The EU's involvement in international human rights covenants

The EU plays an important role in the evolution and promotion of international human rights regimes by itself and through by its Member States' actions. However, the EU has ratified only one of the UN human rights treaties. Moreover, although the Lisbon Treaty mandated the EU to ratify the ECHR, this process faces obstacles from the European Court of Justice.

The ambivalent relationship between EU law and international human rights norms can be seen in the ECJ's judgment on the EU's accession to the ECHR.¹⁰ In this judgment, the court concluded

¹⁰ Opinion 2/13 of the Court (Full Court) ECLI:EU:C:2014:2454. See also Sionaidh Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (*U.K. Const. L. Blog*, 24 December 2014) <<https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> accessed 1 July 2016; Sionaidh Douglas-Scott, 'Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR' *Europarättslig Tidskrift* (Swedish European Law Journal) special edition 2016 (Festschrift for Ulf Bernitz, eds. J Paju, A Ward, P Watson) <<http://ssrn.com/abstract=2752133>> accessed 1 June 2016

that the agreement on the accession to ECHR is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2).

The latter protocol states that the Union shall not affect the competences of the Union or the powers of its institutions to ECtHR, and the accession agreement. It shall ensure 'that nothing therein affects the situation of Member States in relation to the European Convention' and also that it cannot harm 'measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention'. It also emphasises that Article 344 TFEU, according to which, Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein' remains binding.

As C.2 section of this chapter shows, this interpretation is very similar to arguments expressed by those who do not support US accession to international human rights agreements. The judgment ruled that the draft agreement on the EU's accession was incompatible with EU law because of several reasons.¹¹ Among them we find some that are related to EU's competencies, like the argument that in case of adoption, Member States could turn to ECtHR in inter-state disputes instead of the ECJ, which could violate the above-mentioned rule in Article 344 TFEU. The problem of the situation of CFSP was also raised: accession could mean that legislation adopted in this field could get subject to judicial review by a court other than the ECJ.¹² Furthermore, according to the judgment, the draft agreement did not take account of the specific characteristics of EU law, and the fact that at the present time Member States may not have higher standards than those set in CFR in many instances. Some technical objections were also raised, which are less interesting now for us.

If we review the argumentation of the court, we can see that from a political point of view, a kind of power struggle can be seen behind them: between the EU's legal, political and court system and an external system. Interestingly, based on their positions, even critics who refer to the human rights systems of the EU and the US are very similar. In her study on EU external policy and human rights, Gráinne de Búrca argued that there is a split between EU foreign policy and domestic enforcement of human rights:

The current regime is characterized by a struggle between governmental actors seeking to confine and minimize their human rights obligations, on the one hand, and supranational and civil society actors seeking to expand and enforce them, on the other.

She also noted that

¹¹ Steve Peers collects them in a more detailed analysis by selecting the five most important points, see Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (EU Law Analysis blog, 18 December 2014) <<http://eulawanalysis.blogspot.hu/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 1 August 2016

¹² The interests of US foreign policy could also collude with human rights, especially in war conflicts.

[t]hree of the main criticisms of the EU's human rights system namely, that it lacks a serious human rights mechanism, that it is insufficiently integrated with the international human rights system, and that there is a double standard as between internal and external human rights policies - not only continue to be valid, but some of the deficiencies have even been incorporated into the EU's constitutional framework through the Lisbon Treaty.¹³

As a result of double standards and ambivalence, she claims, the EU's international role as a human rights actor is weakened. Very similar arguments were collected by the general report on EU foreign policy and human rights in our Frame FP7 project (Working Package 6 - Report on mapping, analysing and implementing instruments). The report identified various inconsistencies between EU internal and foreign policies among other problems in the EU's legal system. Thus, we can say that human rights considerations have a varying intensity in different partnerships. This probably depends largely on the bargaining position that the EU is in when negotiating these partnerships. While this was to be expected, the fact that human rights are promoted more or less vigorously by the EU depending on who is sitting across the table raises several concerns about the consistency and coherence of EU foreign policies, like the inconsistency between values and interests, between rhetoric and action, or inconsistencies in the treatment of third countries. Some scholars, like Bogdandy, even claim that human rights should not be put into the centre of the EU. Quite provocatively, as he puts it, human rights, though important, 'should not be understood as the *raison d'être* of the Union'.¹⁴

Regarding the US, many allegations are strikingly similar to those raised against the EU. Scholars even use the same wording in their criticism. Apart from specific problems (like torture, phone tapping, etc.) scholars also focus on general issues of the US human rights system. In a book, which received the Human Rights Book of the Year award of the American Political Science Association (*Bait and Switch - Human Rights and US Foreign Policy*), Julie A. Mertus criticises the US using nearly the same arguments. In her view, the relationship between the US and human rights can be interpreted like a car sale. The US tries to enforce human rights abroad in the way cars salesmen sell cars and scam costumers ('bait and switch technique'):

The car salesman lures people into his showroom with promises of good deals that don't really exist, only to switch to the lesser offering once the unsuspecting customer is in the showroom. The United States still pretends to support universal human rights when actually it recognizes different standards for itself and its friends than those it applies to its enemies. Once states start to go along with the United States on human rights, the real offer is unveiled: U.S. exceptionalism and ad hoc favoritism over true universalism.

¹³ Gráinne de Búrca: *The Road Not Taken: The European Union As a Global Human Rights Actor*. 'The Road Not Taken: The European Union As a Global Human Rights Actor' (2011) 105 AJIL 649 692

¹⁴ Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 CMLR 1307 1338

She also claims,

[t]he car dealer misleads people through his power of influence, created by both the fact that he has something someone else wants and that his wealth gives him a magnified voice (i.e., his ability to advertise). Like the car dealer, the United States can use its wealth and influence to mislead other states about its commitment to the human rights framework, appearing as universalist when actually EU at the international stage, legal personality and participation in international organisations and human rights covenants.¹⁵

When it comes to the UN human rights treaties, the EU acceded only to the UN Convention on the Rights of Persons with Disabilities (CRPD, the EU signed the Convention in 2007, and the ratification process ended in 2010). As VP/HR Catherine Ashton announced, this step is a ‘milestone in the history of human rights as it is the first time ever that the EU becomes a party to an international human rights treaty’.¹⁶ Comparing this accession to the abovementioned ECHR accession process, one may find that the relatively easy and unimpeded ratification of the CRPD on the one hand, and the difficulties of the ECHR ratification on the other may derive from the fact that the ECHR is a much more complex covenant with its own jurisdiction (ECtHR), while the CRPD can be seen as a ‘single issue’ covenant with the lack of the above mentioned possible ‘power struggle’ between the UN and the ECJ.

c) Democracy and human rights: the frames of the EU’s external policy

As several other Frame – FP7 reports study and analyse the instruments, the policy making process and other features of EU external relations in the light of the EU’s commitment towards human rights and democracy, this report only highlights the most important patterns of the EU’s external policy.¹⁷

¹⁵ Julie A Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (2nd edn, Routledge, 2008) 228.

¹⁶ European Commission, ‘EU ratifies UN Convention on disability rights’, (*Rapid*, 5 January 2011) <http://europa.eu/rapid/press-release_IP-11-4_en.htm> accessed 1 June 2016

¹⁷ See (in chronological order by their publishing date): FRAME ‘Report mapping legal and policy instruments of the EU for human rights and democracy support’ Work Package No. 12-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 1 June 2016; FRAME ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’ Work Package No. 8-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>> accessed 1 July 2016; FRAME report ‘Critical analysis of the EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law’ Work Package No. 3-Deliverable No. 2 see <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 1 July 2016; FRAME ‘Report on mapping, analysing and implementing instruments’. Work Package No. 6-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 1 July 2016

The significance of human rights and democracy in the founding treaties puts a new obligation on the EU in its internal and external policies, namely, the realisation of these aims in all the EU's policies and actions. In order to achieve these aims, the EU had to build up a new policy background (with its legal, financial and human resources). Thus, analysing the wide range of documents, actions and instruments, one may find that the EU's policy for promoting human rights and democracy has been developed in three steps and/or phases. The first step was the adoption of the policy of mainstreaming human rights in the EU's external relations in 1995. The second step has been the adoption group of thematic guidelines on human rights and EU procedures (from 1998), which define and frame the EU's external actions, as well as the EU's expectations and aims for third countries. The third phase began in 2012, with the adoption of the Strategic Framework and Action Plan on Human Rights and Democracy, a landmark document 'pledged to implement [the EU's] human rights agenda'.¹⁸

As human rights and democracy became eminent principles of the EU treaties, the aim of mainstreaming human rights also appeared in EU external policy.¹⁹ Mainstreaming human rights is a strategic process of incorporating human rights into documents like international agreements and bilateral relations, which (in theory) do not explicitly deal with human rights. This mainstreaming started in 1995, when the EU sought to insert a human rights clause in its agreements with non-EU countries, and has been reinforced in 2001 by the Commission and in 2006 by the Council.²⁰

As the pillar of CFSP was established, it was also necessary to adopt the related policy documents for the regulation of EU's external relations with regards to human rights. Therefore, the Council of the EU adopted guidelines on the particular issues of human rights: the very first of them is the EU Guideline on Death Penalty (adopted in 1998, for a thorough elaboration see the Chapter II). In the following years, the Council adopted several other specific guidelines. So far, the human

¹⁸ Jan Wouters, Laura Beke, Anna-Luise Chané, David D'Hollander, Kolja Raube, 'A comparative study of EU and US approaches to human rights in external relations' (Directorate Generale for External Policies, Policy Department, 2014) 123 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU\(2014\)534981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU(2014)534981_EN.pdf)> accessed 1 June 2016

¹⁹ For mainstreaming see Jan Wouters, Laura Beke, Anna-Luise Chané, David D'Hollander, Kolja Raube, 'A comparative study of EU and US approaches to human right sin external relations' (Directorate Generale for External Policies, Policy Department, 2014) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU\(2014\)534981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534981/EXPO_STU(2014)534981_EN.pdf)> accessed 1 June 2016; Florence Benoit-Rohmer, Horst Fischer, George Ulrich, Wolfgang Benedek, Carmen Marquez Carrasco, Zdzislaw Kedzia, Adam Mickiewicz, Michele Grigolo, Gerd Oberleitner, Christian Pippan, Chadi Sidhom, Matthias C., Markus Möstl, 'Human Rights Mainstreaming In EU's External Relations' (EXPO/B/DROI/2008/66) <http://www.eiuc.org/tl_files/EIUC%20MEDIA/Docs/EST28775.pdf> accessed 1 August 2016; McCrudden, C., 'Mainstreaming Human Rights', in Harvey, C. (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart Publishing, Oxford, 2005) 9-28.

²⁰ See Communication of the Commission and the European Parliament, 'Promoting human rights and democratisation in third countries' (2001) and Council of the EU, 'Mainstreaming human rights across CFSP and other EU policies' COM (2001) 252 final

rights fundament of EU foreign policy is based on eleven specific guidelines: most of them deal with the substantive issues of human rights (death penalty; torture and other cruel, inhuman or degrading treatment or punishment; freedom of religion or belief; LGBTI rights; children and armed conflict; promotion and protection of the rights of the child; violence against and discrimination of women; freedom of expression online and offline), while another part of them regulates the EU's action and procedures in external relations (guideline on human rights dialogues with third countries; guideline on human rights defenders; guidelines on promoting compliance with international humanitarian law).²¹ These guidelines serve as frameworks 'for the EU's efforts to protect and promote human rights in third countries'.²²

With the evolution of the human rights mainstreaming, the proposal of adopting an EU Strategic Framework and Action Plan on Human Rights and Democracy (SF/AP) by the HR/VP Catherine Aston opened a new period. The adoption of the SF/AP in 2012 meant that the EU has adopted a comprehensive human rights document with a related action plan, which collects the human rights principles and objectives of the EU (in the Strategic Framework), and in the Action Plans (followed up in 2015) the EU defines the actions and tools to achieve its aims. In sum, the SF/AP is the very first document that collects and specifies the human rights and democracy provisions on EU external action.²³

As several other Frame-reports elaborate the substance and the significance of the SF/AP, this study highlights only the most important points of them in brief. The SF says that the EU calls on all states to 'implement the provisions of the Universal Declaration of Human Rights and to ratify and implement the key international human rights treaties, including core labour rights conventions, as well as regional human rights instruments',²⁴ and also says that the EU will speak out against attempts of the states to undermine respect and enforcement of human rights. It also stresses the EU's interpretation that human rights are universal. In this general framework, numerous human rights are mentioned such as the rights of woman, the abolition of capital punishment and torture, freedom of religion or belief, and the need for anti-discrimination on grounds of race, ethnicity, age, gender or sexual orientation. It also deals with the rights of the child, persons belonging to minorities, indigenous peoples, refugees, migrants and persons with

²¹ All 11 guidelines are available at <http://eeas.europa.eu/human_rights/docs/index_en.htm> accessed 1 August 2016

²² Council of the EU, 'Mainstreaming human rights across CFSP and other EU policies' 10076/06, 7 June 2006, 3 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news66.pdf> accessed 1 August 2016

²³ Council of the European Union, 'EU Strategic Framework and Action Plan on human rights and democracy' (2012) 11855/12 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 1 June 2016 (hereinafter: 'Strategic Framework and Action Plan 2012')

²⁴ EU Strategic Framework and Action Plan 2012, 1-2

disabilities or economic as well as social and cultural rights. It highlights the importance of fair and impartial administration of justice and the protection of human rights defenders.²⁵

Regarding bilateral relations, it says that the EU continues to deepen its human rights dialogues with partner countries, it will raise human rights issues vigorously in all appropriate forms of bilateral political dialogue, including at the highest level. Moreover, it emphasises that the EU remains committed to a strong multilateral human rights system and international cooperation with the UN and OSCE, among others. Furthermore, human rights are implemented in impact assessments.

As a follow-up, the Council adopted its 'second' AP on 20 July 2015, for the 2015-2019 period.²⁶ This document, based on the 2012 SF principles and objectives, is already a more detailed action plan than the former one. The new action plan includes supporting the capacity of National Human Rights Institutions as well as of Parliamentary institutions, electoral help, the support to justice institutions and public institutions, strengthening cooperation with international (including regional) organisations and civil society. It repeats the EU's commitment to support bi- and multilateral dialogue on the right to privacy and data protection and work to ensure that the legislation and procedures of States should conform to international human rights law. It addresses torture, the death penalty and cruel, inhuman or degrading treatment or punishment, and supports joint actions to abolish these practices worldwide. It promotes women's rights as well as children's rights with the optional adoption of Protocols to the UN Convention on the Rights of the Child: on the involvement of children in armed conflict, on the sale of children, child prostitution and child pornography and supports the consideration of the accession to the Optional Protocol on a communications procedure. It also wants to strengthen capacity building and develop political and operational guidance on economic, social and cultural rights. It creates special institutional frameworks and cooperation in many different fields. In bilateral talks, its aim is to ensure that human rights and democracy considerations are part of sectorial dialogues with partners: this means, that human rights and other questions are handled simultaneously (human rights mainstreaming).

This brief overview of the historical evolution of the human rights dimension of the EU's external policy is probably adequate to indicate the EU's commitment to advance human rights and democracy through and by its external policy. After this sum up of the evolution of EU's human rights policy in external relations, the report focuses on the EU-US bilateral relation in a chronological and institutional dimension.

²⁵ For a deeper analysis see FRAME 'Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors' Work Package No. 7-Deliverable No. 2 <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>> accessed 1 July 2016

²⁶ Council conclusions on the Action Plan on human rights and democracy 2015-2019 as adopted by the Council on 20 July 2015. 10897/15, <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> accessed 1 July 2016

2. EU-US relations

a) The framework of EU-US relations

One cannot overstate the role of the US in the process of European integration. Both financially through the Marshall Plan and militarily through the NATO, the US has provided enormous contributions to European integration. However, despite that the US guaranteed the security circumstances of the integration from the beginning, and diplomatic relations were established in 1952, the official cooperation between the two sides of the Atlantic were established only in 1990, by the Transatlantic Declaration (TD) and five years later with the New Transatlantic Agenda (NTA), adopted in 1995.²⁷ Both documents are general ones, arguing the need for promoting peace and stability, democracy and development around the world, support of world trade and closer economic relations, advancement of human rights, the promotion of non-proliferation and cooperation on development and humanitarian assistance. They created a system of biannual consultations (between presidents and foreign ministers as well), ad hoc consultations, cabinet level cooperation and briefings. After the NTA, many forms of dialogues had been established between the EU and the US.²⁸

- Transatlantic Business Dialogue (1995), encouraging trade and cooperation in different industrial sectors, which now includes a Transatlantic Business Council;²⁹
- Transatlantic Consumer Dialogue (1998);³⁰
- Transatlantic Economic Partnership (TEP, 1998) in the field of trade and investment. Also a Transatlantic Economic Council was set up in 2007;³¹
- Transatlantic Legislators Dialogue (TLD), establishing a formal annual dialogue between the European Parliament and the US Congress (1999);³²

²⁷ On the history of EU-US diplomatic relations, see (*EU in the US*) <<http://www.euintheus.org/who-we-are/history-of-the-delegation/>> and (*US EU mission*) <http://useu.usmission.gov/transatlantic_relations.html>; Transatlantic Declaration on EC-US relations (TDA, adopted on November 23, 1990) <http://useu.usmission.gov/1990transatlantic_declaration.html>, New Transatlantic Agenda (NTA, adopted on 3rd December 1995) <http://useu.usmission.gov/new_transatlantic_agenda.html> accessed 31 July 2016

²⁸ Helle Porsdam, *From Civil To Human Rights. Dialogues On Law And Humanities In The United States And Europe* (Edward Elgar 2009) 63-64.

²⁹ Peter Chase, Jacques Pelkmans, 'This time it's different: Turbo-charging regulatory cooperation in TTIP. Paper No. 7 in the CEPS-CTR project *'TTIP in the Balance'* and CEPS Special Report (No. 110/June 2015) <<https://www.ceps.eu/system/files/SR110%20Regulatory%20Cooperation%20in%20TTIP.pdf>> accessed 1 August 2016

³⁰ Trans Atlantic Consumer Dialogue. <http://tacd.org/?option=com_frontpage&Itemid=1> accessed 1 August 2016

³¹ Transatlantic Economic Council. <<http://www.state.gov/p/eur/rt/eu/tec/>> accessed 1 August 2016

³² For the documents of the annual meetings of the two legislatures, see <<http://www.europarl.europa.eu/delegations/en/d-us/publications.html?tab=IPMs>> accessed 20 July 2016

- Trans-Atlantic Environment Dialogue (TAED, 1999); got suspended in 2000. Later, the EU-US High Level Dialogue on Climate Change, Clean Energy and Sustainable Development was launched in 2006, and several meetings were held in 2006-2008, but no meetings were held after 2009;³³
- Transatlantic Labour Dialogue (between the ETUC and the AFL-CIO, 2001);
- EU-US Working Group on cybersecurity and cybercrimes (2010).³⁴

There is also continuous dialogue between US and the EU in the form of joint summits. Such summits have two functions. First, these are the ‘forum of intergovernmental consultation: it brings up top “political” officials and places topical or timely issues, including disputes, on the table for discussion’, while the second function is to ‘both initiate policy output’ incorporated in the transatlantic dialogue.³⁵ It is important to mention that during the Obama administration EU-US summits (at the highest level) became less frequent – the last summit were held in 2014 in Brussels.³⁶

Twice yearly, there are consultations on human rights issues between the EU and the US. However, these consultations focus on the upcoming UN meetings (UNGA and UN HRC), and no official communications are released about the content and results of them, although the aim of these consultation is not arguing the state and condition of human rights in the US or the EU but ‘to discuss issues of common interest and the possibilities for cooperation within multilateral human rights bodies’.³⁷ That means that these consultations may focus on cooperation in the UN for strengthening human rights and democracy in third countries, and not to emerge and discuss problematic topics of internal policies and concerns on the threats or realities of human rights violations in the EU or the US.³⁸

When it comes to the TLD, on the inter-parliamentary meetings many special issues like foreign policy, trade and security issues are discussed, however, as for the joint statements, the divergence of human rights policy, like the case of the death penalty or TIDTP have never been

³³ ‘Transatlantic Environment Dialogue suspended’ (*Euractiv.com*, 29 January 2010) <<http://www.euractiv.com/section/climate-environment/news/transatlantic-environment-dialogue-suspended/>> accessed 20 July 2016

³⁴ ‘EU-US cooperation on cyber security and cyberspace’ <https://eeas.europa.eu/statements/docs/2014/140326_01_en.pdf> accessed 1 August 2016 “Fact Sheet: U.S.-EU Cyber Cooperation” (White House) <<https://www.whitehouse.gov/the-press-office/2014/03/26/fact-sheet-us-eu-cyber-cooperation>> accessed 1 August 2016

³⁵ Rebecca Steffenson, *Managing EU-US Relations: Actors, Institutions and the New Transatlantic Agenda*, (Manchester University Press 2005) 53

³⁶ US-EU Summit in Brussels, 26 March 2014, <http://useu.usmission.gov/useu_summit_brussels_032614.html> accessed 1 August 2016. For the list of former summits, see <http://useu.usmission.gov/us_eu_summits.html>

³⁷ EU guidelines on human rights dialogues with third countries 4.

³⁸ EU and US cooperated during the years in a great number of cases related to UN or human rights in other countries (like Syria, North-Korea, China).

discussed. According to the released statements, these negotiations focus rather on foreign policy, trade, security, as well as the current concerns in the world (the global fiscal crisis in 2008-2009, the Arab Spring in 2011, the civil war in Syria in 2012), and the common achievements and projects for the future (like TTIP since 2012). Regarding disagreements or conflicts between the US and the EU in human rights relations, only the issue of EU concerns about the Guantánamo detention facility was raised in 2009, but not mentioned in later joint statements.

According to the subject of this report, the most important element of the EU-US relations would be the human rights dialogues. Although this kind of foreign policy instrument is part of both US and EU foreign policy, as the facts show, these two powers do maintain human rights dialogues with several countries. However, there are no official or direct human rights dialogues between the EU and the US. And despite the EEAS' statement that the '[c]ooperation is also growing with other established or developing regional human rights mechanisms, such as the Organisation of American States (OAS)', the EU is not among the strategic partners of the OAS, therefore this indirect way to the US is not available, either.³⁹

In sum, the report finds that the EU-US dialogues focus basically on economic and security cooperation. Although both the EU and the US claim their leading role and commitment to strengthen human rights and democracy around the world, it seems that this mutual commitment does not result in a higher level of negotiations with each other than that which is maintained by both parties with third countries and international organisations. According to the chronological evolution of the EU's policy of human rights mainstreaming and the development of EU-US relations, one may find that this growing role of and commitment to human rights from the EU's part has hardly affected the transatlantic partnership.

b) Human rights objectives and the aims of the EU in its relations with the US

Due to the lack of a EU-US human rights dialogue, and the general (not country-specific) feature of the SF/AP, one has to find other sources for analysing the EU's human rights objectives and aims towards the US. Thus, for assessing the EU's human rights objectives and aims articulated towards the US, this report summarises the EU's Annual Report on Human Rights and Democracy in the World Series. Similarly to the US Country Reports on Human Rights Practices released by the US State Department since 1965,⁴⁰ the EU published its first Annual Report on Human Rights

³⁹ See EEAS, 'Human Rights Dialogues', <https://eeas.europa.eu/factsheets/docs/factsheets_europe_day_2014/factsheet_human-rights_dialogues_en.pdf>, and 'OAS General Secretariat Cooperation with International Organizations' (OAS) <http://www.oas.org/en/ser/dia/institutional_relations/documents/OAS_Cooperation_with_International_Organizations.pdf> accessed 31 July 2016

⁴⁰ The Foreign Assistance Act (FAA, 1961) requires that 'the Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate by February 25 "a full and complete report regarding the status of internationally recognized human rights, within the meaning of subsection (a)...in countries that receive assistance under this part, and...in all other foreign

and Democracy in 2000, and has amended it with detailed country reports since 2007, prepared by the EEAS and adopted by the Council every year. The EU reports elaborate the state of human rights mainstreaming, the latest developments of EU policy makings in regard of its commitment towards human rights, its role in the international community and the evolution of bilateral relations, but the greatest part of the reports study the EU's achievements and outputs in the world's countries, by continents.⁴¹ Because the reports separate general, continent-based and country-specific questions, when talking about EU aims and actions, it seems useful to separate the major aims the EU wants to achieve worldwide and special topics related to the US. It is important to mention that even worldwide aims may be important regarding US policies.

The 2009 report⁴² highlighted that the EU and its Member States and the United States adopted a Joint Statement on the Closure of the Guantánamo Bay Detention Facility and on Future Counter-Terrorism Cooperation. The frameworks of counterterrorism were discussed in other meetings as well, especially the question of the rule of law and effective fight against terrorism. It is a clear aim of the EU to force the US to close down Guantánamo, as well as to abolish torture in or related to the US (at least the EU's statements follow this approach). It is also important to make the US review detention, transfer, trial and interrogation policies in counter-terrorism and increase transparency about past practices with regard to these policies, as well as the elimination of secret detention facilities (for the details, see Chapter IV). The EU supported the US membership of the ICC, and also the US decision to seek membership of the UN Human Rights Council. The EU also continued to maintain its support for the fight against the death penalty, and make US abolish it completely (for the details, see Chapter II).

Regarding 2010,⁴³ the top concern of the EU was the death penalty.⁴⁴ EU Member States as well as the EU continued to press the United States for implementation of the Avena decision of the International Court of Justice on foreign nationals' consular rights before US courts.⁴⁵ This decision has an important consequence on procedural rights of detainees and their right to

countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.' See United States Department of State, <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>> accessed 2 August 2016

⁴¹ Most of the reports can be downloaded from the website of the EU External Action Service, see <http://eeas.europa.eu/human_rights/docs/index_en.htm> accessed 2 August 2016

⁴² EU Annual Report on Human Rights and Democracy in the World (2009). <http://eeas.europa.eu/human_rights/docs/2010_hr_report_en.pdf> accessed 2 August 2016

⁴³ EU Annual Report on Human Rights and Democracy in the World (2010) <http://eeas.europa.eu/human_rights/docs/annual_hr_report_2010_en.pdf> accessed 2 August 2016

⁴⁴ Since Cuba carried out its last execution in 2003, the US is the only country in America which maintains the capital punishment in practice.

⁴⁵ In the case, Mexico instituted proceedings against the US in front of the ICJ because of the breaches of Articles 5 and 36 of the Vienna Convention on Consular Relations regarding Mexican nationals who had been tried, convicted and sentenced to death in the United States. The Court found that the US had breached the Convention, because it did not inform the Mexican consular without delay about the procedures, and as a result, the US prohibited Mexico to provide assistance to its nationals. See *Avena and other Mexican nationals (Mexico v. United States of America)* 2004 I.C.J. 12 (Mar. 31)

contact and keep in touch with consuls. Even though agreed, the Guantánamo Bay camp has not been closed, therefore the EU maintains its call to close it.

In 2011,⁴⁶ the National Defence Authorisation Act was adopted, which cut off all funding for any transfer of Guantánamo prisoners to the territory of the United States, and as such, makes the earlier mentioned joint statement doubtful. This means that even though the Obama administration was open to a change in these policies, the Congress was able to block those efforts. During this year, because the EEAS was in the process of being established, no official human rights consultations were held with the US. During this period, besides meetings with the State Department, the EU tried to 'intensify connections' with stakeholders and NGOs. Because of legal reasons (some states even had to modify regulations) the EU ban on the export of drugs used for executions seemed to be partly successful (see Chapter II). Special issues were not raised.

In 2012,⁴⁷ bilateral human rights consultations were held again, especially in the field of counter terrorism. Several issues were discussed like economic and political empowerment, women's rights, peace and security, freedom of religion and belief, freedom of the Internet, LGBTI rights. The death penalty remained in the centre of EU criticism in this year as well. The 2012 Report also mentions that '[f]or a third year in a row (meaning beginning 2013 as well) the US Congress passed legislation preventing the use of funds to construct/modify detention facilities in the US, or to transfer detainees from Guantánamo to the US or to third countries'. On the other hand, President Obama stated that his administration still prefers to close these facilities. The illegal transfer of prisoners intra-Europe by the CIA also became part of public talk again, and the European Parliament (EP) adopted a report on the issue.⁴⁸ Besides making demands on the US, the report also stresses some European governments' responsibility (in allowing transfers or not cooperating properly in related investigations). The EP called on EU institutions to 'urge its major allies, including the US, to comply with their own domestic and international law', and also stated that the EP is 'particularly concerned by the procedure conducted by a US military commission in respect of Abd al-Rahim al-Nashiri, who could be sentenced to death if convicted; calls on the US authorities to rule out the possibility of imposing the death penalty on Mr al-Nashiri'.⁴⁹

The EP also called on NATO and the US authorities to conduct their own investigation, and it also greeted civil efforts to control capture, detention and prosecution of persons under the

⁴⁶ EU Annual Report on Human Rights and Democracy in the World (2011) <http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf> latest acces 2 August 2016

⁴⁷ EU Annual Report on Human Rights and Democracy in the World in 2012 - Country reports (Country Reports) 15144/13 <http://eeas.europa.eu/human_rights/docs/hr_report_country_2012_en.pdf> accessed 2 August 2016

⁴⁸ European Parliament 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 (2012/2033(INI)). <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0309+0+DOC+XML+V0//EN>> accessed 2 August 2016

⁴⁹ Ibid

administrations. It also wanted to achieve the abolition of indefinite detention without charge or trial in the US as set out by the National Defense Authorization Act (NDAA). New efforts were also made to empower women in the US and help them to participate fully in public life.

In 2013,⁵⁰ human rights consultations between the US and the EU took place again. Such consultations included the freedom of religion and belief, LGBTI rights, and business and human rights. In a US context, the EU raised the case of the death penalty again, supported advocacy groups, and reached out to relevant authorities (some cases involved the capital punishment of people with mental illnesses). The EU also raised the problem of detention conditions, human rights aspects of the fight against terrorism, including Guantánamo and indefinite detention. The activities of US intelligence services were also discussed in EU institutions (even an ad hoc EU-US working group was established in order to check data protection rights). The extent and length of solitary confinement in the US penitentiary system was also discussed and debated. The EP also discussed detention for an indefinite period and the use of drones for the targeted killing of terrorism suspects. Data protection by US authorities was criticised as well. The discussions on women's rights and the rights of people with disabilities continued.

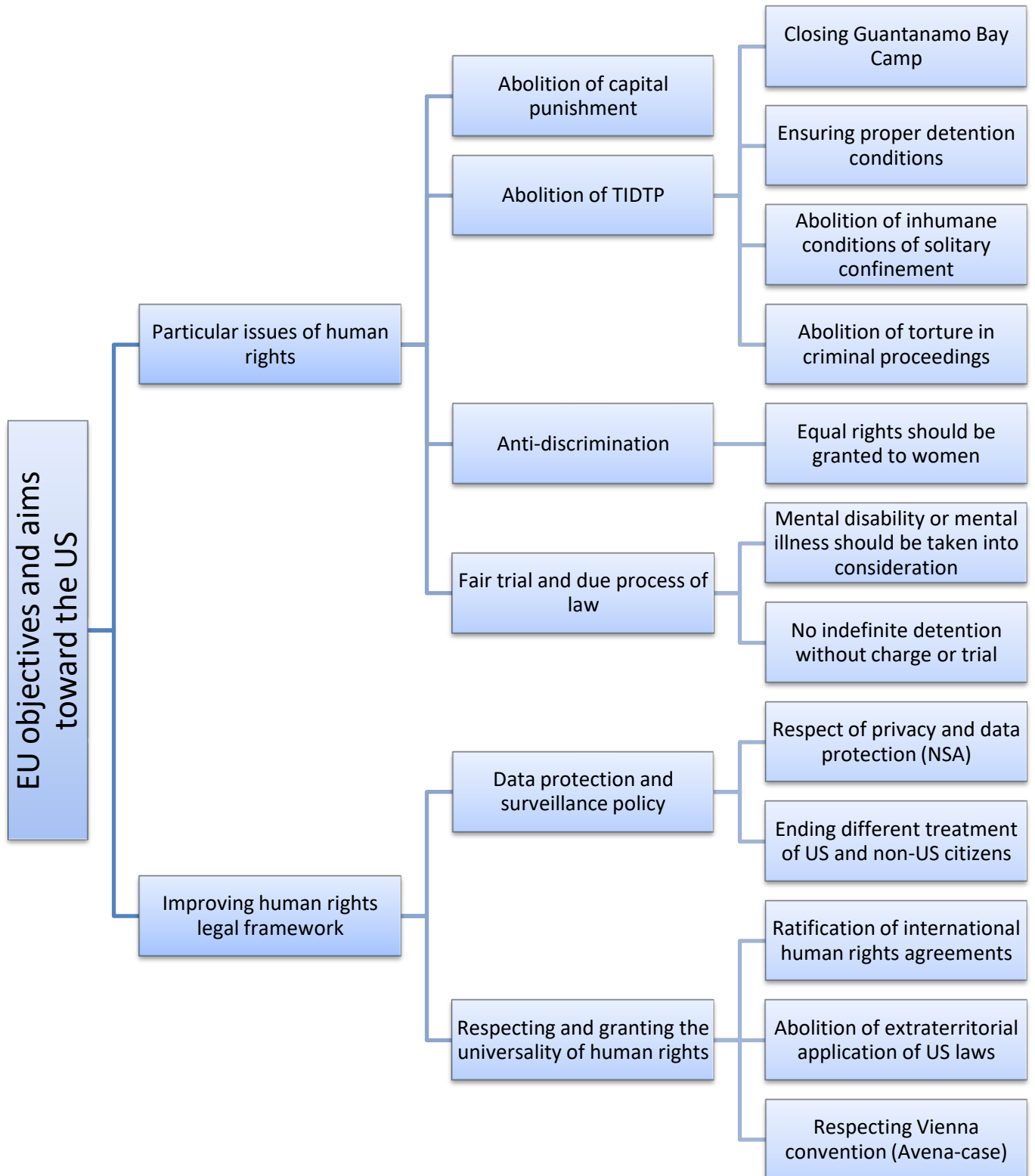
In 2014,⁵¹ besides major questions like the death penalty and the US fight against terrorism, the circumstances of international law on human rights were discussed again. The EU's aim is to make the US ratify relevant international human rights instruments and 'strengthening cooperation with the USA in multilateral human rights fora'. In addition to the issues broached in earlier years, a new issue, namely the extraterritorial application of human rights treaties, and different treatment of US and non-US citizens with regard to privacy and data protection was raised. US reservations attached to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the continuous breaching of consular rights (Avena-decision) were raised again. The need for proper treatment of people with mental disability or mental illness in criminal procedures was also discussed. The EU continued to support activists working for the abolition of the death penalty. The EU also adopted 'a resolution in March on the US NSA surveillance programme'.

According to the annual reports, one may find that the EU has some long-time, regularly applied concerns towards the US, like the abolition of capital punishment, the issue of TIDTP, the recognition and respect of the right of consular assistance (Avena-decision), and since 2013, the challenge of data protection in the light of the war on terror and the US NSA surveillance policy. All in all, this report finds that the EU's human rights objectives and expectations argued towards the US can be categorised into two groups: particular issues of human rights and general calls for improving the US human rights legal framework (Figure 1).

⁵⁰ EU Annual Report on Human Rights and Democracy in the World in 2013. 11107/14,23 June 2014. <http://eeas.europa.eu/human_rights/docs/2013_hr_report_en.pdf> accessed 2 August 2016

⁵¹ EU Annual Report on Human Rights and Democracy in the World in 2014 <http://www.eeas.europa.eu/human_rights/docs/2014-hr-annual-report_en.pdf> accessed 2 August 2016

Figure 1: EU human rights objectives and aims towards the US



The space limits of this report do not allow the elaboration of all these concerns in detail. However, the chosen topics of the case studies – capital punishment, data protection and surveillance policy, extraordinary rendition and TIDTP – are, as Figure 1 shows, the issues most widely argued by the EU. Therefore, the authors of this report hope that through these case studies this report provides an eligibly profound analysis of the EU-US relations in the light of human rights.

After the overview of EU’s human rights policy and objectives in its external relations in general and also with regard to EU-US relations, one must also overview the other side of this relationship. Namely, the relation of the international human rights agreements and the US Constitution, or, in other words, the challenge of universal human rights to the US political system on the one hand, and the theory and reality of US exceptionalism, on the other.

C. Understanding US exceptionalism: independence, human rights and the impact of the US political system

According to the purpose of this report, after analysing the main patterns and setup of the EU’s human rights objectives and EU-US relations, it is also inevitable to elaborate this issue from the other side of the Atlantic. The fact is that the US, although it regularly calls on its international partners to ratify the relevant international human rights treaties, does not act in the same way, has been widely elaborated as the phenomenon of US exceptionalism or the US double standard policy. However, instead of judging this US practice, in this final section of the introduction, the report overviews the legal and political background of this phenomenon, in order to elucidate this kind of exceptionalism. This analysis is important for a better understanding of US policy on international human rights treaties and may also provide useful consequences to the US’ international partners for improving human rights in the country.

1. US’ participation in international human rights covenants

The United States took a major role and was the engine of the creation of the United Nations and the drafting of the Universal Declaration of Human Rights in 1948.⁵² As Sitaraman puts it,

‘One of the enduring paradoxes of United States participation in international treaty regimes and acceptance of international law is that it has acted as an enforcer of norms and rules by sanctioning and rewarding states that cooperate with international treaties, while exempting itself from formal participation in the very same treaties that it helped to establish.’⁵³

Although the US played an essential role in the formation of the UN, and promoted the UN covenants and treaties in the UNGA meetings and on other international stages as well, it ratified only 5 of the UN’s 18 international human rights covenants (Figure 2). Moreover, the US started to ratify some major human rights treaties with great delay, only in the late 1980s, and has still

⁵² Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 1.

⁵³ Srinivasan, *State Participation in International Treaty Regimes*. (Ashgate, 2009) 143.

not ratified some important ones.⁵⁴ President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights in 1977, but the US Senate did not ratify the Covenant (some scholars highlight that this had a strong negative effect on social rights in the country).⁵⁵ The US also failed to ratify the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women (only 7 countries in the world did not sign this Convention).⁵⁶ When it comes to the above-mentioned UN human rights treaties, the UN Convention on the Rights of the Child (adopted in 1989) is signed and ratified by all eligible states around the world, with the exception of the US.⁵⁷

Figure 2: UN human rights covenants ratified by the US⁵⁸

| | Date of UNGA adoption | Date of US signature | Date of US ratification |
|--|-----------------------|----------------------|-------------------------|
| International Convention on the Elimination of All Forms of Racial Discrimination | 1965 | 1966 | 1994 |
| International Covenant on Civil and Political Rights | 1966 | 1977 | 1992 |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | 1984 | 1988 | 1994 |
| Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 2000 | 2000 | 2002 |
| Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography | 2000 | 2000 | 2002 |

The US is no more involved in other multilateral treaties either. The case of the very first treaty of the UN, Genocide Convention from 1948⁵⁹ already showed the US' reluctance: the ratification of

⁵⁴ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 Chinese Journal of International Law 321.

⁵⁵ Ann Piccard, 'The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?' (2010) 13 The Scholar: St. Mary's Law Review on Minority Issues 231

⁵⁶ The United States is one of seven countries that have not ratified the Convention. These include the Pacific Island Nations of Tonga and Palua, Iran, Somalia, South Sudan and Sudan.

⁵⁷ President Clinton signed the treaty in 1995. For a while Somalia and the US were the only two non-party states to this convention, but Somalia ratified it in October 2015. For the updated state of the ratification of this convention, see United Nations Treaty Collection, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en> last access 8 August 2016

⁵⁸ 'Ratification of 18 International Human Rights Treaties' (UN Human Rights Office of the High Commissioner) <<http://indicators.ohchr.org/>> accessed 8 August 2016

the convention occurred after a huge 40-year-long delay in 1988. One may find several examples of international treaties on different issues (human rights, environment, disarmament, and so on), which means that the resistance of the US towards international treaties does not concern one specific subject, but the notion of binding international treaties in principle. Some examples: the US has not ratified the Convention on Biological Diversity (since 1992, with 196 parties), the Comprehensive Nuclear-Test-Ban Treaty (since 1996, with 164 parties), the Kyoto Protocol (United Nations Framework Convention Protocol on Climate Change, since 1997, with 192 parties), or the Rome Statute of the International Criminal Court (since 1998, with 124 parties). The case of the International Criminal Court seems to be a good example of ambiguous US cooperation: 'in 1998, the United States took part in the negotiations for the International Criminal Court but secured guarantees that its military, diplomats, and politicians would never come before that court. The Clinton administration signed the treaty before leaving office, only to have the incoming Bush administration unsign it'.⁶⁰

All these treaties were supported by the US government during the preparation phase and were signed by the US president, but the ratifications finally never happened, although these are widely respected covenants, with more than 100 party states per treaty. These figures show the resistance of the US towards international treaties in general, and towards international human rights treaties in particular, as well.

Moreover, in the case of every single ratified human rights covenant the US puts reservations, understandings, and declarations (RUDs) that ensure, among others, that the given covenant is not self-executing, or, in other words, has no direct domestic effect.⁶¹ As Moravcsik highlights, this practice means that '[i]n contrast to all other Western democracies, the United States offers its citizens no opportunity to seek remedies for violations of internationally codified rights before either a domestic or an international tribunal'.⁶² These RUDs reflect the main features and principles of the US political system, namely federalism, the checks and balances and the Constitution, as the supreme law of the land.⁶³

However, as Goldsmith argues, this RUD policy is not exceptional: many other European countries also adopt their RUDs for ratified international human rights treaties, but with less attention from

⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. <<http://www.hrweb.org/legal/genocide.html>> accessed 1 June 2016

⁶⁰ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 4.

⁶¹ For a profound analysis of the RUD's in US human rights policy, see Curtis A. Bradley and Jack. L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent', (2000) 149 *Pennsylvania Law Review* 399 also published as Chicago Public Law and Legal Theory Working Paper, No. 10, The Law School, University of Chicago (2000) <http://www.law.uchicago.edu/files/files/10.JLG_.Treaties1.pdf> accessed 1 July 2016

⁶² Andrew Moravcsik, 'Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 149.

⁶³ Jack L. Goldsmith, 'International Human Rights Law and the United States Double Standard' (1998) 1 *Green Bag* 365.

the critics' side. Regarding one of the most criticised RUDs: while the US always declares that the given international treaty/covenant is non-self executing, other states (European liberal democracies, and Canada, New Zealand or Australia) rather fail to implement the regulations, principles and objectives of the given treaty into domestic law. Thus, the final result is the same: the treaty 'has nominal domestic status but no domestic legal force'.⁶⁴

This leads to the question that even if the US signs international treaties, they are not always followed in domestic practice. As Ignatieff puts it:

Exceptionalism also takes the form of signing on to international rights conventions and then failing to abide by their requirements. The U.S. record of treaty compliance is no worse than that of other democracies, but because of the superpower's exceptional political importance, U.S. forms of noncompliance have more impact than those of less powerful states. Examples of noncompliance include failing to inform UN human rights bodies when derogating from treaty standards; failing to cooperate with UN human rights rapporteurs seeking access to U.S. facilities; and refusing to order stays of execution in compliance with the Vienna Treaty on Consular Obligations. Both the Canadian and German governments have sought stays of execution for their nationals in U.S. courts, on the grounds that these nationals were convicted without prior access to their consular officials. Neither Virginia nor Texas paid any attention to these foreign requests, and these states allowed the executions to proceed.⁶⁵

Some scholars like Andrew Moravcsik argue that the following elements make the US sceptical of implementation of international norms: 1) the fact that the country is geopolitically powerful; 2) it has a long tradition of stable democracy (even if interpretation of democracy has changed in history); 3) it has a very active and important conservative minority, and finally, that 4) as a result of historical development, it has decentralised and fragmented political institutions, with the principle of checks and balances.⁶⁶

Curtis A. Bradley adds some aspects of historical development and the features of American constitutionalism (including the role of the Senate, the federal structure, constitutional stability, strong and independent judiciary, powerful modern presidency) as the main reasons behind US attitude to be 'less willing than other nations to embrace international human rights treaties'.⁶⁷

⁶⁴ Jack L. Goldsmith, 'The Unexceptional U.S. Human Rights RUDs', (2005) 3 *University of St. Thomas Law Journal* 311 319.

⁶⁵ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 6.

⁶⁶ Andrew Moravcsik, 'Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005)

⁶⁷ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 *Chinese Journal of International Law* 321

Besides the above-mentioned arguments, Michael Ignatieff mentions four causes as a background of US exceptionalism: 1) the widespread usage of the realist theory and its connection with the US as a superpower, 2) the cultural background that contains myths (a kind of civic/lay religion, as mentioned by Gentile⁶⁸) 3) the special institutional system (including federalism and the principle of checks and balances 4) political issues (special kinds of conservatism and individualism).⁶⁹

In the following sections the report overviews those elements and features of the US political system that are the origins and reasons of US exceptionalism. Although the above-mentioned scholars, like many others who deal with this topic, emphasise partly different – constitutional, political, social or even international – reasons behind this exceptionalism, one may find that their explanations can be divided into three categories: 1) the legal heritage, namely US exceptionalism in general and the role of sovereignty and independence, 2) the Constitution and its powerful principles (republican form of government, checks and balances, judicial review and federalism), 3) political culture (the role of the US in international politics, the influence of conservative ideology, and the long-time tradition of human rights struggles by and through social movements.

2. Legal heritage: independence and the supremacy of the Constitution

In order to understand the historical background of the thinking behind US keeping distance of certain international agreements, one of the core documents of USA, the Declaration of independence⁷⁰ serves as a guideline. It says that

[W]e, [...], the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

Based on these principles, transferring power from the national government (which was created by the people of the US to grant, support and protect freedom and democracy) to a foreign organisation or institution, or the narrowing down of US power by applying foreign rules, and as such, to cut sovereignty, is always problematic. Freedom, democracy, and independence got

⁶⁸ Emilio Gentile, 'Political Religion: A Concept and its Critics – A Critical Survey' (2005) 6 *Totalitarian Movements and Political Religions* 19

⁶⁹ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 11.

⁷⁰ 'The Declaration of Independence: A Transcription' <http://www.archives.gov/exhibits/charters/declaration_transcript.html> accessed 1 July 201

attached in US thinking, because of historical reasons. In the US tradition, the people created the United States as well as the states in it, and they were made to provide freedom for every citizen. From this perspective, cutting their power may mean cutting people's power and freedom. As the beginning of the Declaration says that '[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.

The loss of power (the supremacy of international law) may endanger these rights, from a US perspective. Especially this is true, if US citizens are judged by foreign courts. Thus the idea that a court like the International Criminal Court could judge US citizens, claims jurisdiction over US citizens and takes away US courts' power to proceed is also problematic, from this perspective. From the point of US citizens, this may lead to the distortion of their constitutional rights.

Concluding treaties was seen in US history as tools to regulate the connection of the US with external actors, and not to regulate domestic issues, especially not the 'core' of constitutionalism. As a proof, Dru Brenner-Beck cites James Madison's statement that treaty power was to be exercised 'principally on external objects, as war, peace, negotiations and foreign commerce'.⁷¹ Interestingly, US constitution and jurisprudence also follow the path based on this general legal culture.

The core provision, the so-called supremacy clause (Article VI, Clause 2) of the US Constitution says that

[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Based on the text, the fact that the 'laws of the United states' must be made in pursuance of the US Constitution is clear. However, it does not connect 'treaties made' to the Constitution, and its interpretation caused scholars and jurisprudence some difficulties. Deciding whether international treaties must be in line with the constitution (and with its interpretation) or whether they may take away state powers (see later) is of great importance: in case of collision, such treaties could not get applied, or even nullified. However, the Constitution itself does not give us further details whether the federal government has the power to change state laws in the form of concluding international treaty obligations.⁷²

⁷¹ Dru Brenner-Beck, 'Federalism and the Treaty Power: Breaking the "Bond(S)" Between Nations: The Treaty Power and Status of Forces Agreements' (2014) 5 American University National Security Law Brief 1

⁷² Sрни Sitaraman, *State Participation in International Treaty Regimes* (Ashgate, 2009) 158.

Interpreting the relation of the role and position of international treaties in the US legal system, the US Supreme Court (SCOTUS) in the *Missouri v. Holland* case (1920) held that

[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power, but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national wellbeing that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found.⁷³

Later, in the *Reid v. Covert* case (1957),⁷⁴ the SCOTUS provided a clear answer to the question, whether the Constitution may conflict with international treaties. The SCOTUS clearly expressed that the Constitution supersedes (or by the related EU terminology: has supremacy above) international treaties, even if they were ratified by the Senate. The court highlighted that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’ The judges rejected the idea that ‘when the United States acts against citizens abroad, it can do so free of the Bill of Rights’, because, as they claimed (just like we have seen above) ‘the United States is entirely a creature of the Constitution’, and ‘its power and authority have no other source’. As a consequence, the decision claims the Constitution protects the right to life and liberty of US citizens even abroad.⁷⁵

Of course, the fact that the Constitution is at the centre of a country is common in Europe, as well. However, on numerous occasions international treaties may raise practical questions regarding domestic law, and in case of conflict, they may very quickly find themselves in the terrain of domestic politics in the US. As such, numerous treaties were not ratified, because they may raise constitutional problems, like the case of the Convention on the Protection of the Child, or see the RUDs attached to the ICCPR, because of the much wider understanding of the freedom of speech in the US than in the EU member states.⁷⁶ This attitude could also be behind the fact

⁷³ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁷⁴ *Reid v. Covert*, 354 U.S. 1 (1957).

⁷⁵ Interestingly, they claimed, this approach is not new in history: they cited the example of Paul in ancient Roman Empire, or the case of Settled Colonies and old English law.

⁷⁶ For a profound analysis, see Kristina Ash, ‘U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence’ (2005) 3 *Northwestern Journal of International Human Rights* <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1018&context=njihr>> accessed 1 August 2016; and Jack L. Goldsmith, ‘The Unexceptional U.S. Human Rights RUDs’ (2005) 3 *University of St. Thomas Law Journal*, 311 ff

that in 1998 President Clinton signed the Treaty on the International Criminal Court, but maintained guarantees that politicians, diplomats, military would never come before that court. While the Bush administration unsigned the treaty, it also negotiated with allied countries that they will not hand over US citizens to the ICC.⁷⁷

The struggle for independence and freedom can also be felt on the present actions of the SCOTUS. As Justice Scalia expressed in *Printz v. United States*,

Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.⁷⁸

These problems seem to be merely technical for European readers, some of them (even for the authors of present report) seem to be technical with obvious solutions in a globalised world. On the other hand, for the US mind-set they can create a struggle, and this struggle can also be seen in the case of US institutions.

3. Institutional settings

a) *The role of the Senate*

When talking about the role of the Senate regarding international agreements, firstly we must make some distinction between human rights treaties and agreements. Under international law a 'treaty' is any international agreement concluded between states or other entities. The frameworks of international agreements are governed by the 1969 Vienna Convention on the Law of Treaties,⁷⁹ which sets out the major rules of international agreements. Thus, in international law, the terms 'treaty' and 'agreement' are both used, without special distinction or meaning, for the same documents.

However, this is not so in domestic US law, in which treaties are different from agreements. In the US, international agreements may be implemented into US law in three ways: 1) as so called 'treaties', 2) as 'congressional-executive agreements' or as 3) 'presidential' or '*sole executive agreements*'. Please note that in the present report, we use agreement and international agreement according to European standards interchangeably. If we refer to executive agreements, we use this latter term according to US rules.

As Frederic L. Kirgis put it, the term

⁷⁷ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 4.

⁷⁸ *Printz v. United States*, 521 U.S. 898, 921 n. 11 (1997)

⁷⁹ Vienna Convention on the law of treaties of 1969 (signed on 23 May 1969)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>

accessed 1 June 2016

“treaty” has a much more restricted meaning under the constitutional law of the United States. It is an international agreement that has received the “advice and consent” (in practice, just the consent) of two-thirds of the Senate and that has been ratified by the President. The Senate does not ratify treaties. When the Senate gives its consent, the President - acting as the chief diplomat of the United States - has discretion whether or not to ratify the instrument. Through the course of U. S. history, several instruments that have received the Senate’s consent have nonetheless remained unratified. Those instruments are not in force for the United States, despite the Senate’s consent to them.⁸⁰

Under US law, treaties have the same power (are equivalent to) federal laws. The original name of the treaty is not of interest, it can be called ‘convention’, ‘agreement’, ‘protocol’, ‘accord’, etc. However, if it is submitted to the Senate for advice and consent, it is considered a treaty under U.S. law. Section 2 of Article II of the Constitution says that the President ‘shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur’. This means that generally, international agreements (and this is true regarding human rights agreements as well) must be approved by the Senate.⁸¹ Bradley mentions that this supermajority requirement is unusual compared to other countries.⁸² However, still, for human rights, the Article II process is used, and since such treaties contain sensitive regulations, there is a stable political consent in that this must stay so in the future as well.

As Thourn writes, ‘[i]n the case of congressional-executive agreement, an international agreement is backed by the (simple) majority of Congress (i.e. Senate and House of Representatives). Such agreements do not need the supermajority consent of the Senate, and generally, presidents seek congressional approval once they are signed.’⁸³ Finally, presidential agreements are concluded by the President without the active participation or consent of the Congress or Senate.

The fact which procedure to choose for which area is not unambiguous. In theory, ‘the prevailing view is that ‘a congressional-executive agreement may be used whenever a treaty could be’,⁸⁴

⁸⁰ Frederic L. Kirgis, ‘International Agreements and U.S. Law’ (1997) ASIL Insight <<https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>> accessed 1 June 2016

⁸¹ The supermajority rule has a great tradition in US history: it came into the center when south and north states were debating before the Constitutional Congress whether they should conclude an agreement on trade with Spain, which that time controlled the mouth of the Mississippi River. Since the two groups could not reach a conclusion, they tried to make it difficult to sign treaties too easily.

⁸² Curtis A. Bradley, ‘The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism’ (2010) 9 Chinese Journal of International Law 321 327.

⁸³ Mark Thorburn, *The President and the Executive Branch: How Our Country is Governed* (Enslow Publishers, 2013) 32.

⁸⁴ Frederic L. Kirgis, ‘International Agreements and U.S. Law’ (1997) ASIL Insight <<https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>> accessed 1 June 2016

while presidential agreements should be used in some special areas like agreements on military issues,⁸⁵ but their application still causes serious debates.⁸⁶ Generally, as Hathaway has put it, most authors emphasise that 'trade is an area in which congressional-executive agreements are prominent, whereas human rights and arms control are areas in which treaties are more common'.⁸⁷

However, international agreements containing human rights clauses must receive the supermajority of the Senate. This means, that a number of treaties which do not receive 2/3 majority support can not be ratified by the President, even though he signed these treaties (like the Convention on the Rights of the Child). With this power, the Senate is able to block decision making, even against the President's will. This is the reason why numerous international agreements did not pass the Senate, because a minority was able to block the efforts, like in the case of the one on the League of Nations, the Genocide Convention, or the Convention to Eliminate all forms of Discrimination of Women (CEDAW).⁸⁸

Finally, we must also mention that the Senate also has the right to amend the draft of a Treaty. This first happened in 1795, when the Senate erased a provision in a treaty the President had concluded with Great Britain, but otherwise approved the rest of the Treaty.⁸⁹

b) The role of the President

One cause of relative unsuccessfulness, especially of the implementation of human rights treaties and international human rights in the US could be the President's role in the US constitutional system.⁹⁰ The President has great power in shaping US policies, including human rights. On the other hand, based on the system of checks and balances, his role is limited: without the Congress or (as we have seen before, the Senate), he has very limited power to issue laws or general guidance in the field of human rights. The President has different duties: he is an administrator (appoints ambassadors, judges, government officials – in most cases the Senate must approve the selection). He also has law enforcement duties (to enforce the laws that are passed by the

⁸⁵ See *ibid.* and also American Law Institute's Restatement Third of Foreign Relations Law of the United States, § 303.

⁸⁶ Leila Nadya Sadat, 'The Proposed Restatement Fourth of the Foreign Relations Law of the United States: Treaties. Some Serious Procedural and Substantive Concerns.' *Washington University in St Louis School of Law Legal Studies Research Paper Series*, Paper NO.15-08-02 8.

⁸⁷ Hathaway's work is a detailed collection of different agreements concluded in different fields. She concludes that the line between the topics of agreements and treaties not as simple as it is commonly assumed, see Oona A. Hathaway, 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) 117 *Yale Law Journal* 1236 1252 ff

⁸⁸ Andrew Moravcsik, 'Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 187-188.

⁸⁹ Mark Thorburn, *The President and the Executive Branch: How Our Country is Governed* (Enslow Publishers, 2013) 32.

⁹⁰ Neil Kinkopf, 'Inherent Presidential Power and Constitutional Structure' (2007) 37 *Presidential Studies Quarterly* 37

Congress). He has some special duties (like being the Commander-in-Chief of the Military). Finally, he has some legislative rights.

Firstly, he can propose laws for the Congress to get adopted. As Section 3, Article II of the Constitution expresses:

[s/he] shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

On the other hand, it is highly important to note that formally, only members of Congress may introduce legislation (i.e. submit proposals). This means that occasionally, a member (a so-called sponsor) introduces legislation by request of the President. However, the President may not turn to the Congress directly.

It is also important to stress that the way Presidents use this power is diverse. Some Presidents (like Woodrow Wilson) presented concrete drafts of proposals to Congress. Even if s/he chooses this way, s/he does not have the power to enter the Congress personally – s/he must wait to use Members of Congress for advocating for the bill in the Congress. Most of the Presidents, however, used informal tools too shape Congress legislation. President Franklin Delano Roosevelt created the Office of Legislative Affairs of the White House, which ‘informs the members of Congress of what bills the president supports and opposes. It also actively seeks congressional approval of laws that would implement the president’s policies’.⁹¹

Secondly, he has the power to make (and sign) treaties ‘and ratify them by and with the advice and consent of the Senate’, provided (as mentioned before) that two thirds of the Senators support them.

Thirdly, the President has veto rights: he may prevent a Bill adopted by congress by not signing it. However, Congress can still adopt the rejected legislation into a valid law by casting a two-thirds vote in both the House of Representatives and the Senate.

Fourthly, the President himself may issue different legislation. However, his powers are very limited, and most of them can be interpreted as the result (extension) of his executive power. The President may issue executive orders, in order to help the executive branch. Executive orders have the full force of law. In a number of cases President Obama also announced executive orders (such as the order on immigration).⁹² The President may also issue other regulative legal sources

⁹¹ Mark Thorburn, *The President and the Executive Branch: How Our Country is Governed* (Enslow Publishers, 2013) 20.

⁹² ‘Is Obama's Immigration Executive Order Legal?’ (U.S. News, 21 November 2014) <<http://www.usnews.com/debate-club/is-obamas-immigration-executive-order-legal>> accessed 1 August

like a Presidential notice or Presidential memoranda or Presidential determinations. Moreover, regarding certain issues, the President may take executive actions. Such actions do not have legal weights, but are informal actions when a President wants to reach something in the Congress.

As we have seen in a number of cases, the role of the President is highly problematic if he tries to implement human rights policies into the US legal system without the Congress. This system can cause some problems if the EU wants to change policies. When talking about these problems, two major problems must be separated.

Firstly, the President's strong position can also be a problem regarding the implementation of human rights. A good example of this is the way international agreements are concluded: during the negotiations, the Senate does not have the right to modify the text, it is the job of the Executive Branch to do so, and the President has the right to sign the text. The Senate may consent/not consent/erase some parts of the text. However, the Senate does not have a right to modify the Treaty during negotiations, or affect the negotiations. This may result in hostility towards the final version of the Treaty (as we have seen in numerous instances mentioned before).⁹³

Bradley mentions that this problem is rooted in old traditions. As he puts it:

At the same time that international human rights law was being developed, the increased power of the presidency prompted concerns within the United States about an erosion of separation of powers. These concerns were particularly salient during the Cold War, a time when George Orwell's novel 1984 captured the fears of many about where the world was headed. Conservatives in the U.S. Senate were particularly unhappy with the concessions that President Roosevelt had unilaterally made to the Soviet Union, first in the Litvinov Assignment in the 1930s and then at the Yalta conference in 1945. The Truman Administration was viewed as continuing this pattern of unilateral executive authority with the Potsdam Accord in 1945, the commitment of military force to Korea in 1950, and the seizure of the nation's steel mills in 1952 in response to a threatened strike in that industry.⁹⁴

No wonder President power is seen by some members of the Congress as a danger to the system of checks and balances, which brings us to the second problem, namely, that as a balance, the Congress (and the Senate) wants to keep its independent and autonomous role as strong as possible.

2016; 'Executive Actions Versus Executive Orders: Definition of Executive Actions and List of Examples' <<http://uspolitics.about.com/od/Gun-Control/a/Executive-Actions-Versus-Executive-Orders.htm>> accessed 1 August 2016

⁹³ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 Chinese Journal of International Law 321 335.

⁹⁴ Ibid.

Secondly, the Presidents relatively weak powers may also cause implications.⁹⁵ The best example for this is the case of the Guantánamo camp: President Obama expressed his intentions to abolish the camp in 2008 and issued an executive order⁹⁶ in 2009.⁹⁷ On the other hand, without the Congress, he seems to be unable to do so. One reason for this is that the Congress has to vote for allocation of the financial background of transfers to the US, and (as there is a Republican majority at present in the House of Representatives as well as in the Senate, which opposes the closure of the camp), it does not support any such move.⁹⁸ Even though President Obama announced new plans to close the camp in 2015, just like in earlier years, the 2016 Defense Policy Bill contains a strict ban on bringing detainees to the U.S.⁹⁹

c) Federalism

Another issue, which makes the picture even more complex is the role of the states. According to the Tenth Amendment to the Constitution (Amendment X), 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'¹⁰⁰ The Senate is composed of two Senators from each State, which also shows the strong role of states.

In the aforementioned *Missouri v Holland* case, the Supreme Court held that Treaties may regulate questions belonging to state power. As the judgment says,

most of the laws of the United States are carried out within the States and ...many of them deal with matters which, in the silence of such laws, the State might regulate... Valid treaties, of course, "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." (*Baldwin v. Franks*, 120 U. S. 678, 120 U. S. 683). No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it

⁹⁵ See Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 *Chinese Journal of International Law* 321 335.

⁹⁶ POTUS, 'Executive order on the Closure Of Guantánamo Detention Facilities' <https://www.whitehouse.gov/the_press_office/ClosureOfGuantánamoDetentionFacilities> accessed 1 August 2016

⁹⁷ Georgiana Constantin, 'Guantanamo Bay and the Land of the Free', *Georgetown Journal of International Affairs* online <<http://journal.georgetown.edu/guantanamo-bay-and-the-land-of-the-free-by-georgiana-constantin/>> accessed 1 July 2016

⁹⁸ For a summary of actions see Chris Edelson, and Robert J. Spitzer, 'Obama's Guantanamo Paradox' *US News* (30 November 2015) <<http://www.usnews.com/opinion/blogs/world-report/2015/11/30/obama-should-not-try-to-close-guantanamo-bay-with-an-executive-order>> accessed 1 July 2016

⁹⁹ Dave Boyer, 'Obama finalizing plan to close Guantánamo Bay', *The Washington Times*, (5 November 2015) <<http://www.washingtontimes.com/news/2015/nov/5/obama-finalizing-plan-to-close-guantanamo-bay/>> accessed 1 August 2016

¹⁰⁰ For a highly interesting textual analysis claiming that federal powers does not have to be formed explicitly, see Garrett Epps, 'Constitutional Myth #7: The 10th Amendment Protects 'States' Rights' *The Atlantic* <<http://www.theatlantic.com/national/archive/2011/07/constitutional-myth-7-the-10th-amendment-protects-states-rights/241671/>> accessed 1 August 2016

was recognized as early as *Hopkirk v. Bell*, 3 Cranch 454, with regard to statutes... and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall.199.

This means that the federal level (President-Congress) may take power to regulate something instead of the States. This solution makes States fear rights can be taken away from them. We can imagine what protests would occur if in Europe power from the states could be limited through the way of concluding international treaties.

In the EU, there is no such system. Something similar is the provision found in Article 352 TFEU, which says that if action by the European Union should prove necessary in order to attain one of the objectives set out in the primary legal sources, and these sources have not provided the necessary powers, the European Council shall adopt the appropriate measures. Of course, in these cases, the proposal is created by the Commission and the consent of the European Parliament is necessary). If such measures are adopted in a special legislative procedure, the Council acts unanimously. In this process, national Parliaments are only notified about the proposals.

Regarding the US, a good example of the domestic struggle between the federal and state levels is how the Supreme Court struggled with the ban on child labour. Firstly, in 1918 the Supreme Court found¹⁰¹ that the Congress does not have the power to ban child labour, not even if the question is related to commerce. Moreover, it was also said, that the related Keating-Owen Act of 1916 was unconstitutional. As the judgment claims, 'In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.' On the other hand, the decision was later changed, when *United States v. Darby* overruled the former decision.¹⁰² As this new decision says,

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.¹⁰³

Under such articles we can mean articles created with the use of child labour as well. In sum, as a tool, the Government can use its implied powers, and introduce, even if the case is not related to an international Treaty.¹⁰⁴ On the other hand, this results in the limitation of State powers. And as Moravcsik put it,

¹⁰¹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918)

¹⁰² *United States v. Darby Lumber Co.*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941)

¹⁰³ *Ibid.*

¹⁰⁴ Milosz Hodun, 'Doctrine of Implied Powers as a Judicial Tool to Build Federal Polities Comparative Study on the Doctrine of Implied Powers in the European Union and the United States of America'. PhD

To rescue the popular sovereignty explanation, one might argue that Americans hold a principled belief in local, small-scale democracy within a federal system, which predisposes them to reject centralized forms of rights enforcement, particularly at the international level. It is certainly true that Americans report suspicion about “big government” in Washington, and tend to trust state and local officials more. The United States has more elected offices per capita than any country in the world. The practice of electing local judges, viewed with abhorrence in most of the developed world, is widely accepted in the United States.¹⁰⁵

However, in his article, Moravcsik disagrees with this claim. He mentions that in other parts of the world like Germany or Switzerland, the same issues could be raised.¹⁰⁶ However, such arguments are rarely applied there, while all the more in the US.

As an example of EU actions being less successful in the US we could mention the case of consular rights. Article 36(1) of the Vienna Convention on Consular Rights of 1963 (Vienna Convention - US ratification: 1969, Optional Protocol expressing the jurisdiction of ICJ also from 1969: US signed and later withdrew from it in 2005)¹⁰⁷ sets out the basic rights of detainees. It says that

[a] consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State

and also that

consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.

The non-application of this provision, especially regarding detainees sentenced to the death penalty caused great difficulties in the US. Numerous cases emerged before the International Court of Justice as well as before US courts, such as the LaGrand cases,¹⁰⁸ the Avena Case,¹⁰⁹ or

dissertation, School of Law, Reykjavik University
http://skemman.is/stream/get/1946/20824/47793/1/Doctrine_of_implied_powers_as_a_judicial....pdf
 accessed 1 August 2016

¹⁰⁵ Andrew Moravcsik, ‘Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 160.

¹⁰⁶ Ibid

¹⁰⁷ http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

¹⁰⁸ Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999). See also State v. LaGrand (Karl), 733 P.2d 1066, 1067 (Ariz. 1987); State v. LaGrand (Walter), 734 P.2d 563, 565 (Ariz. 1987). 103. LaGrand

the Medellín case.¹¹⁰ In all of them, the direct effect of international agreements were at the centre of the disputes. From a European perspective, the solution of the problem is simple: the US ratified a treaty, which must be enforced in US courts. However, from the point of view of US constitutionalism, the Federal government may not intrude into state power, and the regulation of criminal law belongs to the states. Thus, such a direct effectuation could raise federalism concerns.

Bradley in an article on Avena mentions some basic problems, regarding the direct effect of the Avena decision.¹¹¹ As he puts it, ICJ judges are ‘not subject to the appointment and life tenure provisions set forth for the federal judiciary in Article III of the Constitution, making it problematic to vest ICJ judges with the authority to displace United States laws and decisions’.¹¹² However, we must mention that the lifelong tenure is also target of criticism in the US. Levinson collected numerous approaches (including those of Tushnet, Calabresi and Lindgren, Garrow, LaRue and Justice Scalia and concludes that

as noted at the beginning of this chapter, I am not exercised by the fact that members of inferior federal courts also enjoy life tenure. However, were I forced to choose between limited eighteen-years appointments for *all federal judges and maintaining the present practice of truly unlimited life tenure, I would have no hesitation in opting for the former.*¹¹³

d) The role of the Supreme Court

Regarding human rights in the US, some commentaries highlight the importance of the existence of an independent judiciary in the US.¹¹⁴ Since the Constitution has direct effect, and as such, can be used directly before the courts, courts have the authority (may invalidate) actions of the government or states as well as not to apply laws, which seem to be in conflict with the

(Karl), 733 P.2d at 1067; LaGrand (Walter), 734 P.2d at 565. 104. LaGrand (Karl & Walter) v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998).

¹⁰⁹ Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

¹¹⁰ Medellín v. Texas, 552 U.S. 491 (2008); Jesse Townsend, ‘Medellín Stands Alone: Common Law Nations Do Not Show a Shared Poststratification Understanding of the ICJ’, *The Yale Journal Of International Law*, 2009 pp. 463-497.

¹¹¹ Curtis A., ‘Bradley, Enforcing the Avena Decision in U.S. Courts’, *Harvard Journal of Law & Public Policy*, 2006, pp. 119-125; Taryn Mark, ‘The Problems Of Self- Execution: Medellín V. Texas’ *Duke Journal Of Constitutional Law & Public Policy*, 2009 pp. 191-203.; Sarah M. Ray, ‘Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations’, *California Law Review*, 2003, p. 1729-1771.

¹¹² Ibid 121

¹¹³ Stanford Levinson, *Our Democratic Constitution – Where the Constitution Goes Wrong (And How We can Correct It)* (OUP, 2006)

¹¹⁴ Curtis A. Bradley, ‘The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism’ (2010) 9 *Chinese Journal of International Law* 321 332.

Constitution. This principle of the *ex post* review of constitutionality was set in *Marbury vs. Madison*¹¹⁵ in 1803. As the judgment says:

it is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

As Moravcsik interprets the courts' role, in the US they are at the centre of domestic redistributive conflicts in a way unmatched in Western democracies.¹¹⁶

As we have seen before, this principle also applies to international agreements. The great power of the federal Supreme Court is illustrated by Bradley in the example on the 'war on terrorism'. As he put it:

to date, the Court has determined the minimum procedures that must be used in evaluating which terrorist detainees can be held by the military, which has asserted jurisdiction over the detention facility at the U.S. naval base at Guantánamo Bay, Cuba, and has invalidated a military trial system established by the Executive Branch.¹¹⁷

Consequently, regarding the problems surrounding the Guantánamo Bay Camp, we have to add the Supreme Court to the list of important institutions that can shape US policy.

In the opinion of Bradley, the strong position of the judiciary has three main consequences. First, less need is recognised for international treaties. Second, the effect of international treaties may cause confusion if read together with domestic rules. Third, as he claims, treaties may cause the danger of generating 'substantial litigation and uncertainty'. Fourth, 'a strong and independent judiciary can increase the domestic influence of international institutions'.¹¹⁸

¹¹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803). See also the collection of articles (*Marbury at 200: A Bicentennial Celebration of Marbury v. Madison*) in *Constitutional Commentary*. Vol. 20 No. 2, Summer 2003

¹¹⁶ Andrew Moravcsik, 'Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 191.

¹¹⁷ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 *Chinese Journal of International Law* 321 333

¹¹⁸ *Ibid* 333.

4. Political culture

a) *Human rights as results of social struggle*

The fact that certain rights in the US were achieved through a great social struggle can interestingly also make the system more closed to any change, and can also serve as a kind of hostility towards internationalisation.

A good example of this is the case of race relations in the US. Speaking very simplified, in the US, African-American people's civil and political rights were limited until the sixties. Moreover, for Europeans probably surprisingly, the 'race struggle' was also extended to international norms and areas, which are different than the sole interpretation of discrimination based on race or ethnicity. In the 1950s, the so called 'Bricker Amendments'¹¹⁹ (a collection of amendments of the Constitution, named after John Bricker, who was a member of the Senate that time) were intended to try to limit government power, by placing restrictions on the scope and ratification of treaties and executive agreements concluded by the United States.¹²⁰ One of the aims of the amendments was to stop the Government from implementing policies and signing treaties, which could give more rights to African-Americans. The amendments received great support from the American Bar Association (ABA) but remained unsuccessful.

There were numerous arguments the proponents of Bricker Amendment used:¹²¹ international treaties 1) diminish basic rights, 2) may violate states' rights (by legitimising an unlawful and useless federal action), 3) promote world government (and thereby cause legitimacy problems), 4) subject US citizens to trial abroad 5) threaten the form of government and lead to the destruction of the American political system 6) enhance communist and Soviet influence 7) infringe domestic jurisdiction, 8) some treaties create self executing obligations (without the need of further legislation), 9) increase international entanglements. Kauffman and White pointed out that some of these arguments survived, and are regularly used in America even today.¹²²

In sum, as Bradley put it,

some conservatives in the United States, especially in the South, were concerned that the national government would use international human rights law to achieve

¹¹⁹ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 *Chinese Journal of International Law* 321 325 ff.; Eric Foner, *The Story of American Freedom* (W. W. Norton & Company 1999) 219 ff

¹²⁰ Because of the need for simplification for the European readers, we hereby try to avoid going into details of earlier cases. However, it must be mentioned that the case law of segregation and discrimination contained numerous decisions which had to be repealed or modified, see e.g. Natalie Hevener Kaufman and David Whiteman, 'Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment' *Human Rights Quarterly*, 1988, p.310; 314. et seq.

¹²¹ I implement the main arguments collected by Kaufmann and Whiteman, p. 321 et. seq.; p. 335. et.seq.

¹²² They cite the Carter Presidency and hearings in 1979, see Kaufmann, Whiteman, p. 330.

civil rights reform that was otherwise beyond the scope of either Congress's authority or what the Constitution mandated.¹²³

Although the Bricker Amendment finally failed, its effects – the fear of supremacy of international agreements over the US Constitution, and the fear of unbalancing the federal structure of power sharing between the states and the federal government – had not disappeared so far, but provided the basic arguments of US exceptionalism.

Moreover, it was also claimed that international agreements like the Genocide Convention of 1948 could be used to defend African-American people's rights, since the segregation and discrimination (and the harm caused by physical and psychological means) could be interpreted by critics as a form of genocide (the Convention mentions the destruction of a race).¹²⁴ Moreover, for such thinkers, the danger was even greater, since for them (as Kaufman and Whiteman put it), such efforts could lead to an international court judging in the cases of US citizens.¹²⁵

After a long struggle and injustice, in the Brown case in 1954¹²⁶ the US Supreme Court held that maintaining and establishing a public school, which segregates between students based on race are unconstitutional, and during the sixties African-American people received electoral rights as well.

b) The influence of conservative social groups

There were numerous occasions in US history when isolationists proposed that the US remain inactive in international relations: the isolationist theory was very common e.g. in the 1950s, during and after the beginning of the cold war, and it still receives some support today.¹²⁷ Such an attitude can be problematic, because it prohibits international and open conversation about problems. However, the fact, whether a more cooperative or a less cooperative foreign policy was used was very much dependent on the actual situation of the country. For example, during the fifties, McCarthyism with its hostility towards communism and communist countries also caused internationalisation (including international human rights) to become suspicious, since it might contain human rights interpretations inspired by the Soviet bloc, derogating US values. As

¹²³ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 Chinese Journal of International Law 321 325.

¹²⁴ That time, this was not a completely irrational and particular idea, numerous prestigious scholars and lawyers accepted it, see Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 Chinese Journal of International Law 321 325.

¹²⁵ Kaufman, and Whiteman, p. 325.

¹²⁶ Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). For the former, separate but equal principle see Plessy v. Ferguson, 163 U.S. 537 (1896).

¹²⁷ Curtis A. Bradley, 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism' (2010) 9 Chinese Journal of International Law 321 325.

mentioned before, apart from politicians, similar criticisms of international agreements were used by the American Bar Association as well.¹²⁸

When talking about conflicts between the world inside and outside of the US, we must also mention that currently, there is also a political climate especially in some circles of the Republican Party, which promotes a kind of ‘old patriotism’ against new solutions stemming from outside of the country, while most democrats are more open for internationalisation and international human rights. Thus, a neoconservative attitude as a defender of old rights is also surrounding some fundamental rights questions against more progressive (sometimes, international) solutions, and this can be especially seen if there is a republican majority in the Congress.¹²⁹ This can also be traced down in the fact that the US accession to most of the major international human rights were either concluded by a Democrat President or backed by a Democrat senate majority (or, possibly, both).¹³⁰ Moravcsik claims that the gap

in support for international human rights between liberal and conservative opinion leaders approaches 50 percent (e.g., 73 percent liberal vs. 25 percent conservative elite support propositions like “too many Iraqis were killed in the [first] Persian Gulf War”).¹³¹

We must also stress that a part of US conservatives think in an authoritarian way, and as such, among such right wing authoritarians (RWAs), the level of fear is by far higher than in society (or probably even higher than in the Republican Party itself). As a result, they are afraid more than others for the future of the world, and their reactions to fearful factors is also harsh (in a number of cases, unnecessarily).¹³² Altemeyer describes a game among students, in which persons with

¹²⁸ Kaufman and Bradley cite these critics in their writings, see above. Interestingly, Moravcsik claims that the activity of ABA was absolutely not as consequent as one would assume. For example, during the forties, it supported cooperation, later, during the fifties, it was one of the strong proponents of isolation, while at present time again its the engine of international cooperation, and supports the signature of agreements like the UN Convention on the rights of the Child or the accession of US to the ICC.

¹²⁹ This neoconservative attitude became stronger and stronger during and after the Reagan administration, see Stanley B. Greenberg, *The Two Americas – Our Current Political Deaslock and How to Break It*. Thomas Dunne Books, 2004 p. 49. et. seq.; Foner: *The Story of...* p. 307 et. seq.

¹³⁰ Andrew Moravcsik, ‘Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 185.

¹³¹ Ibid 156.

¹³² It is highly inspiring to read about this thinking in Bob Altemeyer's book, 'The Authoritarians', available online at <<http://members.shaw.ca/jeanaltemeyer/drbob/TheAuthoritarians.pdf>> As he puts it,

authoritarian followers score highly on the Dangerous World scale, and it’s not just because some of the items have a religious context. High RWAs are, in general, more afraid than most people are. They got a “2 for 1 Special Deal” on fear somehow. Maybe they’ve inherited genes that incline them to fret and tremble. Maybe not. But we do know that they were raised by their parents to be afraid of others, because both the parents and their children tell us so. Sometimes it’s all rather predictable: authoritarians’ parents taught fear of

high RWAs and low RWAs played in two different groups. In the first group, where persons with high RWAs represented countries destroyed a major part of the world relatively quickly, because states were continuously in conflict with each other. In the group of persons with low-level RWAs, the cooperation dominated and they were able to handle international problems.¹³³ As he put it, 'high RWAs tend to feel more endangered in a potentially threatening situation than most people do, and often respond aggressively'.¹³⁴ To find international agreements, norms and foreign countries suspicious is in a number of cases clearly connected to fear, and as such, to authoritarian thinking in the US.

Furthermore, we must also add an extra layer to this problem. Robert J. Antonio states that there is a kind of paleoconservatism existing in the US (which, in some elements resembles European far right populism),¹³⁵ which forms a part of global tribalism.¹³⁶ In his opinion, paleoconservatives in the US are even stronger against internationalisation than traditional neoconservatives, since neoconservatives support open markets, market liberalisation, and also partly multiculturalism. As he put it, paleoconservatives even

attack neoconservatives for surrendering U.S. sovereignty to the New World Order (e.g., the United Nations, the International Monetary Fund, NAFTA) and capitulating to neoliberalism, consumer culture, liberal individualism, and multiculturalism.¹³⁷

In this interpretation, internationalisation and foreign influence leads to nihilism (while, in a traditional conservative way of thinking possibly a more interest-oriented, proactive, realist approach to international actions is useful). Such a worldview is posing the conclusion of international human rights treaties and implementing international norms or modification of US legal system in order to conform to European demands, especially, if the two kinds of conservative ideas block international influence in the US.

As a next problem, unlike in Europe, where there exist different (extreme, radical, populist, authoritarian) far right, right-wing and right-centre parties in most countries, in the US, Republicans, conservatives, with their mostly libertarian-free market attitude, paleoconservatives and liberal-conservatives are not separated in the Republican Party. This means that in certain

homosexuals, radicals, atheists and pornographers. But they also warned their children, more than most parents did, about kidnapers, reckless drivers, bullies and drunks - bad guys who would seem to threaten everyone's children. So authoritarian followers, when growing up, probably lived in a scarier world than most kids do, with a lot more bogey men hiding in dark places, and they're still scared as adults.

For such a group, 'foreign rules' are also suspicious, and fall under dangerous and useless measures.

¹³³ Ibid 26.

¹³⁴ Ibid 26.

¹³⁵ Cas Mudde, *Radical Right Parties in Europe* (CUP 2007).

¹³⁶ Robert J. Antonio, „After Postmodernism: Reactionary Tribalism” *American Journal of Sociology* 2000/1. 40-87.

¹³⁷ Ibid 64-65.

instances, even though ideas against internationalisation cannot form a majority, they can still strongly influence the rest of the party. Since decision making in the Congress is based around problems and not solely around parties, this effect can influence decision making strongly.

An example could be the US accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). President Jimmy Carter signed CEDAW on July 17 1980, but he did not send the treaty for ratification to the Senate. President Clinton sent the treaty to the Senate for ratification in 1993. Sitaraman summarises the reasons why the US rejected the CEDAW (p. 197.). As he expresses it, firstly, there are some traditional concerns (rights may abolish provisions of the United States Constitution, the US could face a loss of sovereignty, violation of federalism and state rights may occur). Moreover, as an extra layer, conservatives believed that the ultimate goal of CEDAW is to encourage abortion, same-sex marriage, and modify preordained gender roles of men and women. There was also anxiety that ratification of CEDAW will change relationships among men and women and 'alter traditional family relations in the US society through international law, especially through human rights treaties, as Senator Bricker had feared'.¹³⁸ However, this is a misinterpretation of the Convention. We believe, the aim of the Convention is to abolish the traditional hierarchical gender roles in certain cultures, and not to completely re-shape gender roles in the party countries.

A very similar problem occurs with the Covenant on the Rights of the Child, whose rejection is also based on a kind of conservative ethos:

Most American laws are already consistent with the pact, but not all. A notable exception is that in America under-18s can be jailed for life without parole (until 2005, they could be sentenced to death). The treaty prohibits cruel and degrading punishment, so ratification might curb smacking. Although America has laws against child abuse, a third of states allow corporal punishment in schools and none bans it at home.¹³⁹

It must also be mentioned that for US libertarians, some rights like broad social rights may seem actually harmful for social order.¹⁴⁰ This also could be one reason why the US did not sign the UN Covenant on Economic and Social Rights or the documents of the International Labour Organisation.

¹³⁸ Srinu Sitaraman, *State Participation in International Treaty Regimes* (Ashgate, 2009) 197.

¹³⁹ 'The Economist explains Why won't America ratify the UN convention on children's rights?' (The Economist, 6 October 2013) <<http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2>> accessed 1 July 2016

¹⁴⁰ Andrew Moravcsik, 'Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 162.

On the other hand, it must also be mentioned that the split between liberal and republican reaction is not always as clear as it seems. As Sitaraman puts it in connection with the abolition of the death penalty and the Genocide Convention:

it is difficult to present the ratification struggle as a purely conservative and liberal issue simply because Republican Presidents Nixon and Reagan supported the ratification of the Genocide Convention, while congressional leaders from both parties blocked ratification.¹⁴¹

In his opinion, 'a combination of institutional, political, and normative factors prevented the quick ratification of the treaty',¹⁴² not the political sides themselves. We feel that this can be the cause behind most of the similar issues. In a detailed paper, John Kane writes about some kind of struggle through American history between human rights and American values during the different presidencies.¹⁴³ In this struggle, together with the American institutions certain forms of conservatism may block the enforcement of certain, internationally recognised norms in the US.

c) *The superpower and its 'Realpolitik'*

One explanation of the US being independent could be based on the realist approach towards internationalisation of human rights (this is mentioned by Moravcsik as well, and also by Ignatieff). After World War II, the US became an exceptional superpower, and superpowers try to shape world thinking regarding certain basic rights. On the other hand, they usually tend to be less receptive towards such rights, if they are preferred to be enforced by foreign countries. In the realist theory, to give up state power could weaken a country's international position. Middling powers (like Germany, France, UK) may have an interest to try to convince the US about their opinions. As Joseph Nye, Jr. put it in *National Interest*, this could be the strategy used by smaller states to tie the United States down like Gulliver among the Lilliputians.¹⁴⁴ On the other hand, a completely unilateral approach is also not followed by the US, since it is not in its interest. In the interpretation of Nye (and this may be interesting for us regarding acceptance of foreign notions in US human rights as well):

American foreign policy in a global information age should have a general preference for multilateralism, but not all multilateralism. At times, we will have to go it alone. If, on the other hand, the "new unilateralists" succeed in elevating unilateralism from an occasional tactic to a full-fledged strategy, they are likely to fail for three reasons: the intrinsically multilateral nature of a

¹⁴¹ Sriniv Sitaraman, *State Participation in International Treaty Regimes* (Ashgate, 2009) 194.

¹⁴² Ibid.

¹⁴³ John Kane, 'American Values or Human Rights? U.S. Foreign Policy and the Fractured Myth of Virtuous Power' (2003) 33 *Presidential Studies Quarterly* 772.

¹⁴⁴ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 12.

number of important transnational issues in a global age; the costly effects on our soft power; and the changing nature of sovereignty.¹⁴⁵

This approach is not completely open for a multilateral US foreign policy and human rights acceptance, but for one, which is only partly based on multilateralism. On the other hand, one may agree with Ignatieff, who claims that realism itself cannot explain all of the shortfalls of US human rights, since the US was one of the human rights proponents of numerous human rights treaties, which cut its powers.¹⁴⁶

We also believe some ideas of thinkers like Robert Kagan must also be mentioned here. Kagan, one of the leading neocon American thinkers suggests in his book *The Return of History* that ‘the great fallacy of our era has been the belief that a liberal international order rests on the triumph of ideas and on the natural unfolding of human progress’.¹⁴⁷ However, the world does not work this way. Nowadays, just like earlier in modern history, the world was split between democracies and autocracies, and the role of the US was to promote democracy: in certain instances, it did so with fallacies, while in other instances its actions were popular and accepted worldwide. In his opinion, US patriotism is tied to the nation’s global significance. He says that Americans ‘have ignored United Nations, their allies, and international law when these institutions and rules became obstacles to their objectives’,¹⁴⁸ and, according to great American thinkers, this dominance of the indispensable nation was for the sake of the whole of humankind.¹⁴⁹

Moravcsik cites several authors who criticise the US approach towards human rights from different aspects. He mentions J. D van der Fyer, who points out that the US approach to international human rights is a form of relativism, founded on national, ethnic and religious grounds. Natalie Kaufman also mentions an ethnocentric worldview, while David Forsythe talks about isolationism.¹⁵⁰ In Moravcsik’s opinion, however, human rights were useful propaganda tools in foreign policy, even if their application was not transparently applied (e.g. the US supported foreign dictatorships as well).¹⁵¹

Figure 3 shows the factors that have the capacity to make EU actions in the US less efficient in the field of human rights. The figure enlists the EU’s aims as they were set by the yearly human rights world reports. The ‘X’ marks the potentially aggravating factors.

¹⁴⁵ Joseph S. Nye, ‘Seven Tests: Between Concert and Unilateralism’ in: *The National Interest on International Law and Order* (Ed. Woolsey RJ). (Transaction Publishers, 2003) 85.

¹⁴⁶ Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 13.

¹⁴⁷ Robert Kagan, *The Return of History And The End of Dreams* (Alfred A. Knopf, 2008) 102.

¹⁴⁸ Ibid 50.

¹⁴⁹ Ibid 50.

¹⁵⁰ Andrew Moravcsik, ‘Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 153.

¹⁵¹ Andrew Moravcsik, ‘Explaining The Paradox Of American Human Rights Policy: Rights Culture Or Pluralist Pressures?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 169.

Figure 3: Possible factors of US exceptionalism as burdens of EU human rights aims

| | Legal heritage | | Institutional settings | | | Political culture | | |
|---|--|----------|------------------------|------------|-----------|-------------------|----------------------------|-----------------------------------|
| | Independence and the supremacy of the Constitution | Congress | President | Federalism | Judiciary | Social movements | Conservative-liberal split | Superpower and it's 'realpolitik' |
| Abolition of the death penalty | X | X | | X | X | X | X | |
| Closing Guantánamo Bay camp | | X | X | | X | | X | X |
| No indefinite detention without charge or trial | X | | X | X | X | | X | X |
| Proper detention conditions | X | X | X | X | X | | X | |
| Ending the maintenance of inhuman conditions of solitary confinement | X | X | X | X | X | | X | X |
| Mental disability or mental illness should be taken into consideration | X | X | | X | X | X | | |
| Equal rights to women | X | | | X | X | X | X | |
| Enforcing human rights standards in NSA surveillance activities | X | X | X | | | X | | X |
| Respecting data protection rights | X | | | | | X | | X |
| Ratification of the relevant international agreements | X | X | X | X | | | X | X |
| Abolition of extraterritorial application of certain US laws | X | | X | | | X | | X |
| Stopping different treatment of US and non-US citizens with regard to privacy and data protection | X | X | X | X | X | | | X |
| Making consular rights available | X | X | X | X | X | | | |

II. Capital punishment

‘The guillotine works. Never fails. It’s quick. It’s effective. (...) The death penalty is barbaric. And I think we as a society need to come face-to-face with that. If we’re not willing to face up to the cruelty, we ought not to be doing it.’

Judge Alex Kozinski, Ninth Circuit Court, USA¹⁵²

A. Principles, legal and policy standards of the EU on death penalty

The EU upholds that capital punishment is unacceptable and incompatible with the principle of human rights, because it violates the right to life and the right to due process of law, and it is cruel and inhumane.¹⁵³ Therefore, the abolition of the death penalty is a standard principle in Europe, granted by the 6th and 13th Protocols to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty,¹⁵⁴ which ensure that actually no European country but Belarus maintains and practices this form of punishment.¹⁵⁵ This anti-death penalty commitment is also reinforced by all EU Member States

¹⁵² Bill Whitaker, ‘The Execution of Joseph Wood’ (CBS, 29 November 2015) <<http://www.cbsnews.com/news/execution-of-joseph-wood-60-minutes/>> accessed 13 June 2016

¹⁵³ Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (2012) 3 (Hereinafter: Strategic Framework) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 1 June 2016

¹⁵⁴ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg, 28.IV.1983 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007952b>> last accessed 1 June 2016; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081563>> accessed 1 June 2016;

¹⁵⁵ Among the Council of Europe member states Azerbaijan and Russia did not sign and ratified the 13th protocol on the total abolition of capital punishment. Armenia signed the 13th protocol but has not ratified it yet. Russia has not ratified the 6th protocol either, although it signed it in 1997. See the related CoE charts, Chart of signatures and ratifications of Treaty 114, <http://www.coe.int/hu/web/conventions/search-on-treaties/-/conventions/treaty/114/signatures?p_auth=GYq6K9L0> and Chart of signatures and ratifications of Treaty 187, <http://www.coe.int/hu/web/conventions/search-on-treaties/-/conventions/treaty/187/signatures?p_auth=GYq6K9L0> accessed 1 June 2016

with the ratification of 2nd Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty,¹⁵⁶ and is also granted by the Charter of Fundamental Rights of the European Union (Article 2, Right to life), which declares that ‘1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed.’¹⁵⁷

This strong commitment towards human dignity drives the EU to play a leading role in the fight against the death penalty worldwide, both through its institutions and its leaders, when this is possible. All major EU actors are involved in this process:

- the Council of the European Union adopted the EU Strategic Framework and Action Plan on Human Rights and Democracy in 2012 which mention the abolition of death penalty as a human rights priority in first place;
- the Council of the EU also adopted the EU Guidelines on Death Penalty;
- under the European Instrument for Democracy and Human Rights (EIDHR), the European Commission has been providing different kinds of contributions to states, policy-makers and anti-death penalty organisations worldwide;
- the European Parliament regularly expresses its concern about the current practice of executions and the retention of the death penalty and adopts resolutions and declarations against capital punishment;
- both the former and the current HR/VP, Catherine Ashton and Federica Mogherini, have issued many statements and declared that the worldwide fight against capital punishment is among their primary objectives.

Prior to evaluating these institutions, actors and their instruments, we have to note that in the case of the death penalty the EU has adopted a firm position not only because of the above mentioned international and EU-level human rights documents, but also because all Member States are committed to this principle, therefore in its external actions the EU can rely on the unconditional and unanimous support of its Member States.¹⁵⁸

1. General remarks

The aim of this chapter is to review and analyse the effects of the EU’s efforts to press for the abolition (or at least suspension) of capital punishment in the US. Has the EU any direct effect or

¹⁵⁶ UNGA Resolution 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>> accessed 20 August 2016

¹⁵⁷ Charter of the Fundamental Rights of the European Union, Article 2

¹⁵⁸ This is worth noting, because regarding other human rights objectives, e.g. LGBTQ-rights, the Member States follow different standards and as they cannot reach consensus in order to strengthen and provide the same rights for sexual minorities, this may weaken the role and influence of the EU in any action against the repression of sexual minorities in third countries.

influence on the contemporary capital punishment system in the United States? How and by what instruments does the EU aim to strengthening the fight against the death penalty in the US? Answering these questions, this chapter provides a factual analysis based on US federal and state-level official and NGO databases,¹⁵⁹ on the academic literature and on available EU documents, like demarches, letters, resolutions and so on. Where needed, the analysis refers to news media journals and reports as well.

In this introductory part, the report reviews the most relevant documents and instruments of the EU regarding the death penalty in general. The second part deals with the recent situation of capital punishment in the US (its legal background and practices), while under the third point we analyse and evaluate the efforts and instruments of the EU in the US towards achieving abolition (or at least a moratorium) of the death penalty. Accordingly, we focus neither on the EU's efforts against the death penalty worldwide, nor on its role in international organisations (UN, CoE, OSCE), nor its contributions in the achievements of national and international NGOs,¹⁶⁰ but on the EU's principles and policy on the death penalty and its actual presence and results in the United States.

2. The EU's role in the fight against capital punishment

The EU's actions against capital punishment are based on three foundations. The widest, framing grounds are the EU Strategic Framework on Human Rights and Democracy from 2012 (Strategic Framework hereinafter) and the related Action Plan on Human Rights and Democracy from 2012 and 2015 (Action Plan 2012 and Action Plan 2015 hereinafter), which define the principles and human rights objectives of the EU in general, and name the responsible EU institutions and actors. The EU Guidelines on Death Penalty (hereinafter: Guidelines) provides a narrower focus, dealing only with the death penalty and gives a detailed action programme and instruments to the different EU actors in order to succeed in their fight against capital punishment. Finally, the European Instrument for Democracy and Human Rights (EIDHR) is the narrowest programme, guided by the Commission, providing financial support for those who are against death penalty. One may find some repetitions or overlaps in these programmes, of course, but we must take into account that these instruments are linked and probably none would stand without the others. Nevertheless, in this introductory section, the report does not summarise all EU and UN resolutions, declarations and other international organisations' calls against the death penalty, instead it focuses on the actual objectives and requirements of EU anti-death penalty policy.

¹⁵⁹ US Department of Justice, Bureau of Justice Statistics, US Census Bureau, Death Penalty Information Center, Amnesty International USA, American Civil Liberties Union.

¹⁶⁰ For a wider elaboration on the EU's fight against the death penalty in a worldwide perspective, and its role in the relevant international organisations, see another Frame Deliverable (No. D12.1) on 'Report mapping legal and policy instruments of the EU for human rights and democracy support' 101-106 <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 1 June 2016

a) EU Strategic Framework and Action Plans on Human Rights and Democracy, 2012-2014, 2015-2020

The Strategic Framework declared that the EU is for building ‘a world founded on respect for human rights, democracy and the rule of law’,¹⁶¹ and that these principles must be enforced in ‘all aspects of the internal and external policies’¹⁶² of the EU. For these reasons, the document says that ‘[t]he death penalty and torture constitute serious violations of human rights and human dignity’ and ‘the EU will continue its long-standing campaign against the death penalty’.¹⁶³ Concerning capital punishment, the Action Plan 2012 determines two forms of actions. Firstly, referring to the EU’s trade policy, it called on the Council and the Commission to review the Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture, to ensure improved implementation.¹⁶⁴ Secondly, it declared the abolition of the death penalty worldwide as a primary objective, and in order to achieve this, it defined three different actions for the EEAS and the Member States: 1) active contribution for lobbying on the UNGA 67/176 Resolution on the death penalty moratorium, 2) undertaking targeted campaigns and intensifying engagement with other retentionist countries, and 3), ensuring EU input to the World Congress against the Death Penalty in 2013.¹⁶⁵

The Action Plan 2015 maintains that the Commission and the EEAS should regularly revise the related ‘regulations on trade in goods that can be used for capital punishment or torture, and on Dual Use goods’.¹⁶⁶ We will see below, elaborating the US practice, that this commitment becomes more and more important, regarding the changes in the composition of lethal injections. This new Action Plan also maintains the primacy of the fight against the death penalty, but addressing human rights challenges, the Plan provides some alterations to the 2012 document. Firstly, it calls not only for abolition or moratorium, but it also mentions the minimum standards (introduced by the EU Guidelines on Death Penalty, see below), which, if respected, may help to lower the number of executions, if a moratorium or a total abolition is not yet available in a country. Secondly, the Action Plan 2015 calls the Commission, the Council, the EEAS and the Member States to elaborate ‘a coherent approach addressing the links between death penalty, torture and cruel, inhuman or degrading treatment or punishment, extra judicial summary or arbitrary executions’¹⁶⁷, which, if it succeeds, may help the EU institutions ensuring deeper and more specified actions towards the legislative and judiciary actors of the retentionist countries (e.g. with amicus briefs). Thirdly, instead of promoting the UNGA 67/176 Resolution (2012) on a moratorium on the death penalty, the EU makes a step forward and promotes the

¹⁶¹ EU Strategic Framework on Human Rights and Democracy 2012, 1

¹⁶² *ibid* 1

¹⁶³ *ibid* 3

¹⁶⁴ *ibid* 11

¹⁶⁵ *ibid* 14

¹⁶⁶ EU Action Plan on Human Rights and Democracy (2015) 40 (hereinafter Action Plan 2015) <http://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf> accessed 1 June 2016

¹⁶⁷ Action Plan 2015, 24

ratification and implementation of the ICCPR Second Protocol.¹⁶⁸ Not neglecting the aforementioned points, we find this change the most meaningful: while the UNGA Resolution proposes the abolition, it calls on states, as a minimum step, at least for a moratorium – however, this moratorium can be and is reversible (as we will see in the case of some US states). The Second Optional Protocol of ICCPR leaves no way for temporary retention, therefore this action is irreversible – ratification of this document by a country implies a greater guarantee that capital punishment will no longer be available there.

b) EU Guidelines on Death Penalty¹⁶⁹

As the latest available policy report of the EEAS highlights, the EU Guidelines on Death Penalty is ‘the first ever Human Rights text of its kind’,¹⁷⁰ which was adopted in 1998 and revised three times (2001, 2008 and 2013). The document summarises and welcomes the relevant international treaties, declarations and resolutions that have led to the abolition or a moratorium on the death penalty (I. Introduction), defines and repeats the objectives of the EU and elaborates its instruments and actions (II. Operational Paper), and declares minimum standards the ‘EU shall insist that those countries that still maintain executions respect’.¹⁷¹ Elaborating the efforts of the EU towards the abolition of the death penalty, we found that its activities rely fundamentally on the minimum standards of this Guideline, as we will see below, therefore a deeper review is worthwhile here.

i) Respecting international standards

In the Introduction, the EU calls on retentionist states to ‘respect international standards that provide safeguards guaranteeing the protection of the rights of those facing the death penalty, in particular the minimum standards’.¹⁷² This kind of minimum standards approach originates from the UN ECOSOC, which passed the 1984/50 Resolution on Safeguards guaranteeing protection of the rights of those facing the death penalty,¹⁷³ and declares these minimum standards in 9 points, with the following requirements for the criminal laws, the condemned person, the whole trial process and the execution itself. In sum, the UN ECOSOC (1984) Resolution says that

¹⁶⁸ *ibid* 24-25

¹⁶⁹ Council of the European Union, ‘EU Guidelines on Death Penalty’ (2013) (hereinafter: Guidelines) <http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/guidelines_death_penalty_st08416_en.pdf> accessed 1 June 2016

¹⁷⁰ European External Action Service, Department for Human Rights and Democracy, ‘Background: the Death Penalty and the EU’s policy on its abolition’ July 2013, 2 (hereinafter: EEAS Background paper) <https://eeas.europa.eu/human_rights/adp/docs/death_penalty_background_en.pdf> accessed 1 June 2016

¹⁷¹ Guidelines, 10

¹⁷² *ibid* 2

¹⁷³ UN Economic and Social Council, Resolution 1984/50 (1984) Safeguards guaranteeing protection of the rights of those facing the death penalty, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>> accessed 1 June 2016. The UN ECOSOC repeated these requirements at its 45th plenary session in the 1996/15. Resolution (23 July 1996).

- Capital punishment should be imposed only for the most serious crimes (1) and should be prescribed at a time when the crime was committed (2);
- No persons under 18 years, no pregnant women or new mothers, and ‘no persons who have become insane’¹⁷⁴ should be executed (3);
- Capital punishment should be based upon clear and convincing evidence (4), ensuring fair trial and adequate legal assistance (5), with the right to appeal, and the right to seek pardon or commutation of sentence (6-7);
- Capital punishment shall not be carried out while any kind of pending procedure (appeal, pardon, commutation) is in progress (8) and when the execution occurs, ‘it shall be carried out so as to inflict the minimum possible suffering’¹⁷⁵ (9).

Besides these UN ECOSOC minimum standards the Introduction of the Guidelines summarises the relating UN resolutions and calls on retentionist states to reform their criminal codes (reducing the number of capital crimes), establish a moratorium on executions, and ‘make available relevant information with regard to their use of death penalty which can contribute to possible informed and transparent national and international debates’.¹⁷⁶

ii) EU Actions towards abolition

In the Operational Paper part, the Guidelines states that ‘the death penalty constitutes serious violation of human rights and human dignity’,¹⁷⁷ it is ‘inhumane and unnecessary’,¹⁷⁸ because there is no evidence that it has any kind of deterrent effect. Based on these grounds, the objectives of the EU are maintaining the worldwide campaign and efforts against capital punishment defined in the Introduction and in the Action Plans, intensifying the initiatives (demarches, declarations, etc.) on death penalty and regularly reviewing the export ban regulation of the EU when it seems necessary, ensuring ‘that EU economic operators refrain from trade which either promotes or otherwise facilitates capital punishment in foreign countries’.¹⁷⁹

The Guidelines provides four types of action. The general demarche serves to call for the universal abolition of, or at least a moratorium on capital punishment, or respecting the international norms and minimum standards, when a state does retain the death penalty. Issuing EU demarches will be considered whenever a state breaks its moratorium, reintroduces capital punishment or expands the number of capital offenses. A general demarche should be released every time when a country takes a positive step ‘towards abolition of the death penalty’.¹⁸⁰ Besides general demarches, the EU ‘becomes aware of individual death penalty cases, in

¹⁷⁴ UN Economic and Social Council, Resolution 1984/50 (1984) Safeguards guaranteeing protection of the rights of those facing the death penalty, Section 3.

¹⁷⁵ UN Economic and Social Council, Resolution 1984/50 (1984), Section 9.

¹⁷⁶ Guidelines, 2

¹⁷⁷ *ibid* 5

¹⁷⁸ *ibid* 5

¹⁷⁹ *ibid* 6

¹⁸⁰ *ibid* 8

particular those which violate the minimum standards',¹⁸¹ and if needed, the EU considers its action on a 'case by case basis and interventions in legal proceedings (as amicus curiae, or otherwise)'.¹⁸² As the Guidelines text says, time matters in these cases, therefore it also calls on Member States to propose such demarches, ensuring the help of the EU Heads of Missions for additional information about each case concerned. The third kind of action is the human rights report prepared by the EU Heads of Missions, with detailed information about the 'use of death penalty and the effect of EU action in this respect'.¹⁸³ Finally, the fourth kind of EU action we may call encouraging the ratification of the relevant international or regional treaties, covenants at all possible multilateral and bilateral levels (e.g. in the OSCE and in the UN).

iii) Minimum Standards

The third part of the Guidelines is the Minimum Standards Paper, which consists of 15 points and like the UN ECOSOC 1984/50. Resolution,¹⁸⁴ deals with criminal law provisions, the special situations of convicted persons, the process of trial and the executions themselves. Comparing the Minimum Standards Paper with the aforementioned resolution, this report finds that the EU minimum standards define stricter expectations towards retentionist states:

- Criminal law: Capital punishment shall not be imposed for non-violent acts (e.g. financial crimes, political offences), for drug related crimes, religious practices, expression of conscience, sexual relations between consenting adults, and never should never be as an unavoidable, mandatory sentence (i-ii). It also highlights the principle of *nulla poena sine lege*, therefore the death penalty shall never be imposed for a crime for which it was not prescribed at the time of the commission (iii).
- Convicted persons: the EU establishes a broader circle of persons who shall never be sentenced to death. Besides the juveniles and pregnant women or new mothers it mentions nursing mothers, specifies and broadens the category of mentally ill people ('people suffering from any mental illness or having an intellectual disability'¹⁸⁵) instead of simply 'becoming insane' as in the UN ECOSOC resolution, and expand the moratorium to the elderly, too (iv). The EU also protects the rights of civilians, saying that no military tribunals shall 'impose death sentences on civilians under any circumstances'¹⁸⁶ (viii).
- Trial: The EU, as well as the UN ECOSOC, insists that no one should be sentenced to death without clear and convincing evidence, and where there is any possible 'alternate explanation of the facts',¹⁸⁷ and prohibits 'the use of torture to extract guilty plea'¹⁸⁸ (v). The Paper requires a fair trial, an independent and impartial competent court, adequate

¹⁸¹ *ibid* 8

¹⁸² *ibid* 8

¹⁸³ *ibid* 9

¹⁸⁴ The UN ECOSOC reinforced this document with the 1996/15. Resolution (adopted: 23 July 1996).

¹⁸⁵ Guidelines, 11

¹⁸⁶ *ibid* 12

¹⁸⁷ *ibid* 11

¹⁸⁸ *ibid* 11

legal assistance (vi), the right to appeal to a higher jurisdiction (ix), and when it is prerequisite, providing the right to contact a consular representative (vii). The Paper also highlights the principle of anti-discrimination, saying that the capital punishment ‘must not be applied or used in a discriminatory manner on any ground including political affiliation, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’¹⁸⁹ (xv).

- Execution: Repeating the UN ECOSOC requirements, the Guidelines paper says that execution should never be carried out while pending procedures are in progress, at any – national, international, regional – level (x), nor should it be carried out ‘in contravention of a state’s international commitments’¹⁹⁰ (xii), and repeats the right to seek pardon or commutation of the sentence (xi). Regarding the circumstances, the EU requires that ‘consideration shall be given to the length of time spent on death row and the conditions of imprisonment after having been sentenced to death’¹⁹¹, because these circumstances ‘may constitute forms of torture or inhumane or degrading treatment or punishment’¹⁹² (xiii). Focusing on the execution itself, the EU insists that ‘it shall only be carried out so as to inflict the minimum possible suffering’¹⁹³, it shall be carried out neither in public, nor in secrecy, or ‘in any other manner intended to further degrade the person facing execution’¹⁹⁴, and that the ‘family and lawyers of prisoners on death row must be notified of details of their executions’¹⁹⁵ (xiv).

As we mentioned before, these are the minimum standards the EU expects retentionist states to respect, and if one or more of these standards are endangered or breached by a state, the EU reacts with one of its aforementioned actions (general demarches, amicus briefs, etc.). Evaluating these standards, we find that these provide a higher level of safeguards than the UN ECOSOC resolution, but, as we will see later, based on this EU-US case study, some parts of this Guidelines document, including the Minimum Standards Paper, would be recommended for a review.

*c) European Instrument for Human Rights and Democracy*¹⁹⁶

According to the EEAS background paper¹⁹⁷ (Background: The Death Penalty and the EU’s policy on its abolition), the Annual Report on Human Rights and Democracy in the World 2014¹⁹⁸

¹⁸⁹ *ibid* 10

¹⁹⁰ *ibid* 12

¹⁹¹ *ibid* 12

¹⁹² *ibid* 12

¹⁹³ *ibid* 13

¹⁹⁴ *ibid* 13

¹⁹⁵ *ibid* 13

¹⁹⁶ We must mention that the website of the EIDHR is not very informative; the latest calls for proposals and data are not available; and we scarcely found any facts or other relevant information about the EU’s (EEAS, Commission, EIDHR, etc.) activities there.

¹⁹⁷ EEAS Background paper, 1

¹⁹⁸ EU Annual Report on Human Rights and Democracy in the World 2014, 45-46 (hereinafter: EU Annual Report 2014) <https://eeas.europa.eu/human_rights/docs/2014-hr-annual-report_en.pdf> accessed 1 June 2016

(hereinafter: Annual Report 2014), and the EU Annual Report on Human Rights and Democracy in the World in 2015 (Thematic Part)¹⁹⁹ (hereinafter: Annual Report 2015), the EIDHR has provided millions of euros to support NGOs and professional organisations all around the world in the fight against the death penalty since 2009. These documents do not contain the precise amounts of this contribution, only the report of the European Court of Auditors (EU support for the fight against torture and the abolition of the death penalty, Special Report No.9/2015) stated that the EU had spent € 17 382 338 in the 2009-2015 period.²⁰⁰ The 2013 background paper reports that ‘in 2012 the European Commission launched 9 new key initiatives under the EIDHR’²⁰¹ and supported civil partners worldwide with € 7 million. The new 2015 EIDHR call for proposals also ‘included a specific lot to support civil society projects fighting against death penalty’.²⁰² Focusing on the death penalty, the general objective of this call is ‘to support actions aiming at promoting the abolition of the death penalty, the establishment of a moratorium on the death penalty, and the restriction of the use of the death penalty’.²⁰³ According to the Annual Report 2014, funding ‘through the EIDHR the EU is the leading donor supporting civil society organizations’ efforts towards abolition’.²⁰⁴ The 2008 and 2011 global calls for proposals report that the EIDHR supported 8 projects, which were focusing ‘on three main areas of progress: reforming criminal codes, respecting the relevant international and regional instruments, and developing a conducive environment for further abolition’.²⁰⁵ These projects contain ‘comprehensive geographical coverage of countries where the death penalty has not yet been abolished, including countries in Asia (China, India, Taiwan, etc.), the Americas (Caribbean countries, the USA), Africa (Liberia, Mali, Uganda, etc.), Eastern Europe (Belarus and Russia), and the MENA Region (Jordan, Morocco and Tunisia)’.²⁰⁶

B. Capital punishment in the US

In order to elaborate the actions and effects of EU efforts in the US against its death penalty regulations and practice, we have to review the recent situation, trends and facts in the United States. In the first two sections, we overview the cornerstone decisions of the US Supreme Court (SCOTUS), the second elaborates the legal, moral and social concerns about the death penalty,

¹⁹⁹ EU Annual Report on Human Rights and Democracy in the World in 2015, Thematic Part, 33-35 (hereinafter: EU Annual Report 2015) <<http://data.consilium.europa.eu/doc/document/ST-10255-2016-INIT/en/pdf>> accessed 15 July 2016

²⁰⁰ European Court of Auditors, EU support for the fight against torture and the abolition of the death penalty, (Special Report No.9/2015) 11. The report analyses the 2007-2015 period but in the first two years no EU funds were spent on the EU’s abolitionist campaign.

²⁰¹ EEAS Background paper, 1

²⁰² EU Annual Report 2015, 33

²⁰³ EEAS, European Instrument for Democracy and Human Rights (EIDHR): Global Call for proposal 2015 (14/09/2015),

<http://eeas.europa.eu/delegations/belarus/press_corner/all_news/news/2015/2015_09_14_en.htm> accessed 10 July 2016

²⁰⁴ EU Annual Report 2014, 46

²⁰⁵ EEAS Background paper, 5

²⁰⁶ EU Annual Report 2014, 46

and after that the third part summarises the facts and trends about the practice. Finally, the paper must elaborate the role of democracy in the retention of capital punishment, because, in contrast with EU member states, where due to the international treaties and constitutional commitments, this form of punishment cannot be introduced through democratic processes, the political system of the US federal states (the role of governors and direct democracy, among others) put this topic into the hands of elected officials and voters.

The death penalty is an available form of punishment in 31 states and also at the federal level for the most serious crimes. At the state level, the criminal codes allow for capital punishment to be imposed for first degree murders²⁰⁷, while at the federal level, beside this kind of crime the criminal code defines a wider circle of crimes, mostly crimes against the legal and social order and security of the country (espionage, genocide, treason, aircraft hijacking, killing of a member of Congress, an important executive official, or a Supreme Court Justice, etc.).²⁰⁸

The US Constitution does not prohibit capital punishment but there are two constitutional safeguards that restrict its imposition. The Eighth Amendment declares that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted',²⁰⁹ and according to this requirement all constitutional debates on capital punishment focus on the 'cruel and unusual punishment' definition, whether the death penalty is a kind of cruel and unusual punishment or not. The other safeguard is the Fourteenth Amendment or so-called Equal Protection Clause, which says in its first section that

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²¹⁰

In regard of this amendment, for challenging the constitutionality of the death penalty one may usually focus on the arbitrariness of the imposition of capital sentences, the essential differences among the retentionist states' practices, the racial and geographical imbalances, and so on. In the next section, the report provides an overview about the contemporary understanding of these amendments, based on the jurisprudence of the SCOTUS.

²⁰⁷ For the complete list of capital offenses at state level, see DPIC, 'Crimes Punishable by the Death Penalty' <<http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS>> accessed 20 June 2016

²⁰⁸ For the complete list of federal capital offenses see DPIC, 'Federal Laws Providing for the Death Penalty' <www.deathpenaltyinfo.org/federal-laws-providing-death-penalty> accessed 20 June 2016

²⁰⁹ US Constitution, Amendment VIII

²¹⁰ US Constitution, Amendment XIV, Article 1.

1. Landmark cases

The longest running death penalty moratorium began in the mid-1960s, with the result that from 1968 to 1977 no executions were carried out at all in the US. This moratorium began as an unofficial one in 1968, as a result of a decade-long effort of anti-death penalty movements and NGOs. The number of executions had been dropping significantly in the 1960s: while 717 executions were carried out in the 1950-1959 period, the next decade one can find ‘only’ 191.²¹¹ Different causes led to the beginning of this unofficial moratorium: criminal law reforms in several states (abolition of death penalty in general, or of mandatory capital sentences), the growing number and longer periods of litigations, and the also growing and intensifying activities of the anti-death penalty movements together achieved that no prisoners had been executed since 1968 (after the record low number of two persons in 1967).²¹² The landmark *Furman v. Georgia* decision officially maintained this moratorium, although it did not declare capital punishment unconstitutional, leaving the door open to future re-regulation of the death penalty. However, the *Furman* decision has not been overruled so far, which means that the revision of the constitutionality of the death penalty *per se* is also an available option for the SCOTUS, which is deeply divided on this issue.²¹³ As recent study claims, the future of capital punishment in the US to ‘a great deal depend[s] on who replaces Justice Scalia on the Court and when’.²¹⁴

a) *Furman v. Georgia (1972)*²¹⁵

The opening of the modern era in the history of capital punishment in the US began with the *Furman v. Georgia* decision of the SCOTUS in 1972. The court declared that in cases of Georgia and Texas, both the processes and methods ‘by which the death penalty was imposed constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments’,²¹⁶ as the ‘imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments’.²¹⁷ Actually, by this decision all death penalty statutes were invalidated in the US, because all of them followed the same rules and procedures that Georgia and Texas did. However, the *Furman* decision did not declare that capital punishment is unconstitutional *per se*, therefore it ‘left open the possibility of a

²¹¹ US Bureau of Justice Statistics data, cited by Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 426 and Herbert H. Haines, *Against Capital Punishment. The Anti-Death Penalty Movement in America, 1972-1994* (Oxford University Press 1996) 12

²¹² Herbert H. Haines, *Against Capital Punishment. The Anti-Death Penalty Movement in America, 1972-1994* (Oxford University Press 1996) 11-14

²¹³ The liberal justices both in the *Baze* (Justice Breyer, Justice Ginsburg, Justice Souter) and in the *Glossip* cases (Justice Breyer, Justice Ginsburg, Justice Sotomayor, Justice Kagan) reaffirmed that capital punishment is unconstitutional *per se* in their dissenting opinions. After Justice Scalia’s death, the recent situation is 4:4 for and against the death penalty in the SCOTUS.

²¹⁴ Ronald J. Tabak, ‘Capital Punishment’, in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 261

²¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972)

²¹⁶ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 204

²¹⁷ *Furman v. Georgia*, 408 U.S. 238 (1972)

resumption of capital punishment, provided the procedures used minimized arbitrary and capricious imposition of the punishment'.²¹⁸ After Furman, state legislatures modified their criminal law systems in two ways:

First, as a result of Furman, all capital prosecutions are now bifurcated into a guilt phase and penalty phase. This change has been instrumental in allowing capital defendants to proclaim their innocence while also seeking mercy from the imposition of the death penalty. Under pre-Furman unitary trials, it was difficult for capital defendants to seek mercy while putting on evidence of innocence. Next, Furman has been instrumental in leading to contrition in the types of crimes upon which the death penalty may be imposed. Under pre-Furman constitutional jurisprudence, crimes such as robbery, burglary, and rape were punishable with death. For all practical purposes, post-Furman constitutional jurisprudence has limited the imposition of the death penalty to crimes involving a homicide.²¹⁹

However, the Furman decision became and remained a reference point for the anti-death penalty movement in the US.

b) *Gregg v. Georgia (1976)*²²⁰

The moratorium, as a consequence of the Furman decision was lifted in 1976 by the *Gregg v. Georgia* judgement. The court – reviewing the new criminal codes of Georgia – held that ‘the punishment of death for the crime of murder does not, under all circumstances, violate the Constitution’.²²¹ Although the Eighth Amendment bans ‘the use of punishment that is excessive either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime’,²²² capital punishment was accepted by the Framers of the Constitution and for the next two centuries as well. Furthermore, ‘retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in deciding whether the death penalty should be imposed’.²²³ Therefore, a death penalty statute is constitutional, if

the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the

²¹⁸ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 267

²¹⁹ *ibid* 267-268

²²⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976)

²²¹ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 228

²²² *Gregg v. Georgia*, 428 U.S. 153 (1976)

²²³ *ibid*

sentencing authority is appraised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information.²²⁴

All in all, this decision meant the end of the 10-year-long moratorium from 1967 to 1977, when the first execution after Gregg was carried out.²²⁵ Moreover, this decision remained – and is still – a landmark for later SCOTUS decisions, because ‘it provided a constitutional blueprint for how States could reinstitute capital punishment’,²²⁶ it is also important to note that the Gregg decision did not overrule Furman.

c) *Atkins v. Virginia (2002)*²²⁷

After decades-long debates and criticisms, in this decision the SCOTUS finally held that ‘executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment.’²²⁸ The Opinion of the Court stated that ‘mentally retarded persons should be categorically excluded from execution’,²²⁹ because, as the Gregg decision held that although retribution and deterrence are acceptable purposes served by the capital punishment, ‘[u]nless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment’.²³⁰

The report highlights that the opinion of the court was based not only on the Eighth Amendment, but also on the already existing statutes and constitutional provisions of several states of the US, where the execution of mentally ill or disabled persons were already prohibited. In respect of the aim of this study, it is also very important to note that the EU took part in this decision, filing an amicus curiae brief which was respected and taken into account in the decision.²³¹ This amicus brief concluded that ‘[t]here is growing international consensus against the execution of

²²⁴ *ibid*

²²⁵ The very first execution after the 10 years long moratorium was followed with high interest and deep concern in the US. As Haines put it, ‘For a while after the Gregg ruling, it was uncertain which state would be the first to put a convicted murderer to death. Texas, Georgia, and Florida seemed likely candidates, but the “winner” in this macabre race turned out to be Utah.’ Herbert H. Haines, *Against Capital Punishment. The Anti-Death Penalty Movement in America, 1972-1994* (Oxford University Press 1996) 57. Actually, the first executed inmate was Gary Clark Gilmore, whose controversial final months (NGOs and his family did everything for clemency while Gilmore wanted the execution to be carried out) proved to be a shocking experience for the country. Herbert H. Haines, *Against Capital Punishment. The Anti-Death Penalty Movement in America, 1972-1994* (Oxford University Press 1996) 58-59

²²⁶ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 229

²²⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002)

²²⁸ *ibid* 304

²²⁹ *ibid* 318

²³⁰ *ibid* 319

²³¹ The EU filed its amicus curiae brief along with other organisations including the American Association on Mental Retardation, the American Bar Association, the American Civil Liberties Union, the American Psychological Association, and the United States Catholic Conference. A record number of amicus briefs (2 for the prosecutor, 7 for the defendant) were filed in this case.

persons with mental retardation²³², emphasising that the US is the only ‘jurisdiction in the Western Hemisphere permitting the execution of the mentally retarded’.²³³ The EU’s argument was based on two reasons. The first is the aforementioned international consensus among nations against the execution of mentally retarded defendants, and the second is that ‘international norms and standards establish the impropriety of the execution’ of these people.²³⁴ Thus, the EU proposed to respect and follow the already existing international standards and practice.

*d) Roper v. Simmons (2005)*²³⁵

According to Justice Stevens, a ‘shameful practice’ of the capital punishment system in the US was abolished in 2005 with the Roper decision: the execution of juvenile offenders.²³⁶ This decision, for which also record number of amicus curiae briefs were filed (2 for supporting the prosecutor, 16 for supporting the defendant), finally held that ‘[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed’.²³⁷

Christopher Simmons was 17 years old when he committed his crime (murder), and the jury, finding him guilty, sentenced him to death. Simmons filed a State habeas petition with the Missouri Supreme Court, arguing that ‘the Eighth Amendment of the federal Constitution prohibited executing individuals who committed capital offenses while under eighteen years of age’.²³⁸ The State Supreme Court decided in favour of Simmons and imposed a sentence of life imprisonment instead of the capital sentence. The SCOTUS upheld this decision, and held that the Eighth Amendment bars executing a person who was under the age of eighteen when s/he committed a capital crime. Furthermore, the Roper decision overruled two prior Supreme Court decisions – *Stanford v. Kentucky*, 492 U.S. 361 (1989) and *Thompson v. Oklahoma*, 487 U.S. 815 (1988) - that allowed the death penalty for capital offences to be imposed on offenders above 16 years old.²³⁹ Among the record number of amicus briefs we find the EU’s opinion, like in the *Atkins* case.²⁴⁰ In its amicus curiae brief, the EU’s argument concluded that

²³² Wilson, Richard J., Brief Amicus Curiae for the European Union in *Atkins v. Virginia* (Captioned as *Mccarver v. North Carolina*), United States Supreme Court (2002). *Atkins v. Virginia*, 436 U.S. 304 (2002). 8

²³³ *ibid* 9

²³⁴ *ibid* 16

²³⁵ *Roper v. Simmons*, 543 U.S. 551 (2005)

²³⁶ See *In re Stanford* 123 S. Ct. 472 (2002) (hereinafter: *Stanford II*)

²³⁷ *ibid*

²³⁸ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 464

²³⁹ In the above-mentioned *Stanford II* case, the SCOTUS denied the Kentucky inmate *Stanford*’s original writ of habeas corpus without majority opinion. The then-time Danish EU presidency, the subsequent Greek Presidency and the Ambassador of the EU Delegation in the US applied for clemency to the governor of Kentucky on 2 October 2002. Governor Paul Patton, who had earlier already declared his opposition to the juvenile death penalty, commuted *Stanford*’s sentence to life imprisonment without parole on 8 December 2003. See ABA Juvenile Justice Center Newsletter, ‘Cruel and Unusual Punishment: The Juvenile

[t]here is wide agreement within the international community against the execution of juveniles under the age of 18 at the time of their offenses. This consensus is evidenced by the practices of the overwhelming majority of nations; provisions of international law including treaties to which the United States is a party; and the positions of States before international bodies.²⁴¹

This argument was based on the international norms and standards that prohibit the execution of juvenile offenders (the ICCPR, the CRC and the abovementioned UNGA Resolution 1984/50.), and that this practice is ‘contrary to the practice of virtually all nations’.²⁴²

*e) Baze v. Rees (2008)*²⁴³

The *Baze v. Rees* case can be seen as an opening of a new era, when the SCOTUS began to focus not on the death penalty in general, but on the lethal injection method itself. The petitioners asserted that the lethal injection protocol of the Commonwealth of Kentucky violates the Eighth Amendment, but the state trial court found (and the Kentucky Supreme Court affirmed) that ‘there was minimal risk of various of petitioners’ claims of improper administration of the protocol’,²⁴⁴ therefore the protocol does not violate the Eighth Amendment because ‘it does not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death’.²⁴⁵ The SCOTUS upheld this decision, based on the following arguments. Clarifying the meaning of cruel and unusual punishment, the court held that, ‘an execution method must present a “substantial” or “objectively intolerable” risk of serious harm. A State’s refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.’²⁴⁶ In this respect, as capital punishment is constitutional, and ‘because some risk of

Death Penalty. Evolving Standards of Decency’ January 2004, <http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_EvolvingStandards.authcheckdam.pdf> accessed 27 July 2016

²⁴⁰ It is also important to note that the abolishment of juvenile death sentences unfortunately did not resolve all problems around juvenile criminal law and penitentiary system in the US. As capital punishment became unattainable for juries, they tended to impose life imprisonment without parole, which also deeply hurts the basic rights of children. Although in the *Graham v. Florida* (560 U.S. 48 2010) the SCOTUS held the Eighth Amendment ‘does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime’, this case did not resolve the problem of former juvenile death row inmates. Though this topic is not touched on in this report, we must call the attention of all who are concerned with human rights that this troublesome situation is incompatible with universal human rights standards, and, analysing the EU actions in the US regarding human rights, one can find almost nothing evaluable in this special context, unfortunately.

²⁴¹ Wilson, Richard J., Brief Amicus Curiae for the European Union and Other Countries of the International Community in *Roper v. Simmons*, United States Supreme Court (2004). *Roper v. Simmons*, 543 U.S. 551 (2005) 6

²⁴² *ibid* 8

²⁴³ *Baze v. Rees*, 553 U.S. 35 (2008)

²⁴⁴ *ibid* Syllabus 1

²⁴⁵ *ibid* Syllabus 1-2

²⁴⁶ *ibid* Syllabus 2

pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain'. Moreover, the court held that the Eighth Amendment bans the 'punishments of torture (...) and all others in the same line of unnecessary cruelty',²⁴⁷ in other words, when the pain and suffering comes from intentional acts.²⁴⁸ Furthermore, an execution under Kentucky's procedures would be humane and constitutional if performed properly, petitioners claim that there is a significant risk that the procedures will not be properly followed—particularly, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Subjecting individuals to a substantial risk of future harm can be cruel and unusual punishment if the conditions presenting the risk are 'sure or very likely to cause serious illness and needless suffering', and give rise to 'sufficiently imminent dangers'.²⁴⁹ Finally, the court said that '[p]etitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment'.²⁵⁰ The Baze decision has remained as a standard for other cases where the constitutionality of the lethal injection protocols is at stake.

f) *Glossip v. Gross (2015)*²⁵¹

Prior to an elaboration of this last decision, we must add that this SCOTUS decision was passed after many botched lethal injection executions, which shocked not only the citizens of the US, but the world as well. Many articles, news bulletins, interviews and reports dealt with the terrifying details of the executions of Michael Lee Wilson (Oklahoma, January 2014), Clayton Lockett (Oklahoma, April 2014), and Joseph Wood II (Arizona, July 2014), among others.²⁵² Focusing again on the lethal injection method, the Glossip case could have meant a cornerstone for the abolitionist movements, but the SCOTUS held otherwise, again.²⁵³

In this case, Oklahoma death-row inmates claimed that 'the use of midazolam violates the Eighth Amendment. Four of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs'.²⁵⁴ But the District Court denied the motion, holding

²⁴⁷ *ibid* Syllabus 2

²⁴⁸ As Justice Thomas claimed in his concurring opinion, 'an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain'.

²⁴⁹ *Baze v. Rees*, 553 U.S. 35 (2008) Opinion of Roberts C. J. 11

²⁵⁰ *Baze v. Rees*, 553 U.S. 35 (2008) Syllabus 3

²⁵¹ *Glossip v. Gross*, 576 U.S. __ (2015)

²⁵² Ronald J. Tabak, 'Capital Punishment', in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 254-256

²⁵³ For a critical commentary, see Stephanie Mencimer, 'I Just Took the Controversial Drug Used for the Death Penalty. Here's What It Was Like.' (*Mother Jones*, 30 June 2015) <<http://www.motherjones.com/politics/2015/06/i-just-took-midazolam-supreme-court-oklahoma-death-penalty>> accessed 7 July 2016

²⁵⁴ *Glossip v. Gross*, 576 U.S. __ (2015) Syllabus 1

that ‘the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain’,²⁵⁵ and that they ‘failed to establish a likelihood of showing that the use of midazolam²⁵⁶ created a demonstrated risk of severe pain’.²⁵⁷

However, the SCOTUS upheld that ‘[p]etitioners have failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment’.²⁵⁸ Also, the court said that ‘petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of executions’.²⁵⁹ Moreover, ‘petitioners have suggested that Oklahoma could execute them using²⁶⁰ a drug other than midazolam but ‘the District Court did not commit a clear error when it found that those drugs are unavailable to the State. Petitioners argue that Eighth Amendment does not require them to identify such an alternative²⁶¹ but the aforementioned Baze decision ‘made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative’.²⁶²

In sum, the report finds that although the Supreme Court provides safeguards and immunity for some social groups with special vulnerabilities like juvenile offenders or persons with mental illness or disabilities, when it comes to capital punishment, and in regard of its highly critical and troubled methods, the court upholds that these elements do not violate the constitutional requirements of the Eighth and Fourteenth Amendments. This report notes that these decisions were not unanimous, and the dissenting opinions regularly raise the question of the constitutionality of capital punishment itself.

2. Further concerns against the death penalty

After interpreting the jurisdiction of the SCOTUS, this section presents an overview of the most important arguments against the death penalty in the contemporary US. The arguments of the leading NGOs, professional experts (legal, medical and pharmaceutical professionals) and academic scholars regularly focus on the legal, moral and social concerns and consequences, which undermine and eliminate the effectiveness of capital punishment.

²⁵⁵ *ibid* Syllabus 1

²⁵⁶ We must underline that according to the evidence from the investigations into the executions of Wilson and Lockett, in both cases the improperly used midazolam was responsible for the suffering and pain experienced by these two persons. For further readings, see Ben Crair, ‘2014 Is Already the Worst Year in the History of Lethal Injection’ (*New Republic*, 24 July 2014) <<https://newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history>> accessed 10 July 2016, and Joe Steinberger, ‘Midazolam Still Being Used in Executions’ (*Death Penalty Focus*, 26 January 2015) <<http://deathpenalty.org/article.php?id=783>> accessed 10 July 2016

²⁵⁷ *Glossip v. Gross*, 576 U.S. ___(2015) Syllabus 1

²⁵⁸ *ibid* Syllabus 1

²⁵⁹ *ibid* Syllabus 2

²⁶⁰ *ibid* Syllabus 2

²⁶¹ *ibid* Syllabus 2

²⁶² *ibid* Syllabus 2

a) Legal concerns

First of all, every anti-death penalty NGO, expert and dissenting SCOTUS judge underlines that capital punishment is cruel and inhumane. Although attempts have been made to eliminate this concern with the so-called safe and painless method of lethal injection (which has, as such, been upheld by the SCOTUS so far, see the Baze and Glossip cases), the facts demonstrate that it may cause strong physical pain and extreme suffering to the inmate, as is plain to see when one sees the botched executions.²⁶³ As Justice Kozinski, the judge of the U.S. Court of Appeals for the 9th Circuit wrote in 2014 in the case of Joseph Woods III, two days before his botched execution by lethal injection,

[u]sing drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf. If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all.²⁶⁴

Two days after Kozinski's dissent was published, Thomas Wood finally died after a record, 2-hour-long period of suffering during his lethal injection execution.²⁶⁵

The American Civil Liberties Union (ACLU) summary underlines that capital punishment is cruel and unusual not only because it causes suffering and pain but also because it is

a relic of the earliest days of penology, when slavery, branding, and other corporal punishments were commonplace. Like those barbaric practices, executions have no place in a civilized society. It is unusual because only the United States of all the western industrialized nations engages in this punishment. It is also unusual because

²⁶³ Although the exact number of botched executions is hard to assess, these failures do not only belong to the lethal injection method, but one can read about botched and repeated (!) executions from earlier decades as well. Nevertheless, the last two years' failures have gained high visibility and transparency, enabling us to demonstrate the cruel and painful patterns of these executions.

²⁶⁴ Wood v. Ryan, United States Court of Appeals for the Ninth Circuit, 5-6 <<http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/21/14-16310.pdf>> accessed 1 July 2016

²⁶⁵ Matt Pearce, Cindy Carcamo and Maya Srikrishnan, 'Arizona killer takes 2 hours to die, fueling lethal-injection debate' (*LA Times*, 23 July 2014) <<http://www.latimes.com/nation/la-na-nn-arizona-execution-20140723-story.html>> accessed 1 July 2016

only a random sampling of convicted murderers in the United States receive a sentence of death.²⁶⁶

The lack of national consensus also strengthens the argument about the unusual pattern of capital punishment.²⁶⁷ Furthermore, the patterns of racially biased jurisdictions and the failure of safeguards are also important and well-known concerns and arguments against the death penalty.²⁶⁸

Moreover, although one of the main criticisms of the Furman decision was the arbitrariness of death sentences, studies show that this feature has not disappeared so far.²⁶⁹ This arbitrariness violates the due process of law, as does irreversibility. As this report highlights below, more than 150 persons were released from death row because of their innocence, which is approximately ten per cent of the number of executed inmates. In this respect, the execution itself violates and denies the due process of law, because the execution de facto finishes all possible appeals or other legal procedures.²⁷⁰ The special circumstances of death row facilities (23 hours of solitary confinement per day, among others) also raise the concern of torture and inhumane, degrading treatment. Finally, the current policy of many retentionist states of keeping the exact data of the execution method and the compilation of the lethal drugs secret also raises legal concerns.²⁷¹ Studies – and many state court rulings say that the state statutes that allow the state (correction department, penitentiary facilities, etc.) to keep the details of the execution and the name of lethal injection drugs, as well as the names of the pharmaceutical enterprises from which the states buy the drugs secret, violate the Eighth and the Fourteenth Amendments.²⁷²

b) Moral concerns

Among the many moral concerns and arguments against death penalty, one may mention the role of punishment in deterrence. In this respect, all studies, reports and statistical data show that

²⁶⁶ ACLU, 'The Case Against the Death Penalty' <<https://www.aclu.org/case-against-death-penalty>> accessed 2 July 2016

²⁶⁷ Lindsey S. Vann, 'History repeats itself: the post-Furman return to arbitrariness in capital punishment' (2011) 45 University of Richmond Law Review 1255, 1283-1284.

²⁶⁸ For instance, the states require different procedures on the investigation of someone's mental abilities, mental illness and disorders, which may easily lead to arbitrariness and inconsistent jurisdiction.

²⁶⁹ Lindsey S. Vann, 'History repeats itself: the post-Furman return to arbitrariness in capital punishment' (2011) 45 University of Richmond Law Review 1255, 1283-1284. See also the NGOs' reports, DPIC on Arbitrariness <<http://www.deathpenaltyinfo.org/arbitrariness>>, ACLU, 'The Case Against the Death Penalty' <<https://www.aclu.org/case-against-death-penalty>> all accessed 25 July 2016.

²⁷⁰ In this respect, one may hint to Cameron Todd Willingham's painful and regrettable story, who was sentenced to death for the murdering of his three daughters, although no physical evidence backed this sentence, and years later state investigation confirmed his innocence. For a detailed elaboration of Willingham's story, see David Green, 'Trial By Fire. Did Texas execute an innocent man?' (*The New Yorker*, 7 September 2009) <<http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>> accessed 2 July 2016

²⁷¹ For an overview, see Josh Sanburn, 'States Try Secrecy to Protect Lethal Injection Drugmakers' (*Time*, 1 October 2014) <<http://time.com/3450777/ohio-lethal-injection-secrecy-law-drugs/>> accessed 2 July 2016

²⁷² Eric Berger, 'Lethal Injection Secrecy and Eighth Amendment Due Process' (2014) 55 Boston College Law Review

the capital punishment has no effect at all on lowering the number of first degree murders. On the contrary, the numbers show that the states with the highest rates of murders (and crime) are the retentionist states.²⁷³ Furthermore, the length of time from the first trial to the execution takes dozens of years, if not decades. This length does not 'provide meaningful redress for victims' families',²⁷⁴ moreover, as ACLU cites, 'many murder victims do not support state-sponsored violence to avenge the death of their loved ones'.²⁷⁵

Discussing the moral concerns, this paper underlines that the existence of capital punishment puts a great burden to the community of medical professions. Nurses, physicians and pharmacists must face the moral and professional challenges and consequences of their participation or absence in/from executions. As many of the relevant studies state,²⁷⁶ the participation of medical assistance in the executions would and could be the safeguard against botched executions, but all national medical associations prohibit their members this kind of professional practice,²⁷⁷ although the ethical codes of these associations are not legally binding. But, after many botched executions this question emerges in two ways. Firstly, in regard of the participation itself, a professional medical presence could probably prevent the failures of the preparations of the execution (IV implementation, preparation and compilation of the needed drugs), and secondly, even if professionals did not make these preparations, in the event of any failures during the execution process they could intervene, stopping the failures. In a moral context, this is the

²⁷³ Department of Justice and FBI data. See also ACLU, 'The Case Against the Death Penalty' <<https://www.aclu.org/case-against-death-penalty>> accessed 2 July 2016

²⁷⁴ Carol S. Steiker and Jordan M. Steiker, 'Capital punishment: a century of discontinuous debate' (2010) 100 *The Journal of Criminal Law and Criminology* 662.

²⁷⁵ ACLU, 'The Case Against the Death Penalty' <<https://www.aclu.org/case-against-death-penalty>> accessed 2 July 2016

²⁷⁶ James K. Boehnlein, 'Should Physicians Participate in State-Ordered Executions?' (2013) 15 *AMA Journal of Ethics* 240; Ty Alper, 'The truth about physician participation in lethal injection executions' (2009) *Berkely Law Scholarship Repository*, <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2664&context=facpubs>> accessed 3 July 2016; Lee Black and Robert M. Sade, 'Lethal Injection and Physicians: State Law vs Medical Ethics' (2007) 298 *Journal of the American Medical Association* 2779; Taylor Ryer, 'Medicine and capital punishment: friend or foe?' (2014) *Goodwin College* <<http://www.goodwin.edu/pdfs/gen-ed/essay-award-ryer-2014.pdf>> accessed 3 July 2016; Daniel N. Lerman, 'Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence' (2007) 95 *Georgetown Law Journal* 1941.

²⁷⁷ The American Medical Association, the American Nurses Association, the American Board of Anesthesiology and the American Pharmacists Association prohibit their members to participate in executions, because 'their involvement would violate pharmacists' roles as health care providers'. Ronald J. Tabak, 'Capital Punishment', in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016), 254. See also the AMA Code of Medical Ethics, Chapter 9: Opinions on Professional Self-Regulation (<<https://download.ama-assn.org/resources/doc/code-medical-ethics/code-2016-ch9.pdf>>) and the American Nurses Association's Position Statement on capital punishment (<<http://www.nursingworld.org/MainMenuCategories/Policy-Advocacy/Positions-and-Resolutions/ANAPositionStatements/Position-Statements-Alphabetically/prtetcptl14447.pdf>>).

challenge of choosing between the two imperatives of medical ethics in the Hippocratic Oath: do no harm or ease the suffering?²⁷⁸

Due to these professional ethics codes and regulations, the US death penalty system has to face another obstacle: the role and legal situation of compounding pharmacies. Since around 2010, more and more US drug companies and pharmacists have refused to provide the needed drugs and professional assistance to the state penitentiary institutions and foreign supplies are almost unavailable, too. Solving the problem of the drug shortage, new, so-called compounding pharmacies have appeared offering to provide the drugs for lethal injections. According to DPIC, these 'compounding pharmacies do not face the same approval process for their products that large manufacturers face, leading to concerns about the safety and efficacy of their products'.²⁷⁹ These enterprises are unregulated by the US Food and Drug Administration (FDA) and the FDA does not approve their products. State supreme courts and the FDA prohibited the use of the drugs purchased from these compounding pharmacies, which also led to de facto temporary moratorium on the death penalty in some states (Ohio, Oklahoma, Texas, Georgia).

c) *Social concerns*

Many studies demonstrate that the fiscal consequences of the capital punishment mean a great burden on the states' budgets. The special circumstances of death row incarcerations, the lengthy trial periods and the decade-long stays on death row imply that one of the most important arguments for the death penalty (that it costs less than life imprisonment without parole) is not valid anymore. As a new study highlights, the emerging costs of capital punishment led several policy makers (state legislatures and governors) who had supported the death penalty in the past to switch to the anti-death penalty side.²⁸⁰

Another aspect of social concerns refers to the role of the US in the international community and its isolation because of the death penalty.²⁸¹ This concern has a general focus on US foreign relations: the world's greatest democracy, the 'City upon a Hill' can neither act sincerely nor can it be respected as the greatest defender of human rights if it violates the most fundamental human right (life), does not ratify the most fundamental human rights documents and if therefore its courts hardly follow and respect the current international standards. However, besides this general focus, scholars and journalists regularly call attention to special death penalty cases, for instance, when US courts do not provide consular assistance for foreign nationals or US citizens

²⁷⁸ Although this paper is not able to solve this contradiction, we must note that this conflict could be easily erased if the capital punishment was abolished. In this context, the role of the state (and the political community) to put this great burden of choosing between two ethical commands for medical professionals raises further moral and social questions.

²⁷⁹ DPIC, Compounding pharmacies and lethal injection <<http://www.deathpenaltyinfo.org/compounding-pharmacies>> accessed 5 July 2016

²⁸⁰ Ronald J. Tabak, 'Capital Punishment', in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 242-251.

²⁸¹ Mark Warren, 'Death, dissent and diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relation' (2004) 13 William & Mary Bill of Rights Journal 309.

with dual citizenship. According to the available data, 32 foreign nationals were executed since 1977, 5 persons died in custody – all but one of them were not informed about their consular rights,²⁸² a violation that may jeopardise not only the international partnerships of the US, but also the basic rights of US nationals abroad, as many studies and articles have pointed out.

3. Current state of capital punishment: the facts

In 2016, 31 states and the federal state uphold the capital punishment. 19 states²⁸³ and the District of Columbia abolished the death penalty in their criminal codes – 7 of them after the millennium. Since the Gregg decision, which ended the moratorium on executions in 1976, 10 states decided in favour of abolition, so in this respect, the last 16 years can be seen as the most efficient term, because no other decades show this high number of abolitions.

a) Executions, death sentences, death row inmates

According to reports on US practice,²⁸⁴ from 1977 to 2016 (July), 1437 executions, including 16 women and 22 juvenile offenders were carried out, and 156 inmates were exonerated from death row because of evidence of their innocence.²⁸⁵ In January 2016, 2943 people, including 55 women, were on death row, while in the first half of 2016 14 inmates were executed, which is the lowest number since 1992 and the same as in 2015.²⁸⁶ The greatest number of executions were carried out in the 1992-2009 period, when – with the exception of 1996 (45), 2007 (42) and 2008 (37) – more than 50 executions were carried out per year (one person per week on average). The number of states where executions are carried out drops almost every year and shows a regional disparity: since 1977, 1170 executions were carried out in the South (and 46% - 538 – only in Texas), 178 in the Midwest, 85 in the West and 4 in the Northeast.

As the number of executions dropped from 2009, the number of death sentences did, too: the peak-year was 1996 with 315 death sentences, while in 2015, 49 capital sentences were handed down, which is two-thirds of the 2014 number.²⁸⁷ It is worth adding, that out of 32 retentionist

²⁸² DPIC, Confirmed foreign nationals executed since 1976 <<http://www.deathpenaltyinfo.org/foreign-nationals-part-ii#executed>> accessed 5 July 2016

²⁸³ The latest abolitionist state, Nebraska will vote on the future of the capital punishment at the 2016 General Elections, see below the B.4 part of this chapter.

²⁸⁴ DPIC, ACLU, AI, FBI, Department of Justice databases and reports

²⁸⁵ The introduction of DNA-based investigations since 1989 are in direct relation with this number: from 1989, 120 innocent people left death row. The number of exonerations drops after 2012, because of the more thorough and accurate investigations.

²⁸⁶ So far, 15 executions were carried out this year. For the next 5 months, 15 executions are scheduled, but 8 of them are already stayed by the DPIC database. The Texas inmate Rolando Ruiz's execution was scheduled for 27 July, but has been postponed to 31 August. DPIC, Upcoming executions <<http://www.deathpenaltyinfo.org/upcoming-executions>> accessed 27 July 2016

²⁸⁷ From the 295 of 1998 the number of death sentences dropped to 223 in 2000, 140 in 2005, and 114 in 2010. After 2010 the number kept falling: 2011: 85, 2012: 82, 2013: 83, 2014: 73. See Ronald J. Tabak, 'Capital Punishment', in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 237, and DCIP reports.

states 18 did not impose any death sentences in 2015.²⁸⁸ Just like executions, death sentences show a regional disparity: while in the 1990s the highest number of death sentences were handed down in Texas and California (with more than 40 death sentences per year), in 2015 California (14), Florida (9) and Alabama (6) led the list of imposed death sentences. However, there is no clear and direct correlation between the number of death sentences and executions: although the state of Georgia has not imposed any death sentences since 2015 (and only one in 2014)²⁸⁹, and the state has 'only' 73 death row inmates, the number of executions did not drop significantly there (only in this first seven months 6 executions were carried out of the national total of 15, 5 in 2015, 2 in 2014, 1 in 2013, 4 in 2011). And vice versa, California has the highest number of death row inmates and death sentences, but since 1992 the state has executed 'only' 13 prisoners.

According to the ACLU and DPIC reports, we must highlight that the impositions of death sentences show a racial disparity: 'although approximately 49% of all homicide victims are white, 77% of capital homicide cases since 1976 have involved a white victim'.²⁹⁰ Another comparison clearly points out the racial bias of death sentences: if we look at interracial murders, we find that 31 white inmates were executed for a capital offence against a black victim, while more than 950% (!) more, 297 black offenders were executed for the homicide of white victims.²⁹¹

Analysing the data on the death row population, we also find racial and regional imbalances: 44% of them are white, 43% are black, 10% are Hispanics, however the ratio of blacks in US society is 12.6%, while the ratio of people with Hispanic or Latino origin and race is 16.3%.²⁹² The highest number of death row inmates is in California (743),²⁹³ while the lowest (1 person) is in Wyoming and in New Hampshire. The US Government and the US Military as well as 33 states maintain death rows; in New Mexico, where capital punishment has been abolished since 2009, this action was not retroactive, therefore two men who were sentenced to death remain on death row.

²⁸⁸ DCIP, 'The death penalty in 2015: Year End Report' <<http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>> accessed 27 July 2016

²⁸⁹ Greg Land, "'Life Without Parole' Leads to Shrinking Death Penalty Pipeline' (*Daily Report*, 16 December 2015) <<http://www.deathpenaltyinfo.org/node/6333>> accessed 5 July 2016, and Ronald J. Tabak, 'Capital Punishment', in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 237.

²⁹⁰ ACLU, 'The Case Against the Death Penalty' <<https://www.aclu.org/case-against-death-penalty>> accessed 2 July 2016

²⁹¹ DPIC, 'Facts about the Death Penalty', 2 <<http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>> accessed 16 July 2016

²⁹² US Census 2010, <<http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>> accessed 5 July 2016

²⁹³ The reason behind this giant number is the moratorium of executions since 2006, due to the lack of professional medical assistance, which is a requirement in the state, but no physicians and nurses take part in the process. This situation led to lengthy legal debates and an on-going attempt to find new ways for carrying out the death sentences, which have been imposed in the last ten years of the moratorium, too. For further readings, see Deborah W. Denno, 'The Lethal Injection Quandary: How Medicine Dismantled the Death Penalty' (2007) 7 *Fordham Law Review* 49; Howard Mintz, 'San Quentin: Inside California's death row' (*The Mercury News*, 30 December 2015) <http://www.mercurynews.com/crime-courts/ci_29323310/inside-californias-death-row?source=pkg> accessed 15 July 2016

Furthermore, the average length of staying on death row has been rising year by year since 1984: from 6 years and 2 months in 1984 it rose up to 15 years and 2 months in 2013.²⁹⁴

As reasons for this general drop in the number of executions and death sentences, Tabak underlines the following:

- criminal reform: introduction of life imprisonment without parole (LWOP) as an alternative form of punishment (Texas);
- trial phase: improvements in defendants’ representation and investigations (Virginia, Texas), change in district attorney (Louisiana);
- problems around the method of executions: lethal injection controversies since 2010 (Tennessee, Alabama, Oklahoma, Ohio, Kentucky, Texas, Arizona, Missouri, Florida, among others).²⁹⁵

The report adds another reason: the growing number of stayed executions since 2010. Elaborating the DPIC database, we found that in the 2010-2016 term, 313 stays were ordered out of which 30 were finally lifted and therefore those executions were carried out (Figure 3).

Figure 4: Stayed executions in the US 1

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|-----------------------------------|------|------|------|------|------|------|------|
| Stays (n) | 37 | 43 | 47 | 34 | 51 | 72 | 32 |
| Executions after stays (n) | 4 | 9 | 8 | 4 | 4 | 1 | 0 |

b) Execution methods and recent developments

There are 5 different methods of execution in the US: lethal injection (32 states and the federal level), electrocution (8 states), gas chamber (5 states), hanging (3 states) and firing squad (2 states), however the primary method is lethal injection in all 32 retentionist states and at the federal level.²⁹⁶ According to the DPIC database, the huge majority of executions – 1262 (88%) –

²⁹⁴ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Capital punishment, 2013 – Statistical Tables*, 4 <<http://www.bjs.gov/content/pub/pdf/cp13st.pdf>> accessed 5 July 2016. By this database, the peak was in 2011 with 198 months (16,5 years). In 14 July 2015, the 60 years old John Conner’s execution has been carried out in Georgia, who spent 35 years, most of his life, on death row.

²⁹⁵ Ronald J. Tabak, ‘Capital Punishment’, in Prof. Mark E. Wojcik (ed), *The State of Criminal Justice 2016* (ABA Criminal Justice Section 2016) 238, 251-260.

²⁹⁶ Although the gas chamber method of execution exists in 5 states, its constitutionality is highly disputed. ‘Two arguments are offered against the use of lethal gas as a method of execution. First, it is asserted that cyanide gas induces excruciating pain. Capital felons have been known to urinate, defecate, vomit, and drool while undergoing death by lethal gas. Second, and the primary threat to continued use of lethal gas, death by this method can take over ten minutes. It is argued that such a span of time amounts to pure torture’. See Louis J. Palmer, Jr. *Encyclopedia of the Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 319.

were carried out by lethal injection since 1977.²⁹⁷ As we will see below, in the last 6 years, the concerns around the lethal injection method, and the outrage of the botched executions led to a growing attention on this method in US media and society. In this respect, the report underlines that the export ban regulation of the EU is the most important and primary reason for this growing attention, as the report elaborates in the C. part of this chapter.

Originally, 'Oklahoma was the first jurisdiction to provide by statute for execution by lethal injection. It did so on May 10, 1977. The first State to actually execute a prisoner by lethal injection was Texas. It did so on December 7, 1982, when Charlie Brooks became the first inmate to die by lethal injection'.²⁹⁸ For a long time, it was basically a compilation of 3 different drugs: the first is a strong anaesthetic and sedative drug (sodium thiopental or some barbiturate derivative) 'that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection',²⁹⁹ while the second 'inhibits all muscular-skeletal movements, and, by paralyzing the diaphragm, stops respiration', then the final, third drug 'interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest'. This three-drug cocktail worked until 2010-2011, but as the states ran out of the sodium thiopental, they altered it to pentobarbital, which was used before only for animal euthanasia.³⁰⁰ However, from 2011, the retentionist states have had to face the lack of pentobarbital, too, because of the EU export ban and the intensifying resistance of US pharmaceutical companies. From this date, executioners report on difficulties because of a shortage of the needed drugs. This situation led some states, like Ohio or Oklahoma, to instigate a temporary adjournment of executions, while other states, like Nebraska or Virginia tried to purchase the needed drugs in secret from abroad. Another group of states has begun to modify their execution processes, but sometimes these steps led to experiments with drugs not used before for executions, and, as it was presupposed by the protesting NGOs and the inmates themselves, these attempts led to botched executions as well. Another way of lethal injection is a one-drug process, based on a large dose of the aforementioned sodium thiopental or pentobarbital – but because of the shortage of these drugs, this process also seems infeasible.

According to the witnesses of the executions, anti-death penalty NGOs, experts, lawyers and physicians, the whole procedure of this kind of executions is quite inhumane: the inmate is strapped to an execution gurney, cannot move his/her legs, arms and head, but in botched executions, has to endure and suffer for minutes, or in some cases, for hours, without any help or

²⁹⁷ DPIC, Facts about the Death Penalty, 2 <<http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>> accessed 16 July 2016

²⁹⁸ Louis J. Palmer, Jr. *Encyclopedia of the Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 319

²⁹⁹ *Baze v. Rees*, 553 U.S. 35 (2008)

³⁰⁰ Nathan Koppel, 'Plea for Execution Drug Faced With Shortage of Anesthetic, Oklahoma Seeks Court Permission for New One' (*Wall Street Journal*, 9 November 2010) <<http://www.wsj.com/articles/SB10001424052748704146904575602784093885378>> accessed 15 May 2016

relief of his/her pain. However, the Encyclopedia on Capital Punishment states that through the 3-drugs method, '[w]hen done properly, death by lethal injection is not painful and the inmate goes to sleep prior to the fatal effects'³⁰¹ of the second and third drugs.

Thus, this problem of the shortage or lack of drugs led to a growing number of stayed executions because of the problems around lethal injection. Amending Table 1 with the number of stayed executions due to the problems around lethal injections, one may find that since 2014 a rising rate of executions have been stayed due to this reason, and this may also mean that the EU export ban slowly but surely may register a partial success (Figure 4).

Figure 5: Stayed executions in the US 2

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|--|------|------|------|------|------|------|------|
| Stays | 37 | 43 | 47 | 34 | 51 | 72 | 32 |
| Executions after stays | 4 | 9 | 8 | 4 | 4 | 1 | 0 |
| Stays due to lethal injection method problems | 7 | 8 | 4 | 3 | 16 | 32 | 13 |

4. The challenge of democracy: the tyranny of the majority?

Elaborating the situation of capital punishment in the US, we must add another important reason behind the existence of this form of punishment: the role of democracy. As we explained before, the upholding of death penalty is a matter of an ongoing constitutional debate, but at state level this is also a subject of the executive and legislative powers.

On the one hand, as in the case of presidential candidates at the federal level, all governors must clear their positions regularly on death penalty, and in this respect, the death penalty is 'a hot button issue on which many voters would decide how to cast their vote'.³⁰² Furthermore, as the right to grant clemency or commute the death sentence to another punishment (usually to life imprisonment without parole) belongs to the governor, s/he takes into account how the voters judge his/her decisions when his/her re-election is at stake. In this respect, it is understandable why southern states execute many more people than others: because the electorate itself is also more pro-death penalty and the governors (and the juries, and the attorneys, who are also elected officials, just like the judges of the supreme courts, etc.) hardly risk their seats as long as the huge majority of the voters support capital punishment.

On the other hand, we must also see that in some cases the existence of the death penalty is in the hands of the voters. Since 1912, when Oregon and Ohio put the question of the death penalty

³⁰¹ Louis J. Palmer, Jr. *Encyclopedia of Capital Punishment in the United States* (2nd edn, McFarland and Company, 2008) 321

³⁰² Herbert H. Haines, *Against capital punishment. The Anti-Death Penalty Movement in America, 1972-1994*, (Oxford University Press, 1996) 100

on a ballot, voters have decided 30 times about it through different kinds of popular votes (legislative referendums, initiatives, constitutional amendments). In these November elections, voters will find questions about the death penalty on their ballot paper in four states: California, Michigan, Nebraska and Oklahoma.

In California, 4 years ago another initiative on abolition was put to the voters, who voted against it, maintaining capital punishment. Now again, another initiative is on the ballot about abolition.³⁰³

In Michigan, the constitutional amendment is about reintroducing the capital punishment in the case of first degree murder of peace-officers (policemen) or correction officers. The report emphasises that Michigan was the very first abolitionist state in the USA in 1847, so this amendment introduced by the Michigan State Legislature would mean an enormous defeat for the anti-death penalty forces.³⁰⁴

In Nebraska, the state legislature (the only unicameral state legislature in the US) abolished the death penalty in 2015 by passing Bill 268, and overturned the governor’s veto, but as the I&R rules provides, at least 5 per cent of the registered voters may launch a veto referendum. If the voters support this initiative in November, it will mean that the abolition passed by Nebraska State Senate will be repealed by the electorate. But if the veto referendum fails, that means that Nebraska will be the 19th state in the US that abolished the death penalty.³⁰⁵

Finally, the constitutional amendment in Oklahoma would reinforce the death penalty, ensuring that all execution methods would be available; however it would maintain the prohibition of cruel and unusual punishment.³⁰⁶

As we can see, democratic institutions and procedures play a great role: the existence of capital punishment is not only a question of human rights and the level of a country’s enlightenment or modernity but also a question of public conscience and support. As late Justice Scalia wrote in his concurring judgment in the *Glossip v. Gross* case,

Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have “changed radically,” post, at 2, and has sought to replace the judgments of the People with their own standards of decency. Capital punishment presents moral questions that

³⁰³ California, Proposition 62, [<https://ballotpedia.org/California_Death_Penalty_Repeal,_Proposition_62_\(2016\)>](https://ballotpedia.org/California_Death_Penalty_Repeal,_Proposition_62_(2016)) accessed 20 July 2016

³⁰⁴ Michigan amendment, [<https://ballotpedia.org/Michigan_Capital_Punishment_Amendment_\(2016\)>](https://ballotpedia.org/Michigan_Capital_Punishment_Amendment_(2016)) accessed 20 July 2016

³⁰⁵ Nebraska ballot, [<https://ballotpedia.org/Nebraska_Death_Penalty_Repeal_Referendum_\(2016\)>](https://ballotpedia.org/Nebraska_Death_Penalty_Repeal_Referendum_(2016)) accessed 20 July 2016

³⁰⁶ Oklahoma amendment, [<https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_\(2016\)>](https://ballotpedia.org/Oklahoma_Death_Penalty,_State_Question_776_(2016)) accessed 20 July 2016

philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide.³⁰⁷

Although this understanding of the constitutionality of the death penalty is not common in the US, one cannot ignore that this kind of democracy-argument is as much an important part of legal debates as the abovementioned definition debates on cruel and unusual patterns of the capital punishment.

C. The EU in the US: actions, influences, effects

In this part, the report summarises and evaluates the actions of the European Union against the capital punishment system of the US. The FRAME Deliverable No. 6.1 defines various tools and instruments that the EU can use in its external relations.³⁰⁸ It has collected, summarised and elaborated the fundamental EU Documents (see above, section A.), and the available sources of the EU's activities in the US (mainly of the Delegation of the European Union to the United States), this report found that the presence of the European Union in the fight against death penalty in the US is grounded in 3 different tools and instruments. The first is, according to Frame 6.1, the targeted instrument, namely the financial support of the EIDHR, provided for US NGOs.³⁰⁹ The second tool belongs to the category of public criticism: those demarches, letters and resolutions, which, according to the EU Guidelines on Death Penalty, call attention of the decision makers and society to the developments (abolition of capital punishment), express the concern of the EU when a moratorium on executions is broken, or apply for clemency in cases of upcoming executions.³¹⁰ The third and most effective tool is the sanction (or restrictive measure): the eleven years old export ban granted by the Regulation 1236/2005 on trade in goods that can be used for capital punishment or torture to ensure improved implementation.³¹¹ As we will see, the impacts of this export ban are probably the most effective and apparent for the public, even if the legal consequences of the export ban, namely the shortage of lethal injection drugs have not yet led to abolition.

Although these three different forms of EU actions are hardly comparable, this paper elaborates them in two ways, in regards of visibility and effectiveness. Under visibility (or publicity) this paper points to the publicity of EU support or actions, whether the role of EU in the actual case is public and transparent or not. Therefore, this research of visibility was based on a content

³⁰⁷ *Glossip v. Gross*, 576 U.S. __ (2015) Justice Scalia's concurring opinion, 7

³⁰⁸ Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion (WP No. 6, Deliverable No. 1) 71-91 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> Accessed 27 July 2016

³⁰⁹ *ibid* 84-85

³¹⁰ *ibid* 92-94

³¹¹ *ibid* 83-84. The use of this term 'sanction' may seem misleading, as generally this definition refers to special actions against one or more states. However, as the cited FRAME Report uses this term, this report follows this practice.

analysis of the following: US national and state-level media, SCOTUS decisions, national and state-level governmental documents, NGOs' statements, documents and reports. The author researched whether the EU's actions in the US, namely the targeted instruments, the individual demarches and the export ban-related issues received any publicity in these surfaces or not. Under effectiveness the report researches whether the EU's actual step has got any effect to the abolition or moratorium on death penalty (for instance, in cases of demarches). This means that the author checked the outcome of every available individual demarche sent by the EU (had the execution been carried out or not, and had the courts/governors/parole boards replied/referred in any way to the joint demarche or communication or not). Also, the report analyses the factual effects and consequences of the EU's export-ban policy on lethal injection drugs when it summarises the developments, challenges and alterations of the US execution practice of the last six years.

1. Targeted instruments

As the report stated before (Section A. 1. b.), the EIDHR provides millions of euro every year for civil society organisations and other partners for strengthening the fight against the death penalty worldwide. Unfortunately, the available data and information about the amount of the share of this fund to the US NGOs is very limited.

The EU Annual Report on Human Rights and Democracy in the World (hereinafter: Annual Report 2014) says that in 2014,

the EU continued its dialogue with civil society organisations, including through involvement in events on topics such as the death penalty in the USA (to mark the World Day Against the Death Penalty), the US landmine policy review, the situation of women and EU-US cooperation on democracy support. As regards financial cooperation, two projects in support of the abolition of the death penalty continued in 2014 under the EIDHR.³¹²

More precise data were published in a 2014 paper says that

the EU awarded \$ 4,8 million since 2009 to seven organizations to combat the death penalty in the United States, including such leading abolitionist NGOs as the Death Penalty Information Center; the National Coalition versus the Death Penalty; Reprieve; Witness to Innocence; and Equal Justice USA. In addition, the EU funded American Bar Association efforts to assess the standards used in the application of the death penalty in individual states.³¹³

³¹² Annual Report 2014, 266

³¹³ EU Matters: Leading the Fight against Capital Punishment. <www.euintheus.org/?attachment_id=14609> accessed 25 July 2016.

According to the European Court of Auditors (ECA), the EU provided 3.14 million euro to US NGOs in the 2007-2013 period (Figure 5).³¹⁴

Figure 6: EIDHR support against the death penalty in the US

| Beneficiary | Project | Grant (euro) |
|--|--|--------------|
| Murder Victims' Families for Human Rights | Voices of victims against the death penalty | 485 615.65 |
| The National Coalition to Abolish the Death Penalty | The National Coalition to Abolish the Death Penalty intensive assistance program | 305 060.86 |
| Witness to Innocence | American DREAM campaign | 374 944.62 |
| American Bar Association | The death penalty assessment project: toward a nationwide moratorium on executions | 708 162 |
| Death Penalty Information Center | Changing the course of the death penalty debate: a proposal for public opinion research, message development, and communications on capital punishment in the US | 193 443 |
| Witness to Innocence | Eyes wide open | 850 032.14 |
| Equal Justice USA Inc Corporation | Breaking barriers: engaging new voices to abolish the death penalty in the United States | 495 014.31 |

The ECA Report contains two specific statements on the impact of EU support for US NGOs: the first says that 'a project in the United States enabled local civil society organisations in two states to develop a fundraising plan in order to ensure their financial sustainability. Both affiliates became financially sustainable, without funding from the coordinating organisation at national level'.³¹⁵ The second specific finding states that 'a project that sought to strengthen organisations that fight against the death penalty in two states in the United States had some impact, albeit far from the extent expected'.³¹⁶ In their reply, the Commission and the EEAS referred to the moratorium on capital punishment introduced in Pennsylvania as a success, declaring that '[o]ne of the decisive arguments put forward by the governor in its decision is the Pennsylvania Death Penalty Assessment produced by the American Bar Association'.³¹⁷

³¹⁴ European Court of Auditors, Special Report EU support for the fight against torture and the abolition of the death penalty, 9/2015, 42 <http://www.eca.europa.eu/Lists/ECADocuments/SR15_09/SR_TORTURE_EN.pdf> accessed 25 July 2016

³¹⁵ ibid 25

³¹⁶ ibid 22

³¹⁷ ibid 52

However, looking for the visibility of EU support and checking the websites of these organisations and the news on their activities one cannot find any references to the EU. The same is true in the case of EIDHR and the European Delegation to the US: although one may find the key objectives and commitment toward the abolition of the US death penalty system, the actual actions and possibilities (EIDHR funds, for instance) and the list of funded NGOs are not available. This, of course, does not mean that the targeted actions and support of the EU are useless; but this report finds that the presence and actual effects of the EU in this regard is almost totally invisible. Only a narrower circle of newspapers and websites noted that the above-mentioned projects were funded partly by the EU.³¹⁸

2. Public criticism

The most frequently used tool of EU actions in the US against death penalty is the public criticism, namely those demarches, letters, declarations and humanitarian appeals which have been sent by the Head of Mission of the EU Delegation to the US, sometimes by the European Parliament and also sometimes by the EU Presidency. These documents are available on the website of the EU delegation from the millennium, providing an opportunity to an extended and deep analysis.³¹⁹

a) The EU's voice in the US

Summarising the available documents of the last 19 years (Figure 6), the report finds that the number of EU actions rose and fell together with the number of executions and that the huge majority of the released official documents were demarches in individual cases for preventing executions.

Figure 7: EU public communications in the US against death penalty

| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | Sum |
|---|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Demarches in individual case | 1 | 2 | 12 | 13 | 13 | 9 | 6 | 3 | 7 | 8 | 11 | 6 | 11 | 6 | 8 | 2 | 4 | 6 | 2 | 130 |
| Number of executions³²⁰ | 68 | 98 | 85 | 66 | 71 | 65 | 59 | 60 | 53 | 42 | 37 | 52 | 46 | 43 | 43 | 39 | 35 | 28 | 15 | 1005 |
| Other EU actions | 1 | 0 | 3 | 1 | 1 | 2 | 2 | 3 | 1 | 3 | 3 | 3 | 2 | 3 | 0 | 2 | 1 | 0 | 1 | 32 |

³¹⁸ See Lachlan Markay, 'European Union Financing Efforts to End Death Penalty in U.S.' (*The Washington Free Beacon*, 30 October 2013) <<http://freebeacon.com/issues/european-union-financing-efforts-to-end-death-penalty-in-u-s/>> accessed 24 July 2016

³¹⁹ See Death Penalty Archive, <<http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>> accessed 24 July 2016

³²⁰ Based on the DPIC database.

All individual demarches were written because of some violation of the EU Minimum Standards, in the following distribution:

- in the first years, from 1998 to 2005, the EU sent individual demarches for saving the life of juvenile inmates: only one was respected, a letter to Missouri Governor Holden in 2002, in the Missouri v. Christopher Simmons case³²¹. Simmons' execution was stayed in 2002, and in 2005 the SCOTUS upheld the aforementioned Roper c. Simmons decision on the prohibition of the juvenile death penalty.³²²
- another part of the individual demarches and letters by the EU Delegation and the current EU Presidencies argued for stays of execution for those convicted persons who suffer from some kind of mental illness or mental disability. As of 2016, only a few of them have been saved out of dozens, like George Banks (Pennsylvania, demarche sent in 2010) or Scott Panetti (Texas, 2004, the last stay was sentenced in 2014).
- In some cases the EU has called the attention of state courts and governors to the violation of the right to consular consultation during the arrest or trial phase, and has called on the governors/parole boards/courts to commute the capital sentences to another sentence. According to the EU Delegation archives and the state penitentiary and other database, only Oswaldo Torres' sentence was finally commuted to LWOP by the Oklahoma governor in 2004.³²³

b) Patterns of the EU's direct actions

Elaborating the 19-year-long practice of EU demarches, this paper finds five important features in the public criticism policy of the EU. First, the EU seems to follow the trend on capital punishment practice in numbers: as the number of executions drops, the number of EU demarches does, too. Second, in the different periods of the last two decades, the EU's actions focused on different kinds of death penalty cases, and sent demarches at different rates in favour of juvenile offenders, mentally ill or disordered prisoners, foreign nationals, and so on. Third, according to the Death Penalty Archive of the EU Delegation, the EU put the case of some convicted persons more than once, while many others were never mentioned or any EU attempts made to save

³²¹ Missouri v. Christopher Simmons: Letter to Missouri Governor Holden, April 17, 2002, see <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2002/eu-policy-on-the-death-pena250/> accessed 25 July 2016

³²² However, and this highlights the arbitrariness and racial bias of death penalty system in the US, in the same year of 2002, 5 other juvenile offenders were scheduled for execution. All of them – Chris Foster, Kevin Stanford, Toronto Patterson, T. J. Jones and Napoleon Baezley, were African-Americans. Christopher Simmons is white. His capital sentence was commuted to life imprisonment without parole by the Missouri Supreme Court in 2003 and upheld by the SCOTUS in 2005. As in the aforementioned Stanford (Kentucky) case, Foster's execution was also stayed and his sentence was later commuted to LWOP by the governor of Mississippi. Patterson, Jones and Baezley were executed in 2002.

³²³ Oklahoma Governor Grants Clemency to Mexican Foreign National, <http://www.deathpenaltyinfo.org/node/1152> accessed 20 July 2016

them from execution. Fourth, although the Guidelines states that the EU acts every time when the Minimum Standards are threatened, one may find that this policy is only partly fulfilled by EU actors. For instance, in the abovementioned case of Cameron Todd Willingham, many experts and reports stated already during the trial that the investigation and the indictment did not provide clear and convincing evidence; however, the EU did not send any message to the governor of Texas in order to save Willingham's life. Another example may be the case of Nebraska: although the EU usually welcomes a moratorium on, or abolition of the death penalty ordered by governors or passed by state legislatures, this was totally missed in the case of Nebraska in 2015. The EU missed the opportunity to welcome the abolition of capital punishment and the overturn of the governor's veto by the Nebraska State Senate and also missed the opportunity to comment on the veto of the governor. In sum, these cases indicate that the EU's practice seems inconsistent in regard of the Guidelines' requirement. Fifth, although in the last two and half years the greatest attention of US society and the international community has been focused on the botched executions, the EU raised this concern only in a few cases in the 2014-2016 period, and its declarations were mainly ex post, although in some cases it would have been appropriate to send a demarche before the execution. An example of this finding is Clayton Lockett's case in 2014. Although in January 2014 a botched execution was carried out in Oklahoma due to a failed compilation and the use of midazolam, Clayton Lockett's execution was scheduled for and carried out on 29 April 2014 in the same way as the former execution. Many newspapers reported about that botched execution, and the last minute legal concerns, and state secrecy around the lethal injection drugs. These facts and reports would have provided enough information for demonstrating the violation of the EU's Minimum Standards, but no EU actors intervened for a stay or clemency for Mr Lockett. HR/VP Catherine Ashton made a statement³²⁴ only after the publication of the horrifying details of Lockett's execution.³²⁵ One cannot state that an intervention (demarche) by the EU would have saved Lockett's life, of course, but this missed opportunity to act also shows that a more circumspect and profound updating and analysing of the latest news and events on the on-going death penalty practice would help and strengthen the EU's actions in the future.

Finally, when it comes to the abovementioned two indicators, visibility and effectiveness, this report finds that the EU's direct actions to prevent executions are visible neither in the US nationally, nor in the state nor local media. Few reports, newspapers or other media cite these documents, mostly the anti-death penalty NGOs mention these actions of the EU. But, although these documents belong to the tools of public criticism, this paper finds that their publicity is hardly wider than their availability on the website of the EU delegation. No better findings can be

³²⁴ EU Statement on the execution of Clayton Lockett in the US State of Oklahoma (13/05/2014), <http://eeas.europa.eu/delegations/council_europe/press_corner/all_news/news/2014/2014051302_en.htm> accessed 20 July 2016

³²⁵ For the most accurate report on the whole story, see Jeffrey E. Stern, 'The Cruel and Unusual Execution of Clayton Lockett' (*The Atlantic*, June 2015) <<http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>> accessed 20 July 2016

concluded in regard of the effectiveness of these documents. As Table 4 shows, the EU applied for staying, clemency or commutation in the cases of more than one tenth of the executions, but these calls were successful in only a handful of cases. Thus, in the light of these findings the report evaluates this tool as less successful, but also emphasises some possible positive developments for the future (see below).

3. Sanctions

The third and most effective tool of the EU's fight against death penalty in the United States is part of the European trade policy, namely the general and export ban on several goods.

a) Development of trade policy against capital punishment

The Council of the European Union adopted the 1236/2005 Regulation³²⁶ concerning the trade in certain goods that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment on 27 June 2005, and prohibited the export of some goods, which may be used for executions. In the 2005-2011 period this export ban referred to a few 'goods designed for the execution of human beings', like gallows, guillotines, electric chairs (for the purpose of execution of human beings), air-tight vaults, made of e.g. steel and glass, (designed for the purpose of execution of human beings by lethal gas method), and automatic drug injection systems (designed for the purpose of execution of human beings by lethal injection). As this report pointed out above, seeing that the main execution method in the US has been lethal injection since the early 1980s, therefore, in its first form the Council Resolution led only to minimal success, because the goods put onto the export ban did not prevent or restrict the consecutive executions of death sentences in the US.

However, a significant breakthrough has been achieved since 2011. That year, the European Commission passed an implementing regulation for amending the 1236/2005 Council Regulations,³²⁷ and amended the list of goods with several drugs that have been systematically used in the US for executions by the lethal injection method. Due to this amendment, from 2012 the EU bans the export of the most frequently used drugs and their ingredients, like 'short and intermediate acting barbiturate anaesthetic agents including, but not limited to amobarbital, amobarbital sodium salt, pentobarbital, pentobarbital sodium salt, secobarbital, secobarbital sodium salt, thiopental, thiopental sodium salt, also known as thiopentone sodium'. The regulations also states that 'this item also controls products containing one of the anaesthetic agents listed under short or intermediate acting barbiturate anaesthetic agents.'³²⁸

³²⁶ Council Regulation 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. [2005] OJ L200/1

³²⁷ Commission Implementing Regulation (EU) No 1352/2011 of 20 December 2011 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, [2011] OJ L338/ 31

³²⁸ See 1352/2011 Commission Implementing Regulation, Annex III, 4., or the consolidated text of the 1236/2005 Regulation, Annex III, 4.

The Regulation states that

1. Any export of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment. 2. The supply of technical assistance related to goods listed in Annex II, whether for consideration or not, from the customs territory of the Community, to any person, entity or body in a third country shall be prohibited.³²⁹

These provisions ensure that no drugs can be sent from or through Europe to the US for executions.

Although it is impossible to explore all antecedents and prior considerations behind this landmark amendment, this paper has analysed the reports on US death penalty cases and their circumstances, and finds that the former indirect involvement of some EU Member States in the lethal injection business (and thus in the executions in the US) had probably provoked deep concerns in the Member States, in the EU institutions, and in European civil society. This spotlight on the EU as a contributor in maintaining capital punishment could push the Commission to act, promoting the EU's strong commitment toward abolition.

In 2011, two cases became public in which companies from EU Member States (Lundberg from Denmark, Dream Pharma from the UK) sold lethal drugs to US states and correctional facilities.³³⁰ As the international concerns and outrage grew, the companies released their statements in which they banned the use of their drugs for carrying out executions.³³¹ Although we found no evidence that any actor of the EU would have criticised these companies publicly, human rights NGOs in the EU and the US pointed out that this kind of international trade is probably in conflict with the fundamental human rights objectives of the EU. From the Member States' part, the then Federal Government Commissioner for Human Rights Policy and Humanitarian Aid at the Federal

³²⁹ Chapter 2, Article 3.

³³⁰ For further details see Andrew Hosken, 'Lethal injection drug sold from UK driving school' (*BBC*, 6 January 2011) <http://news.bbc.co.uk/today/hi/today/newsid_9342000/9342976.stm>; Adam Gabatt and David Batty, 'Danish firm Lundbeck to stop US jails using drug for lethal injections' (*The Guardian*, 1 July 2011) <<https://www.theguardian.com/world/2011/jul/01/lundbeck-us-pentobarbital-death-row>>; Owen Bowcott, 'London firm supplied drugs for US executions' (*The Guardian*, 6 January 2011) <<https://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>>; Brian Evens, 'European Drugs And U.S. Executions' (AI Human Rights Now Blog, 10 June 2011) <<http://blog.amnestyusa.org/europe/european-drugs-and-u-s-executions/>>; all accessed 20 July 2016

³³¹ One year later an India-based company, Hospira released the same call on prohibition of its drugs, stating that the US purchaser did not clarify that the drugs would be used for executions. For further information, see Brian Evens, 'Drug Company: Stop Using Our Product For Executions' (AI Human Rights Now Blog, 24 September 2010) <<http://blog.amnestyusa.org/us/drug-company-stop-using-our-product-for-executions/>> accessed 20 July 2016

Foreign Office of the German government, Marcus Löning called the attention of the European Commission and requested that the export ban list should be amended with sodium thiopental.³³²

The Commission finally passed the aforementioned amendment and put several sedative drugs on the export ban list. Actually, this happened in an optimal moment: from 2010, many of the retentionist states ran out of sodium thiopental and switched to pentobarbital (see above, 3. b) section). In the light of the US lethal injections methods and their shortage of drugs, the amendment of the export ban list led to the result that the EU prohibited the export of pentobarbital so quickly that the US retentionist states had to face problems of supply as early as 2013.

In sum, although the first 5 years of the export ban, as an instrument of EU trade policy, had no effect on the US death penalty system, putting the most frequently used drugs on the list, a new era began, and, comparing the two other instruments (targeted instruments and public criticism) elaborated before, the EU has finally appeared in the US as a visible and effective actor against capital punishment.

b) The role and the effect of the EU's export ban in the US

Following the above mentioned two approaches of visibility and effectiveness, the report finds that the prohibition of the export of lethal drugs for executions is the most successful and effective instrument of the European Union in the fight for abolishing US capital punishment.

When it comes to visibility, in contrast with the two other tools (targeted instruments and public criticism), this policy attracted great publicity, both in the EU and the US. Many newspapers reported on the amendment of the export ban list in 2011, and many anti-death penalty NGOs welcomed it.³³³ This report underlines that this was the very first moment when the EU as an actor against death penalty was actually mentioned. Before this turn of events, all newspapers and reports referred rather to the Member States as actors than the EU.³³⁴ This kind of visibility has become increasingly broader since 2013-2014, as the growing number of botched executions shocked the public in the United States. Several leading journals and weeklies in the US recognised and elaborated the role of the EU in the shortage of lethal injection drugs, and pointed out the ever bitter struggles of the retentionist states to purchase the needed amounts

³³² Maureen Cosgrove, 'Germany urges EU export ban on execution drug' (Jurist, 2 April 2011) <<http://www.jurist.org/paperchase/2011/04/germany-urges-eu-export-ban-on-execution-drug.php>> accessed 20 July 2016

³³³ See 'EU imposes strict controls on 'execution drug' exports' (BBC, 5 March 2012) <<http://www.bbc.com/news/world-europe-16281016>>; Luke Walker, 'EU Bans Export of Lethal Injection Drugs to US' (The Fix, 13 December 2011) <<https://www.thefix.com/content/eu-ban-lethal-injection-drugs-9323>>, both accessed 20 July 2016

³³⁴ For instance, when news were released that Danish and UK pharmaceutical companies prohibited the use of their products in executions, not one of the reports and journals mentioned the EU's human rights policies and commitments.

of drugs to carry out the scheduled executions.³³⁵ As this paper finds, the turning point was the botched execution in Ohio in January 2014, and the peak of the elaboration of the EU's role in the failure of the US death penalty system was in the spring and summer of 2014, after Clayton Lockett's horrifying execution.

It is worthwhile to note that the reports and articles in the US media written about the effect of the EU's export ban policy highlight the EU's commitment towards abolition and do not place the responsibility for the botched executions on the EU. Instead, they focus on the tricky and sometimes illegal efforts of the retentionist states and their penitentiary institutions to purchase the needed amounts of drugs and trying to keep the sources secret.

However, this kind of visibility, namely the recognition of the EU's indirect but powerful effect has been seen neither in the academic journals, nor in the sentences of the relevant US state or federal Courts. Interestingly, the above-mentioned SCOTUS cases (Baze, Glossip) do not mention the EU trade policy regulation (and its origin, the human rights commitment), instead they refer to some European countries prohibiting the export of some drugs to the US. Although this report finds that the visibility to the US public is probably more effective and has a wider influence on the on-going fight for abolition, it is worthwhile to note that the targeted instruments (see C. 1. section in this paper) went to NGOs and professional entities like ABA, without any measurable impact on the visibility of the EU presence.³³⁶

In contrast with the weak or almost invisible effectiveness of targeted instruments and public criticism, the objective of the EU trade policy seems very successful, at least in three ways. Firstly, the export ban has got a direct effect for staying many executions in the US since 2014. As the Table 2 shows, from 2014, 61 executions were stayed due to the shortage of lethal drugs, as in the 2010-2013 period this number was only 22. These stays are usually held because of the lack of drugs, or due to a prohibiting order of the FDA because the state purchased the needed lethal

³³⁵ See Makiko Kitamura and Adi Narayan, 'Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons' (*Bloomberg*, 8 February 2013) <<http://www.bloomberg.com/news/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons>>; 'Europe's moral stand has U.S. states running out of execution drugs, complicating capital punishment' (CBS News, 18 February 2014) <<http://www.cbsnews.com/news/europe-moral-stand-us-states-running-out-of-execution-drugs-complicating-capital-punishment/>>; Matt Ford, 'Can Europe End the Death Penalty in America?' (*The Atlantic*, 18 February 2014) <<http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>>; Ian Steadman, 'US prisons, foiled by an EU boycott, are turning to untested drugs in executions' (*New Statesman*, 14 January 2014) <<http://www.newstatesman.com/future-proof/2014/01/us-prisons-foiled-eu-boycott-are-turning-untested-drugs-executions>>; Joshua Keating, 'Sanctions of Our Very Own' (*Slate*, 30 April 2014) <http://www.slate.com/blogs/the_world/2014/04/30/clayton_lockett_execution_are_the_eu_export_controls_on_death_penalty_drugs.html>; German Lopez, '9 reasons the death penalty is on the decline in America' (*Vox*, 29 June 2015) <<http://www.vox.com/cards/death-penalty-capital-punishment/europe-lethal-injection-drugs>> all accessed 21 July 2016

³³⁶ For instance, a recently published ABA report widely elaborates the consequences of the EU export ban without mentioning its origins.

drugs from compounding pharmacies, or because the secrecy laws of the state are unconstitutional and the state courts stays the executions until the state legislature passes another statute, or because the pharmaceutical companies publicly ban the use of their products for executions. Secondly, the report finds that some states (Ohio, Oklahoma, and Arizona) instead of occasional stays, called for temporary but general moratorium on executions, until they find another source for purchasing the lethal injection drugs. Thirdly, more and more large US and foreign pharmaceutical companies published their decisions on prohibiting the use of their products in executions. Only in 2015, Akorn Pharmaceuticals, Par Pharmaceuticals, and the India-based Sun Pharma did so.³³⁷ There was recent news that Pfizer has also made a commitment in this way.

³³⁷ See 'Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment' (13 May 2016) <<https://www.pfizer.com/files/b2b/GlobalPolicyPaperLethalInjection.pdf>>; Elliott c. McLaughlin, 'The Pfizer decision and America's death penalty dilemma' (CNN, 14 May 2016) <<http://edition.cnn.com/2016/05/14/us/pfizer-decision-state-of-death-penalty-charts-graphs-trnd/>> both accessed 21 July 2016

III. Surveillance and Data Protection

A. Introduction

The purpose of this chapter is to analyse the relationship between the US and the EU in the field of data protection and the framework of surveillance, and to compare the two systems. The topic is one of the major issues in transatlantic cooperation, and as such, attracts great public attention. This chapter aims to measure EU and US actions and their interactions in this field. Moreover, by comparing the legal background in the EU and in the US, we try to give an answer to the question how the EU should protect privacy in the future

Our intention is to highlight the tools the EU uses in privacy protection, and to show some possibilities that could improve cooperation between the US and the EU and to develop EU policies.

In the following, first, we give a sketch of the European background and legal sources of data protection. The latter is made up of fragmented legal sources, which can serve as a starting point regarding privacy protection. These sources contain the basic rules that the EU is promoting in the US as well. Please note that we also include EU answers to public expostulations regarding US surveillance activities, like the resolutions of the European Parliament and the latest set of reforms. We also mention the most important issues raised by the media in this chapter.

Second, we provide an overview the US legal background of data protection, and try to find the key laws and provisions.

Third, we try to select the most important problems that have been at the centre of disputes in this field between the EU and the US, and especially those, which can be important from a European point of view. The selection of these issues is based on public criticism, and also partly on criticism raised by scholars.

Finally, we summarise the major problems and give some hints for future cooperation.

B. General Background – Cooperation or Competition in the Field of Surveillance?

1. US activity

One of the major topics in EU-US relations is the question of cooperation in the field of data transfer and data protection. The topic got into the centre of international debates when Edward Snowden, a one-time employee of the National Security Agency (the US intelligence organisation responsible for global intelligence and data collection) leaked documents on US intelligence activity, and the Guardian³³⁸ as well as the Washington Post wrote their first articles regarding the

³³⁸ 'NSA collecting phone records of millions of Verizon customers daily' *The Guardian* (6 June 2013) <<https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>> accessed 1 June 2016

question.³³⁹ The leaked documents were related to two different surveillance programmes.³⁴⁰ One of these programmes was the domestic metadata programme, which allegedly collected data of millions of phone calls within the US, including call numbers and times of calls, and also accessed personal data of EU citizens on a large scale from the internet (UPSTREAM programme). The other (the so-called PRISM Programme) was about the surveillance and collection of data outside the US. This second programme was related to Internet data, and especially to private communications of users of nine popular Internet services. Later it was revealed that the US had also spied on some leading European politicians. According to press releases, 'NSA did not just tap German chancellor Angela Merkel's phone but also listened in on finance, economy, agriculture and other ministers',³⁴¹ as well as to calls of French Presidents including Jacques Chirac, Nicolas Sarkozy and Francois Hollande. Moreover, some newspapers like der Spiegel also claimed to have been under surveillance.³⁴²

2. Answers by the EU

Some of the European institutions protested against US investigations: for example the European Parliament issued several statements³⁴³ that criticised the participating Member States as well as the US fiercely, while Snowden was shortlisted for the EU's Sakharov prize, one of Europe's top human rights prizes.³⁴⁴

In 2014, the EP adopted a resolution³⁴⁵ on surveillance, which was based on an enquiry of the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the EP, conducted during the second half

³³⁹ Barton Gellman and Laura Poitras 'U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program' (*Washington Post*, 7 June 2013) <https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html>

³⁴⁰ Peter Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' (2014) 82 *Fordham Law Review*, 2137.

³⁴¹ WikiLeaks: US spied on Angela Merkel's ministers too, says German newspaper *The Guardian* (2 July 2015) <<http://www.theguardian.com/media/2015/jul/02/wikileaks-us-spied-on-angela-merkels-ministers-too-says-german-newspaper>> accessed 1 June 2016

³⁴² The newspaper *Der Spiegel* also filed a legal complaint about this, see 'Überwachung: SPIEGEL im Visier von US-Geheimdiensten' (*Der Spiegel*, 3 July 2015) <<http://www.spiegel.de/politik/deutschland/der-spiegel-ist-im-visier-von-us-geheimdiensten-a-1041985.html>> accessed 1 June 2016

³⁴³ US NSA surveillance programme, surveillance bodies in various Member States and impact on EU citizens' privacy - European Parliament resolution of 4 July 2013 on the US National Security Agency surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' privacy 2013/2682(RSP); European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs 2013/2188(INI); European Parliament resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens 2015/2635(RSP)

³⁴⁴ 'Edward Snowden shortlisted for EU's Sakharov prize' (BBC, 1 October 2013) <www.bbc.com/news/world-europe-24347225> accessed 1 July 2016

³⁴⁵ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)) P7_TA(2014)0230;

of 2013.³⁴⁶ The FRA called this resolution a ‘European Digital Habeas Corpus’.³⁴⁷ It addressed many issues such as the extraterritoriality of US rules, international transfers of data, future data protection reform in the EU, IT security and cloud computing, as well as the democratic oversight of intelligence services. This resolution made more than 110 recommendations to develop the European framework on intelligence services. At an international level, the resolution called on the EU Commission to present a strategy for democratic governance of the Internet. Moreover, it called on the Member States to adopt an additional protocol to Article 17 of the (ICCPR) (see later),

which should be based on the standards that have been developed and endorsed by the International Conference and the provisions in the Human Rights Committee General Comment No 16 to the Covenant in order to create globally applicable standards for data protection and the protection of privacy in accordance with the rule of law.

It called on the Member States

to develop a coherent and strong strategy within the UN, supporting in particular the resolution on ‘the right to privacy in the digital age’ initiated by Brazil and Germany, as adopted by the Third Committee of the UN General Assembly Committee (Human Rights Committee) on 27 November 2013, as well as taking further action for the defence of the fundamental right to privacy and data protection at an international level while avoiding any facilitation of state control or censorship or the fragmentation of the internet, including an initiative for an international treaty prohibiting mass surveillance activities and an agency for its oversight.

It also included several statements on the US, which will be addressed at the end of this chapter in more detail, also with a view on what parts of these demands were fulfilled by the latest reforms in the US.

In 2014, during the EU-US joint summit, the question of surveillance was raised again. The factsheet of the summit stressed that

recent revelations about US surveillance programmes have affected the trust of European citizens. In order to restore trust and maintain the continuity of data flows between the EU and US, a high level of data protection needs to be ensured. Building on positive announcements by President Obama in January 2014, the EU is looking forward to

³⁴⁶ For related European Parliament documents, see <http://www.europarl.europa.eu/committees/en/libe/subject-files.html?id=20130923CDT71796> accessed 1 August 2016

³⁴⁷ FRA, ‘Surveillance By Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU Mapping Member States’ Legal Frameworks’ (Publications Office of the European Union, 2015)

concrete and swift progress on key instruments for data protection in transatlantic data flows.³⁴⁸

The parties agreed that the conclusion of a new umbrella agreement is necessary, and also that ‘the main issue which remains is the right of judicial redress that should be granted by the US to EU citizens not resident in the US.’³⁴⁹

3. Surveillance activities of EU Member States

On the other hand, even though actions were undertaken by the EU towards the US, the surveillance activities of several Member States also raised serious problems, as it was revealed that they cooperated with the US in surveillance. Moreover, the UK, Germany, France and some other countries also maintained independent surveillance programmes that were criticised in the press. In this subchapter, we try to collect some of the most important information on them.

It was revealed that the UK government maintained a similar programme called TEMPORA, and others like Sweden, France and Germany also used large-scale Internet interception programmes.³⁵⁰ In the UK in 2015, for example, a court ruled that UK-US surveillance cooperation had been functioning unlawfully for seven years.³⁵¹

Germany's foreign intelligence service, the Bundesnachrichtendienst (BND), has also systematically spied on different foreign politicians, the FBI,³⁵² UN bodies, and even the Vatican.³⁵³ Moreover, German intelligence also spied on NGOs like the International Red Cross and Oxfam. A part of their activities was commissioned by the NSA, while other actions were undertaken on behalf of German interests. Their activities were based on the German law on surveillance (the so-called G 10 law), which is the 2001 Act for Limiting the Secrecy of Letters,

³⁴⁸ Factsheet EU-US Summit Brussels, 26 March 2014 <<http://www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=15245>> accessed 1 August 2016

³⁴⁹ Factsheet Eu-U.S. Summit Brussels, 26 March 2014 <<http://www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=15245>> accessed 1 August 2016

³⁵⁰ Didier Bigo and Sergio Carrera and Nicholas Hernanz and Julien Jeandesboz and Joanna Parkin and Francesco Ragazzi and Amandine Scherrer, ‘Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law’ (2013) CEPS Liberty and Security in Europe Papers No 62 1 <<https://www.ceps.eu/system/files/No%2062%20Surveillance%20of%20Personal%20Data%20by%20EU%20MSs.pdf>> accessed 1 July 2016

³⁵¹ See the case in front of the Investigatory Powers Tribunal: Liberty & Others vs. the Security Service, SIS, GCHQ. IPT/13/77/H 06/02/15.

³⁵² ‘Radio reports say Germany spied on FBI, UN bodies and French foreign minister’ *The Guardian* (1 November 2015) <<https://www.theguardian.com/world/2015/nov/11/germany-spied-fbi-un-bodies-french-foreign-minister>> accessed 1 June 2016

³⁵³ ‘Governments and NGOs: Germany Spied on Friends and Vatican’ *Der Spiegel* (7 November 2015) <<http://www.spiegel.de/international/germany/german-bnd-intelligence-spied-on-friends-and-vatican-a-1061588.html>> accessed 1 June 2016

the Post, and Telecommunications.³⁵⁴ The law serves as an exception to Article 10 of the German Basic Law³⁵⁵ that grants the right to privacy of communication. In France, the importance of the question can be seen in government actions after the Charlie Hebdo attack and after the Paris terrorist attack in November 2015. After the Charlie Hebdo attack,

...[t]he parliament approved a new intelligence law giving more power to France's own spies, partly by legalising activities the intelligence services are already assumed to be doing. The bill was speeded up after the *Charlie Hebdo* attacks in January. Among other things, spies will be allowed to plant hidden microphones, to tap phone and Internet communications and to crunch vast quantities of metadata from private Internet providers. The law prompted little public debate and was passed with strong support from both the left and the right.³⁵⁶

According to some authors, the most debated item of the bill was about Internet 'black boxes'. Such boxes must be installed by Internet operators to technical devices (for example, to internet routers), and they will collect data to detect suspicious online behaviour. Critics claim³⁵⁷ they can be used for mass surveillance.

In 2016, a new law on surveillance was adopted in Poland that was also harshly criticised for breaking away from international norms.³⁵⁸

Surveillance of civil NGOs also took place in several EU Member States. For example in Hungary, after human rights groups faced a crackdown by police and other authorities,³⁵⁹ a black box was found in the Eötvös Károly Institute's (an NGO's) office. Even though we do not know any details,

³⁵⁴ Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses (Artikel 10-Gesetz - G 10) -Artikel 10-Gesetz vom 26. Juni 2001 (BGBl. I S. 1254, 2298), das zuletzt durch Artikel 6 des Gesetzes vom 17. November 2015 (BGBl. I S. 1938) geändert worden ist.

³⁵⁵ Article 10 [Privacy of correspondence, posts and telecommunications] (1) 'The privacy of correspondence, posts and telecommunications shall be inviolable. (2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.'

³⁵⁶ 'I spy, you spy: The French are "shocked, shocked" by American spying—but not their own' *The Economist* (27 June 2015) <<http://www.economist.com/news/europe/21656108-wikileaks-releases-evidence-american-spying-french-say-they-are-shocked-espionage-revealed>> accessed 1 June 2016

³⁵⁷ Félix Tréguer, 'France's Intelligence Bill: legalising mass surveillance' *Open Democracy* (29 April 2015) <<https://www.opendemocracy.net/digitalliberties/felix-tréguer/france's-intelligence-bill-legalises-mass-surveillance>> accessed 1 June 2016

³⁵⁸ Wiktor Szary, 'European Rights Body Says To Review Poland's New Surveillance Law' *Reuters* (14 March 2016) <<http://www.reuters.com/article/us-europe-poland-surveillance-idUSKCNOWG1IC>> accessed 10 June 2016

³⁵⁹ EEA/Norway Grants Fund, 'Government Attacks The Independent Hungarian Civil Sector With Investigations' (EEA/Norway Grants Fund website) <https://norvegcivilalap.hu/en/government_attacks_hungarian_NGOs> accessed 1 June 2016

it seems this action could be part of the government's attacks against NGOs in the country.³⁶⁰ Such actions are possibly part of Hungary's change in political regime, and should be interpreted in this framework. What makes the case ironic is that the latter institute fought for enforcing human rights in Hungary, and was earlier involved in a landmark case³⁶¹ of the ECtHR on government surveillance.³⁶² In this latter case, the court found that 'Hungary's surveillance of private individuals on anti-terror grounds was illegal' and 'the court took issue with the lack of parliamentary oversight and means for judicial redress in the surveillance programme'.³⁶³ However, similar black boxes were found in numerous other places, for example in the office of the directors of the public television channels.³⁶⁴

We must also mention recent accusations against the Russian intelligence services. For example, allegedly Russian government spies hacked the servers of the Democratic National Committee and stole materials,³⁶⁵ tried to get into the 'networks of Trump and Democratic presidential candidate Hillary Clinton, as well as the computers of some Republican political action committees'.³⁶⁶

4. EU actions and the Member States

The problem with such actions of EU Member States is that the EU will hardly be able to represent a human rights centred approach towards the US if there is discrepancy between the

³⁶⁰ FRAME report 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' Work Package No. 3-Deliverable No. 2 see <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 1 July 2016 57 ff

³⁶¹ Szabó and Vissy v. Hungary (App No. 37138/14 (ECtHR, 12 January 2016)

³⁶² International media did not report this incident, even though it could be important for other countries as well.

³⁶³ Catherine Stupp, 'European court's blow to Hungary could draw similar privacy complaints' (*Euractiv*, 14 January 2016) <<http://www.euractiv.com/section/digital/news/european-court-s-blow-to-hungary-could-draw-similar-privacy-complaints/>> accessed 1 May 2016; Katrin Welker, 'Hungary: anti-terrorist surveillance law violates human rights' (*European Centre for Press, Media and Freedom*, 5 February 2016) <<https://ecpmf.eu/news/legal/archive/hungary-anti-terrorist-surveillance-law-violates-human-rights>> accessed 1 June 2016

³⁶⁴ 'Rendszerszerűen hallgatták le a friss köztévés vezetőket' ['New Heads of Public TV Channels Under Systematic Surveillance'] *HVG*, (14 July 2016) <http://hvg.hu/itthon/20160714_Rendszerszeruen_hallgattak_le_a_friss_kozteves_vezetoket> accessed 20 July 2016

³⁶⁵ Ellen Nakashima, 'Russian government hackers penetrated DNC, stole opposition research on Trump' *Washington Post* (14 June 2016) <https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html> accessed 1 July 2016

³⁶⁶ Dustin Volz and Emily Stephenson, 'Russians steal research on Trump in hack of U.S. Democratic Party' *Reuters* (14 June 2016) <<http://www.reuters.com/article/us-usa-election-hack-idUSKCN0Z0205>> accessed 1 July 2016)

practices of its institutions and among its Member States on the approaches to surveillance.³⁶⁷ As it was put by the authors of a report created by the Centre for European Policy Studies (CEPS),

we deceive ourselves in thinking that the EU Member States as a whole and moreover the EU institutions (the Council and the European Commission) can become a strong partner in negotiations with the US in the field of surveillance, despite the efforts of the EU Counter-Terrorism Coordinator. [...] EU Member States have a different attitude towards collaborating with the US in terms of intelligence. This is reflected in their different Member States' national laws that explicitly protect the collaboration between their services and the US from investigation. Therefore, large-scale communications surveillance reveals strong asymmetries at the international level.³⁶⁸

On the other hand, some Member States started to make corrections in their legal systems. In 2016 British lawmakers passed a new surveillance law (see the Investigatory Powers Bill),³⁶⁹ which was created to provide more safeguards for personal data protection, but also expanded the rights of police.³⁷⁰ However, the opposition still demands more security of privacy rights in the law.³⁷¹

Without focusing on enforcing human rights domestically in the EU, it is hard to represent a unified approach externally: if Member States represent very divergent approaches towards surveillance, and the EU is unable (or does not want) to enforce strict rules on privacy matters, it can have a negative effect on EU advocacy abroad. Several other Frame reports have dealt with this question in general, like the Report on coherence of human rights policymaking in EU

³⁶⁷ Questions of coherency in the field of human rights were raised by several other frame reports, see FRAME 'Report on mapping, analysing and implementing instruments'. Work Package No. 6-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 1 July 2016; FRAME report 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' Work Package No. 3-Deliverable No. 2 see <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> accessed 1 July 2016; FRAME 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies' Work Package No. 8-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>> accessed 1 July 2016

³⁶⁸ Bigo D, Carrera S, Hernanz N, Jeandesboz J, Parkin J, Ragazzi F and Scherrer A, 'Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law' (2013) CEPS Liberty and Security in Europe Papers No. 62. 1. <<https://www.ceps.eu/system/files/No%2062%20Surveillance%20of%20Personal%20Data%20by%20EU%20MSs.pdf>> accessed 1 July 2016 30

³⁶⁹ Investigatory Powers Bill (HC Bill 143)

³⁷⁰ 'Surveillance law: Revised bill adds privacy safeguards' (BBC, 2 March 2016) <<http://www.bbc.com/news/uk-politics-35689432>> accessed 1 July 2016

³⁷¹ Rowena Mason, 'Labour demands more privacy safeguards in new surveillance laws' *The Guardian* (4 April 2016) <<https://www.theguardian.com/world/2016/apr/04/labour-seeks-curbs-over-new-surveillance-law>> accessed 1 May 2016

Institutions and other EU agencies and bodies,³⁷² which was also discussed by the Council of the EU.³⁷³ Another report also raised very similar general problems of inconsistencies without discussing the topic of surveillance.³⁷⁴

Furthermore, in a number of cases the EU's aims also seem to be lost in the security versus human rights dilemma (see below). The inconsistencies behind EU and Member States actions can undermine the efficiency of the EU's foreign policy actions. A good example of this is NSA Director General Keith B. Alexander's speech at the Baltimore Council on Foreign Affairs, in which he referred to the fact that French authorities are also spying on the US. As he expressed it: 'That doesn't mean that we don't have focused intelligence programs on France and France doesn't have one on us and each and everybody else'.³⁷⁵ This shows that the activities of European states can be used as an excuse for foreign intelligence services in political disputes, even among allies. On the other hand, intelligence must be conducted in a way that respects human rights, and we also see EU efforts to enforce this principle (see the next chapter for detail).

In the following, we try to recap the most important rules of the EU regarding surveillance, private data and EU-US cooperation.

C. Privacy and Human Rights in the EU

Apart from the question whether mass storage of personal data or surveillance are useful or not from the aspect of security,³⁷⁶ rules allowing easier access to private data have serious human

³⁷² FRAME 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies' Work Package No. 8-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>> accessed 1 July 2016

³⁷³ Council of the European Union, 'Coherence and consistency between internal and external EU human rights policy' 6256/16:

the FRAME-research proposes that coherence should be understood to mean policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of human rights policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States). ... Consistency is seen in this study as an element of coherence, in the sense that it shows a coordinated effort in policy-making, coherence is a broader terms that encompasses both practical policymaking concerns as well as the structures and interests influencing and shaping policies.

³⁷⁴ FRAME 'Report on mapping, analysing and implementing instruments'. Work Package No. 6-Deliverable No. 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> accessed 1 July 2016

³⁷⁵ Available at <<https://www.youtube.com/watch?v=ygKcksuHi4M>> at 39:50

³⁷⁶ Several authors criticize mass surveillance and related metadata programs, since according to their views, it is not a useful tool to hinder terrorist acts, see e.g. Bailey Cahall, Peter Bergen, David Sterman, Emily Schneider Do NSA's Bulk Surveillance Programs Stop Terrorists?' Report of the New America Foundation 1 <<https://www.newamerica.org/international-security/policy-papers/do-nsas-bulk-surveillance-programs-stop-terrorists/>> accessed 1 July 2016:

rights implications. In this subchapter, we try to review the most important rules on privacy issues within the EU. These rules set the framework of the protection of privacy in the EU and in international relations as well, and as such, they have great relevance regarding our connection with the US as well. First we recap the rules on fundamental rights briefly, and then move on to more special rules of data protection.

1. Fundamental rights

Article 7 of the Charter of Fundamental Rights of the EU stresses that everyone has the right to respect for his or her private and family life, home and communications, and (consequently) authorities must respect private and family life.

Article 8 of the Charter says the following on the protection of personal data:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.'

Furthermore, the EU also created a European Data Protection Supervisor (EDPS) for EU institutions.³⁷⁷ The EDPS receives complaints from staff members or from people outside of EU institutions who think that their personal data was mishandled by an EU institution. Moreover, s/he may also start an investigation on his own initiative. As a result s/he may adopt a report as well as administrative actions.

We must mention that protection of personal data is also set out by the European Convention on Human Rights, in Article 8, which talks about the right to respect for private and family life. Some other articles of the ECHR can also be important regarding surveillance, like Article 13 on the right to an effective remedy. Based on these provisions, the Council of Europe adopted several decisions concerning surveillance – the majority of them were in connection with surveillance or

an in-depth analysis of 225 individuals recruited by al-Qaeda or a like-minded group or inspired by al-Qaeda's ideology, and charged in the United States with an act of terrorism since 9/11, demonstrates that traditional investigative methods, such as the use of informants, tips from local communities, and targeted intelligence operations, provided the initial impetus for investigations in the majority of cases, while the contribution of NSA's bulk surveillance programs to these cases was minimal.

³⁷⁷ Ian Cameron, 'Oversight of Intelligence Agencies: The European Dimension' in Goldman ZK and Rascoff SJ (eds), *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (OUP 2016).

privacy of individuals, and were less focused on mass surveillance or metadata.³⁷⁸ However, some of these cases have great relevance, like the Weber case, which set the

criteria for determining the lawfulness of secret surveillance and interference of communications and to avoid 'abuse of powers' and arbitrariness. The Court underlined that the risks of arbitrariness are particularly evident in those cases where a power vested in the executive is exercised in secret, and held: It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated... The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.³⁷⁹

If we put the problem into a broader perspective, we can ascertain that finding the proper answers³⁸⁰ to terrorism causes the EU and its Member States serious problems. Some commentators claim that the war on terror had a detrimental effect on the rule of law and has even led to centralisation on the institutional side: the Council received powers to deal with the

³⁷⁸ Douwe Korff 'Passenger Name Records, data mining & data protection: the need for strong safeguards' Council of Europe, Strasbourg, 15 June 2015 T-Pd(2015)11 Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-Pd) 42, 51 <[https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD\(2015\)11_PNR%20draft%20report%20Douwe%20Korff%20&%20Marie%20Georges_15%2006%202015.pdf](https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2015)11_PNR%20draft%20report%20Douwe%20Korff%20&%20Marie%20Georges_15%2006%202015.pdf)> accessed 1 July 2016; Peter Marguiles also criticises the judgments of the ECHR:

in failing to give Britain detention authority required to effectuate a U.N. Security Council resolution authorizing occupation in post-Saddam Hussein Iraq, the Court also failed to show appropriate respect for the role of the Security Council in ensuring world order.

Peter Marguiles, 'The NSA In Global Perspective: Surveillance, Human Rights, And International Counterterrorism' (2014) 82 Fordham Law Review 2137 2156.

³⁷⁹ Bigo et al, 'Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law' (2013) CEPS Liberty and Security in Europe Papers No 62 21 <<https://www.ceps.eu/system/files/No%2062%20Surveillance%20of%20Personal%20Data%20by%20EU%20OMSS.pdf>> accessed 1 July 2016p; Weber and Saravia v Germany (2008) 46 EHRR SE5; Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' (2015) 31 Utrecht Journal of International and European Law 104

³⁸⁰ For different options on answering terrorism in general see András Jakab, 'Breaching Constitutional Law On Moral Grounds In The Fight Against Terrorism: Implied Presuppositions And Proposed Solutions In The Discourse On 'The Rule Of Law Vs. Terrorism' (2011) 9 International Journal of Constitutional Law 58; Eric A. Posner, Adrian Vermeule, *Terror In The Balance. Security, Liberty, And The Courts* (OUP 2007). Regarding this latest book, our opinion stands closer to those trying to defend human rights, see Alice Ristroph, 'Reviewing Eric Posner & Adrian Vermeule, *Terror In The Balance: Security, Liberty, And The Courts* (Oxford 2007)' (2008) 11 Green Bag 243

most crucial questions raised, while the European Parliament is left at the side lines.³⁸¹ For example,

the Framework Decision on Combating Terrorism, the Framework Decision on the European Arrest Warrant, as well as the later EU-US Passenger Name Record Agreements, were all adopted through processes which sidelined the European Parliament.³⁸²

The dilemma between human rights and security can also be seen in France's derogation³⁸³ of the ECHR and the introduction of the state of emergency, which was later renewed, while scholars, protesters and NGOs claim the maintenance of the state of emergency can seriously violate human rights.³⁸⁴

2. Special rules

The EU started to adopt legislation on questions related to data protection in 1995, when the data protection directive was adopted.³⁸⁵ According to the Directive, personal data could be transferred to third countries only if there is adequate (i.e. essentially equivalent) protection for them.³⁸⁶ From 2012, a general reform of the existing rules began,³⁸⁷ and in April 2016 a new

³⁸¹ Cian C. Murphy, 'EU Counter-Terrorism and the Rule of Law in a post-'War on Terror' World' in Scheinin M (ed), 'European and United States Counter-Terrorism Policies, the Rule of Law and Human Rights' EUI RSCAS Policy Paper 2011/03 11 ff. <http://cadmus.eui.eu/bitstream/handle/1814/18055/RSCAS_PP_2011_03%20.pdf?sequence=1&isAllowed=y> accessed 15 July 2016

³⁸² Ibid 2. For a deeper analysis of the European Parliament's role regarding passenger name record, see Elaine Fahey, 'Of One Shotters and Repeat-Hitters: A Retrospective on the Role of the European Parliament in the EU-USPNR Litigation' in Davies B and Nicola F (eds), EU Law Stories (CUP, 2015)

³⁸³ 'France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights' (CoE website, 25 November 2015) <http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/france-informs-secretary-general-of-article-15-derogation-of-the-european-convention-on-human-rights> accessed 1 June 2016

³⁸⁴ Jan-Peter Loof, 'The French 'post-Paris' state of emergency and its implications for the protection of human rights' (Leiden Law Blog, 3 March 2016) <<http://leidenlawblog.nl/articles/the-french-post-paris-state-of-emergency-and-its-implications-for-the-prote>> 1 June 2016; 'Liberté, Liberté chérie... where things can go wrong. The French reaction to the terrorists attack in Paris' (Renforce Blog of Utrecht Centre For Regulation and Enforcement in Europe – 1 February 2016) <blog.renforce.eu/index.php/nl/2016/02/01/liberte-liberte-cherie-where-things-can-go-wrong-the-french-reaction-to-the-terrorists-attack-in-paris/#more-344> accessed 2 June 2016

³⁸⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31

³⁸⁶ Peter Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

³⁸⁷ W. Gregory Voss, 'Looking at European Union Data Protection Law Reform through a Different Prism: the Proposed EU General Data Protection Regulation Two Years Later' (2014) 24 Journal of Internet Law 12 ff

regulation was adopted, replacing the old directive.³⁸⁸ The reform was intended to strengthen citizens' rights and build trust between states, businesses and citizens. As the related press release states,

citizens will have more information on how their data is processed, presented in a clear and understandable way. They will have the right to know as soon as possible if their data has been hacked or disclosed. The right to be forgotten will be clarified and strengthened. Already in the EU, individuals have the right, under certain conditions, to ask that search engines remove links leading to personal information about them. This right however must be well balanced against the right to freedom of expression. It will also be easier for people to transfer their personal data between service providers such as social networks – thanks to a new right to data portability.³⁸⁹

On the other hand, in 2014, another directive³⁹⁰ on data retention was annulled by the ECJ, because it violated the right to privacy.³⁹¹ This latter directive was adopted to harmonise the rules on data-retention among the Member States. However, the ECJ found the directive gave too many rights to law enforcement by allowing access to telephone and Internet metadata.

3. Passenger Name Records (PNR)

Point 27 of the EU's Counter Terrorism Strategy³⁹² also emphasised the need for more cooperation in the field of data transfer within the EU. Later, especially after the Charlie Hebdo attack and the Paris attack in France in 2015 November, one of the key provisions of counter-terrorism measures³⁹³ was to create a system of passenger name records (PNR - containing data

³⁸⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/1

³⁸⁹ 'Joint Statement on the final adoption of the new EU rules for personal data protection Brussels' (14 April 2016) <http://europa.eu/rapid/press-release_STATEMENT-16-1403_hu.htm> accessed 1 June 2016

³⁹⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54

³⁹¹ Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others ECLI:EU:C:2014:238

³⁹² Council of the European Union, 'EU counter terrorism Strategy' 14469/4/05 Rev 4

³⁹³ Council of the European Union, 'Follow-up to the statement of the Members of the European Council of 12 February 2015 on counter-terrorism: State of play on implementation of measures' 12318/15; Francesco Strazzari, Eva Magdalena Stambøl, 'We Saw it Coming: Jihadist Terrorism, Challenges for the European Union' Norwegian Institute of International Affairs. Policy Brief 13/2015 3 <<https://brage.bibsys.no/xmlui/bitstream/handle/11250/284446/NUPI%2BPolicy%2BBrief-13-15-Strazzari-Stamb%C3%B8l.pdf?sequence=3&isAllowed=y>> accessed 15 June 2016

of travelling passengers). PNR is transferred to authorities automatically; instead of manually as in the former system,³⁹⁴ in which a transfer only took place after a demand was received from authorities. The EU claimed such cooperation could fasten the procedures of authorities in counter-terror actions. In the future, data for flights entering or departing from the EU must get forwarded to the national authorities, and (as an option, not obligation) Member States may also ask to forward data on certain intra-EU flights. According to the arguments in favour of such a directive, the cooperation could help prevention and investigation of terrorist offences. After long debates between data protection advocates and more supportive members of EU institutions,³⁹⁵ in April 2016 the Council adopted the directive on the PNR.³⁹⁶ The Preamble of the Directive says that

Member States should exchange the information among each other through relevant information exchange networks to facilitate information sharing and ensure interoperability,

and also that

Member States should exchange the PNR data that they receive among each other and with Europol, where this is deemed necessary for the prevention, detection, investigation or prosecution of terrorist offences or serious crime.

On the other hand, the directive also stresses that transfers of PNR data to third countries are only permitted on a case-by-case basis and the transfer must be in full compliance with the provisions laid down by Member States pursuant to Framework Decision 2008/977/JHA,³⁹⁷ which sets the rules of data transfers to third countries. The transfer should also be subject to the principles of necessity and proportionality and to the ‘high level of protection’ provided by the Charter of Fundamental Rights and the ECHR.

Some groups within the European Parliament as well as outside of EU institutions opposed the legislation, since in their view it could lead to the infringement of people’s privacy while there

³⁹⁴ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [2004] OJ L261/24 Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L200/1

³⁹⁵ ‘MEPs reject EU passenger data storage scheme’ (EurActiv, 24 April 2013) <<http://www.euractiv.com/section/digital/news/meps-reject-eu-passenger-data-storage-scheme/>> accessed 11 June 2016

³⁹⁶ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. [2016] OJ L119/132

³⁹⁷ Council Framework Decision 2008/977/JHA Of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. [2008] 350/60

was no proof that mass collection of data would help combat terrorism. Others claimed it could lead to profiling, including racial profiling.³⁹⁸ Critics in the European Parliament argued for more cooperation among Member States' authorities instead. On the other hand, official EU statements defended the proposal and the usefulness and efficiency of PNR. First Vice-President Timmermans and Commissioner Avramopoulos even issued a Joint statement on the adoption of the EU PNR Directive, which stressed that

this is a strong expression of Europe's commitment to fight terrorism and organised crime together through enhanced cooperation and effective intelligence sharing. The atrocious terrorist attacks in Paris on 13 November last year and Brussels on 22 March showed once more that Europe needs to scale up its common response to terrorism and take concrete actions to fight it. The EU PNR Directive will be an important contribution to our common response.

The EU PNR Directive will improve the safety and security of our citizens, while also including robust privacy and data protection safeguards ensuring full compliance with the right to data protection.

The processing of PNR data is an effective and much needed tool for Europe to prevent and fight terrorist activity and serious crime. The use of PNR data can sometimes be the only means for law enforcement authorities to identify previously unknown individuals who might be involved in criminal activity and pose a threat to our public safety, and to identify and trace criminal networks and travel patterns. PNR data can be used for prevention as well as investigation and prosecution of terrorist offences.³⁹⁹

4. EU-US cooperation and PNR

The EU also adopted decisions on the safety of private data systems of different countries.⁴⁰⁰ With the US, the EU concluded a whole package of agreements on this subject. An agreement on the transfer of PNR data by air carriers to the United States was signed⁴⁰¹ with the Department of

³⁹⁸ Douwe Korff, 'Passenger Name Records, data mining & data protection: the need for strong safeguards' Council of Europe, Strasbourg, 15 June 2015 T-Pd(2015)11 Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (T-Pd) 22 <[https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD\(2015\)11_PNR%20draft%20report%20Douwe%20Korff%20&%20Marie%20Georges_15%2006%202015.pdf](https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2015)11_PNR%20draft%20report%20Douwe%20Korff%20&%20Marie%20Georges_15%2006%202015.pdf)> accessed 1 July 2016

³⁹⁹ 'Joint Statement by First Vice-President Timmermans and Commissioner Avramopoulos on the adoption of the EU Passenger Name Record (PNR) Directive by the European Parliament' (14 April 2016) <http://europa.eu/rapid/press-release_STATEMENT-16-1404_en.htm> accessed 1 June 2016

⁴⁰⁰ 'Commission decisions on the adequacy of the protection of personal data in third countries' <http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm>

⁴⁰¹ Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air

Homeland Security, Bureau of Customs and Border Protection in 2004. Later, however, the ECJ annulled the conclusion of the agreement.⁴⁰² In this judgment, the court stressed the lack of EU powers to act under the EC Treaty. The judgment stated:

the transfer of PNR data constitutes processing operations concerning public security and the activities of the State in areas of criminal law, and does not therefore fall within the scope of the Directive on the protection of personal data.⁴⁰³

The cooperation continued with agreements on data transfer in 2006,⁴⁰⁴ 2007⁴⁰⁵ and 2012, which brought PNR back into the sphere of EU-US cooperation.⁴⁰⁶ These agreements contained some additional rights, but also had some weak points. They added some important safeguards to the text of the agreement, for example the 2006 agreement

‘extends the privacy protections found in the Privacy Act of 1974 (*see later*) and the Freedom of Information Act to non-U.S. citizens and provides a system of redress for persons seeking information about or correction of PNR. In addition, the Revised Agreement provides assurances from the Department of Homeland Security that it will provide to airlines a form of notice concerning PNR collection and redress practices to be available for public display [and]... will work with interested parties in the aviation industry to promote greater visibility of this notice. Finally, the Revised Agreement adopts the push system of transmitting PNR.’⁴⁰⁷

Using the ‘push’ method, carriers transmit the PNR data into the database of the requesting authority, instead of allowing direct access of the authority to their databases. Direct access

Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] OJ L183/83

⁴⁰² Joined cases C-317/04 and C-318/04 *European Parliament v Council of the European Union (C-317/04) and Commission of the European Communities (C-218/04)* ECLI:EU:C:2006:346

⁴⁰³ European Commission Legal Service, ‘Summary of C-317/04 *European Parliament v Council and C-318/04 European Parliament v Commission*’, <http://ec.europa.eu/dgs/legal_service/arrets/04c317_en.pdf>

⁴⁰⁴ Council Decision 2006/729/CFSP/JHA of 16 October 2006 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security [2006] OJ L298/27

⁴⁰⁵ Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) [2007] OJ L204/16

⁴⁰⁶ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security [2012] OJ L215/5

⁴⁰⁷ Matthew R. VanWasshnova ‘Data Protection Conflicts between the United States and the European Union in the War on Terror: Lessons Learned from the Existing System of Financial Information Exchange’ (2007-2008) 39 *Case Western Reserve Journal of International Law* 827 838.

would mean that US authorities could search any time in the database of a company ('pull method'), while using the pull method, authorities must ask them to give them the data. However, the revised agreements also had weakened some of the safeguards:⁴⁰⁸ they extended the retention period from three and one-half years to fifteen years, allowed the Department of Homeland Security to use sensitive PNR data elements and required 'the airlines to transfer new PNR data that were not required under the previous agreements, including additional baggage and frequent flyer information.'⁴⁰⁹

Apart from these agreements, there exist other actions which may also be important such as the processing of EU originating personal data for counter terrorism purposes,⁴¹⁰ the 2010 Agreement on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the terrorist finance tracking programme.⁴¹¹ Some other sources such as the Agreement on mutual assistance⁴¹² can also be important, as mutual legal assistance treaties can be used to obtain electronic communications.⁴¹³

The frameworks of electronic data transfer were set out by the Commission: the EU and the US agreed on a framework set out in a Commission Decision:⁴¹⁴

Following negotiations between the United States and the EU, the parties agreed on a mechanism that would allow U.S. companies to meet the "adequate level of protection" [...]. In 2000, the U.S. Department of Commerce issued the Safe Harbor

⁴⁰⁸ For a thorough comparison of the three agreements see <<http://www.statewatch.org/news/2012/jan/Comparison%20eu-usa-pnr-agreement-comparative-chart-2004-2007-2011.pdf>> accessed 1 July 2016

⁴⁰⁹ Matthew R. VanWasshova 'Data Protection Conflicts between the United States and the European Union in the War on Terror: Lessons Learned from the Existing System of Financial Information Exchange' (2007-2008) 39 Case Western Reserve Journal of International Law 827 839.

⁴¹⁰ Processing of EU originating Personal Data by United States Treasury Department for Counter Terrorism Purposes — SWIFT [2007] OJ C166/18

⁴¹¹ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program [2010] OJ L195/5

⁴¹² Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America [2009] OJ L 291/40

⁴¹³ Didier Bigo and Sergio Carrera and Nicholas Hernanz and Julien Jeandesboz and Joanna Parkin and Francesco Ragazzi and Amandine Scherrer, 'Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law' (2013) CEPS Liberty and Security in Europe Papers No 62 25 ff <<https://www.ceps.eu/system/files/No%2062%20Surveillance%20of%20Personal%20Data%20by%20EU%20MSs.pdf>> accessed 1 July 2016

⁴¹⁴ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) (Text with EEA relevance.). [2000] OJ L215/7

Privacy Principles,⁴¹⁵ which were subsequently recognized by the European Commission.^{416 417}

Under the Safe Harbour Framework, US companies were allowed to self-certify as giving adequate protection for the data of European users, and thereby receiving data from companies in Europe. Such companies included Facebook, Apple, Microsoft and Google. This system was useful for allowing the transfer of personal data to the US, without the need to ask for consent, whoever the data came from.

On the other hand, it became relatively quickly known that the transparency of data protection in the US is problematic. As a report by the European Commission states

A substantial number of organisations that have adhered to the Safe Harbour are not observing the expected degree of transparency as regards their overall commitment or the contents of their privacy policies. Transparency is a vital feature in self-regulatory systems and it is necessary that organisations improve their practices in this regard, failing which the credibility of the arrangement as a whole risks being weakened.⁴¹⁸

5. The Schrems case

The legality of this framework was challenged, when Max Schrems, an Austrian citizen, started to litigate against Facebook in Ireland, because the company transferred data to the NSA. According to his interpretation, he could not verify whether his data is stored in a secure environment, which may violate the Charter of Fundamental Rights of the European Union.⁴¹⁹ In its judgment, the CJEU overturned the Safe Harbour Agreement. As the judgment stressed in point 91,

As regards the level of protection of fundamental rights and freedoms that is guaranteed within the European Union, EU legislation involving interference with the

⁴¹⁵ U.S. Department of Commerce, 'Safe Harbor Privacy Principles' July 21, 2000 <https://www.coe.int/t/dghl/standardsetting/dataprotection/National%20laws/USA_SAFE%20HARBOR%20PRIVACY%20PRINCIPLES.pdf> accessed 1 June 2016

⁴¹⁶ Martin A. Weiss, Kristin Archick, 'The EU-U.S. Safe Harbor Agreement on Personal Data Privacy: In Brief' October 29, 2015. Congressional Research Service 7-5700, R44257 <<https://www.fas.org/sgp/crs/misc/R44257.pdf>> accessed 1 August 2016

⁴¹⁷ See Commission Decision 2000/520/EC

⁴¹⁸ Commission Staff Working Paper - The application of Commission Decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce SEC(2002) 196 It is worth to compare its statements with Esther Kersley, 'Mass surveillance: security by 'remote control' - consequences and effectiveness' Remote Control Briefing Paper August 2015, available at <<http://remotecontrolproject.org/wp-content/uploads/2015/07/Mass-surveillance-briefing-paper.pdf>> accessed 1 July 2016

⁴¹⁹ Case 362/14 *Maximilian Schrems v Data Protection Commissioner* EU:C:2015:650

fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data.

In the Court's argumentation, each country's national regulators have the right to suspend transfers if a US company does not adequately protect user data properly: that was the main reason why the Court struck down the Commission Decision 2000/520/EC⁴²⁰ which expressed that the US is a safe country regarding data protection. Thus, even if the Commission has adopted a decision,

the national supervisory authorities, when dealing with a claim, must be able to examine, with complete independence, whether the transfer of a person's data to a third country complies with the requirements laid down by the Data protection directive.⁴²¹

Furthermore, it was also expressed that the US was 'failing to ensure a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order'.⁴²²

After the CJEU decision, a new trial was started against the Facebook company in Ireland in 2016 by Mr Schrems. In this new trial he claimed the company still does not apply EU privacy rules properly. Please note that in a peculiar way, the US Government also expressed its desire to participate in this procedure: it asked the Irish High Court to be joined as an amicus⁴²³. In this latter case, Mr. Schrems attacked the methods Facebook used after the first CJEU decision.

⁴²⁰ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) (Text with EEA relevance.). [2000] OJ L215/7 7

⁴²¹ 'The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid' (Court of Justice of the European Union, 6 October 2015), Press release 117/15 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>> accessed 2 June 2016

⁴²² Some scholars disagree with this statement, see Peter P Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 1, 3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴²³ 'NSA mass surveillance: US Government wants to intervene in European Facebook-Case' <www.europe-v-facebook.org/PR_MC-US.pdf> accessed 1 August 2016

6. The latest corrections

As an answer, the European Commission and the United States have agreed on a new framework for transatlantic data flows in 2016 and created the so-called EU-US Privacy Shield,⁴²⁴ and the Commission proposed an EU-US Data Protection Umbrella Agreement.⁴²⁵

According to the official statements and a Communication from the Commission to the European Parliament and the Council on transatlantic data flows,⁴²⁶ the shield created ‘strong obligations on companies handling Europeans’ personal data and robust enforcement’, ‘clear safeguards and transparency obligations on U.S. government access’ and ‘create effective protection of EU citizens’ rights with several redress possibilities’. In July 2016 Member States approved the final version of the shield. Commissioner Jourová stressed that the shield

is fundamentally different from the old ‘Safe Harbour’: It imposes clear and strong obligations on companies handling the data and makes sure that these rules are followed and enforced in practice. For the first time, the U.S. has given the EU written assurance that the access of public authorities for law enforcement and national security will be subject to clear limitations, safeguards and oversight mechanisms and has ruled out indiscriminate mass surveillance of European citizens’ data. And last but not least the Privacy Shield protects fundamental rights and provides for several accessible and affordable redress mechanisms.⁴²⁷

After having reviewed the history of legal cooperation between the EU and US on personal data protection, we shortly recap the most important legal sources regarding surveillance activities in the US, and also the most important questions raised from the point of view of the European Union.

D. The US Legal Background

In this chapter, we try to overview the most important US regulations; we begin with the rules of international law, since these are the rules that were central to disputes regarding the US, since they could serve as an external framework of policies.

⁴²⁴ European Commission, ‘EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield’. (Rapid Press release, 2 February 2016) <http://europa.eu/rapid/press-release_IP-16-216_en.htm> accessed 1 June 2016

⁴²⁵ Commission, ‘Proposal for a Council Decision on the signing, on behalf of the European Union, of an Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offense’ COM (2016) 238 final

⁴²⁶ Commission Communication from the Commission to the European Parliament and the Council, ‘Transatlantic Data Flows: Restoring Trust through Strong Safeguards’ COM (2016) 117 final

⁴²⁷ Commission, ‘Statement by Vice-President Ansip and Commissioner Jourová on the occasion of the adoption by Member States of the EU-U.S. Privacy Shield’ <http://europa.eu/rapid/press-release_STATEMENT-16-2443_en.htm> accessed 1 August 2016

1. International law

We already mentioned in the introductory part of the present report that US accession to human rights treaties is a complicated issue, and this has an effect on privacy laws and surveillance as well. Hereby, we firstly briefly present the main provisions, which could bind the US.

The two main fundamental international law documents which could be relevant regarding surveillance and privacy rules regarding the US is the UNDHR and the ICCPR. One of general relevant components can be found in the UNDHR from 1948. Article 12 of the Declaration says that

no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Apart of the UNDHR, the right to privacy is also codified in Art. 17 of ICCPR from 1966. It says that

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

On the other hand, in the case of US, to use these sources seem to be a more complex problem.⁴²⁸ The US ratified ICCPR in 1992, but submitted a number of reservations, declarations and understandings. Moreover, the Senate made a statement that the provisions of ICCPR are not self-executing.⁴²⁹ It also stressed that the ICCPR cannot be applied directly and it relies on the language of Article 2(1) limiting a state's duty to individuals 'within its territory and subject to its jurisdiction': this is the dispute on the extraterritorial application of the ICCPR. The US claim is disputed by many scholars and some states,⁴³⁰ but is still maintained by the US Government. As Anne Peters expressed it:

⁴²⁸ Anne Peters, 'Surveillance without Borders: The Unlawfulness of the NSA Panopticon, Part II' EJIL online <www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon-part-ii/> accessed 1 June 2016

⁴²⁹ For this problem see David Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' (1999) 24 Yale Journal Of International Law 129.

⁴³⁰ Aldo S. Zilli, 'Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR'. (2011) 9 Santa Clara Journal of International Law 399 ff; Peter Marguiles, 'The NSA In Global Perspective: Surveillance, Human Rights, And International Counterterrorism' (2014) 82 Fordham Law Review 2137 2138.; Ashley Deeks, 'An International Legal Framework for Surveillance'. (2015) 55 Virginia Journal Of International Law 291 308 ff; Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 International Law Studies 20 27 ff

it is generally assumed that the US-American culture lays a strong emphasis on the protection of privacy, more so than European legal culture. In fact, the concept of privacy is an Anglo-American one which only in the last decades has been received in Europe. In the post-9/11 constellation, sensibilities seem to have been reversed. Or it may be that Americans care more about their own privacy under US-constitutional law, as opposed to foreign citizens' privacy. But international law does not allow this type of gazing without being seen; it prohibits the modern Panopticon.⁴³¹

This means that the provisions of the Covenant cannot be used before US courts – i.e. they do not have direct effect before US courts, and especially not if they are used for activity targeted abroad, which have some special rules (see later in this report). In July 2013, Germany expressed its interest in amending ICCPR or adding a protocol to the Convention. The German intention was to clarify the rules on the right to privacy in the text by adding concrete provisions on the applicability of the Convention, thereby clearing all the disputes surrounding its application. In the interpretation of the German government, such a clarification could be used force US to apply the Covenant properly. However, that time it was also announced that

the Justice Ministry has said that it is in the process of drawing up a treaty revision that would regulate intelligence agencies' access to communications data. But a finished draft does not yet exist, and the negotiations over amending Article 17 of the ICCPR will likely take years to complete.⁴³²

2. Constitutional guarantees

The US Constitution also contains a rule that can be relevant. The Fourth Amendment says that

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴³³

The general provisions of the fourth amendment are interpreted in special laws.

⁴³¹ Anne Peters, 'Surveillance without Borders: The Unlawfulness of the NSA Panopticon, Part II' EJIL online <www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon-part-ii/> accessed 1 June 2016

⁴³² Matthias Bölinger, 'Berlin Calls for Global Data Protection Rules' (Deutsche Welle, July 16 2013) <<http://www.dw.de/berlin-calls-for-global-data-protection-rules/a-16952477>> accessed 1 August 2016

⁴³³ For its connection with the Patriot Act mentioned below see e.g. Joseph D. Mornin, 'NSA Metadata Collection And The Fourth Amendment' (2014) 29 Berkeley Technology Law Journal 985 995 ff. See also United States v. Jones, 132 S. Ct. 945, 565 U.S. ____ (2012); Katz v. United States, 389 U.S. 347 (1967)

3. Special laws

US law is really fragmented in the field of data protection and surveillance, and contains numerous rules that contain special provisions either about data protection, or surveillance activities.

Firstly, we must mention the 1978 Foreign Intelligence Act (FISA),⁴³⁴ which sets the general framework for foreign intelligence, and also created an independent court, the Foreign Intelligence Surveillance Court.⁴³⁵ After 1978, 'wiretraps and electronic surveillance for foreign intelligence purposes, conducted within the US could only be done by approval by a FISC judge'.⁴³⁶ FISA serves as the general framework of NSA activities. However, a Reagan executive order also added to the framework of the surveillance authority. This Executive Order 12,333 (the so called 'twelve triple three') extended the NSA's mandate and gave more authority to the Agency, and reshaped the powers of the CIA, the FBI and the NSA. The Order also sets the limits of gathering information on U.S. citizens abroad, but excludes foreign citizens.⁴³⁷ The Order talks about the protection of United States persons, which means

a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.⁴³⁸

Several other laws should be mentioned here as well, like the Omnibus Crime Control and Safe Streets Act of 1968 (the Wiretap Statute), which was adopted to prevent government access to private electronic communications, or its modification from 1986 called Electronic Communications Privacy Act of 1986. It was later amended by the Communications Assistance for Law Enforcement Act (CALEA) of 1994.

In 2001 the Patriot Act was adopted,⁴³⁹ to be followed by the Patriot Reauthorization Act in 2006, while the FISA was also modified in 2008. The Patriot Act expanded the scope and availability of wiretapping and surveillance, making broader surveillance activities available. One reason why

⁴³⁴ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801-1811 (2000)

⁴³⁵ Peter P. Swire, 'The System of Foreign Intelligence Surveillance Law' (2004) 72 *George Washington Law Review* 1306 1315 ff; Peter P. Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴³⁶ Ibid 8.

⁴³⁷ Executive Order 12333 (December 4, 1981), 3 C.F.R. 200 (1981) See also Margo Schlanger, 'Intelligence Legalism and the National Security Agency's Civil Liberties Gap' (2015) 6 *Harvard National Security Journal* 112 129 ff

⁴³⁸ Section 3.4(i)

⁴³⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 204, 115 Stat. 272, 281 (amending 18 U.S.C. § 2511(2)(f) (2000 & Supp. III 2003))

the Patriot Act was criticised was that it allowed the FBI to search telephone, email, and financial records without a court order.⁴⁴⁰

Moreover, also in 2001, the Aviation and Transportation Security Act of 2001 (ATSA) was adopted, which required

all airline carriers operating to, from, or across U.S. territory to provide the U.S. Customs and Border Protection Bureau (U.S. Customs) with electronic access to the PNR data contained in their reservation and departure control systems. ATSA also provides that the information transmitted to U.S. Customs may be shared with other Federal agencies for the purpose of protecting national security. Airlines that did not comply with ATSA could be subject to fines or a revocation of landing rights.⁴⁴¹

Later, in the long run, as a result of the public debate surrounding the Patriot Act, several reforms took place to advance US privacy law, for example an Email Privacy Act protecting email contents was passed with a 419-0 vote in the House.⁴⁴² In 2014, a Presidential Policy Directive on Signals Intelligence Activities (the PPD-28) was adopted to develop the system in a more democratic way.⁴⁴³ This Directive expressed that ‘privacy and civil liberties shall be integral considerations in the planning of U.S. signals intelligence activities’, and that ‘the collection of signals intelligence shall be authorized by statute or Executive Order, proclamation, or other Presidential directive’. In 2015, the Judicial Redress Act of 2015 was adopted, which amends the Privacy Act of 1974. However, this Act failed to extend Privacy Act protections to non-US citizens.⁴⁴⁴ Also in 2015, the Senate adopted the US Freedom Act to end the NSA’s controversial bulk collection of phone call metadata.⁴⁴⁵

⁴⁴⁰ The American Civil Liberties Union also protested against the law, and later also claimed it was not efficient, see ACLU, ‘Surveillance Under The Patriot Act’ <<https://www.aclu.org/infographic/surveillance-under-patriot-act>> accessed 1 June 2016

⁴⁴¹ Matthew R. VanWasshova, ‘Data Protection Conflicts between the United States and the European Union in the War on Terror: Lessons Learned from the Existing System of Financial Information Exchange’ (2007-2008) 39 Case Western Reserve Journal of International Law 827 833.

⁴⁴² Dustin Volz, ‘Email privacy bill unanimously passes U.S. House’ (*Reuters*, April 27 2016) <<http://www.reuters.com/article/us-usa-congress-email-idUSKCN0XO1J7>> accessed 1 July 2016

⁴⁴³ Exec. Office of the President, Presidential Policy Directive 28: Signals Intelligence Activities (2014) . For its content see Peter P Swire, ‘US Surveillance Law, Safe Harbor, and Reforms Since 2013’ Georgia Tech Scheller College of Business Research Paper No. #36 23 ff <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴⁴⁴ Electronic Privacy Information Center (EPIC), ‘Judicial Redress Act’ Provides Little Redress’ (State Watch, 21 February 16) <<http://www.statewatch.org/news/2016/feb/eu-usa-redress-act-epic.htm>> accessed 1 June 2016

⁴⁴⁵ Erin Kelly, ‘Senate approves USA Freedom Act’ *USA Today* (2 June 2015) <<http://www.usatoday.com/story/news/politics/2015/06/02/patriot-act-usa-freedom-act-senate-vote/28345747/>> accessed 1 August 2016

4. Crucial provisions

Some provisions of the above mentioned laws could be especially important from the perspective of EU-US cooperation. The first one is Section 702 of FISA, and another is Section 215 of the Patriot Act, which form the cores of investigations. Below we recap their most important content.

Section 702 of FISA regulates the concrete set up of foreign surveillance, and also serves as the background framework for setting up the intelligence programmes PRISM and Upstream⁴⁴⁶ (which were mentioned in the introduction part of the present report):

[U]nder § 702, the government may conduct surveillance targeting the contents of communications of non-U.S. persons reasonably believed to be located abroad when the surveillance will result in acquiring foreign intelligence information.⁴⁴⁷

The NSA interpreted Section 702 as an authorisation to intercept Internet and telephone communications in and outside of the U.S.

Section 215 of the Patriot Act, gives power to the government to obtain foreign intelligence information to protect against international terrorism.

Section 215 provides that the Federal Bureau of Investigation ('FBI') may apply for an order from the FISA court requiring the production of any 'tangible things (including books, records, papers, documents, and other items) needed for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

...

An application for a section 215 order must be supported by a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) and by detailed minimization procedures designed to ensure that information about U.S. persons that may be obtained under the order will not be retained or disseminated unnecessarily.⁴⁴⁸

⁴⁴⁶ For the connection of Section 702, the surveillance programs and the Schrems case see Peter P. Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 12 ff <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴⁴⁷ Margulies, 'The NSA In Global Perspective: Surveillance, Human Rights, And International Counterterrorism' (2014) 82 Fordham Law Review 2137 2140.

⁴⁴⁸ Steven G. Bradbury, 'Understanding The Nsa Programs: Bulk Acquisition Of Telephone Metadata Under Section 215 And Foreign-Targeted Collection Under Section 702' (2013) 1 Lawfare Research Paper No. 3.

5. Other provisions

It is important to stress that above mentioned USA Freedom Act changed Section 215, and thereby revoked NSA authority to collect mass data of phone calls, which was available earlier. In the future, companies must store data and NSA must ask for a permission to receive them from the FISC.⁴⁴⁹

Finally, there are also some other sources, which can be important. For example, national security letters (NSLs) can be issued by the federal government, and can request non-content information like transactional records, phone numbers dialled, emails contacted.

Moreover, the President of the United States also has some special rights regarding surveillance. For example US President George W. Bush established the 'President's Surveillance Program' (PSP), which was a collection of secret data under the code name STELLARWIND.⁴⁵⁰

Below, we try to interpret these sources and analyse the most important issues.

E. Crucial Issues of Data Protection Rules in the US from a European Perspective

In this subchapter we try to highlight the most important issues of US surveillance activities that can still require actions from the EU in the future. There are many arguments, which could be raised against the limitation of human rights in the field of surveillance, the ones mentioned below are the most common in legal literature and in the media as well. Some of them can be directly relevant for the US as well. As mentioned before, we must also add that after the public appraisal back in 2013-2014, the US improved its system a lot in a positive, more democratic way.⁴⁵¹

1. The metadata problem

Firstly, in a number of cases, US agencies were collecting metadata without the control mechanisms used in Europe. Metadata does not contain the content of communication:

in the context of electronic communications, metadata includes information about the time, duration, and location of a communication as well as the phone numbers

See also Peter Margulies, 'Defining "Foreign Affairs" in Section 702 of the FISA Amendments Act: The Virtues and Deficits of Post-Snowden Dialogue on U.S. Surveillance Policy' (2015) 72 Washington and Lee Law Review 1283.

⁴⁴⁹ For the disputes in the Senate see Kelly E, 'Senate approves USA Freedom Act' (USA Today, 2 June 2015) <<http://www.usatoday.com/story/news/politics/2015/06/02/patriot-act-usa-freedom-act-senate-vote/28345747/>> accessed 1 August 2016

⁴⁵⁰ Jeff Stone, 'Secrecy, Legal Questions Hurt NSA's Stellar Wind Spy Program: US Watchdogs'. (International Business Times, 26 April 2015) <www.ibtimes.com/secrecy-legal-questions-hurt-nasas-stellar-wind-spy-program-us-watchdogs-1897087> accessed 1 June 2016

⁴⁵¹ One of the best sources in this regard is Peter P. Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

or email addresses of the sending and receiving parties. It also may include information about the device used (make/model and specific device identification number). Metadata is generated whenever we use electronic devices (such as computers, tablets, mobile phones, landline telephones, and even modern automobiles) or services (such as email clients, social networks, word processing programs, and search engines). Many of these activities generate considerable amounts of information (metadata) about our usage of these devices or services. In most cases, service providers collect and retain this information in databases that often can be traced directly to an individual person.⁴⁵²

We agree with those who claim that metadata needs a very similar protection as content, because using metadata is a kind of profiling, which could move into a dangerous direction, and as such, its collection should be made subject to court permission.⁴⁵³ Based on metadata, authorities can gain access to important aspects of our lives, and it can serve as the basis of profiling. As mentioned before, its efficiency can also be questioned. Such dangers were also mentioned by a report of the Council of Europe.⁴⁵⁴ This opinion was not completely shared by the US Supreme Court even if some of its judges supported it. In a case where a GPS was put in a car of a person by a joint FBI-police task force, the court found this action without a court order to be unconstitutional.⁴⁵⁵ The majority of judges, just like the US Government, claimed metadata in itself is not protected by the Fourth Amendment, but that courts still ‘may offer protection against the privacy harms resulting from government queries of massive databases, even if the individual data points themselves lack protection’.⁴⁵⁶

However, an earlier statement in the same case by a district court explained the essence of this problem differently. It put that

prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a

⁴⁵² Bryce Clayton Newell, Joseph T. Tennis, ‘Me, My Metadata, and the NSA: Privacy and Government Metadata Surveillance Programs: iConference 2014’, IDEALS 346 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345468> accessed 1 June 2016

⁴⁵³ Ibid 354.

⁴⁵⁴ Mr Pieter Omtzigt, ‘Mass Surveillance’ Doc. 13734 18 March 2015 (Council of Europe Parliamentary Assembly) <<https://Ccdcoe.Org/Sites/Default/Files/Documents/Coe-150318-Masssurveillancereport.Pdf>> accessed 1 May 2016

⁴⁵⁵ United States v. Jones, 132 S. Ct. 945 (2012) See also <<https://www.law.cornell.edu/supremecourt/text/10-1259>> accessed 1 August 2016

⁴⁵⁶ Joseph D. Mornin, ‘NSA Metadata Collection And The Fourth Amendment’ (2014) 29 Berkeley Technology Law Journal 985 1006.

person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story.* A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.⁴⁵⁷

2. Meaning of surveillance

The meaning of surveillance is sometimes used differently than in Europe, which can also raise human rights concerns, since they can violate privacy rights. As Justice Alito put it in the Concurring Opinion attached to Jones,⁴⁵⁸ historically, in a high number of cases, privacy was interpreted in the US as belonging to personal property, which means that in a number of older cases the Fourth Amendment Protection did not apply because surveillance technology was located on public property, even if their usage was to collect vices from a private property.⁴⁵⁹ This changed in the Katz case,⁴⁶⁰ which extended the borders of privacy, and gave more protection against abuse. In the case, Mr Katz used a public phone, his phone conversations were recorded, and he was convicted based on his conversations about illegal activities. The device used by the FBI was put to the external side of the phone, not inside it. However, later, the court decided that a conversation is protected from 'unreasonable search' and that wiretapping counts as a search, which means that a physical intrusion is not necessary to interpret it as an intrusion into privacy rights.

On the other hand, the former interpretation still had some effect on the handling of metadata, as we have seen it in the Jones case.

It is very important to stress that as mentioned before, at present time it seems the days of most US mass metadata programmes are over. In 2011, most programmes⁴⁶¹ were stopped and in 2015 the US Freedom Act was passed. This means that in the future no information can be gained by government authorities this way legally.

⁴⁵⁷ US v. Maynard, 615 F.3d 544 (U.S., D.C. Circ., C.A.)

⁴⁵⁸ U.S. v. Jones, 565 U.S. ___, (2012), Alito, J., concurring

⁴⁵⁹ Olmstead v. United States, 277 U. S. 438 (1928); Goldman v. United States, 316 U. S. 129, 135 (1942)

⁴⁶⁰ Katz v. United States, 389 U.S. 347 (1967)

⁴⁶¹ On the other hand, other documents show the NSA still had some authority to receive data without judicial approval after, see Cooke S, *NY Times* (November 19 2015) 'NSA Declassifies Inspector General Reports About Defunct Bulk E-mail Metadata Program' <<http://www.nytimes.com/interactive/2015/11/19/us/20-foia-nsa.html>> accessed 1 June 2016; New York times mentions several options similar techniques continue to exist, see Charlie Savage, 'File Says N.S.A. Found Way to Replace Email Program' *New York Times* (November 15 2015) <<http://www.nytimes.com/2015/11/20/us/politics/records-show-email-analysis-continued-after-nsa-program-ended.html>> accessed 1 August 2016

The control of wiretapping was also problematic, from a European point of view. In the European legal culture, generally (with some notable exceptions), wiretapping must be controlled relatively strictly. In the US, this is not as obvious, differing opinions exist on this issue, and they also differentiate between methods of wiretapping.⁴⁶² In a number of cases, government agencies even used illegal methods to get information.⁴⁶³

3. Functioning of FISC

In a number of cases, surveillance was nearly automatically allowed. The FISC approved demands from the NSA in a semi-automatic way:

from 1979 through 2012, the court overseeing the Foreign Intelligence Surveillance Act has rejected only 11 of the more than 33,900 surveillance applications by the government, according to annual Justice Department reports to Congress... Of 1,856 FISA applications the Justice Department made in 2012, the court denied none but modified 40, the Justice Department reported.

This means that 99,97% of application were approved. Even though there are scholars⁴⁶⁴ who defend this practice (they claim the rate of acceptance does not show how well founded these claims were), it is hard to believe that all the applications were well founded and that claims were valid in such a high number.⁴⁶⁵ Furthermore, in 2015, all the 1,497 warrant requests were approved.⁴⁶⁶ All in all, the practice of semi-automatic approval should be amended.⁴⁶⁷ There can

⁴⁶² Blake C. Norvell, 'The Constitution And The NSA Warrantless Wiretapping Program: A Fourth Amendment Violation?' (2009) 11 *Yale Journal of Law and Technology* 228.; Evan Tsen Lee, 'Does Warrantless Wiretapping Violate Moral Rights?' (2007) 44 *San Diego Law Review* 723.

⁴⁶³ See the latest scandal regarding one of the the Drug Enforcement Agency's operation, which 'almost certainly violated federal wiretapping laws while using millions of secretly intercepted calls and texts to make hundreds of arrests nationwide.' 'Prosecutors halt vast, likely illegal DEA wiretap operation' *USA Today* (25 February 2016) <<http://www.usatoday.com/story/news/2016/02/25/dea-riverside-wiretaps-scaled-back/80891460/>> accessed 1 April 2016

⁴⁶⁴ Conor Clarke, 'Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate' (2014) *Stanford Law Review Online* <https://www.stanfordlawreview.org/online/is-the-foreign-intelligence-surveillance-court-really-a-rubber-stamp/> accessed 22 January 2016; Peter P. Swire, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' *Georgia Tech Scheller College of Business Research Paper No. #36 10* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴⁶⁵ Peter Swire also claims that "taken together, the total number of individuals targeted under Section 702 in 2013 was 92,707, a tiny fraction of total EU or global Internet users" (see *ibid*). On the other hand, we believe the constitutionality of an institution does not depend on the numbers, and also believe that these are relatively high numbers.

⁴⁶⁶ James Sutton, 'FISA court approved every warrant request by FBI and NSA in 2015' (*The Hill*, 4 May, 2016) <<http://thehilltalk.com/2016/05/04/fisa-court-approved-every-warrant-request-in-2015/>> 1 July 2016

⁴⁶⁷ For other problems see also [Elizabeth \(Liza\) Gotein](#), [Faiza Patel](#), 'What Went Wrong with the FISA Court'. *NYU School of Law Brennan Centre For Justice Research Paper*, <<https://www.brennancenter.org/publication/what-went-wrong-fisa-court>> accessed 1 June 2016

be disputes as to how to solve such problems, but we believe demands from the NSA should be investigated on an individual basis and at a proper level.⁴⁶⁸

On the other hand, we must also mention that some changes were made to this system by the Obama administration. A five person group called 'Privacy advocates' were selected by the FISA Court to act as an outside advocate to the court.⁴⁶⁹ On the other hand, their activities do not seem to be successful until now.⁴⁷⁰

4. Data storage

Data storage issues were also raised, concerning how private companies handled sensitive data. The question of who controls the data storage at private companies will also emerge in the EU in the future. In general, private companies store data and in case of a demand, transfer it to the authorities. In the future, NSA must get a court order to acquire data,⁴⁷¹ which conforms with EU requirements. On the other hand, in 2015, the NSA and the CIA doubled the number of warrantless searches in the NSA database, which topped at 4,672 searches.⁴⁷² As an open letter of NGOs including the American Civil Liberties Union pointed out to Mr James Clapper, the Director of National Intelligence,

so-called 'back door searches' of Section 702 data are highly controversial. These searches use U.S. person identifiers to query data, even though the data was obtained pursuant to a certification that no U.S. persons were targets. In order to have an informed debate on how Congress should address this issue in 2017, the public needs and deserves better information. You have disclosed the yearly number of U.S.-person queries that the CIA and NSA perform on Section 702-derived data.

⁴⁶⁸ For different options to improve the framework of FISC see Orin S. Kerr, A Rule of Lenity For National Security Surveillance Law ' (2014) 100 Virginia Law Review 1513 1531 ff

⁴⁶⁹ Cyrus Farivar, 'America's super-secret court names five lawyers as public advocates "Very impressive" group has longstanding ties to Washington' (Ars Technica, 28 November 2015) <<http://arstechnica.com/tech-policy/2015/11/americas-super-secret-court-names-five-lawyers-as-public-advocates/>> accessed 1 July 2016

⁴⁷⁰ Del Quentin Wilber, 'U.S. spy court judge dismissed privacy advocate's concerns about data use' *LA Times* (19 April 2016) <<http://www.latimes.com/nation/la-na-fisa-court-records-20160419-story.html>> accessed 1 July 2016; Grant Gross, 'Privacy advocates want protections for US residents in foreign surveillance law' (PcWorld, 10 May 2016) <<http://www.pcworld.com/article/3068405/privacy-advocates-want-protections-for-us-residents-in-foreign-surveillance-law.html>> accessed 1 June 2016

⁴⁷¹ 'NSA Ends Blanket Surveillance Program And Must Now Get A Court Order To Obtain Your Data – Kind Of' (Glitch, 25 May 2016) <<http://www.glitch.news/2015-12-01-nsa-ends-blanket-surveillance-program-and-must-now-get-a-court-order-to-obtain-your-data-kind-of.html>> accessed 1 August 2016

⁴⁷² Office of the Director of National Intelligence, 'Statistical Transparency Report Regarding Use of National Security Authorities - Annual Statistics for Calendar Year 2015' May 2, 2016 <<https://icontherecord.tumblr.com/transparency/odni-transparencyreport-cy2015>> accessed 1 July 2016 ; Jenna McLaughlin, 'NSA and CIA Double Their Warrantless Searches on Americans in Two Years' (The Intercept, 3 May 2016) <<https://theintercept.com/2016/05/03/nsa-and-cia-double-their-warrantless-searches-on-americans-in-two-years/>> accessed 1 July 2016

You have not disclosed this same figure for the FBI, however, and the USA Freedom Act conspicuously exempts the FBI from such a requirement. Given the PCLOB's (i.e. the Privacy and Civil Liberties Oversight Board)⁴⁷³ description of how the FBI uses this information, there is every reason to believe the number of FBI queries far exceeds those of the CIA and NSA. To present a fair overview of how foreign intelligence surveillance is used, it is essential that you work with the Attorney General to release statistics on the FBI's use of U.S. person queries.⁴⁷⁴

5. Discrimination of foreign citizens

Discrimination between US and foreign citizens is common. As we have seen before, the US legal system differentiates between NSA activities targeting foreigners and US citizens on US soil, compared to NSA activities outside the US, where the Agency faces fewer legal constraints. Some of the most far-reaching surveillance programmes conducted by the NSA were authorised under Section 702 FISA. As Marko Milanovic recapped the problem,

Section 702(b) of FISA explicitly limits such authorizations so as to prohibit surveillance of any person known to be located in the United States, and of any U.S. person (defined as a U.S. citizen or permanent resident) reasonably believed to be located outside the United States. In other words, while non-U.S. citizens and permanent residents will be protected against surveillance when they set foot on U.S. soil, unlike U.S. citizens and permanent residents they will enjoy no such protection when they are outside the United States. For FISA's drafters, therefore, the physical presence of an individual on U.S. territory, and his or her citizenship or residence status, were criteria of categorical normative relevance with regard to the enjoyment of the right to privacy. Like for the Supreme Court in *Verdugo-Urquidez*, a citizen is entitled to privacy no matter where he is located, but the same does not apply for an alien.⁴⁷⁵

The core provisions allowing this of method is best summarised in a joint report of the American Civil Liberties Union and Human Rights Watch, which says that,

the U.S. government attached certain limiting understandings to Articles 2(1), 4(1), and 26 at the time of ratification of the ICCPR. With respect to the antidiscrimination provisions contained in Articles 2(1) and 26, the U.S. asserted an understanding that

⁴⁷³ Privacy and Civil Liberties Oversight Board <<https://www.pclob.gov/>> accessed 1 July 2016

⁴⁷⁴ Civil Society to FBI: Show Us How Section 702 Affects Americans (Project on Government Oversight, 29 October 2015) <<http://www.pogo.org/our-work/letters/2015/civil-society-to-fbi-show-us.html?referrer=https://www.google.hu/>> accessed 1 July 2016 Similar concerns were raised in a hearing in the White House, see ACLU's letter to Chairman Goodlatte and Ranking Member Conyers, <https://www.aclu.org/sites/default/files/field_document/aclu_letter_hjc_hearing_702_2_2_2016.pdf> accessed 1 July 2016

⁴⁷⁵ Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 *Harvard International Law Journal* 81 89.

distinctions between individuals would be permitted under the ICCPR if they were, 'at minimum, rationally related to a legitimate governmental objective'. This reduces the U.S. obligation down to the lowest level of equal protection already afforded under the constitution, the mere rationality test. Additionally, the U.S. government asserted an understanding that the prohibition against discrimination in times of a public emergency contained in Article 4(1) of the ICCPR did not bar the U.S. from making 'distinctions that may have a disproportionate effect upon persons of a particular status'.⁴⁷⁶

This problem was raised by the 2014 EP report as well, which said that its intention was to 'shed light on the revelations on the indiscriminate practices of mass surveillance of EU citizens'. Similar practice can lead to a differentiation between US and foreign citizens, the legality of which can be questioned. In our view the fact that some other countries like Canada, New Zealand or Australia use similar techniques⁴⁷⁷ cannot serve as a justification to support such a discriminating practice. We must add that the retention and dissemination limits for non-US persons were recently changed, but the effect of these changes cannot yet be measured.⁴⁷⁸

Discriminative differentiation regarding surveillance between persons should be abolished. As David Cole put it,

When we balance liberty and security, in other words, we should respect the equal dignity and basic human rights of all persons. In the wake of September 11, we have failed to follow that mandate. When we spy on foreign nationals without probable cause but not citizens, selectively target foreign nationals for registration, detention, and deportation based on their ethnic and religious identities, and lock up foreign nationals in secret or without any hearings at all, we have chosen the easy way out: sacrificing their rights for our purported security. In the end, the true test of justice in a democratic society is not how it treats those with political power, but how it treats those who have no voice in the democratic process. How we treat foreign nationals, the paradigmatic other in this time of crisis, ultimately tests our own humanity.⁴⁷⁹

⁴⁷⁶ HRW, 'Human Rights Violations In The United States - A report on U.S. compliance with The International Covenant on Civil and Political Rights' 11 <<https://www.hrw.org/sites/default/files/reports/US941.pdf>> accessed 1 May 2016

⁴⁷⁷ Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 Harvard International Law Journal 81 88. footnote 25.

⁴⁷⁸ Peter P. Swire PP, 'US Surveillance Law, Safe Harbor, and Reforms Since 2013' Georgia Tech Scheller College of Business Research Paper No. #36 35 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709619> accessed 1 June 2016

⁴⁷⁹ Cole D, 'Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?' (2003) 25 Thomas Jefferson Law Review 367 388.

6. Surveillance of politicians

Surveillance of European politicians (see the introduction of this chapter) has also caused tensions in EU-US relations. One could argue that surveillance of European politicians was legal and constitutional from the point of view of domestic US law, as it was probably approved by FISC or by presidential order. However, it can seriously harm transatlantic relations.

IV. Extraordinary Rendition

A. Extraordinary rendition and the ‘War on Terror’

1. General Context

There has been a great deal of commentary and debate about the practice of ‘extraordinary rendition’ over the past decade. Before we discuss the subject in depth, we should define its meaning. While there are many different definitions of the term rendition,⁴⁸⁰ the definition used in this report is based on EU’s network of independent experts and Council of Europe sources. Rendition is a situation in which one State obtains custody over a person suspected of serious crime within the jurisdiction or territory of another State and/or the transfer of such a person to custody in the first State’s jurisdiction or the jurisdiction of a third State.⁴⁸¹ Rendition can be lawful and indeed the process of extradition can easily fall within the definition of rendition. The term extraordinary rendition, by contrast, is used to describe rendition which occurs outside the normal legal procedures and is, as a result, implicitly illegal.⁴⁸² The phenomenon of extraordinary rendition can give rise to a range of associated human rights abuses, which will be discussed further below, from violations of the right to liberty and security of the person, to violations of the prohibition on torture, inhuman and degrading treatment or punishment (TIDTP).

The participation of European States in extraordinary rendition operations, either of their own instigation or in concert with other States, is not a new phenomenon.⁴⁸³ However, recently the phenomenon of extraordinary rendition has garnered much greater interest with the advent of the so-called ‘war on terror’ and the extraordinary rendition operations carried out by US security forces, particularly the CIA, in that context. The United States has openly admitted that their security services engaged in extraordinary rendition operations, transferring detainees to a range of different locations throughout the world.⁴⁸⁴ Soon after the terrorist attacks of 11 September

⁴⁸⁰ See *inter alia* David Weissbrodt and Amy Bergquist, ‘Extraordinary Rendition: A Human Rights Analysis’ 19 Harvard Human Rights Journal 123, 127; *Ahmad v United Kingdom* (2013) 56 EHRR 1 at [113]; *Belhaj v Straw* [2014] EWCA Civ 1394 at [20]; Peter Gibson, *The Report of the Detainee Inquiry* (The Stationery Office 2013) 30 (hereinafter ‘Gibson Report’).

⁴⁸¹ EU network of independent experts on fundamental rights, ‘Opinion No. 3-2006: The human rights responsibilities of the EU member states in the context of the CIA activities in Europe (‘extraordinary renditions’)’ (2006) CFR-CDF.Opinion3.2006, p.6 (hereinafter ‘EU Network Report’); European Commission for Democracy through Law, ‘Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of prisoners’ (2006) no.363/2005 at [30] - [31] (hereinafter ‘Venice Commission Report’)

⁴⁸² Venice Commission Report at [30] – [31].

⁴⁸³ There are a series of relatively high profile cases of extraordinary rendition involving European States, which have come before the European Court of Human Rights over the past number of years. See, for example, *Reinette v France* (App No 14009/88) EComHR 2 October 1989; *Altmann Barbie v France* (App No 10689/83) EComHR 4 July 1984; *Sanchez Ramirez v France* (App No 28780/95) EComHR 24 June 1996.

⁴⁸⁴ George W. Bush, ‘President Discusses Creation of Military Commissions to Try Suspected Terrorists’ (East Room – White House, Washington D.C. 6 September 2006) <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>> accessed 21 April 2015; UNHRC, ‘Joint

2001, the US President at that time, George W. Bush, granted the CIA authority to detain terrorist suspects, set up secret detention facilities and subject the detainees to brutal treatment.⁴⁸⁵ Duffy has described the US extraordinary rendition programme as the nadir of the descent into international illegality of the war on terror, which was designed and meticulously perpetrated to deliberately nullifying the effect of law.⁴⁸⁶ As information about this programme of extraordinary rendition slowly illuminates the practice, it has become clear that the programme would not have been possible to implement without the active or tacit assistance of many States, including EU member States. European States have been complicit in these activities to varying degrees, from allowing planes carrying such detainees to transit through their airspace unmolested, to hosting secret prisons on their territory in which detainees have been held. The prohibition on TIDTP was widely flouted by the US during the war on terror. The US used its influence over its European allies to facilitate its violation of this prohibition through negotiating access to European airspace and airports and even using the aforementioned secret detention facilities on European territory to interrogate detainees and subject them to TIDTP.⁴⁸⁷ The mere fact that such egregious violations of human rights could occur with the tacit acceptance and in some cases active participation of EU Member States speaks volumes about how close relationships and cooperation between western States can be harnessed to perpetrate significant human rights abuses.

In this section of the report, we will map out the different human rights abuses inherent in extraordinary rendition, analyse the nature of EU Member States' participation in extraordinary renditions, discuss the EU response to extraordinary rendition and discuss measures aimed at ensuring that the human rights abuses associated with the phenomenon of rendition are prevented. Finally, it should be noted that given the secret nature of the extraordinary rendition programme operated by the US security services, it is not certain that the programme has entirely ceased at this point in time. While the Obama administration expressly disavowed torture in an Executive Order issued in 2009, it did not repudiate extraordinary rendition.⁴⁸⁸ Indeed the Washington Post has reported on a number of renditions by the US of suspected Al-Shabab militants from Djibouti and Nigeria over the past years.⁴⁸⁹ It may be that the US has simply

study on global practices in relation to secret detention in the context of countering terrorism of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2010) UN Doc A/HRC/13/42, para [128] (hereinafter 'UNHRC Joint Study'); Gibson Report, 10.

⁴⁸⁵ Helen Duffy, *The 'War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 778.

⁴⁸⁶ *Ibid.* 779.

⁴⁸⁷ EU Commission, *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* (European Union 2012) 5.

⁴⁸⁸ Barack Obama, 'Executive Order 13491 -- Ensuring Lawful Interrogations' (The White House, 22 January 2009) <https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations> accessed 2 September 2015.

⁴⁸⁹ Craig Whitlock, 'Renditions continue under Obama, despite due-process concerns' (*The Washington Post*, 1 January 2013) <<https://www.washingtonpost.com/world/national-security/renditions-continue->

outsourced these tasks to third countries or private contractors to reduce the US ‘fingerprint’ on these operations.⁴⁹⁰

2. Human Rights Issues

The process of extraordinary rendition can give rise to multiple layers of human rights violations.⁴⁹¹ The multifarious nature of the violations has been reflected in the human rights cases brought against European States at the European Court of Human Rights (ECtHR) for their role in extraordinary rendition,⁴⁹² which have invoked many articles of the European Convention on Human Rights (ECHR). In order to fully appreciate the magnitude of the human rights violations inherent in the practice of extraordinary rendition, it is worth examining them in some detail here.

At the outset, the action of unlawfully obtaining custody of a person and detaining them violates their right to liberty and security of the person.⁴⁹³ The incommunicado nature of their detention also prevents the detainees from challenging the lawfulness of their detention, which can violate the aforementioned right, their right to access a court and their right to an effective remedy for a human rights violation.⁴⁹⁴ Indeed, secret detention may, in and of itself, constitute a violation of the prohibition on TIDTP.⁴⁹⁵ The unlawful detention itself often serves as a context in which serious human rights violations, such as torture, occur.⁴⁹⁶ It is regularly remarked that precluding access to detainees actively facilitates the perpetration of TIDTP upon detainees.⁴⁹⁷

Many of the detainees that were subject to extraordinary rendition at the hands of the United States’ security services were also subjected to so-called ‘enhanced interrogation techniques’, a euphemistic term used to collectively describe an array of physical and psychological abuse.⁴⁹⁸

[under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html](http://www.huffingtonpost.com/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html)> accessed 2 September 2015.

⁴⁹⁰ Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 780 and 790; Hunter Stuart, ‘How We Outsourced CIA Torture And Why It Matters’ (*Huffington Post* 16 December 2014) <http://www.huffingtonpost.com/2014/12/12/outsourcing-torture_n_6317236.html> accessed 2 September 2015.

⁴⁹¹ EU Network Report p.6; UNHRC Joint Study at [17] ff; David Weissbrodt and Amy Bergquist, ‘Extraordinary Rendition: A Human Rights Analysis’ 19 *Harvard Human Rights Journal* 123, 127.

⁴⁹² See, for example, *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014; *El-Masri v Macedonia* (2013) 57 EHRR 25; *Husayn (Abu Zubaydah) v Poland* (App No 7511/13) ECtHR 24 July 2014.

⁴⁹³ European Convention on Human Rights, art 5; EUCFR, art 6.

⁴⁹⁴ European Convention on Human Rights, art 13; EUCFR, art 47.

⁴⁹⁵ *El-Masri v Macedonia* at [202]-[203].

⁴⁹⁶ European Convention on Human Rights, art 3; EUCFR, art 4.

⁴⁹⁷ See, for example, *Aksoy v Turkey* (1997) 23 EHRR 553 at [76]: - ‘prompt judicial intervention may lead to the detection and prevention of serious ill-treatment’ and UNGA Res. 60/148 recital 11: - ‘prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment’.

⁴⁹⁸ UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ (2007) UN Doc A/HRC/6/17/Add.3, at [33] (hereinafter Scheinin report); Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving*

This included physically striking detainees, placing them in stress positions, sensory deprivation, sleep deprivation, subjection to extremes of temperature and waterboarding.⁴⁹⁹ Many of these ‘techniques’ taken in isolation are sufficient to reach the threshold of a violation of the prohibition on TIDTP,⁵⁰⁰ but when viewed collectively as a pattern of abuse clearly violate that prohibition.⁵⁰¹

The rights of other parties, particularly the detainee’s family members, are also important. The detainee’s right to enjoy a family and private life may be significantly impaired by extraordinary rendition. Equally, there are broad correlations between the practice of extraordinary rendition and the human rights violation known as enforced disappearance.⁵⁰² The rights of family members take on particular significance in enforced disappearance cases and the lack of knowledge about the fate of a loved one may constitute a form of inhuman and degrading treatment.⁵⁰³ Further human rights violations can arise from the State’s failure to properly investigate the human rights violations outlined in the previous paragraphs and the failure to furnish all necessary facilities to the ECtHR when it examines a case, which will be discussed further below.

While European State agents may not have been directly responsible for inflicting the human rights abuses mentioned above, their alleged complicity in the process, through hosting secret detention facilities or permitting the transfer of detainees from their jurisdictions, may be sufficient to trigger liability under international human rights law. The process of capturing a detainee within the jurisdiction of a European State and transferring them elsewhere may engage the European State’s non-refoulement obligations under human rights law. Transferring a person to a third country’s jurisdiction where they face a real risk of being subjected to TIDTP,⁵⁰⁴ the death penalty,⁵⁰⁵ a flagrantly unfair trial,⁵⁰⁶ and/or unlawful detention can all engage the

Council of Europe Member States: Second Report (Council of Europe, Committee on Legal Affairs and Human Rights AS/Jur (2007) 36) at [2] (hereinafter Marty Report).

⁴⁹⁹ See US Department of Justice, ‘Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency’ (*US Department of Justice*, 10 May 2005) <<http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-2.pdf>> accessed 8 May 2015; for an overview of these techniques see Marty Report at [51] ff.

⁵⁰⁰ Ill-treatment must attain a minimum level of severity before it constitutes a breach of human rights law - *Saadi v Italy* (2009) 49 EHRR 30 at [134]; *Jalloh v Germany* (2007) 44 E.H.R.R. 32 at [67].

⁵⁰¹ Scheinin report at [33]; UNHRC Joint Study at [106]; Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 806-807.

⁵⁰² Enforced disappearance entails: arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law – see International Convention for the Protection of All Persons from Enforced Disappearance (adopted 12 January 2007, entered into force 23 December 2010) 2515 UNTS 3, art. 2.

⁵⁰³ See *inter alia Timurtas v Turkey* (2001) 33 EHRR 6 at [94]-[98].

⁵⁰⁴ See *inter alia Chahal v United Kingdom* (1997) 23 EHRR 413.

⁵⁰⁵ See *inter alia Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014 at [456] and EU Parliament Resolution of 9 June 2011 on Guantánamo: imminent death penalty decision [2012] OJ C 380/132 at [4].

responsibility of the European State.⁵⁰⁷ Equally, allowing State actors from third States or private parties to perpetrate human rights abuses within their territory can, in certain circumstances, breach positive obligations under international human rights law.⁵⁰⁸

The ECtHR case of *El-Masri v Macedonia* is illustrative of the kind of liability European States could face for extraordinary rendition cases.⁵⁰⁹ In that case, the applicant was a German citizen who travelled from Germany to Macedonia. On arrival he was stopped by border guards and interrogated about his involvement with Islamic terrorist organisations. He was then detained and interrogated by Macedonian agents in a hotel in Skopje for 23 days. After this he was handed over to American agents at Skopje airport and flown to Afghanistan where he claims that he was subjected to torture. After a number of months he was flown to Albania and released. The applicant claimed he was held incommunicado in Macedonia and that there was no court order authorising his detention, no records of it, or opportunity to test the lawfulness of his detention. The ECtHR held that the applicant was subjected to ‘extraordinary rendition’ which entailed detention ‘outside the normal legal system’ and which ‘by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention’.⁵¹⁰

While there were many human rights violations in this case, we will focus on the arbitrary detention of the applicant to illustrate the modes of liability. Macedonia was held responsible under Article 5 of the ECHR for the applicant’s arbitrary detention in two distinct ways. First, the ECtHR followed a standard non-refoulement line of argument that the State was deemed responsible for transferring the applicant to the US authorities in the knowledge that he would be taken to Afghanistan and faced a real risk of a flagrant violation of his rights under Article 5 there.⁵¹¹

The second ground for Macedonia’s responsibility advanced by the ECtHR requires a bit of explanation. Normally in order for a State to be held liable for a violation of human rights law the victim must be within the jurisdiction of the State and the action violating the human rights of the individual must be attributable to the State.⁵¹² The State will not typically be held responsible for

Even the imposition of a death sentence which is not carried out can be sufficient to trigger a non-refoulement obligation in a European State - *Soering v United Kingdom* (1989) 11 EHRR 439, see further discussion of this in this chapter section B.2.a.

⁵⁰⁶ See section B. 3. a. in this chapter.

⁵⁰⁷ See section of extradition chapter – section B. 3. b. in this chapter.

⁵⁰⁸ Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 804 ff; see also further discussion below in section I D 2 (proactive Measures) and Cross reference to section of extradition chapter II B 1.

⁵⁰⁹ *El-Masri v Macedonia* (2013) 57 EHRR 25.

⁵¹⁰ *Ibid* at [239].

⁵¹¹ *Ibid* at [239].

⁵¹² James Crawford, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2 Yearbook of the International Law Commission, 34; Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 HRLR 411, 437; Occasionally the Court may be required to determine whether the acts of particular soldiers

the acts of private actors, because those acts may not be attributable to it.⁵¹³ Equally, acts that are attributable to the State may not give rise to State responsibility where it does not owe obligations to the victims under international law, which is contingent on the exercise of jurisdiction. An argument could be made that neither of these conditions were satisfied in the *El-Masri* case as while the applicant was detained by US agents, their actions were attributable to the US and, under the ECtHR's own case law, the applicant would have been considered to fall within the extra-territorial jurisdiction of the US State agents.⁵¹⁴ Yet in *El-Masri*, the ECtHR held that Macedonia was responsible for the actions of the US agents that had illegally detained the applicant in Macedonia.⁵¹⁵

At first view this result seems controversial. However, the ECtHR reasoned that Macedonia was responsible for these actions because their agents knew the applicant was being detained by third parties and had breached their positive obligation to prevent human rights violations as they had acquiesced to that detention within their jurisdiction. Positive obligations demand that the State undertake certain actions to pro-actively protect rights.⁵¹⁶ The standard is that when a State knows, or ought to have known, of a real and immediate risk that the applicant would be arbitrarily detained by a third party, it must take measures within the scope of its powers that judged reasonably might have been expected to avoid that risk.⁵¹⁷ Thus, for example, in *Medova v Russia* the applicant's husband was abducted by armed men in Ingushetia. They placed him in the boot of a car and tried to take him across the border into Chechnya. Before they could cross, police stopped them and discovered two men in the boot. The police took them all to the local station, where the abductors allegedly identified themselves as State agents and claimed they had permission to detain the men. The agents were allowed to cross the border with the detainees, who were never seen again. The ECtHR held that Article 5(1) lays down 'a positive obligation on the State to protect the liberty of its citizens', which the Russian authorities had violated.⁵¹⁸ The State had failed to adequately check the identities of the men or the legality of Mr. Medov's detention.⁵¹⁹ The ECtHR considered that the authorities' failure to put an end to Mr.

are attributable to the State first before considering the issue of control, see Marko Milanovic and Tatjana Papic, 'As bad as it gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 ICLQ 267, 273.

⁵¹³ James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (3rd edn, OUP 2010), 454.

⁵¹⁴ See, for example, *Reinette v France* (App No 14009/88) EComHR 2 October 1989; *Altmann Barbie v France* (App No 10689/83) EComHR 4 July 1984; *Ocalan v Turkey (Merits)* (2005) 41 EHRR 45; *Sanchez Ramirez v France* (App No 28780/95) EComHR 24 June 1996.

⁵¹⁵ *El-Masri v Macedonia* at [239]; *Husayn (Abu Zubaydah) v Poland* at [449]; *Al-Nashiri v Poland* at [452].

⁵¹⁶ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 7.

⁵¹⁷ Adapted from the standard applied in the case of *Osman v United Kingdom* at [115]; The IACtHR has inferred a similar obligation holding that a State can be held responsible where it did not take the necessary steps in order to prevent the particular violation from taking place - *Velasquez Rodriguez v Honduras Series C No 4 IACtHR 29 July 1988* at [30]-[31].

⁵¹⁸ *Medova v Russia* (App No 25385/04) ECtHR 15 January 2009 at [123].

⁵¹⁹ *Ibid* at [99].

Medov's arbitrary detention when they had the opportunity constituted a breach of the State's positive obligation under Article 5.⁵²⁰ This positive obligation has been upheld in other cases.⁵²¹ It was this basis for responsibility and line of jurisprudence that the ECtHR relied on in *El-Masri*. The *El-Masri* case is a watershed moment in international law representing the first time that a State has been held responsible for an extraordinary rendition,⁵²² and the ECtHR has deftly engineered the means to hold the State responsible for what happens both within and outside its territory. Since the landmark *El-Masri* judgment, the ECtHR has held EU states responsible for their complicity in extraordinary rendition operations in a similar vein.⁵²³

The application of EU law itself to extraordinary rendition is far from clear. The Directorate General for Internal Policies issued a comprehensive note on the subject in 2012, which goes into much more detail than it is possible to do in this short section. It states that the EU's fundamental rights architecture 'exhibits several shortcomings and dilemmas in cases of extraordinary renditions and secret detentions, especially when trying to ascertain their relationship with the EU and the responses to be expected from EU institutional instances from the viewpoint of European law'.⁵²⁴ The Charter contains relevant provisions and Article 19(2) states that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. However, as the provisions of the Charter are addressed to EU member states only when they are implementing union law and it is unclear how extraordinary renditions fall within this category of implementing union law, it is unclear how the charter applies.⁵²⁵

Two possible avenues present themselves. Firstly, there is a presumption in EU law that that MSs assure human rights protection in areas outside the scope of EU law.⁵²⁶ Yet, as we shall clearly see below, that presumption has not been upheld in many cases of extraordinary rendition, which implicate EU member states. The note argues that where national legal systems fail to ensure proper human rights protection in areas that are formally outside of EU jurisdiction but that indirectly affect its functioning and effectiveness, then the EU should be in a position to expand its remit to include Member States' compliance with human rights outside the scope of EU law.⁵²⁷

⁵²⁰ Ibid at [124].

⁵²¹ *Riera Blume and Ors v Spain* (App No 37680/97) ECtHR 14 October 1999; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

⁵²² Federico Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14 HRLR 85, 96.

⁵²³ See, for example, *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014.

⁵²⁴ EU Commission, *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* (European Union 2012) 28.

⁵²⁵ EU Charter of Fundamental Rights, art 51.

⁵²⁶ EU Commission, *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* (European Union 2012) 29.

⁵²⁷ Ibid 30.

There is some evidence to support this contention as the practice of extraordinary rendition conflicts with fundamental human rights as general principles of EU law and Union values, thereby undermining the premises of the area of freedom, security and justice the treaties aim to create. Secondly, some of the individuals who were subjected to extraordinary renditions and secret detentions, such as Khaled El-Masri, were EU citizens and the process of extraordinary rendition interfered with their rights as citizens under EU law, which strongly suggests EU competence in these affairs.⁵²⁸

3. Europe's Role in Extraordinary Rendition

As we noted in the opening section, the complicity of European States in the process of extraordinary rendition has taken many active and passive forms, which will be discussed in some detail in the following sections. The United Nations has drawn up a list of ways in which States have been complicit in the process of extraordinary rendition which includes:

1. When one State asks another State to secretly detain a person for them.
2. Where a State holds a person shortly in secret detention before handing them over to another State where that person will be put in secret detention for a longer period.
3. When a State knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person or by soliciting or receiving information from persons who are being kept in secret detention.
4. When a State has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility or otherwise be detained outside the legally regulated detention system.
5. When a State has failed to take measures to identify persons or airplanes passing through its airports or airspace after information of the CIA programme involving secret detention had already been revealed.⁵²⁹

EU States have been responsible for many of these activities in the context of the war on terror.

a) Facilitating Air Travel

Given the extensive use of aircraft for the purposes of moving victims of extraordinary rendition to different locations around the world, the process of extraordinary rendition required the use of air facilities and the airspace of many States. Shortly after the attacks on 11 September 2001, a number of European States agreed to provide blanket overflight clearances for the United States'

⁵²⁸ Ibid 37-39.

⁵²⁹ UNHRC Joint Study at [159].

and other Allies' aircraft for military flights related to operations against terrorism,⁵³⁰ as well as access to ports and airfields, including for refuelling, for the United States and other Allies for operations against terrorism.⁵³¹ These clearances were then exploited by the CIA to carry out their extraordinary rendition operations.⁵³²

The European Parliament has expressed concern about the blanket overflight clearances noting that at least 1,245 flights operated by the CIA flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005.⁵³³ Overall, the Parliament criticised States for relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA, which were being used for extraordinary rendition and other transportation of detainees.⁵³⁴ These activities were not simply confined to the States' home territories, but also encompassed transit through dependent territories. The US has acknowledged, for example, that they used the base on Diego Garcia in the British Indian Ocean Territories to carry out extraordinary rendition operations apparently without the knowledge of the UK authorities.⁵³⁵ By permitting aircraft to land, refuel and transit their airspace many European States have been complicit in the extraordinary rendition programme as they actively facilitated it,⁵³⁶ whether the planes were carrying detainees at the time of their stopovers or transits or simply moving empty planes involved in rendition between places to carry out further activities.⁵³⁷ These activities represent perhaps the most pervasive form of complicity that we are aware of as they involved virtually every State in the EU.⁵³⁸

⁵³⁰ Marty Report at [105]; Tom Lansford, *All for One: Terrorism, NATO and the United States* (Ashgate 2003) 112; NATO, 'North Atlantic Council Decision On Implementation Of Article 5 of the Washington Treaty following the 11 September Attacks against the United States' (Brussels, 4 October 2001) <<http://www.nato.int/docu/speech/2001/s011004b.htm>> accessed 12 May 2015.

⁵³¹ Marty Report at [91].

⁵³² Marty Report at [99]; European Parliament, 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (2007) 2006/2200(INI) at [44] (hereinafter 'EU Fava Report').

⁵³³ The Fava report implicates a number of European States in these practices specifically Italy [66], United Kingdom [78], Germany [94], Sweden [98], Spain [114], Portugal [120], Ireland [123], Greece [127], Cyprus [128], Belgium [130], Romania [162] and Poland [169].

⁵³⁴ EU Fava Report at [42]-[44] and UNHRC Joint Study at [115].

⁵³⁵ Jamie Doward, 'UK urged to admit that CIA used island as secret 'black site' prison' (*Guardian*, 13 April 2014) <<http://www.theguardian.com/world/2014/apr/13/cia-black-site-diego-garcia-uk-role/print>> accessed 8 May 2015; Jason Leopold, 'Revealed: Senate report contains new details on CIA black sites' (*Al-Jazeera*, 9 April 2014) <<http://america.aljazeera.com/articles/2014/4/9/senate-cia-torture.html>> accessed 8 May 2015.

⁵³⁶ UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (2010) UN Doc A/HRC/13/39/Add.5 at [244]; Venice Commission Report at [45].

⁵³⁷ Gibson Report 40 ff.

⁵³⁸ A good overview of EU States' activities and complicity in extraordinary rendition is set out in the open society justice initiative's report - Open Society Justice Initiative, 'Globalizing Torture CIA Secret Detention and Extraordinary Rendition' (Open Society Foundations, 2013).

b) Direct Participation in Rendition

There have been some cases of European States actively participating in rendition operations. In the UK, for example, evidence has emerged following the collapse of Muammar Gaddafi's Libyan regime that the UK was heavily involved in the rendition of two Libyan nationals, Abdel Hakim Belhadj (aka Abdullah Sadeq) and Sami Al Saadi (aka Abu Mundhir). In the case of Belhadj, he alleges that UK authorities supplied intelligence to the CIA and Libyan authorities and assisted in his unlawful rendition to Libya, where he was unlawfully detained and tortured.⁵³⁹ A criminal investigation into these activities is ongoing,⁵⁴⁰ as is a court case for damages against the British authorities. In the case of Sami al-Saadi, he along with his pregnant wife and four children were all captured and taken on a plane from Hong Kong to Libya, Al-Saadi was then unlawfully detained and subjected to torture, inhuman and degrading treatment in a Libyan prison for six years. The UK has since settled the case for damages out of court, with no admission of wrongdoing, for 2.2 million pounds.⁵⁴¹ In a similar vein, UK security services have been implicated in the abduction of Bisher Al-Rawi and Jamil El-Banna from Gambia and ultimately to Guantanamo Bay.⁵⁴²

Italy was also complicit in the extraordinary rendition of Osama Moustafa Hassan Nasr. Nasr had been granted asylum in Italy, but he was abducted in February 2003, transferred to a NATO base in Aviano by car, flown to the NATO base in Ramstein, Germany and then to Egypt where he was unlawfully detained and tortured.⁵⁴³ An Italian carabinieri and a number of security services agents played an active role in the abduction and this case will be discussed further below.⁵⁴⁴

Sweden was implicated in the extraordinary rendition of two individuals, Ahmed Agiza and Muhammad Alzery, on 18 December 2001. The men, whose claims for asylum in Sweden had failed, were handed over to US agents in Stockholm airport. The UN Committee against Torture (UNCAT), which examined the incident, noted that the men were stripped, shackled, hooded and subjected to treatment which violated the UNCAT.⁵⁴⁵ As this occurred with the acquiescence of the State's police, Sweden was held responsible for violating Article 16 of the UNCAT. The men were subsequently taken by the US authorities to Egypt where they were detained and allegedly

⁵³⁹ See generally *Belhaj v Straw* [2014] EWCA Civ 1394.

⁵⁴⁰ Owen Bowcott and Richard Norton-Taylor, 'Police hand Libyan abduction evidence to Crown Prosecution Service' (*Guardian*, 31 October 2014) <<http://www.theguardian.com/uk-news/2014/oct/31/met-libya-abduction-rendition-cps>> accessed 5 May 2015.

⁵⁴¹ Dominic Casciani, 'UK pays £2.2m to settle Libyan rendition claim' (*BBC News*, 13 December 2012) <<http://www.bbc.co.uk/news/uk-20715507>> accessed 5 May 2015.

⁵⁴² EU Fava Report at [70].

⁵⁴³ EU Fava Report at [50]; UNHRC Joint Study at [84]; See generally Francesco Messineo, 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023.

⁵⁴⁴ EU Fava Report at [51].

⁵⁴⁵ *Ahmed Hussein Mustafa Kamil Agiza v Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005 at [10.2] and [13.4].

tortured. Thus, Sweden was held responsible for breaching the *non-refoulement* provisions of the UNCAT.⁵⁴⁶

Finally, as we will see below, Poland hosted a secret CIA prison on its territory. As part of this arrangement, it cooperated in the perpetration and execution of rendition operations *inter alia* by providing logistical support, transport for the CIA teams and security at the secret prison.⁵⁴⁷

c) *Interrogation*

There is some evidence that the intelligence services of a number of European States contributed to or participated in interrogations of rendered detainees.⁵⁴⁸ A report from the UK which looked at whether Britain was implicated in the improper treatment of detainees held by other countries, the Gibson Report, states that ‘officers from the Agencies and elsewhere took part in numerous interviews with detainees including in Afghanistan, Iraq and at the US detention facility at Guantanamo – whether in the role of sole interviewer, in concert with officers from other countries, or if invited to witness interviews conducted by foreign liaison partners’.⁵⁴⁹ These intelligence officers were aware of a number of concerning treatment issues, including hooding, the use of stress positions, physical assaults, sleep deprivation and substandard detention facilities.⁵⁵⁰ Indeed some subjects of rendition have alleged that UK agents were not only aware of their ill-treatment, but were actively involved in it.⁵⁵¹ These officers continued to engage with the intelligence partners responsible for this even after detention issues had been identified and raised.⁵⁵² The legality of the detainees’ detention did not appear to be considered by the agents.⁵⁵³ The UK is not alone in this regard and we know that German intelligence officials were at the very least involved in the interrogation of a detainee in Guantánamo,⁵⁵⁴ and a further detainee, Muhammad Haydar Zammar, in Syria.⁵⁵⁵

d) *Hosting Secret Prisons*

Perhaps the most egregious form of complicity in the context of extraordinary rendition was the hosting of secret CIA prisons on European soil. Four EU countries have been implicated in this regard, Germany, Poland, Lithuania and Romania.

In the first place, there have been allegations that the US used a military installation in Mannheim-Blumenau to detain and ill-treat people as part of its extraordinary rendition

⁵⁴⁶ *Ibid* at [13.4].

⁵⁴⁷ *Al-Nashiri v Poland* at [442].

⁵⁴⁸ Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 786-787; UNHRC Joint Report 82-83.

⁵⁴⁹ Gibson Report, 9.

⁵⁵⁰ *Ibid*, 22.

⁵⁵¹ *Ibid*.

⁵⁵² *Ibid*, 24.

⁵⁵³ *Ibid*, 28.

⁵⁵⁴ EU Fava Report at [85].

⁵⁵⁵ UNHRC Joint Report, 82-83.

programme.⁵⁵⁶ The Polish authorities are alleged to have allowed the CIA to use the small airport of Szymany in North-Eastern Poland for rendition operations and hosted a secret prison nearby in Stare Kiejkuty.⁵⁵⁷ The 'routine procedure' was for the person subject to rendition to be taken to a van provided by the Polish authorities and driven to the Polish intelligence service's training base in Stare Kiejkuty where they were subjected to enhanced interrogation techniques.⁵⁵⁸ While Poland has denied hosting a secret prison for the CIA,⁵⁵⁹ the ECtHR has held that at least one detainee was held in secret by the CIA in Poland between 2002 and 2003 and found Poland responsible for its complicity in the CIA programme, which enabled the US authorities to subject the applicants to torture and ill-treatment on its territory.⁵⁶⁰

Lithuania is alleged to have hosted two secret detention facilities on its territory, one in Antaviliai and the other in Vilnius.⁵⁶¹ A case is currently pending before the ECtHR concerning Lithuania's role in the extraordinary rendition programme.⁵⁶² Finally, Romania is alleged to have hosted a CIA prison in Bucharest, which was used in the extraordinary rendition programme.⁵⁶³ While Romanian officials denied that they had hosted a secret prison on their territory,⁵⁶⁴ media reports suggest that the former Romanian president, Ion Iliescu, approved the CIA's request to establish such a site on Romanian territory.⁵⁶⁵ A case concerning Romania's involvement in extraordinary rendition is also currently pending before the ECtHR.⁵⁶⁶

⁵⁵⁶ EU Fava Report at [95].

⁵⁵⁷ Marty Report at [167] ff; EU Fava Report at [174] ff; Adam Goldman, 'The hidden history of the CIA's prison in Poland' (*Washington Post*, 23 January 2014) <http://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_print.html> accessed 5 May 2015.

⁵⁵⁸ *Al-Nashiri v Poland* at [91]-[97].

⁵⁵⁹ UNHRC Joint Study at [114].

⁵⁶⁰ *Al-Nashiri v Poland* at [598].

⁵⁶¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)' (CPT/Inf (2011) 17) at [64]-[74]; UNHRC Joint Report at [120]-[122]; Reprieve, 'New evidence shows CIA held prisoners in Lithuania' (*Reprieve* 16 January 2015) <<http://www.reprieve.org.uk/press/new-evidence-shows-cia-held-prisoners-in-lithuania/>> accessed 5 May 2015.

⁵⁶² *Abu Zubaydah v Lithuania* (App. No. 46454/11) ECtHR communicated on 14 December 2012.

⁵⁶³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Rapport au Gouvernement de la Roumanie relatif à la visite effectuée en Roumanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)' CPT/Inf (2011) 31 at [145].

⁵⁶⁴ The Romanian government categorically denied the possibility that secret detention facilities could be hosted on Romanian soil - EU Fava Report at [159].

⁵⁶⁵ Associated Press, 'Former Romania president admits allowing CIA site' (*Al-Jazeera*, 27 April 2015) <<http://www.aljazeera.com/news/2015/04/romania-president-admits-allowing-cia-site-150427140351035.html>> accessed 5 May 2015.

⁵⁶⁶ *Al-Nashiri v Romania* (App. No. 33234/12) ECtHR communicated on 18 September 2012.

4. The EU Response to Extraordinary Rendition

The practice of extraordinary rendition necessitated collusion between EU member states and the United States of America and enabled the United States to perpetrate widespread and systematic human rights abuses. It is arguably the most grave human rights violation perpetrated by western States in recent history. The European Union's response, as an institution, to extraordinary rendition has been extremely limited. The European Parliament has been at the forefront of the EU's efforts issuing resolutions,⁵⁶⁷ drafting investigatory reports,⁵⁶⁸ and commissioning expert opinions on the subject.⁵⁶⁹ The response of the Commission, Council and Member States has been much less forthcoming. From the earliest public indications that extraordinary rendition was occurring, the European Parliament had called for the Council and the Commission to engage on the subject and for Member States to investigate extraordinary rendition allegations against them.⁵⁷⁰ The Council initially responded with a press release following a meeting of the General and External Affairs Council in September 2006 alluding generally to the practice of extraordinary rendition and secret detention sites in EU countries

Ministers reiterated their commitment to combating terrorism effectively, using all legal means and instruments available. Terrorism is itself a threat to a system of values based on the rule of law. They reiterated that, in combating terrorism, human rights and humanitarian standards have to be maintained. Accordingly, they acknowledged the intention of the United States administration to treat all detainees in accordance with the provisions of the Geneva Convention and the assurances about ICRC (International Committee of the Red Cross) access.

⁵⁶⁷ See, for example, European Parliament Resolution of 15 December 2005 on presumed use of European Countries by the CIA for the transportation and illegal detention of prisoners 2005/2658 (RSP); European Parliament Resolution of 30 January 2007 on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners 2006/2200(INI); European Parliament Resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA 2014/2997(RSP); Follow-up to the resolution of Parliament of 11 February 2015 on the US Senate report on the use of torture by the CIA 2016/2573(RSP).

⁵⁶⁸ See for example European Parliament, 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (2007) 2006/2200(INI); European Parliament, *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* (European Union 2012); The Parliament recently instructed its Committee on Civil Liberties, Justice and Home Affairs to resume its inquiry on 'alleged transportation and illegal detention of prisoners in European countries by the CIA' and create a further report on the subject - European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP) at [10].

⁵⁶⁹ See EU network of independent experts on fundamental rights, 'Opinion No. 3-2006: The human rights responsibilities of the EU member states in the context of the CIA activities in Europe ('extraordinary renditions')' (2006) CFR-CDF.Opinion3.2006; European Parliament 'A quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme' (European Union 2015).

⁵⁷⁰ European Parliament Resolution of 15 December 2005 on presumed use of European Countries by the CIA for the transportation and illegal detention of prisoners 2005/2658 (RSP) at [9] and [10].

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. Ministers noted that they would continue their dialogue with the US focusing on safeguarding human rights in the fight against terrorism.⁵⁷¹

When a more robust response from the other institutions and member states was not forthcoming, the European Parliament's frustration was clear in a subsequent resolution where it stated that it deplored

the inability of the Council - due to the opposition of certain Member States - to adopt conclusions in response to that statement at the General Affairs and External Relations Council of 15 September 2006, and requests that the Council adopt them urgently in order to dissipate any doubt as to the Member State governments' cooperation with and connivance in the extraordinary rendition and secret prisons programme in the past, present and future.

Calls on the Council and the Member States to issue a clear and forceful declaration calling on the US Government to put an end to the practice of extraordinary arrests and renditions, in line with the position of Parliament;

Deplores the fact that the governments of European countries did not feel the need to ask the US Government for clarifications regarding the existence of secret prisons outside US territory;⁵⁷²

It seems there were initial attempts to raise the issue bi-laterally with the US authorities, but these were summarily shut down by the United States. At an EU-US ministerial meeting on justice and home affairs in 2006, for example, European justice ministers attempted to raise concerns about the extraordinary rendition programme, but US Attorney General Alberto Gonzalez stated that the USA was a democratic country and accountable only to congress. This was interpreted as a clear indication that that the USA would not accept being questioned on this issue by the EU.⁵⁷³

A few years later in 2009, after the Bush administration had left office, the EU and US issued a joint statement concerning the methods employed in combatting terrorism stating

⁵⁷¹ Council of the European Union, '2748th/2749th Council Meetings General Affairs and External Relations' (15 September 2006) 17
<http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/90993.pdf> accessed 5 August 2016.

⁵⁷² European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) at [7] – [9].

⁵⁷³ Katrin Kinzelback and Julia Kozma, 'Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights' in Xymena Kurowska, Patryk Pawlak (eds), *The Politics of European Security Policies* (Routledge 2014) 118.

Efforts to combat terrorism should be conducted in a manner that comports with the rule of law, respects our common values, and complies with our respective obligations under international law, in particular international human rights law, refugee law, and humanitarian law.⁵⁷⁴

The EU has also issued other policy statements concerning the prohibition of TIDTP. In 2012, for example, the EU issued guidelines on EU policy toward third countries on TIDTP, which includes a commitment for the EU to ‘raise the prohibition of torture and other forms of ill-treatment in its counter-terrorism dialogues with third countries’ and ‘ban secret places of detention’.⁵⁷⁵ Given the prominence of the practice of extraordinary rendition and the extent of MS complicity with it, it is bizarre that it is not even mentioned in a policy document on TIDTP and engagement with third countries.

The most recent EU Action Plan on Human Rights and Democracy also contains a commitment for the EEAS, Commission, Council and MSs to

Address torture and ill-treatment (prevention, accountability and rehabilitation), and the death penalty (abolition, moratorium and minimum standards) in a comprehensive manner through political and human rights dialogues and support to partner countries, independent national prevention mechanisms and civil society; mainstream safeguards against death penalty, torture and ill-treatment in EU activities, including in counter-terrorism and in crisis management.⁵⁷⁶

While these statements of policy have a place, the reality is that they are of extremely limited value in the context of extraordinary rendition and have not resulted in tangible actions. One of the most recent European Parliament resolutions sums up the current situation well. Overall the European Parliament condemned the

apathy shown by Member States and EU institutions with regard to recognising the multiple fundamental rights violations and torture which took place on European soil between 2001 and 2006, investigating them and bringing those complicit and responsible to justice.⁵⁷⁷

⁵⁷⁴ United States Department of State, ‘U.S.-E.U. Joint Statement on Closure of Guantanamo Bay and Future Counterterrorism Cooperation’ (Washington, 15 June 2009) <<http://www.state.gov/r/pa/prs/ps/2009/06a/124796.htm>> accessed 5 August 2016.

⁵⁷⁵ Council of the European Union, ‘Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment’ (20 March 2012) COHOM 57 PESC 326 <<https://www.consilium.europa.eu/uedocs/cmsUpload/8590.en08.pdf>> accessed 5 August 2016

⁵⁷⁶ Council of the European Union, *Action Plan on Human Rights and Democracy (2015-2019)* JOIN/2015/0016 final, objective 13.

⁵⁷⁷ Follow-up to the resolution of Parliament of 11 February 2015 on the US Senate report on the use of torture by the CIA 2016/2573(RSP) at [3].

Despite the policy commitment to dialogue and engagement on the subject, the European Parliament observed that ‘the US Government has failed to cooperate with EU Member States’⁵⁷⁸ investigating extraordinary rendition practices. The European Parliament also noted, with regret, ‘the slow pace of investigations, the limited accountability and the excessive reliance on state secrets’.⁵⁷⁹ The Parliament also expressed concern

regarding the obstacles encountered by national parliamentary and judicial investigations into some Member States’ involvement in the CIA programme, and the undue classification of documents leading to de facto impunity for perpetrators of human rights violations.⁵⁸⁰

There are a few possible explanations of the EU’s limited response to extraordinary rendition. Firstly, from the outset the EU parliament recognised that cooperation in the field of intelligence was an exclusive reserved competence of EU Member States falling within the scope of their bilateral and multilateral relations.⁵⁸¹ As such EU engagement in the subject was limited. However, the issues arising from extraordinary rendition, which compromise human rights and the rule of law more broadly across the EU, clearly intersect with an area of shared competence, namely securing the area of freedom, security and justice in the EU.⁵⁸² As such it is at best a partial justification for the lack of action.

Secondly, it was arguably never envisaged that Western liberal democracies, which broadly respect human rights and the rule of law, could collude and coordinate to such an extent to perpetrate such egregious violations of both. As this was never realistically contemplated, the EU was not designed to have the legal mechanisms to respond to this. There are two possible avenues for legal action, utilising Article 258 of the Treaty on the functioning of the European Union or alternatively Article 7 of the Treaty on European Union, but neither is ideally suited for the task of tackling extraordinary rendition.

The European Commission could theoretically utilise Article 258 to issue a reasoned opinion that a MS has failed to fulfil an obligation under the treaties, such as the duty to respect fundamental rights or the rule of law. If the State does not comply with the opinion, the Commission can bring enforcement proceedings against it at the Court of Justice. While the Commission has used this procedure to combat anti-democratic actions in Hungary,⁵⁸³ the Commission has never invoked a violation of the values of Article 2 of the Treaty on European Union, such as fundamental rights or the rule of law on its own as a basis for a legal action, tending instead to rely on actions grounded

⁵⁷⁸ Ibid. at [8].

⁵⁷⁹ Ibid. at [10].

⁵⁸⁰ Ibid. at [14].

⁵⁸¹ European Parliament Resolution of 15 December 2005 on presumed use of European Countries by the CIA for the transportation and illegal detention of prisoners 2005/2658 (RSP), preamble (C).

⁵⁸² Treaty on the Functioning of the European Union Protocol (No. 5) on the Statute of the European Investment Bank [2012] OJ C 326/47, art. 4.

⁵⁸³ C-286/12 *Commission v Hungary* [2013] 1 CMLR 44.

in an infringement of secondary legislation.⁵⁸⁴ Thus, while an action under this heading is not inconceivable,⁵⁸⁵ it seems unlikely in the near future and would probably not be utilised, at least initially, for something as politically sensitive as extraordinary rendition.

The other option is utilising Article 7 of the Treaty on European Union which states that

On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.⁵⁸⁶

The values referred to include the rule of law and fundamental rights, both of which were severely compromised by MSs' complicity in the extraordinary rendition program. The article envisages that where a breach occurs, certain rights deriving from the application of the EU treaties, including voting rights, can be suspended in respect of the country responsible.⁵⁸⁷ The European parliament, for its part, expressed a commitment

to opening the procedure under Article 7 of the Treaty on the European Union if investigations confirm the allegations that any Member State has given assistance, whether by act or omission, to agents acting on behalf of other governments in conducting such practices.⁵⁸⁸

This was a remarkably forthright commitment, which has never materialised in practice despite ample evidence, which we have outlined above, that Member States offered a great deal of assistance to the US in carrying out extraordinary rendition.

The practicalities of invoking this article are extremely challenging. It is anathema to the general approach of the EU of co-operation and mutual trust to single out a specific MS and make such a damning accusation against them. The EU Commission has begun investigating Poland for changes to its Constitutional Court and media laws and a request to open Article 7 proceedings against Hungary in response to anti-democratic legislation implemented by the government there

⁵⁸⁴ Kim Lane Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions' 9 <http://www.law.nyu.edu/sites/default/files/upload_documents/Kim%20Lane%20Scheppele%20SIP%20revision%20clean.pdf> accessed 21 July 2016; European Commission, 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final, 5.

⁵⁸⁵ Former Justice Commissioner Viviane Reding, for example, specifically suggested that enforcement proceeding could be used by the Commission or another member state to enforce the rule of law principle of Article 2 - Viviane Reding, 'The EU and the Rule of Law – What next?' (Brussels, 4 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm> accessed 21 July 2016.

⁵⁸⁶ Consolidated Version of the Treaty on European Union [2012] OJ C 326/01 (TEU), art 7.

⁵⁸⁷ Consolidated Version of the Treaty on European Union [2012] OJ C 326/01 (TEU), art 7(3).

⁵⁸⁸ European Parliament resolution on presumed use of European Countries by the CIA for the transportation and illegal detention of prisoners 2005/2658 (RSP) at [12].

was declined by the European Parliament.⁵⁸⁹ In both cases the EU has declined to formally trigger the Article 7 procedure, instead engaging in a pre-Article 7 dialogue procedure with Poland.⁵⁹⁰ Indeed the indications from the EU are that they consider this procedure to be a last resort, a ‘nuclear option’ in the words of former Commission President José Manuel Barroso,⁵⁹¹ which may never be invoked in any circumstances. Secondly, the procedure contemplates MSs singling out a specific MS for censure, when in the context of extraordinary rendition many MSs were complicit with the actions of the CIA in executing its program of extraordinary rendition to varying degrees. In such circumstances it becomes a case of ‘let he who is without sin among you cast the first stone’ and any censure procedure against a specific MS would be highly hypocritical. As the procedure also relies on obtaining a critical mass of votes in the Council and European Parliament to trigger the procedure, it seems unlikely to succeed given the pervasive nature of the MSs’ complicity. This has prompted calls for the process of triggering Article 7 to be reformed so that it is less political and includes greater involvement of other actors, such as the EU Fundamental Rights Agency.⁵⁹² The political dimensions of the Article 7 process and the fact that it has not been triggered yet indicate that there is a clear lack of political will on the part of MSs to address the issue of extraordinary rendition. This is also reflected in the lack of co-operation between the MSs and the Council with the European Parliament’s investigation of extraordinary rendition.⁵⁹³

Thus, the overall prospects of addressing extraordinary rendition at the EU level remain bleak. While the European Parliament has been active, its counterparts at the Commission and Council have been less forthcoming and the opposition of the Member States to action at this level seems intractable at this point in time. Yet, as the European Parliament notes, accountability for extraordinary rendition is essential in order to protect and promote human rights effectively in the internal and external policies of the EU.⁵⁹⁴ Kinzelback and Kozma argue that ‘the failure to look into its own conduct and to stand up to the USA on extraordinary renditions and secret places of detention has harmed EU [sic] ability to promote human rights in third countries’.⁵⁹⁵ There is also the outstanding question of how to prevent any similar actions in European States in the future. The Council of Europe has expressly called on the EU to consider ‘ways of avoiding

⁵⁸⁹ Daily News Hungary, ‘EP Committee Rejects Liberal Group Article 7 Initiative Against Hungary’ <<http://dailynewshungary.com/ep-committee-rejects-liberal-group-article-7-initiative-against-hungary/>> accessed 20 July 2016.

⁵⁹⁰ European Commission, ‘A new EU Framework to strengthen the Rule of Law’ COM(2014) 158 final.

⁵⁹¹ José Manuel Barroso, ‘State of the Union 2012 Address’ (Brussels, 12 September 2012) <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm> accessed 20 July 2016.

⁵⁹² EU Commission, *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* (European Union 2012) 42.

⁵⁹³ European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) at [13].

⁵⁹⁴ Follow-up to the resolution of Parliament of 11 February 2015 on the US Senate report on the use of torture by the CIA 2016/2573(RSP), Preamble (E).

⁵⁹⁵ Katrin Kinzelback and Julia Kozma, ‘Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights’ in Xymena Kurowska, Patryk Pawlak (eds), *The Politics of European Security Policies* (Routledge 2014) 120.

similar abuses in future and ensuring compliance with the formal and binding commitments which states have entered into in terms of the protection of human rights and human dignity'.⁵⁹⁶ The European Parliament has called for the adoption of an 'EU internal strategy on fundamental rights' and invited the Commission 'to propose the adoption of such a strategy and a related plan of action'.⁵⁹⁷

In the following sections we look toward the future and specifically the different means of addressing impunity, putting in place measures to prevent extraordinary rendition happening again and policing the increasing reliance by member states on state secrecy to hide dubious behaviour and complicity in unlawful activities.

5. Future Prevention of Extraordinary Rendition

a) Combatting Impunity

The first step in trying to prevent extraordinary rendition in the future is holding those who have been directly responsible for the perpetration of these human rights abuses accountable under the law. Any State could theoretically take legal action against those who planned and implemented the extraordinary rendition programmes as the programme itself, or at least certain aspects of it, can trigger universal jurisdiction under international law.

All EU member States are party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).⁵⁹⁸ Under this treaty, the States have a wide ranging obligation to criminalise torture and bring perpetrators of torture to justice.⁵⁹⁹ This includes an obligation to create universal jurisdiction over the offence wherein the State has a duty to exercise jurisdiction over persons of any nationality who are suspected of torture in any country if they are on the territory of that State.⁶⁰⁰ The UN Committee against Torture, which oversees the implementation of the UNCAT, has held that the State's failure to establish universal jurisdiction (or any other type of jurisdiction envisaged in article 5) constituted a violation of article 5.⁶⁰¹ Thus, the perpetrators of extraordinary rendition and its associated TIDTP should have

⁵⁹⁶ Marty Report at [11].

⁵⁹⁷ European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA 2014/2997(RSP) at [9]. The genesis for this proposed internal strategy arose in a report of the European Fundamental Rights Agency - European Union Agency for Fundamental Rights, 'An EU internal strategic framework for fundamental rights: joining forces to achieve better results' (European Union Agency for Fundamental Rights, 2014).

⁵⁹⁸ For text and signatories see United Nations, 'UN Convention Against Torture' <https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en> accessed 16 April 2015 (hereinafter UNCAT).

⁵⁹⁹ UNCAT, arts 4-9.

⁶⁰⁰ UNCAT, art 5(2); UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (2010) UN Doc A/HRC/13/39/Add.5, at [152].

⁶⁰¹ Ibid.; *Guengueng et al v Senegal*, Communication No. 181/2001, (2006) UN Doc CAT/C/36/D/181/2001 at [9.5] – [9.6].

no safe haven in Europe.⁶⁰² Equally, and perhaps more importantly in the European context, the UNCAT creates an obligation on States to punish complicity in torture under Article 4, which states that any ‘act by any person which constitutes complicity or participation in torture’ shall also be an offence under the domestic law of state parties to the Convention. While the specifics of these offences will largely be dependent on the municipal rules on participation in crime of individual States,⁶⁰³ the obligation is clear and it is up to European States to uphold their duties under international law.⁶⁰⁴

The system of extraordinary rendition established and implemented by the United States arguably also constituted a crime against humanity. While crimes against humanity historically required a nexus to an armed conflict,⁶⁰⁵ this requirement for a link to an armed conflict has now been abandoned.⁶⁰⁶ The definition for a crime against humanity in the Rome Statute of the International Criminal Court sets out a number of illegal acts, including torture, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law and enforced disappearance. These are then qualified as crimes against humanity when they are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶⁰⁷ The system of extraordinary rendition was certainly consciously and knowingly directed as part of a ‘war on terror’ and it was widespread across the world and systematic in its execution. The United States would argue that it was not directed at a civilian population, considering the persons subjected to extraordinary rendition to be unlawful

⁶⁰² According to a 2012 report from Amnesty International every EU member state, with the exception of Slovakia, has legal measures permitting it to invoke universal jurisdiction against perpetrators of torture – See Amnesty International, *Universal Jurisdiction A Preliminary Survey of Legislation Around The World – 2012* (Amnesty International, 2012) 16-22.

⁶⁰³ Francesco Messineo, ‘Extraordinary Renditions’ and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy’ (2009) 7 *Journal of International Criminal Justice* 1023, 1028.

⁶⁰⁴ For a more detailed discussion of complicity under the UNCAT see *Ibid.* 1028ff. In practice universal jurisdiction is seldom invoked and is often conditioned by requirements that the victims be nationals of the State, or the perpetrators present on the territory of the State, see generally Amnesty International, *Universal Jurisdiction A Preliminary Survey of Legislation Around The World – 2012* (Amnesty International, 2012). Perhaps the most famous example of the invocation of universal jurisdiction in the EU context occurred when the Spanish judge, Baltasar Garzón, unsuccessfully sought the extradition of Augusto Pinochet to Spain to face charges of torture and other crimes – see *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet (No.3)* [2000] 1 A.C. 147.

⁶⁰⁵ Principle 6(c), Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (adopted 29 July) International Law Commission Document A/1316.

⁶⁰⁶ The nexus was not a requirement by 1995 and is not mentioned in ICTR statute or judicial opinion from that time. Statute of the International Criminal Tribunal for Rwanda (adopted 12 January 1995) UN doc. SC/5974, art 3; *Prosecutor v Tadic* (Case no. IT-94-1-AR72) 2 October 1995 at [140]-[141].

⁶⁰⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1).

combatants.⁶⁰⁸ However, innocent civilians, such as Khaled El-Masri, were caught up in the system of extraordinary rendition.

It can be argued that the nature of the acts as crimes against humanity or violations of the prohibition on TIDTP generate specific investigatory and prosecutorial obligations for European States. Both the prohibition on TIDTP and crimes against humanity constitute peremptory norms of *jus cogens* under international law.⁶⁰⁹ A violation of such a norm gives rise to a corresponding obligation *erga omnes* – an obligation owed by states to the international community as a whole – either to institute criminal proceedings or to extradite the suspect to another competent state.⁶¹⁰ The *jus cogens* nature of these provisions fosters an entitlement ‘to prosecute and punish or extradite individuals’ accused of these acts ‘who are present in a territory under its jurisdiction’.⁶¹¹

However, thus far the prosecutorial actions of States against the perpetrators of extraordinary rendition have been extremely limited. This is despite the fact that the normal municipal legal rules of most States should have the capacity to punish many facets of extraordinary rendition under their normal criminal laws, which prohibit crimes like kidnapping, assault and unlawful detention, without the need for specific new offences.⁶¹² In 2006, an Italian court issued arrest warrants for a number of Italian security services agents, including the former head of the Italian Military Intelligence and Security Service, Niccoló Pollari, and EU arrest warrants for over 20 CIA agents who were suspected of involvement in the extraordinary rendition of Abu Omar – Osama Mustafa Hassan Nasr.⁶¹³ On 12 February 2013, Pollari was sentenced to ten years in prison for his involvement in Abu Omar’s rendition.⁶¹⁴ The CIA agents, who had absconded, were subsequently tried *in absentia* and convicted of their involvement in the rendition. Accountability of this type

⁶⁰⁸ In the context of the war on terror the US government utilised the term enemy combatant to describe ‘a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)’ - Military Commissions Act 2006 10 U.S.C. 948a. This term is widely considered to have been contrived in order to strip terrorism suspects of rights under the Geneva Conventions and criminal law - Rosa Brooks, ‘War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror’ (2005) 153(2) *University of Pennsylvania Law Review* 735-736.

⁶⁰⁹ M. Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ 59(4) *Law and Contemporary Problems* 63, 68.

⁶¹⁰ M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, 1995) 51-55; Guy S. Goodwin-Gill, ‘Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute’ in Guy S. Goodwin-Gill and Stefan Talmon, *The Reality of International Law* (OUP 1999) 213.

⁶¹¹ *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 December 1998 at [156].

⁶¹² Francesco Messineo, ‘‘Extraordinary Renditions’ and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy’ (2009) 7 *Journal of International Criminal Justice* 1023, 1028-1029.

⁶¹³ *Ibid*, 1034.

⁶¹⁴ BBC News, ‘Italy’s ex-spy chief convicted over 2003 CIA rendition’ (*BBC News*, 12 February 2013) <<http://www.bbc.co.uk/news/world-europe-21435632>> accessed 5 May 2015.

can be hampered by immunities from prosecution of, for example, heads of state, government officials and parliamentarians although there has been a notable trend against immunities from prosecution for international crimes.⁶¹⁵ With respect to torture specifically, the fact that torture is defined in the UNCAT as being perpetrated by a state agent and that treaty imposes, as we just noted, an obligation on states to extradite or prosecute perpetrators of torture, it implicitly precludes immunities.⁶¹⁶ In the context of extraordinary rendition, in the case of Abu Omar when the issue of immunity from prosecution of a number of the participants in the extraordinary rendition was raised, it was rejected by the Italian courts.⁶¹⁷ While the trend against *de jure* immunities is evident, the *de facto* immunity of high level officials implicated in extraordinary rendition practices remains a significant barrier to future prosecutions.⁶¹⁸ Italy has, for example, since quashed the convictions of the Italian nationals on the grounds of state secrecy and has only sought the extradition of one of the US citizens implicated in the case and this agent subsequently received a pardon from the President of Italy. In a recent case before the European Court of Human Rights, it held that the failure of the Italian authorities to seek extradition and the quashing of the sentences of the Italian agents constituted a violation of the procedural obligation in Article 3 of the European Convention on Human Rights.⁶¹⁹ In a similar vein, in 2007 the Munich District Court issued warrants for the arrest of 13 suspected CIA agents for their involvement in the extraordinary rendition of Khaled El-Masri.⁶²⁰ However, the German authorities have not sought the extradition of the agents to Germany to face trial.⁶²¹

The UK began investigations into a number of alleged offences related to extraordinary rendition. It has begun investigations into the alleged involvement of UK State agents in the rendition of two Libyans, Abdel Hakim Belhadj and Sami Al Saadi, with the complicity of US and Libya.⁶²² Other investigations, into allegations that a UK security officer was involved in the torture of extraordinary rendition victim Binyam Mohammed and the alleged participation of UK State

⁶¹⁵ See for example, Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002), art 27.

⁶¹⁶ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 EJIL 815, 842.

⁶¹⁷ Helen Duffy, *The 'War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 820.

⁶¹⁸ Helen Duffy, *The 'War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 152.

⁶¹⁹ *Nasr and Ghali v Italy* (44883/09) judgment of 23 February 2016.

⁶²⁰ EU Fava Report at [83].

⁶²¹ European Center for Constitutional and Human Rights, 'Germany must enforce criminal prosecution of CIA agents and demand an apology and compensation for CIA victim El Masri' (*European Center for Constitutional and Human Rights*, 15 December 2014) <http://www.ecchr.de/el_masri_case.html> accessed 5 May 2015.

⁶²² Ian Cobain, 'Police to investigate MI6 over rendition and torture of Libyans' (*Guardian*, 12 January 2012) <<http://www.theguardian.com/world/2012/jan/12/libya-rendition-torture-abduction-mi6>> accessed 5 May 2015.

agents in the ill-treatment of victims of extraordinary rendition held at Bagram, have been abandoned due to insufficient evidence.⁶²³

While individual responsibility is one facet of the equation, State responsibility under international human rights law must also be brought into the equation. There is some historical precedent for States themselves to be held accountable before international human rights bodies for operations akin to the extraordinary rendition system established by the United States. In *Goiburú et al. v Paraguay*, the Inter-American Court of Human Rights (IACtHR) examined systemic human rights violations on an international scale.⁶²⁴ In that case, a Paraguayan doctor, Agustín Goiburú Giménez, was arrested and illegally detained by Argentinian State agents in 1977. He was taken to Paraguay and turned over to Paraguayan State agents. While held incommunicado by Paraguay, he was tortured and he subsequently disappeared. Others were subjected to similar treatment in a co-ordinated international military operation called Operation Condor. The operation involved State agents from Chile, Argentina, Bolivia, Paraguay and Uruguay. Each government sought to stifle opposition to their rule through this operation by engaging in abduction, unlawful preventive detention and targeted killing all over the world between 1974 and 1977.⁶²⁵ The IACtHR recognised that this individual case occurred ‘in the context of the systematic practice of arbitrary detention, torture, execution and disappearance’.⁶²⁶ It further ruled that ‘the State’s international responsibility is increased when the disappearance forms part of a systematic pattern or practice applied or tolerated by the State’ and that Operation Condor as a whole was a crime against humanity.⁶²⁷

The ECtHR was very critical of the Polish investigation into the extraordinary rendition of Abd al-Rahim al-Nashiri. Despite allegations that the Polish State was hosting a secret prison for the CIA on its territory emerging in 2005, there was ‘no attempt to initiate any formal, meaningful procedure in order to clarify’ the situation.⁶²⁸ While the State eventually began an investigation in March 2008, the ECtHR noted that six years later the investigation remained pending and there was a ‘perceptible lack of will to investigate [Poland’s complicity in extraordinary rendition] at domestic level’.⁶²⁹ Furthermore, since March 2008 no meaningful progress in the investigation has been achieved and no persons bearing any responsibility have apparently been identified.⁶³⁰ As a result, the ECtHR concluded that Poland had violated the procedural obligation to investigate alleged violations of Article 3 of the ECHR. In light of these arguably more positive developments on the responsibility front, the instruction in a resolution from the European Parliament to its

⁶²³ Ian Cobain, ‘UK investigations into torture and rendition – a guide’ (*Guardian*, 26 March 2012) <<http://www.theguardian.com/world/2012/jan/12/uk-investigations-torture-rendition-guide>> accessed 5 May 2015.

⁶²⁴ *Goiburú and Ors v Paraguay* Series C No 153 IACtHR 22 September 2006.

⁶²⁵ *Ibid* at [61(6)].

⁶²⁶ *Ibid* at [60].

⁶²⁷ *Ibid* at [82].

⁶²⁸ *Al-Nashiri v Poland* at [490].

⁶²⁹ *Al-Nashiri v Poland* at [492].

⁶³⁰ *Al-Nashiri v Poland* at [493].

Committee on Civil Liberties, Justice and Home Affairs to resume its inquiry on ‘alleged transportation and illegal detention of prisoners in European countries by the CIA’ and report back to the parliament is a welcome development and will hopefully also lead to greater accountability within Europe.⁶³¹

b) Proactive Measures to Prevent Extraordinary Rendition

When one examines the complicity of European States in the extraordinary rendition programme of the United States two things become clear. Firstly, that European States traded their sovereignty for America’s goodwill in furthering its extraordinary rendition programme.⁶³² Secondly, that European States were not proactive in their protection of human rights within their jurisdiction. A key factor in creating an environment conducive to extraordinary rendition has been the limited exercise of sovereignty by European States over their airspace or territory and their general acquiescence to the activities of US security services. In some instances, legal rules hampered the ability of European States to exercise their jurisdiction; in others the legal rules were adequate, but simply not utilised by the State.

i) Status of Forces Agreements

Where US security services used US military facilities on European soil for the purposes of extraordinary rendition, the agreements governing these military bases, such as the NATO status of forces agreement (SOFA), created obstacles to the effective exercise of jurisdiction by the territorial State.⁶³³ The NATO SOFA, for example, limited the territorial State’s ability to search the military bases and meant that the sending State (the US) retained criminal and disciplinary jurisdiction over its forces within the base.⁶³⁴ This obviously created practical barriers to securing compliance with European human rights rules within those facilities. Nonetheless, this does not mean the EU States can abdicate their human rights responsibilities, the agreements, such as the NATO SOFA, must be interpreted and applied in a manner consistent with the State’s human rights obligations.⁶³⁵ Looking forward European States could consider amending the terms of the NATO SOFA or other memoranda of understanding governing foreign troop deployments on their territory to include a provision which permits entry and search of military facilities to comply with international human rights law.⁶³⁶

ii) Aviation Control

It is also clear from the analysis above that the system of rendition would have been much more difficult to implement if the US security services did not have such free access to European airspace and air facilities. Thus, if we wish to prevent extraordinary rendition in the future,

⁶³¹ European Parliament Resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA 2014/2997(RSP) at [10].

⁶³² Alan Clarke, *Rendition to Torture* (Rutgers University Press 2012) 160.

⁶³³ EU Network Report, 9-11.

⁶³⁴ Venice Commission Report at [131]; EU Network Report, 9.

⁶³⁵ EU Network Report, 11; Venice Commission Report at [153].

⁶³⁶ Venice Commission Report at [150].

placing sensible limits on access to European airspace is a must. It should be pointed out that the ECHR requires States to secure the rights in the Convention to everyone within their jurisdiction.⁶³⁷ The State's jurisdiction includes airspace and aircraft travelling through this jurisdiction fall concurrently within the jurisdiction of the so-called flag state – the State in which the aircraft is registered – and the jurisdiction of the territorial State.⁶³⁸ The State's positive obligations under human rights law are engaged in two distinct ways here. Firstly, the State may have an obligation to investigate under the procedural obligations in the European Convention where there is a suspicion that human rights violations are occurring on-board an aircraft within their jurisdiction.⁶³⁹ Secondly, when a State knows, or ought to have known, of a real and immediate risk of a human rights violation, it must take measures within the scope of its powers that judged reasonably might have been expected to avoid that risk.⁶⁴⁰ As we noted above there have been a number of cases where States have been held responsible for acquiescing in a person's loss of liberty by third parties within their jurisdiction.⁶⁴¹ States need to be more cognisant of these positive obligations in the future and to create greater awareness of their duties with respect to detention by third parties among their State agents and security forces if extraordinary rendition is to be halted.

There are distinct rules governing civil aviation and civil aircraft that do not apply to State aircraft.⁶⁴² The distinction is important because many of the extraordinary rendition flights utilised chartered civilian aircraft for their activities. While civilian aircraft enjoy a number of overflight rights under international law, State aircraft are, generally speaking, not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned.⁶⁴³ The civilian aircraft involved in extraordinary rendition activities were used by State agents to carry out State functions and where any doubt arises as to whether an airplane is a civilian aircraft or a state aircraft the issue will be determined by the function it actually performs at a given time.⁶⁴⁴ Therefore if a plane involved in rendition was considered a State aircraft, it would have to seek the consent of the territorial State before transiting its territory and

⁶³⁷ European Convention on Human Rights, art. 1.

⁶³⁸ *Medvedyev v France* (2010) 51 EHRR 39 at [65]; *Al-Skeini and Ors v United Kingdom* (2011) 53 EHRR 18 at [75]; Venice Commission Report at [100].

⁶³⁹ UK Joint Committee on Human Rights, *Nineteenth Report* (The Stationery Office 2006) at [156]-[159]; Venice Commission Report at [101].

⁶⁴⁰ *Osman v United Kingdom* (2000) 29 EHRR 245 at [115].

⁶⁴¹ *El-Masri v Macedonia* at [239]; *Husayn (Abu Zubaydah) v Poland* at [449]; *Al-Nashiri v Poland* at [452]; *Medova v Russia* (App No 25385/04) ECtHR 15 January 2009 at [123]

⁶⁴² Chicago Convention on International Civil Aviation 1944 (adopted 7 December 1944, entered into force 4 April 1947) (1994) 15 UNTS 295, art. 3(a) (hereinafter Chicago Convention).

⁶⁴³ Chicago Convention, art. 3(c).

⁶⁴⁴ Venice Commission Report at [91]; Although the principle may be in need of further clarification, see Chatham House International Law Discussion Group, 'Extraordinary Rendition' (2008) Chatham House Working paper: EEDP 04/07, 10-11 <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/i127030_8.pdf> accessed 8 May 2015.

the territorial State could refuse this permission.⁶⁴⁵ States should also consider removing the blanket overflight clearances granted in the context of NATO agreements soon after 9/11 and generally making overflight permission for State aircraft conditional upon respect for express human rights clauses, which include a right to search the aircraft where there is a suspicion that human rights violations are occurring on board.⁶⁴⁶ If the aircraft involved in rendition misrepresented itself as a civilian aircraft, it would be in breach of the terms of the Chicago Convention and the territorial State would be permitted, under article 16 of the Chicago Convention, to request the plane to land and to search the plane.⁶⁴⁷ None of the provisions of the Chicago Convention would prevent a police search of a civil aircraft stopped for refuelling, or the arrest of persons aboard the aircraft who were suspected of crimes of torture.⁶⁴⁸ European States should also consider introducing rules obliging the operators of chartered civil aircraft passing through their airspace to provide lists of staff and passengers on board.⁶⁴⁹

c) State Secrecy

The misuse of State secrecy rules and undue classification of documents in some European States has prompted criticism from the European Parliament, the Council of Europe and the United Nations as it has hampered investigations into European States' complicity in extraordinary rendition, led to the termination of some criminal proceedings and *de facto* impunity for the perpetrators of human rights violations.⁶⁵⁰ The use of state secrecy rules has been described as a 'systematic cover up',⁶⁵¹ which supports the idea that European States were complicit in extraordinary rendition operations.⁶⁵² The invocation of these secrecy rules is occurring both in US courts and within Europe at domestic and international levels.⁶⁵³

⁶⁴⁵ Ibid, 9.

⁶⁴⁶ Venice Commission Report at [151].

⁶⁴⁷ UK Joint Committee on Human Rights, *Nineteenth Report* (The Stationery Office 2006) at [161]; Helen Duffy, *The 'War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 797; Chatham House International Law Discussion Group, 'Extraordinary Rendition' (2008) Chatham House Working paper: EEDP 04/07, 9 <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il270308.pdf>> accessed 8 May 2015.

⁶⁴⁸ UK Joint Committee on Human Rights, *Nineteenth Report* (The Stationery Office 2006) at [160].

⁶⁴⁹ UK Joint Committee on Human Rights, *Nineteenth Report* (The Stationery Office 2006) at [166.]

⁶⁵⁰ European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA 2014/2997(RSP) at [7]; Marty Report at [42]; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (2009) UN Doc A/HRC/10/3 at [60].

⁶⁵¹ Marty Report at [179].

⁶⁵² Alan Clarke, *Rendition to Torture* (Rutgers University Press 2012) 161-162.

⁶⁵³ Alan Clarke, *Rendition to Torture* (Rutgers University Press 2012) 97; See, for example, *Maher Arar v John Ashcroft, et al.* 18 January 2005, C.A. No. 04-CV-249-DGT-VV; At the European level Poland unsuccessfully attempted to have a case concerning its role in extraordinary rendition, *Al-Nashiri v Poland*, heard in private – Christian Lowe, 'Court rejects Polish request to keep CIA jail hearing private' (*Reuters*, 14 November 2013) <<http://www.reuters.com/article/2013/11/14/us-poland-cia-prison-idUSBRE9AD16M20131114>> accessed 8 May 2015.

In Italy, for example, during the trial of a number of Italian and CIA security officials for offences related to the extraordinary rendition of Osama Moustafa Hassan Nasr, the invocation of State secrecy laws jeopardised the entire trial. A number of witnesses refused to answer questions on the grounds of state secrecy.⁶⁵⁴ Indeed, the President of the Italian Council of Ministers took legal action demanding the annulment of indictments underpinning the trial and the cessation of the trial on the grounds that it violated legal rules on State secrecy because it would reveal details of the working relationship between the CIA and the Italian security services.⁶⁵⁵ He was largely successful in his claims. The Italian Constitutional Court interpreted the President's power to establish state secrets very widely and the scope for judicial review over this power very narrowly. This ruling 'significantly narrowed the scope of what could be ascertained' by the judge in the case, although it did not ultimately stop the trial and, as noted above, a number of Italian and CIA officials were convicted.⁶⁵⁶ The European Court of Human Rights subsequently held in this case that the Italian executive authorities had misused the rules on state secrecy in order to ensure the impunity of those implicated in the case.⁶⁵⁷

In the UK, victims of extraordinary rendition enjoyed some success in legal battles against State secrecy, successfully petitioning the courts for the disclosure of documents related to their extraordinary rendition cases.⁶⁵⁸ However, the UK's response to these cases has been lamentable. In response to these successes, the UK government expanded the use of closed material procedures. These procedures allow the government to refuse to disclose evidence to other parties in a case where the disclosure would be 'contrary to the public interest'. Instead, special advocates, approved by the government, are permitted to see the evidence and represent the interests of the parties who cannot see the evidence.⁶⁵⁹ These procedures had previously been confined to specific limited areas of litigation.⁶⁶⁰ However, as a direct response to the aforementioned cases, the UK significantly extended their scope to include all civil proceedings

⁶⁵⁴ Francesco Messineo, 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023, 1038-1039.

⁶⁵⁵ Francesco Messineo, 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023, 1037; Marty Report at [319]-[320].

⁶⁵⁶ Francesco Messineo, 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023, 1040.

⁶⁵⁷ *Nasr and Ghali v Italy* (44883/09) judgment of 23 February 2016 at [272]. The judgment is currently only available in French and Italian the court states 'En l'espèce, le principe légitime du « secret d'État » a, de toute évidence, été appliqué afin d'empêcher les responsables de répondre de leurs actes [...] En fin de compte, il y a donc eu impunité'.

⁶⁵⁸ *R. (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34.

⁶⁵⁹ Adrian Zuckerman, 'Closed material procedure - denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34' (2011) 30(4) *Civil Justice Quarterly* 345, 345-346.

⁶⁶⁰ Terrorism Prevention and Investigation Measures Act 2011, Schedule 4; Counter-Terrorism Act 2008, Part 6.

before the courts of England and Wales.⁶⁶¹ The legislation also limited civil procedure rules on disclosure known as Norwich Pharmacal orders.⁶⁶² Under these orders, where a party innocently becomes involved in the wrong of another, that person owes a duty to the wronged person to disclose all the information they have pertaining to the wrongdoer. The ruling acts in the form of a discovery order exercisable against a third party where the claimants have no cause of action against the third party, but require information from them to make a case against the wrongdoer who cannot be identified.⁶⁶³ The lawyers for Binyam Mohammed, a victim of extraordinary rendition, attempted to utilise this disclosure mechanism to induce the foreign secretary to disclose documents to them relevant to Binyam Mohammed's extraordinary rendition.⁶⁶⁴ Following this case, the UK authorities, again in the Justice and Security Act 2013, limited the ability of courts to exercise their Norwich Pharmacal disclosure jurisdiction to compel release of 'sensitive information' held by the security services.⁶⁶⁵

Thus instead of actively investigating allegations of complicity in torture, many European States are actively obstructing such investigations by relying on and expanding State secrecy laws in ways that undermine the fundamental principles of justice.⁶⁶⁶ The invocation of state secrets should not be permitted when it is used to conceal human rights violations and it should, in any case, be subject to rigorous oversight.⁶⁶⁷ The broader trend of invoking state secrecy laws has prompted pleas for States to uphold a 'right to the truth', a right for the victims of extraordinary rendition and the public at large to know about the abuses committed by governments in the field of national security.⁶⁶⁸

There may however be some positive changes to the oversight of state secrecy within Europe, beginning at the ECtHR. Where the Court had previously shown itself to be quite deferential on the subject of judicial review of the application of state secrecy laws,⁶⁶⁹ the ECtHR's judgment in *Janowiec and Ors v Russia* could signal a shift in the Convention's jurisprudence toward requiring greater oversight of State secrecy applications.⁶⁷⁰ In that case, Russia abruptly discontinued an

⁶⁶¹ Justice and Security Act 2013, s. 6(11).

⁶⁶² *Norwich Pharmacal Company & Ors v Customs And Excise* [1973] UKHL 6.

⁶⁶³ Stuart Wallace, 'The Journalist-Source Relationship in Context: A Comparative Review of U.S. and English law' (2009) 38(3) *Common Law World Review* 268, 272; *Norwich Pharmacal Company & Ors v Customs And Excise* [1973] UKHL 6 at [175].

⁶⁶⁴ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218. Although it was subsequently held that the court did not have jurisdiction to do this - *R (Omar and Ors.) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118.

⁶⁶⁵ Justice and Security Act 2013, s.17.

⁶⁶⁶ See generally Adrian Zuckerman, 'Closed material procedure - denial of natural justice: *Al Rawi v The Security Service* [2011] UKSC 34' (2011) 30(4) *Civil Justice Quarterly* 345.

⁶⁶⁷ Marty Report at [6].

⁶⁶⁸ *El-Masri v Macedonia* (2013) 57 EHRR 25 at [191]; See also Fabio Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14 *Human Rights Law Review* 85.

⁶⁶⁹ See, for example, *Finogenov and Others v Russia* (App No 18299/03) ECtHR 20 December 2011.

⁶⁷⁰ *Janowiec and Ors v Russia* (2014) 58 EHRR 30.

investigation into the so-called Katyn massacre, which involved the deaths of hundreds of Polish officers and officials during World War 2. Russia classified the decision to discontinue the investigation as top secret. It refused to disclose the contents of the decision, claiming that its top secret status meant it was legally precluded from transferring the information to an international organisation like the ECtHR.⁶⁷¹ The ECtHR found there was a violation of Article 38, which obliges States to furnish all necessary facilities to the ECtHR when investigating cases. It noted the domestic decisions did not specify the exact nature of the security concerns justifying their secret classification. While the ECtHR was reluctant to challenge the judgments of national security authorities, it was apparent that there was insufficient legal oversight of the decision. The domestic courts had not balanced the national security claims against the legitimate public interest in the disclosure of the documents.⁶⁷² The ECtHR strikes the right balance between the conflicting interests here, indicating that it will respect decisions on classification as long as they are subject to sufficient domestic scrutiny.

This move was also apparent in the recent case of *Al-Nashiri v Poland* (discussed above). There the Polish government refused to disclose documents to the ECtHR concerning extraordinary rendition on the grounds that there were insufficient safeguards at the ECtHR to ensure the confidentiality of the requested material. They claimed that Polish law demanded that the confidential information was properly secured.⁶⁷³ The ECtHR responded by finding the Polish State had violated their obligation under Article 38, stating that there were sufficient safeguards at the ECtHR and that the State could not invoke domestic law to trump international law.⁶⁷⁴ When one reads this decision in conjunction with the ECtHR's calls for States to satisfy the right to truth in *El-Masri*, the ECtHR seems to be moving toward greater scrutiny when state secrecy rules are invoked.

B. EU-US Extradition Treaty

1. General Context

On 25 June 2003, the European Union and the United States signed two agreements, one on extradition,⁶⁷⁵ and another on mutual legal assistance.⁶⁷⁶ These agreements were adopted as a response to the terrorist attacks of 11 September 2001 in the United States. At the time it was

⁶⁷¹ *Janowiec and Ors v Russia* (2014) 58 EHRR 30 at [192].

⁶⁷² *Ibid* at [214].

⁶⁷³ *Al-Nashiri v Poland* at [343].

⁶⁷⁴ *Al-Nashiri v Poland* at [358]. The information requested by the ECtHR was not disclosed to it and requests for further information in the context of enforcing the judgment have met with little success – See Council of Europe Committee of Ministers, 'Al-Nashiri v Poland: Updated Action Plan (17/11/2015)' <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a7066>> accessed 18 July 2016.

⁶⁷⁵ Agreement on extradition between the European Union and the United States of America [2003] OJ L181/27 (hereinafter EU-US extradition agreement 2003)

⁶⁷⁶ Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L181/34 (hereinafter EU-US mutual legal assistance agreement 2003).

imperative that extradition and legal assistance should not vary from one European State to another in order to avoid terrorists gravitating toward States with a softer approach to anti-terrorist issues.⁶⁷⁷ This was the first in a new generation of treaties in the realm of police and judicial cooperation in criminal matters negotiated under the previous Articles 24 and 38 TEU.⁶⁷⁸

The negotiation of the agreements was shrouded in secrecy and the drafts were only disclosed to parliaments toward the very end of the negotiation process. This prompted criticism that the EU left very little time for parliamentary scrutiny of the agreements.⁶⁷⁹ Despite being negotiated in 2003, the agreements were not ratified by both parties until 23 October 2009.⁶⁸⁰ They eventually entered into force on 1 February 2010.⁶⁸¹

As the US had extradition agreements in place with all the EU Member States prior to the negotiation of the EU-US agreement, that agreement was broadly designed to co-exist with the existing bi-lateral treaties between the US and European States.⁶⁸² Article 3 of the treaty establishes how the agreement applies in conjunction with pre-existing bi-lateral treaties, with some articles of the EU-US treaty applied in place of bi-lateral provisions, others in addition to bi-lateral provisions and finally others are to be applied in the absence of bi-lateral provisions.⁶⁸³ Equally, the EU-US treaty does not preclude member States and the US from entering further bi-lateral agreements on extradition, however, it does stipulate that such subsequent agreements must be consistent with the EU-US treaty.⁶⁸⁴ The parallel nature of the extradition treaties creates a worrying prospect as it could conceivably allow a State to attempt extradition under both a bi-lateral treaty and the EU-US treaty or vice versa if one of the requests fails. Bassiouni argues this

⁶⁷⁷ Theodore Georgopoulos, 'What kind of treaty making power for the EU? Constitutional problems related to the conclusion of the EU-US agreements on extradition and mutual legal assistance' (2005) 30 *European Law Review* 190, 190-191; European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 6.

⁶⁷⁸ M. Cherif Bassiouni (ed.), *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Martinus Nijhoff, 2008) 350; EU Council, '2423rd Council meeting – Justice Home Affairs and Civil Protection' (Luxembourg, 26 April 2002) 13 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/70307.pdf> accessed 27 April 2015.

⁶⁷⁹ Georgopoulos, 'What kind of treaty making power' 193; European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 7-8.

⁶⁸⁰ Council Decision 2009/820/CFSP on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America [2009] OJ L291/40.

⁶⁸¹ US Department of Justice, 'U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force' (Washington DC, 1 February 2010) <<http://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force>> accessed 27 April 2015.

⁶⁸² European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 9.

⁶⁸³ EU-US extradition agreement 2003, art. 3; Bernd Martenczuk and Servaas Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (IES, 2008) 347.

⁶⁸⁴ EU-US extradition agreement 2003, art 18.

creates a risk that the subjects of the extradition request may simply accede to the extradition rather than facing lengthy imprisonment while waiting for an extradition hearing.⁶⁸⁵

Before extradition can be sought under the treaty, certain criteria must be met. The offence underpinning the extradition request must be punishable under both the laws of the requesting State and the laws of the requested State. The maximum punishment for the extraditable offence must be at least one year of imprisonment. Where extradition is sought for the enforcement of an existing sentence, the person must have at least four months of imprisonment remaining in their term of imprisonment.⁶⁸⁶ Thus, where other extradition treaties establish finite lists of extraditable offences, this treaty establishes a generalised condition for all criminal offences thereby creating a level playing field for extraditable offences. Where multiple extradition requests are received for the same person, for example, from the US and a European Arrest Warrant or an arrest warrant from the international criminal court, discretion is left to the member state as to which extradition request it satisfies, if any.⁶⁸⁷

The mutual legal assistance agreement is meant to facilitate judicial assistance between competent authorities in the US and in EU member states so that all parties can combat crime in a more effective way.⁶⁸⁸ In general, the mutual legal assistance provisions do not have a penalty threshold, unlike the extradition treaty, which means assistance can potentially be requested in the context of any offence, not just ones subject to at least one year imprisonment.⁶⁸⁹ The agreement allows authorities in each State to request information on natural or legal persons' past convictions or involvement in criminal offences, bank details, information that financial institutions possess and information on financial transactions. It also creates conditions for the establishment of joint investigation teams to conduct criminal investigations or prosecutions and facilitates video conferencing to allow witnesses to give evidence remotely.⁶⁹⁰ While this section focuses broadly on the extradition treaty, some reference will be made to the mutual legal assistance treaty where relevant issues arise. The treaties both give rise to a number of human rights issues, which will be discussed further below and there are a series of terms in the treaty which potentially conflict with European human rights law as it currently exists.

⁶⁸⁵ M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn. OUP 2014) 35.

⁶⁸⁶ EU-US extradition agreement 2003, art 4(1).

⁶⁸⁷ EU-US extradition agreement 2003, art 10(2) and explanatory note.

⁶⁸⁸ EU-US mutual legal assistance agreement 2003, preamble.

⁶⁸⁹ European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 9.

⁶⁹⁰ EU-US mutual legal assistance agreement 2003, arts 4-6; EU Council, '2423rd Council meeting – Justice Home Affairs and Civil Protection' (Luxembourg, 26 April 2002) 13 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/70307.pdf> accessed 27 April 2015.

2. Extradition and Torture Inhuman and Degrading Treatment or Punishment

a) *Death Penalty and its relationship to Torture, Inhuman and Degrading Treatment or Punishment*

The opposition of European States to the death penalty is well-established and deeply entrenched in European legal systems. The relationship between the death penalty and extradition dates back to the seminal *Soering v UK* case,⁶⁹¹ where the applicant, Jens Soering, had murdered two people and fled the US to the UK. The US sought his extradition to face murder charges and on conviction he could have faced the death penalty. The applicant claimed that detainees held on death row in the US experienced severe psychological distress while they awaited execution and that subjecting him to this amounted to torture, inhuman and degrading treatment or punishment (TIDTP). The ECtHR held that transferring someone in such circumstances would violate the prohibition on TIDTP in Article 3 and established the “real risk” test, which states that extradition will be incompatible with the Convention if substantial grounds have been shown for believing that the person being extradited “faces a real risk of being subjected to torture or to inhuman and degrading treatment or punishment in the requesting country”.⁶⁹² EU member States have all ratified the additional protocols to the European Convention related to the death penalty.⁶⁹³ Equally, the EU Charter of Fundamental Rights reflects the EU member States’ commitment to the abolition of the death penalty when it states: ‘No one shall be condemned to the death penalty, or executed’.⁶⁹⁴

The US still regularly executes prisoners in many States and at the federal level. As the EU member States are staunchly opposed to the death penalty, it is unsurprising that the EU-US extradition treaty contains a specific provision on the death penalty. This provision states that:

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State *may grant extradition on the condition* that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed *shall not be carried out*. If the requesting State accepts extradition subject to conditions pursuant to this Article, it

⁶⁹¹ *Soering v United Kingdom* (1989) 11 EHRR 439.

⁶⁹² *Soering v United Kingdom* at [91]; It has since been applied to other expulsions from a state’s jurisdiction see, for example, *Chahal v United Kingdom* (1997) 23 EHRR 413 and *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

⁶⁹³ European Convention on Human Rights, Protocol No. 6 concerning the abolition of the death penalty – this protocol abolished the death penalty, but permitted that: ‘A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war’ see art 2. The subsequent European Convention on Human Rights, Protocol No. 13 concerning the abolition of the death penalty in all circumstances, prevented the imposition of the death penalty even in times of war or imminent threat of war.

⁶⁹⁴ Charter of Fundamental Rights, art. 2(2).

shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition *may be denied*.⁶⁹⁵

There is a worrying degree of conditionality in the provision. There is no obligation on the sending State to make the extradition dependant on the receiving State agreeing not to impose or carry out the death penalty and equally no obligation to refuse extradition if this condition is not accepted.⁶⁹⁶ Thus in principle, the treaty accepts that people may be condemned to the death penalty (even if the sentence is not carried out). This is arguably incompatible with the CFR, which expressly stipulates that no one shall be condemned to the death penalty and when read in conjunction with Article 19(2) of the CFR, which enshrines the non-refoulement provision, should make refoulement to condemnation to the death penalty *per se* illegal. The fact that a person is condemned to capital punishment would in itself be sufficient to constitute a breach of the ECHR and arguably also the CFR.⁶⁹⁷

Martenczuk et al. argue that the treaty reflects both political and legal realities. They argue that a mandatory provision by which both Contracting Parties would have bound themselves to refuse extradition in case of risk of the death penalty would amount to a moral condemnation by the US of its own legal system.⁶⁹⁸ However, there was no need for the US to do anything that would morally condemn its own legal system, the EU could have simply maintained that it would make acceding to extradition requests conditional on receiving guarantees that capital punishment would not be imposed. Indeed this appears to have been the original intent of the EU and in the negotiating mandate for the treaty, the Council states that:

As regards extradition, the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regards to life sentences.⁶⁹⁹

In fact, given the centrality of the ECHR to Union law, the agreement should have explicitly provided a wider guarantee, offering European States the possibility to refuse extradition where it was incompatible with any aspect of the European Convention on Human Rights and not simply

⁶⁹⁵ EU-US extradition agreement 2003, art. 13.

⁶⁹⁶ Amnesty International, 'EU-US extradition agreement still flawed on human rights' (*Amnesty International*, 4 June 2003) <<http://www.amnesty.eu/en/news/press-releases/eu/death-penalty/eu-us-extradition-agreement-still-flawed-on-human-rights-amnesty-international-releases-legal-a-0168/#.VUnX5PIVhBc>> accessed 6 May 2015.

⁶⁹⁷ Georgopoulos, 'What kind of treaty making power' 199.

⁶⁹⁸ Bernd Martenczuk and Servaas Van Thiel (eds), *Justice, Liberty, Security : New Challenges for EU External Relations* (IES, 2008) 359

⁶⁹⁹ EU Council, '2423rd Council meeting – Justice Home Affairs and Civil Protection' (Luxembourg, 26 April 2002) 13 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/70307.pdf> accessed 6 May 2015; See also Ian Black, 'Extradition of terror suspects ruled out' (*Guardian*, 14 September 2002) <<http://www.theguardian.com/world/2002/sep/14/usa.ianblack>> accessed 11 May 2015.

the prohibition on capital punishment.⁷⁰⁰ Despite setting out this principle in the negotiating mandate it soon fell by the wayside. This was mainly because US federal authorities do not have control over the sentencing powers of state courts and in some instances state law may require that the death sentence is sought for certain offences. It was not possible therefore to guarantee in the treaty that the subjects of extradition from the EU would not be sentenced to death in all circumstances.⁷⁰¹ While Martenczuk et al. downplay the legal and political significance of this, it could create problems. While the US federal government is responsible for giving assurances to other States through diplomatic relations, the federal government has no power to commute death sentences within individual states when the crimes are tried under state law.⁷⁰² Thus, while the assurance is given by the federal government, the practical difficulties in ensuring compliance occur at the state level where the federal government has limited control.

Finally, the mutual legal assistance agreement does not contain specific provisions on the death penalty. Thus States may not *a priori* refuse to provide legal assistance to the United States where the assistance could result in the imposition of the death penalty on a suspect in the US.⁷⁰³ This could again pose problems under human rights law. Although European human rights law on complicity is far from clear, it is at least conceivable that providing assistance which could lead to the imposition of the death penalty would violate the State's positive obligations under Article 2 of the ECHR. The ECtHR has ruled that Article 2 has now been implicitly amended so as to prohibit the death penalty in all circumstances.⁷⁰⁴ When this is read in conjunction with the State's positive obligation under Article 2, specifically that when a State knows, or ought to have known, of a real and immediate risk to the life of an individual, it must take measures within the scope of its powers that judged reasonably might have been expected to avoid that risk,⁷⁰⁵ it could amount to an obligation to refuse to provide mutual legal assistance in capital cases.

b) Diplomatic Assurances

While there has been criticism of the use of diplomatic assurances and memoranda of understanding as a means of circumventing non-refoulement obligations under human rights

⁷⁰⁰ European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 11.

⁷⁰¹ Bernd Martenczuk and Servaas Van Thiel (eds), *Justice, Liberty, Security : New Challenges for EU External Relations* (IES, 2008) 358.

⁷⁰² US Department of Justice, 'Pardon Information and Instructions' (*Department of Justice*, 13 January 2015) <<http://www.justice.gov/pardon/pardon-information-and-instructions>> accessed 6 May 2015. While the President has the power to grant pardons for people sentenced to death in federal courts and military courts-martial, the power to pardon at the state level is typically vested in the governor of that state, a board or advisory group, or some combination of the two – see Death Penalty Information Center, 'Clemency' <<http://www.deathpenaltyinfo.org/clemency>> accessed 18 July 2016.

⁷⁰³ European Union Select Committee, *EU/US Agreements on Extradition and Mutual Legal Assistance* (HL 2002–03, 153-I) 13.

⁷⁰⁴ *Al-Saadoon and Mufdhi v United Kingdom* (Merits) (2010) 51 EHRR 9 at [120].

⁷⁰⁵ *Osman v United Kingdom* (2000) 29 EHRR 245 at [115].

law,⁷⁰⁶ the criticism has been directed more toward the use of assurances in the context of torture rather than the death penalty. This is because a) death penalty is not *per se* illegal under international law, while the prohibition on TIDTP is and b) monitoring compliance with a diplomatic assurance against using the death penalty is significantly easier than monitoring one related to the prohibition on TIDTP.⁷⁰⁷

The ECtHR for its part has repeatedly upheld the use of diplomatic assurances as a means of ensuring that the death penalty is not carried out in cases where there is a risk that the applicant would be subjected to the death penalty.⁷⁰⁸ In *Ahmad v United Kingdom*, the applicants were indicted for terrorism charges in the US and prosecutors there sought their extradition from the UK to face trial.⁷⁰⁹ The applicants complained that as terrorist suspects they could be tried by a military commission, which would violate their fair trial rights, and subjected to the death penalty. However, the US prosecutors gave assurances that they would be tried in the regular federal court system and not subjected to the death penalty. The ECtHR held that: ‘the United States prosecutors have already set out the charges which he would face upon extradition and made clear that the death penalty is not sought in respect of any of them. To the extent that, in federal cases, the final decision on whether to seek the death penalty rests with the Attorney-General and not the attorney responsible for the prosecution, there is no reason to suggest that the Attorney-General is any more likely to breach the terms of the United States’ assurances than the President’.⁷¹⁰

The ECtHR has found violations of the Convention and demanded that the States seek assurances *ex post facto* when States have permitted the transfer of detainees from their jurisdiction without assurances that they would not be subjected to the death penalty in the receiving jurisdiction.⁷¹¹ In some instances even where assurances have been sought they may not be sufficient to satisfy the ECtHR that the applicant will not be subjected to the death penalty in the receiving jurisdiction. Thus in *Saadi v Italy*, the Italians had sought assurances from the Tunisian authorities that the applicant would not be subjected to TIDTP in the Tunisia.⁷¹² The Tunisian authorities responded by claiming that Tunisian law protected the right to a fair trial and that they had acceded to the relevant international treaties and conventions on the prohibition of torture.⁷¹³ However, these assurances were not good enough for the ECtHR which held that the existence of

⁷⁰⁶ See generally Colin Warbrick, ‘Diplomatic assurances and the removal of terrorist suspects from the UK’ (2006) 4 Archbold News 6, 7-8; Martin Jones, ‘Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings’ (2006) 8 European Journal of Migration and Law 9.

⁷⁰⁷ Anthony Lester and Kate Beattie, ‘Risking torture’ [2005] European Human Rights Law Review 565, 568-569.

⁷⁰⁸ See for example, *Rrapo v Albania* (App. No. 58555/10) ECtHR 25 September 2012.

⁷⁰⁹ *Ahmad v United Kingdom* (2013) 56 EHRR 1.

⁷¹⁰ *Ahmad v United Kingdom* (2013) 56 EHRR 1 at [119].

⁷¹¹ *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014 and *Al-Saadoon and Mufdhi v United Kingdom (Merits)* (2010) 51 EHRR 9.

⁷¹² *Saadi v Italy* (2009) 49 E.H.R.R. 30.

⁷¹³ *Saadi v Italy* (2009) 49 E.H.R.R. 30 at [55].

domestic laws and accession to treaties was not sufficient to ensure adequate protection against the risk of ill-treatment and even where the State had provided assurances the ECtHR had to assess their reliability.⁷¹⁴ Thus, to the extent that the treaty, in principle, permits States to transfer detainees to the US without assurances that they will not be subjected to the death penalty, this is incompatible with European Convention and the CFR. In practice, however, it seems unlikely that the ECtHR would hold that the treaty violates ECHR law. Indeed, the ECtHR has held that there is a presumption of good faith with regard to diplomatic assurances given by a State, like the United States, ‘which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States’.⁷¹⁵ It should be noted that the ECtHR has maintained this position in the face of a number of dubious detention and prosecution practices in the context of the war on terror, which included the use of military tribunals to try suspected terrorists, incommunicado detention, torture etc.

c) Irreducible Life Sentences

The possibility that an applicant could receive an irreducible life sentence on conviction in the receiving jurisdiction may also give rise to an issue under the ECHR. In principle, where a life sentence is irreducible *de jure* and *de facto*, it will be incompatible with the ECHR.⁷¹⁶ The Court has interpreted this principle to mean that:

in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.⁷¹⁷

In practice this meant that ‘a whole-life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence would take place or could be sought’.⁷¹⁸

This principle has been applied in the context of extradition to the United States in the case of *Trabelsi v Belgium*. There the US sought the applicant’s extradition to face charges related to a conspiracy to blow up the US embassy in Paris.⁷¹⁹ Some of the charges against the applicant carried the potential of a life sentence. The applicant complained that his extradition exposed him to a real risk of treatment contrary to article 3 because, *inter alia*, on conviction he could face life imprisonment without any prospect of release. The ECtHR held that although assurances given by the US authorities referred to the prospect of release and commutation of sentences for people

⁷¹⁴ *Saadi v Italy* (2009) 49 E.H.R.R. 30 at [147].

⁷¹⁵ *Ahmad v United Kingdom* (2013) 56 EHRR 1 at [105].

⁷¹⁶ *Kafkaris v Cyprus* (2009) 49 EHRR 35 at [99].

⁷¹⁷ *Vinter and Ors v United Kingdom* (App. No. 66069/09) ECtHR 9 July 2013 at [119].

⁷¹⁸ *Vinter and Ors v United Kingdom* (App. No. 66069/09) ECtHR 9 July 2013 at [122].

⁷¹⁹ *Trabelsi v Belgium* (2015) 60 EHRR 21.

sentenced to life imprisonment, ‘none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds’.⁷²⁰ The ECtHR therefore held that the applicant’s extradition to the United States violated Article 3. This area of law has developed significantly in the past number of years and the potential incompatibility of extradition with this area of law is not even countenanced in the EU-US agreement.

d) *Detention Conditions*

The absence of specific provisions relating to conditions in pre-trial and post-conviction detention in the United States in this treaty are also a cause for concern from a human rights perspective.⁷²¹ Expelling a person to another jurisdiction where they may be detained in conditions that do not comply with human rights standards can also give rise to issues under the ECHR.

In *Aswat v United Kingdom*, for example, the United States sought the applicant’s extradition as he was alleged to have conspired with others to establish a jihad training camp.⁷²² However, the applicant was diagnosed with paranoid schizophrenia in the UK prior to his extradition and complained that because of his condition, extradition to the US would expose him to TIDTP. The allegation arose because it was unclear what concessions the US would make for his medical condition while he was detained there. The ECtHR stated that: ‘whether or not the applicant’s extradition to the United States would breach Article 3 of the Convention very much depends upon the conditions in which he would be detained and the medical services that would be made available to him there’.⁷²³ The ECtHR held that his extradition to the US would violate Article 3 if it went ahead for a number of reasons. Firstly, the US had not provided sufficient information concerning his pre-trial detention facilities and it was unclear how long he would be detained on remand. Secondly, the possibility that the applicant would be detained in a so-called super maximum security or ‘supermax’ prison also gave rise to an issue.⁷²⁴ Detention in these facilities can involve ‘special administrative measures’ such as prolonged solitary confinement. While detention in these facilities was not *per se* contrary to the Convention for persons in good health or with less serious mental health problems,⁷²⁵ these conditions of detention could precipitate a deterioration in the applicant’s physical and mental health because of his particular pathology and expose him to a real risk of treatment contrary to Article 3.⁷²⁶ However, as we saw above with the death penalty, diplomatic assurances can be used to allay concerns about the conditions

⁷²⁰ *Trabelsi v Belgium* (2015) 60 EHRR 21 at [137].

⁷²¹ Georgopoulos, ‘What kind of treaty making power’ 199.

⁷²² *Aswat v United Kingdom* (2014) 58 EHRR 1.

⁷²³ *Aswat v United Kingdom* (2014) 58 EHRR 1 at [52].

⁷²⁴ *Aswat v United Kingdom* (2014) 58 EHRR 1 at [52].

⁷²⁵ See for example, *Ahmad v United Kingdom* (2013) 56 EHRR 1.

⁷²⁶ *Aswat v United Kingdom* (2014) 58 EHRR 1 at [57].

of detention in a third State and in the *Aswat* case, subsequent assurances given by the US prosecutors were deemed sufficient by both the High Court of England and Wales and the European Court of Human Rights for the extradition to go ahead.⁷²⁷

While the prospect of detention in supermax facilities currently only triggers a non-refoulement obligation in particular circumstances, this is a developing area of law. It is entirely foreseeable that the prolonged solitary confinement used in many supermax prisons could be considered TIDTP by the ECtHR in all circumstances in the near future.⁷²⁸ If this shift in policy materialises, it will necessitate further changes in the extradition arrangements between EU member States and the US.

3. Non-Refoulement guarantees under other Articles

a) Article 6

While the preamble to the treaty states that the parties are ‘mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person’,⁷²⁹ there are no further references to that right in the rest of the treaty. There is no clause, for example, allowing States to refuse to extradite on the grounds that the person risks being subjected to an unfair trial in the receiving State or has already been convicted following a trial that does not meet international fair trial standards.

This is an important lacuna because the absence of such a possibility could potentially give rise to a clash with the obligations in the ECHR. The European Court of Human Rights has developed non-refoulement obligations in this sphere stating that ‘an issue under Art.6 could be raised by an extradition decision where the individual had suffered or risked suffering a flagrant denial of justice in the receiving State. Such a risk had to be assessed primarily by reference to the facts which the Contracting State knew or ought to have known at the time of extradition’.⁷³⁰ A violation would arise where an applicant has already been convicted in the receiving jurisdiction after a flagrantly unfair trial and is to be extradited to that State to serve a sentence of imprisonment.⁷³¹

Thus, in *Al-Nashiri v Poland* (discussed above), the applicant had been subjected to extraordinary rendition and as a result he was exposed to the possibility that he would be tried before a military commission in the US. These commissions were established specifically to try certain non-citizens in the war against terrorism. The commission’s rules did not exclude any evidence, including that

⁷²⁷ *R. (Aswat) v Secretary of State for the Home Department* [2014] EWHC 3274 and *Aswat v United Kingdom (no. 2)* (App. No. 62176/14) ECtHR 6 January 2015.

⁷²⁸ *Csüllög v Hungary* (App. No. 30042/08) ECtHR 7 June 2011; *Gorbulya v Russia* (App. No. 31535/09) ECtHR 6 March 2014 at [74] – [81]; See also Jules Lobel, ‘Prolonged Solitary Confinement and the Constitution’ (2008) 11 University of Pennsylvania Journal of Constitutional Law 115, 117-125.

⁷²⁹ EU-US extradition agreement, preamble.

⁷³⁰ *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 at [89]-[90]; *Soering v United Kingdom* (1989) 11 EHRR 439 at [113].

⁷³¹ *Othman v UK* at [232].

obtained under torture, if it ‘would have probative value to a reasonable person’.⁷³² The ECtHR held that a trial before these commissions would not comply with Article 6 as the commissions did not qualify as independent and impartial tribunals established by law and given the high probability that evidence obtained under torture would be admitted in the applicant’s trial.⁷³³ As a result the ECtHR held that Poland’s cooperation and assistance in the applicant’s transfer from its territory, despite a real and foreseeable risk that he could face a flagrant denial of justice in a trial before a military commission engaged the Polish State’s responsibility under Article 6.⁷³⁴ State practice on extradition also illustrates opposition to the use of military commissions, with both Spain and Holland refusing to extradite people to the US in the absence of assurances that they would not be tried by military commissions.⁷³⁵

In *Othman v United Kingdom*,⁷³⁶ the applicant was convicted *in absentia* in Jordan for conspiracy to cause explosions. He was set to be deported from the United Kingdom on national security grounds, but challenged his deportation *inter alia* under Article 6 on the grounds that he could be re-tried in Jordan and that evidence used in the trial against him was obtained by torture. When the case ultimately came before the ECtHR, the court ruled that the applicant’s deportation to Jordan would violate Article 6 on account of the real risk of the admission at the applicant’s retrial of evidence obtained by torture of third persons. The Court stated that ‘the admission of torture evidence is manifestly contrary, not just to the provisions of art.6 , but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome’.⁷³⁷

While this area of case law is still developing and the contours of what constitutes a flagrant denial of justice are still being defined, the ECtHR has taken a strong stance on expulsion to violations of Article 6, whether that be because evidence obtained by torture is used in an applicant’s trial or the tribunal they will be tried before does not meet Article 6 standards. As this area of case law develops further, the lacuna in the extradition agreement on fair trial guarantees in the receiving jurisdiction will likely become more problematic.

b) Article 5

The ECtHR has also introduced a related non-refoulement obligation under Article 5, which demands that States refrain from expelling a person where they face a real risk of being subjected

⁷³² *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014 at [566]; Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 686-690.

⁷³³ *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014 at [567].

⁷³⁴ *Al-Nashiri v Poland* (App No 28761/11) ECtHR 24 July 2014 at [568].

⁷³⁵ Helen Duffy, *The ‘War on Terror and the Framework of International Law* (2nd edn, CUP, 2015) 233.

⁷³⁶ *Othman v United Kingdom* (2012) 55 EHRR 1.

⁷³⁷ *Othman v United Kingdom* (2012) 55 EHRR 1 at [267].

to a flagrant breach of Article 5, the right to liberty and security, in a receiving jurisdiction.⁷³⁸ In *Stoichkov v Bulgaria*, the ECtHR held that:

if a “conviction” is the result of proceedings which were a ‘flagrant denial of justice’, i.e. were ‘manifestly contrary to the provisions of Article 6 or the principles embodied therein’, the resulting deprivation of liberty would not be justified under Article 5.⁷³⁹

In a similar vein, in *Othman v UK* (discussed above), the ECtHR stated that a violation could arise where:

the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial [or...] if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.⁷⁴⁰

A few caveats should be added to this. Firstly, the threshold for a violation, a flagrant denial of justice, is difficult for an applicant to satisfy, especially against a western democratic State such as the United States. Secondly, there may be some limited scope to satisfy such obligations within the context of the treaty. Thus, the treaty permits States to refuse to extradite on any ground set out in a bilateral extradition treaty which is not covered by the EU-US agreement.⁷⁴¹ Thus if there is scope for the State to deny extradition on this ground within the context of their existing extradition agreement with the US, the EU-US agreement does not preclude it. The EU-US treaty itself also creates the possibility for ‘special consultations’ with an extraditing State ‘where the constitutional principles of the requested State may pose an impediment to fulfillment of its obligation to extradite’.⁷⁴² As the ECHR provisions often form part of the State’s constitutional law, there is scope for the non-refoulement obligation under Articles 5 and 6 to fall within this provision. However, it should be noted that while the treaty measure facilitates consultation there is no express provision permitting refusal to extradite.

⁷³⁸ *Tomic v United Kingdom* (App No 17837/03) ECtHR 14 October 2003; *Z and T v UK* (App No 27034/05) ECtHR 28 February 2006. The rule has also been referred to in other jurisdictions – *R. (Ullah) v Special Adjudicator* [2004] UKHL 26 at [17]-[25] and *RB (Algeria) v Home Secretary* [2009] UKHL 10 at [137]-[138]; *Boudellaa and Others v Bosnia and Herzegovina* Case no CH/02/8679 Human Rights Chamber for Bosnia and Herzegovina 11 October 2002 at [233]-[237].

⁷³⁹ *Stoichkov v Bulgaria* (App No 9808/02) ECtHR 24 March 2005 at [51]; *Ilascu and Others v Moldova and Russia* (2005) 40 EHRR 46 at [461] and *Radu v Germany* (App No 20084/07) ECtHR 16 May 2013 at [88].

⁷⁴⁰ *Othman (Abu Qatada) v United Kingdom* at [233]; for more analysis of this case see Christopher Michaelson, ‘The Renaissance of Non-Refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights’ (2012) 61 ICLQ 750.

⁷⁴¹ EU-US extradition agreement 2003, art. 17(1).

⁷⁴² EU-US extradition agreement 2003, art. 17(2).

V. Key findings and recommendations

The purpose of this report was to provide an insight and analysis of the critical points in EU-US relations from a human rights perspective. Therefore, in its Introduction chapter, the report elaborated the fundamentals and main elements of the EU's human rights principles and its tools and policies in human rights mainstreaming in its external relations, on the one hand, and the origins, reasons and relevance of US exceptionalism on the other. Although the EU and the US share many common values in the fields of human rights and democracy, this report focused on the conflicting points of the transatlantic relationship. The selected case studies map this relationship in different ways and at different levels: the case of capital punishment shows the EU's actions and effects towards the abolition of death penalty in the US, while the cases of data protection and surveillance, and the extraordinary rendition focused on the legal frameworks and policies of the EU and the US in the related fields, and analysed the effects of the consequences of US practices on the EU and its Member States. This last chapter of the report summarises the key findings and the recommendations of the case studies in two parts. In the first one, the report elaborates general findings concluded on the basis of the whole report. The second part of this chapter talks about the special findings and recommendations of the case studies.

A. General findings

Summarising the main findings, the report ascertains that both the EU and the US maintain leading roles in promoting human rights and democracy worldwide. In Chapter I the report gave a thorough overview of their activities in this regard, and noticed that they are the most important powers to promote human rights around the world. In order to mainstream human rights internationally, the institutions and authorities responsible for foreign relations in the EU and in the US spend a great deal of financial resources and effort in propagating the respect for human rights, and also try to call on other nations to join international human rights agreements worldwide. Furthermore, historically, they were also some of the main actors proposing the conclusion of new international treaties, since, according to official statements, these can be beneficial for all countries and serve the interest of all humankind.

However, joining international agreements and enforcing their content domestically causes great difficulties to both of them. The US uses a great amount of reservations, understandings and in a number of cases also adds interpretative declarations to international agreements (together: RUDs). The US is not part of the majority of the international human rights treaties and other international agreements, some major judgments of the ICJ are also not followed by US legal practice, and the country did not join and has a sceptical stance towards ICC as well. The EU's position is slightly similar. As an entity, it did not join mainstream international agreements on human rights, with the exception of CRPD. There could be divergent reasons behind this. As Opinion 2/13 of the CJEU shows, joining international agreements could collide with the conferred competencies of the EU, and also could hurt the institutional system by allowing an external court some kind of control besides the CJEU.

The EU as well as the US asseverate their own human rights achievements as role models and represent them as exemplary human rights systems in international negotiations. This is so, even though the US as well as the EU could be called unwilling actors in joining international agreements. On the other hand, the positions of the EU Member States have a stabilising effect in Europe: they have joined numerous international agreements, so in effect Europe is covered by more major human rights agreements than the US. Thus, the great difference between the US and the EU is that in Europe, as a counter-balance, unlike US federal states, Member States may join international human rights treaties, and regularly do so. The report also proves that in the US, divergent causes exist why the state only occasionally joins international agreements, and most of these causes are related to internal politics and the political system. Consequently, the report separated diverging issues (like the cases of the death penalty or surveillance and protection of private data) to receive a proper picture about the concrete area: there are multiple factors behind US exceptionalism.

The ties between the US and the EU are the strongest in the fields of economy/commerce and military cooperation. Overviewing the transatlantic dialogues of the EU, the report highlights the lack of an ongoing human rights dialogue about the human rights systems of the parties. Checking the contents of ongoing dialogues, one may find that most of them are related to commercial questions. Nevertheless, the report did not find any proof that major human rights issues were discussed openly between the two parties at these meetings. On the other hand, a human rights-based cooperation between the EU and the US exists only for focusing on third countries and inside the framework of the UN. The lack of mutual conversation can show different things: the parties trust each others' human rights systems, and/or do not want to hurt economic interests and cooperation with human rights problems and/or Europe's vulnerable position in international politics (the lack of federalised, common foreign policy and military forces and due to this, the inevitable transatlantic partnership) does not allow it to raise these questions, probably because of a lack of greater and centralised military power. Based on EU documents, it seems that creating a dialogue on human rights between the EU and the US would make sense, especially because several sensitive incidents have occurred in the last fifteen years. However, we do not know what causes the lack of such a dialogue, whether it was actually proposed by the EU, or not. Based on the 'City upon a Hill' self-interpretation of the US, one may presume that the US is unwilling to set up or continue talks about sensitive issues (this was the case regarding the EU-US High Level Dialogue on Climate Change, Clean Energy and Sustainable Development as well, when the US stopped financing the cooperation).

It seems the EU is most efficient regarding the abolition of the death penalty in the US among the topics we analysed. In this field, the EU uses three tools, namely public criticism, export bans and targeted instruments (i.e. financial support for NGOs). Among them, the commercial ban of exporting goods to the US for the executions seems to be a direct and effective tool. Regarding surveillance, the European Parliament adopted several important resolutions, but it seems the Commission and the Council support US actions and cooperation with the US strongly, with hardly any special reservations. Regarding extraordinary rendition, US actions had an extremely strong

effect on Member States' policies, and in fact the ECtHR seems to be by far more efficient in enforcing human rights in Europe than the European Union. This is interesting because the opinions most diverging between the US and the EU regarding the topics we examined can be found in the case of the death penalty. It seems that in other questions the fundamentals are not so very different: e.g. criticising US surveillance activities did not result in a halt of data transfers from the EU to the US.

Explaining EU Member States' roles, the report found that in the EU, in a number of cases Member States also outsourced some parts of their sovereignty (for example by allowing the use of detention facilities in their countries, but also the willingness to transfer data in the war on terror to the US proves this). Many factors could be behind this: the EU's lack of power to create own and efficient institutions (like EU intelligence services), the strong position of the US in the negotiations and EU Member States' limited capacity to act efficiently. As a result of this outsourcing, a major part of responsibility could be pushed to the US as well, even though some EU member States also started to limit human rights (for example see our summary regarding surveillance in the EU).

B. Special findings and recommendations

1. Capital punishment

Among the researched topics, the case of capital punishment seems the most successful field in which the EU can achieve its human rights goals in the US.

Paradoxically, the most effective tool of the EU in its effort is the one that requires the least activity, namely, the sanction policy (restricted measure): the Regulation 1236/2005, which bans the export of those goods that can be used for capital punishment or torture. The enforcement of this regulation (the control of the international trade of the related goods from Member States) is based on the Member States' food and drugs authorities, and the report did not find any data or information about any possible violation of this regulation. The effectiveness of this export ban policy seems to be extremely high, making this measure successful since 2011 when the EU put the lethal injection drugs on the list of banned goods. As Chapter II showed, this amendment of the regulation led to the dropping number of executions and the growing number of stayed executions because of the shortage of lethal injections in many retentionist states in the US. Another consequence of this trade policy is that the growing number of botched executions due to the lack of lethal drugs gained nationwide attention in the US, raising and framing the constitutional and moral challenges of capital punishment. In this respect, the results of the general elections in November will be crucial: the new political composition of the presidency and the Congress will be determinative to the SCOTUS, filling the empty position of Late Justice Scalia, and giving a majority to the liberal or conservative side of the Court, and providing the possibility that the Baze and Glossip decisions might be overturned in the event of a liberal majority.

Maintaining the effectiveness of this export ban policy, the report recommends to the EEAS and the Commission to follow the developments and circumstances of the US state level policies,

whether the retentionist states plan to find any other kinds of drugs to carry out executions. This attention is inevitable for updating the list of goods banned for export by and from the EU.

Although the EU, mostly through the HoM in Washington D.C., puts great effort into its public criticism tool against capital punishment in the US, the report finds that this part of the EU's action has had the least (direct or indirect) effect on the current practice of the death penalty of the US. The practice of the EU seems inconsistent: one cannot forecast when and why the EU will apply for clemency in the case of the upcoming executions, and, as the research has shown, the EU regularly misses opportunities for calling against executions, or welcoming the moratorium/abolition on the death penalty in a given state. It is hard to understand why the EU acts in some cases and does nothing in others. Therefore, this report concludes that the EU partly fulfils the requirements of the EU Guidelines on Death Penalty with the inconsistent practice of public criticism. Moreover, the EU seems not to take into account that the existence of capital punishment is (partly) in the hands of the electorate, but seems to neglect this aspect of the problem, leaving the November elections unmentioned. Also, the EU's public criticism has no visible effects: generally neither the state, nor the national media, nor the addressed actors (governors, parole boards, legislative bodies) make public announcements or other signs (press releases, communications, interviews, and so on) reflecting on the EU's calls. This fact leads the report to conclude that the addressed actors of the EU's public criticism seem to ignore the EU's actions. However this cannot mean that the EU should end its engagement with this kind of politics.

For strengthening the effects of the EU's public criticism, this report makes three recommendations. First, to advance a more consistent practice, the EU actors (HoM, HR/VP, and so one) should consider protesting against every single execution in the future. This would be coherent with the Guidelines, as it declares that the EU opposes capital punishment regardless of any circumstances. Regarding the dropping number of executions in the US, this change in the recent practice of public criticism would probably not overburden the work of the EEAS and the HoM in the US, but would surely result in a more consistent, enthusiastic and visible moral stand by the EU against the death penalty. In this case, the EU can rely on the activities and work of the anti-death penalty NGOs in the US, which strictly and punctually follow the latest news and upcoming events (executions, legislative and gubernatorial actions, referendums, and so one) and which could make EU actors aware of them at an early time enabling the EU to prepare its own actions.

Second, the Council should consider the revision of the Guidelines itself: as the EU opposes capital punishment *per se*, therefore the Guidelines would seem to be more coherent if they called on EU actors to act publicly against every execution, and not only against those that may violate the Minimum Standards.

Third, when it comes to the visibility of the EU actions, the EEAS and the HoM in the US could also take into consideration that besides releasing and uploading demarches and other forms of announcements onto the HOM's website, other forms of targeted actions could also be organised

(common events with anti-death penalty NGOs, national press conferences when the HoM/Presidency, HR/VP announce their concerns/welcoming addresses, and so on).

The report finds that the EU's financial support for anti-death penalty NGOs in the US mainly goes to the larger organisations like the American Bar Association or the Death Penalty Information Center. Based on the ECA report, one may conclude that these acts of financial support play an important role in favour of abolition, but as the research in this report finds, the presence of the EU is almost invisible, both from the NGOs' and from the EU's part: this means that neither the supported NGOs', nor the EU's own websites or other documents contain any relevant information about EIDHR funding. Therefore, this report recommends that the EEAS and the HoM provide better and more transparent surfaces for information about the available forms of support from the EIDHR, and also, more up-to-date and relevant information about on-going support grants and programmes.

2. Surveillance and data protection

After reviewing the legal sources and reforms of US privacy law and European reactions, we can highlight some key points concerning transatlantic cooperation in the field of surveillance and personal data protection.

First, we agree with those⁷⁴³ who claim that we should not give up the common human rights standards regarding this issue. Some documents created in the UN could be very useful while creating a common framework for future cooperation, such as the Compilation of good practices on legal and institutional frameworks and measures on intelligence agencies.⁷⁴⁴ This would be in line with the EU's own evaluation, since the FRA also stresses the importance of this framework in relation to EU Member States.⁷⁴⁵ To put it differently, we agree with the view that

not only is the pendulum argument wrong in falsely assuming that sacrifices of rights and civil liberties are necessary, it also misses the point about why rights and civil liberties matter. The protection of liberty is most important in times of crisis, when it is under the greatest threat. During times of peace, because we are less likely to make unnecessary sacrifices of liberty, the need to protect it is not as dire. The

⁷⁴³ One of the most convincing arguments can be found in Alice Ristroph, 'Reviewing Eric Posner & Adrian Vermeule, *Terror In The Balance: Security, Liberty, And The Courts* (Oxford 2007)' (2008) 11 Green Bag 243. See also Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press, 2011). 61.

⁷⁴⁴ UNHRC, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight' GE.10-13410 (E) 010610. <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.46.pdf>> accessed 1 May 2016

⁷⁴⁵ See FRA, 'Surveillance By Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU Mapping Member States' Legal Frameworks' (Publications Office of the European Union, 2015)

greatest need for safeguarding liberty comes during times when we least want to protect it, when our fear clouds our judgment.⁷⁴⁶

Second, as seen before, we believe that there were serious concerns regarding US privacy and surveillance laws, which are based on valid grounds. However, as mentioned before, the US improved its system a lot. As Secretary John F. Kerry wrote in a letter addressed to Commissioner Věra Jourová in the beginning of 2016, the US has established a Privacy Shield Ombudsperson, who is independent from the U.S. intelligence community, and reports directly to him.⁷⁴⁷ The changes were based on the observations of an independent review group.⁷⁴⁸

Third, we must highlight that the EU does not have an independent intelligence agency, which makes it dependent on US actions, even if there exists a cooperation between Member States' counter-terrorist authorities. In a number of cases it was proven that this cooperation could hardly overcome the fragmentation among Member States.⁷⁴⁹

Finally, one question regarding transatlantic cooperation is whether the data sent to the US is stored under safe conditions. We have seen before that access to them by NSA or FBI raises valid concerns in this regard. At the same time, it is too early to assess the effect of the latest reforms, which were introduced in 2015.

⁷⁴⁶ Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press, 2011) 61.

⁷⁴⁷ Letter of Secretary of State John F. Kerry to Commissioner Jourová <http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision-annex-3_en.pdf> accessed 1 August 2016

⁷⁴⁸ Peter P. Swire, 'The USA Freedom Act: A Partial Response to European Concerns about NSA Surveillance' Sam Nunn School of International Affairs Georgia Institute of Technology Working paper GTJMCE-2015-1 <<http://inta.gatech.edu/jmce/working-papers>> accessed 1 June 2016

⁷⁴⁹ For general problems regarding this topic see Larissa van den Herik, Nico Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order - Meeting the Challenges* (CUP 2013). As Raphael Bossong put it,

the EU's strategy to combat radicalisation and recruitment into terrorism also underlined the limits to further integration. As a result, policy-makers experimented with flexible integration, while the Commission emphasised research support and knowledge exchange. As this generated limited results that accentuated repression over early prevention, the Stockholm programme emphasised lower levels of government and support for the horizontal exchange of experiences.

For possible future changes he wrote that

the proposed network of local and professional actors could make a step forward, but should not be expected to provide a breakthrough for EU cooperation counter-terrorism prevention. A few interested actors are likely to utilise the additional opportunities and resources of the network, while extensive and meaningful awareness raising across lower levels of government in Europe should not be expected.

Raphael Bossong, 'Assessing the EU's Added Value in the Area of Terrorism Prevention and Violent Radicalisation.' January 2012 Economics of Security Working Paper 60 (EUSECOCON research project) 10 ff. <https://www.diw.de/documents/publikationen/73/diw_01.c.399445.de/diw_econsec0060.pdf> accessed 1 June 2016

Compared to the case of capital punishment, it is a much more complicated task to give any kind of hints for EU legislation regarding data protection cooperation with the US. There are several reasons why this is so.

First, without a unified approach on surveillance and common institutions, the EU will only be able to harmonise some of the Member States' rules and/or create rules on privacy protection. Without a unified approach the answers given will always be ad hoc or in certain instances reflect on actions of the CJEU, as we have seen after the Schrems case. It could be argued that the present framework still gives a lot of free space to conduct surveillance by governments. For example in France, the latest changes mentioned before prove that Member States' intelligence services will have great discretion regarding surveillance in the future as well.

Second, the latest changes in EU law, and especially the adoption of the Privacy Shield were heavily debated in the EP, which shows that they can have numerous hidden flaws, while it also reveals the complexity of problems. As some MEPs such as Sophie in' t Veld from ALDE claimed during debates in the EP,

if I look at the text, the protections it offers are of much lower level than the ones actually provided by the EU data protection legislation, that we're currently discussing. [...] I want to be absolutely sure before we vote, that there is no risk that this agreement will ever override the data protection directive.⁷⁵⁰

Thirdly, a certain amount of time must pass until we can evaluate the new rules, and even then we will not have too much information about their application. For example, if Edward Snowden had not leaked documents about NSA, there is a chance the public still would not know too much about the surveillance activities of US agencies. The adoption of the Privacy Shield and the Umbrella is a major step forward in this field, and some time must pass until the changes can be observed more clearly. However, we must take into consideration that the future decision in the Schrems II case will also add to our interpretation of privacy in Europe.

When thinking about US surveillance law, there are two crucial questions that can bring us forward regarding future cooperation. The first question is whether the US changed any legislation to conform to European solicitude. The second is whether the EU should trust that the US is a reliable and cooperative partner in granting data privacy.

⁷⁵⁰ Paola Tavola, 'The EU-US Umbrella agreement on Data Protection just presented to the European Parliament. All people apparently happy, but....' (European Area of Freedom Security & Justice FREE Group, 22 September 2015) <<https://free-group.eu/2015/09/22/the-eu-us-umbrella-agreement-just-presented-to-the-european-parliament-all-people-apparently-happy-but/>> accessed 10 August 2016

The European Parliament stressed numerous points regarding the EU's relationship with the US in 2014.⁷⁵¹

It pointed out that there is a need 'for the US to restore trust with its EU partners, as it is the US intelligence agencies' activities that are primarily at stake'.⁷⁵² The document also stressed that the crisis of confidence extends to the spirit of cooperation within the EU, to citizens, who now know even their own government may be spying on them as well as to the respect for fundamental rights, democracy and the rule of law. Furthermore, some other values like the credibility of democratic, judicial and parliamentary safeguards and oversight in a digital society were also mentioned.

It highlighted that the EP

believes that the mass surveillance of citizens and the spying on political leaders by the US have caused serious damage to relations between the EU and the US and negatively impacted on trust in US organisations acting in the EU; this is further exacerbated by the lack of judicial and administrative remedies for redress under US law for EU citizens, particularly in cases of surveillance activities for intelligence purposes.⁷⁵³

It also added that serious 'signals are needed from our American partners to demonstrate that the US distinguishes between allies and adversaries'.⁷⁵⁴ Moreover, it emphasised that the information and judicial redress rights of EU citizens must be granted in the US, which was indeed later implemented by the US reforms. Finally, it 'called on the EU institutions to explore the possibilities for establishing a code of conduct with the US, which would guarantee that no US espionage is pursued against EU institutions and facilities'.⁷⁵⁵

We have seen before that many regulations were recently changed in the US, and its data protection privacy has developed well in the recent months. However, regaining mutual trust can take more time than simply changing laws.

Commission President Jean-Claude Juncker was extremely quick after the Schrems case to claim that cooperation with the US in this field would continue. Vice-President Joe Biden and President Juncker emphasised in November 2015 that the EU and the US must rapidly conclude a

⁷⁵¹ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)) P7_TA(2014)0230.

⁷⁵² *ibid*, Point 111

⁷⁵³ *ibid*, Point 114

⁷⁵⁴ *ibid*, Point 118

⁷⁵⁵ *ibid*, Point 121

replacement to the Safe Harbor framework.⁷⁵⁶ Earlier, top officials stressed that whatever the CJEU decided in the Schrems case, the EU planned to maintain a kind of 'safe harbour' in the future as well. And in fact, this is what happened.

One reason for this is that besides having their own intelligence services, which occasionally commit illegal activities, EU Member States also 'outsource' part of their intelligence at the expense of the privacy security of their citizens. However, after all the revealed surveillance scandals of the past and the assessment of the various flaws in the US legal system concerning this issue, we can ascertain that no responsible person could claim the US could be trusted as a partner where data of European citizens is granted absolutely safety. Furthermore, if such problems emerged with another country with lesser bargaining power, their existence would be obvious and recognised by all the EU institutions involved in the decision making process.

3. Extraordinary Rendition, the 'War on Terror' and TIDTP

The process of extraordinary rendition has led to untold suffering for the victims caught in its net and an array of both direct and incidental human rights abuses. Many European States have been complicit in these operations to varying degrees from allowing rendition aircraft to transit their airspace, to hosting CIA detention facilities. The establishment of this process at the scale it operated on would have been virtually impossible without the complicity of many EU States, opening their airspace, sharing information and assisting the US in a variety of other ways. This record of complicity was built upon a pervasive abdication of sovereignty and control across EU States, which enabled widespread human rights violations to occur. Since this complicity came to light, the investigations into European States' involvement in this programme have been largely sub-standard. Many States have actively hampered domestic and international investigations aimed at establishing the truth by invoking state secrecy provisions and changing the law to make it more difficult for victims to make cases. While the legal framework is capable of punishing both the perpetrators of these human rights abuses and those complicit in them, the political will for such action seems to be largely absent. Even where the judicial system has functioned correctly, executive refusals to seek the extradition of people convicted or suspected for their involvement in extraordinary rendition cases have thwarted these positive developments.

Looking forward with a view to curtailing such activities in the future, a number of steps will be necessary. Firstly, EU Member States must utilise their legal systems to pursue the perpetrators of torture and those complicit in extraordinary rendition and actively bring them to justice. Secondly, States must actively uphold their positive human rights obligations throughout their jurisdiction and increase awareness of these duties among their State agents. Thirdly, States need to assess the legal and political agreements which have enabled extraordinary rendition, such as NATO SOFAs, blanket overflight clearances etc. and alter these so that they are not a barrier to human rights compliance. Fourthly, while state secrecy can be legitimate in some circumstances, there

⁷⁵⁶ Roberta Rampton, 'U.S. Vice President Biden, EU's Juncker discuss data pact: White House' (*Reuters*, 3 November 2015) <<http://ca.reuters.com/article/topNews/idCAKCN0SS2HK20151103>> accessed 10 August 2016

needs to be greater oversight and scrutiny of the invocation of state secrecy at domestic and international levels.

The EU-US extradition agreement is a divisive treaty in many respects. The secrecy surrounding the negotiation process was lamentable, as was the divergence of the EU from its negotiation mandate on the death penalty. Any changes to this treaty or treaties in this field in future should be negotiated with a higher level of transparency. There have also been significant developments in the non-refoulement protections provided under the ECHR in past years. This expansion in non-refoulement guarantees should be reflected in the extradition arrangements between the EU and the US. A number of criminal justice practices in the US present barriers to extradition between EU countries and the US. The use of capital punishment, trial by military commissions and prolonged solitary confinement in supermax facilities are deeply problematic practices from a European human rights perspective. In light of these problems the extradition agreement should ideally contain explicit provisions allowing any EU State to refuse extradition where it would be incompatible with any provision of the ECHR and not simply the prohibition on capital punishment.

At the EU-level the process of invoking Article 7 needs to be less dependent on political will and more firmly grounded in legal analysis. It should be invoked, as the European Parliament indicated it would, against States that were most complicit in the process of extraordinary rendition, but have failed to adequately investigate their complicity.

More generally the EU needs to be less sycophantic and more transparent in its political relations with the United States. This deference characterised the relationship between the US and the EU when extraordinary rendition began, enabling the practice in the first place. It has continued since then with the EU failing to openly and publicly challenge the behaviour of the US as they refused to co-operate with investigations into extraordinary rendition. The negotiation of the EU-US extradition treaty was also characterised by a lamentable lack of transparency, limiting political oversight of the process and ultimately resulting in a flawed treaty, which does not adequately protect EU legal interests. The treaty does not adequately cater for the EU member states to restrain extradition in response to these criminal justice problems.

Overall the legal framework for pursuing perpetrators of extraordinary rendition is adequate, their conduct is criminalised, universal jurisdiction and other mechanisms can assist in bringing cases and there are extradition agreements in place to summon alleged perpetrators before the courts. The problems are an absence of political will to pursue prosecutions and the widespread utilisation of state secrecy rules to keep information out of the public domain. Member States need to address the rules governing state secrecy and put in place greater oversight of the invocation of state secrets to ensure it is not abused. Equally, there needs to be a seismic shift in political attitudes towards extraordinary rendition in order to combat the tendency of member states to ignore the practice. The practice of extraordinary rendition needs to be confronted and the perpetrators brought to justice as it currently casts a long shadow across the EU's foreign policy action.

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