

## Public consultation “Debate on the future of Home Affairs policies: An open and safe Europe – what next?”

### Contribution of the International Commission of Jurists

January 2013

#### 1. Introduction

The International Commission of Jurists (ICJ) is pleased to present its contribution to the European Commission in the framework of the public consultation “Debate on the future of Home Affairs policies: An open and safe Europe – what next?” and to join the discussion in view of the forthcoming Commission Communication on the New Agenda for Home Affairs.

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Article 2 of the Treaty on the European Union (TEU)<sup>1</sup> states that the European “Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. Article 51.1 of the *Charter of Fundamental Rights of the European Union* (“EU Charter”), which has equal legal force to the Treaties under Article 6 TEU, provides that the “provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity [and that they] shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

While significant efforts to implement Charter fundamental rights have been undertaken by the European Union in recent years, the ICJ notes that EU law in the field of home affairs and the corresponding national legislation adopted by a number of EU Member States are not yet fully in line with the EU Charter.<sup>2</sup> The ICJ therefore recommends that, in order to fully satisfy their duties under article 6 of the EU Treaty and article 51 of the EU Charter, the EU institutions

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<sup>1</sup> The TEU and the Treaty on the Functioning of the European Union (TFEU) will be referred to together in this contribution as “the Treaties”.

<sup>2</sup> The Treaty has given binding force to the *Charter of Fundamental Rights of the European Union* (“EU Charter”), which now has primary law status, and reinforced the obligation of the EU institutions and of EU law to abide by fundamental and human rights enshrined in EU law and in international law. There is still debate as to the reach of the EU Charter within and beyond the scope of EU law (article 51 of the Charter). The ICJ understands that, at present, the line has been set by the Grand Chamber of the Court of Justice of the European Union to include not only express conflicts between EU law and the Charter assessment of the compliance of national law transposing EU law with the Charter, but also of any national legal provision which, although not directly originating from EU law, has the purpose to ensure the implementation of a EU competence or provision (see, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, 26 February 2013).

undertake a range of reforms with regard to institutional affairs, infringement proceedings, asylum, border control and migration, and counter-terrorism.

## 2. Institutional affairs

The institutional structures and procedures which govern the development of home affairs policies and the enactment of EU legislation on home affairs matters are the means by which more effective protection of human rights in EU law and policy can be achieved. The ICJ welcomes the fact that all the EU legislative institutions (Commission, Parliament and Council) have set up internal policies and procedures to ensure that legislation is compatible with the EU Charter of Fundamental Rights.<sup>3</sup> **However, the ICJ recommends that the EU institutions develop and implement means to enhance fundamental rights assessment procedures, so as to ensure a more in-depth evaluation of all legislative proposals for their compliance with human rights law, as enshrined in the EU Charter and international human rights law.** This could be achieved, for example, by providing for fundamental rights assessments of legislative proposals separate from the general impact assessment, and/or by requiring a fundamental rights assessment of amendments before they are put to a vote, and/or by giving the competence, or systematically tasking, the Fundamental Rights Agency or another independent expert body, to produce these assessments.

Furthermore, the ICJ notes that the EU, acting through its institutions, not only has the obligation to respect the rights enshrined in the EU Charter, including in its proposing and adopting of legislation, but must also take positive measures to protect and promote the application of the rights enshrined in the Charter. As the European Commission has stated, in its *2012 Report on the Application of the EU Charter of Fundamental Rights*, “[w]here the EU has competence to act, the Commission can also propose EU legislation that gives concrete effect to the rights and principles of the Charter”.<sup>4</sup> Pursuant to article 51(1) of the Charter, EU institutions, bodies, offices and agencies must “respect the rights, observe the principles and promote the application thereof”, subject to the principle of subsidiarity. **The ICJ, therefore, suggests that a new post-Stockholm programme on home affairs<sup>5</sup> tasks the European Commission to conduct a thorough and periodic assessment of all the measures needed under the justice and home affairs chapter in order to ensure the realization of the rights under the Charter within their fields of competence.**

Finally, more needs to be done to ensure that the right to access the documentation of EU institutions is guaranteed, pursuant to rights under the Charter. The European Parliament expressed its strong concern in its resolution 2013/0271 of 12 June 2013 at the deadlock that exists among the EU institutions impeding any reform of *Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European*

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<sup>3</sup> Rule 36 of the *Rules of Procedure of the European Parliament*, January 2014; Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*, Doc. No. COM(2005) 172 final, 24 April 2005; *Practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, Doc. No. COM(2009) 205 final, 29 April 2009; Doc. No. COM(2010) 543 final, 8 October 2010; *Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union*, 23 May 2011; *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies*, Doc. No. 10140/11, 18 May 2011. For an exhaustive research on the issue, see, Olivier De Schutter, “The Implementation of the Charter by the Institutions of the European Union”, in *Commentary on the EU Charter of Fundamental Rights*, edited by Steve Peers, Tamara Hervej, Jeff Kenner and Angela Ward, Hart Publ., Oxford and Portland, Oregon, December 2013.

<sup>4</sup> *2012 Report on the Application of the EU Charter of Fundamental Rights*, Doc. No. COM(2013) 271 final, 8 May 2013, page 3.

<sup>5</sup> The Stockholm programme, successor of the Tampere and Hague Programmes, outlined the measures to be undertaken by the EU institutions until 2014 in the field of justice and home affairs.

*Parliament, Council and Commission documents.*<sup>6</sup> The ICJ refers to the Court of Justice decision of 17 October 2013<sup>7</sup> which condemned the practice of the Council of the European Union with regard to access to documents related to the ordinary legislative procedure, and to the current draft report of MEP Sophia in't Veld on public access to documents calling for a revision of Regulation No. 1049/2001 and to enhance transparency in all phases of the legislative procedure.<sup>8</sup> The ICJ considers that access to official documents is an essential element of the rule of law, in particular when the documents form part of a legislative procedure. This right is also guaranteed in a number of human rights treaties, including article 41 of the EU Charter, article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 8 of the *European Convention on Human Rights* (ECHR). **For this reason, the ICJ recommends that the EU institutions consider the need for revision of Regulation No. 1049/2001 in order to bring it into line with EU obligations under the Lisbon Treaty (articles 1 and 16 of the TEU and articles 15 and 298 TFEU), the EU Charter (articles 41 and 42) and in accordance with principles of transparency and the rule of law. In any such reform, the recently adopted *Global Principles on National Security and the Right to Information* ("the Thswane Principles"), endorsed by the Parliamentary Assembly of the Council of Europe,<sup>9</sup> would provide valuable guidance.**<sup>10</sup>

### 3. Infringement proceedings

The ICJ considers that a new home affairs programme should focus on implementation of current EU law and agrees with the former Lithuanian presidency of the Council in its statement that "Europe has to be credible in terms of implementation and abide by its commitments".<sup>11</sup> In that respect, the EU should, first and foremost, reinforce the tools of implementation monitoring and of infringement proceedings of the European Commission.

The last available report on cases of infringement of EU law in 2012<sup>12</sup> revealed that, out of 1,405 new infringement cases from the Commission (whether they originated from complaints or from the Commission itself), only 22 concerned home affairs, while 61 were in the area of justice and fundamental rights. These figures suggest the rate of enforcement action in these areas remains too low to be effective, in contradistinction to the relatively higher rate of enforcement in the economic or environmental fields.

**The ICJ recommends that consultations take place assessing the current system of infringement proceedings and considering ways to increase its effectiveness and transparency to ensure full and effective implementation of EU justice and home affairs legislation by Member States, in compliance with the EU Charter.**

<sup>6</sup> European Parliament resolution of 12 June 2013 on the deadlock on the revision of Regulation (EC) No 1049/2001, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2013-0271%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>7</sup> *Council v Access Info Europe*, Case no. C-280-11 P, 17 October 2013.

<sup>8</sup> *Draft Report on public access to documents* (Rule 104(7)) for the years 2011-2013 (2013/2155(INI)), Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Sophia in 't Veld, EP Doc. No. PE524.641v01-00, 2 December 2013, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-524.641%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>.

<sup>9</sup> *National Security and Access to Information*, PACE, Resolution 1954(2013), 2 October 2013, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en>. See also, *National Security and Access to Information*, PACE, Recommendation 2024(2013), 2 October 2013, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20194&lang=en>

<sup>10</sup> Available at <http://www.icj.org/new-global-principles-on-the-right-to-information-launched/>

<sup>11</sup> Discussion Paper on the future development of the JHA area, Doc No. 14898/13, Brussels, 16 October 2013, page 4.

<sup>12</sup> Reports available at [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/annual\\_report\\_30/sg\\_annual\\_report\\_monitoring\\_eu\\_law\\_1310\\_23.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_30/sg_annual_report_monitoring_eu_law_1310_23.pdf); and at [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/annual\\_report\\_30/com\\_2013\\_726\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_30/com_2013_726_en.pdf).

#### 4. Asylum

The ICJ welcomes the efforts of the EU institutions to fulfil their goal contained in the Stockholm programme to set up a Common European Asylum System (CEAS). The approval of the directives and regulations into law has signalled an important progression in the respect, protection and fulfilment of asylum seekers' rights throughout the European Union, at least in law. **To make effective these directives and regulations, the ICJ considers that the task of monitoring, implementation and execution of these measures in law and in practice should be the highest priority of the EU institutions and, in particular, of the European Commission.**

The ICJ notes, however, that the new directives still leave space for discretion to be exercised by States as to whether to fully discharge their obligations regarding certain human rights of refugees and asylum seekers, especially economic, social and cultural rights. Furthermore, parts of the CEAS legislation still do not seem to discharge the EU obligations under international human rights law and the EU Charter, such as, for example, the retention of the concept of safe country of origin or safe third country in asylum procedures. The ICJ also regrets the lost chance to introduce a suspension mechanism, proposed by the Commission, within the Dublin III Regulation, in case a transfer gives rise to a risk of the person transferred being subject to inhuman or degrading treatment or other serious violations of his or her human rights in the destination Member State. **For these reasons, the ICJ suggests that a further effort be undertaken by the EU institutions to identify and modify those provisions, and only those, which may not be in compliance with the EU Charter of Fundamental Rights. The identification of these provisions may be assisted by a public consultation procedure.**

**The ICJ would further suggest that a new plan on home affairs include a modification of the system of application of temporary protection,<sup>13</sup> as required by article 78.2(c) TFEU** which indicates that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising ... a common system of temporary protection for displaced persons in the event of massive inflow".<sup>14</sup> The ICJ believes that a reform of this system giving the Commission and the Parliament more leeway to allow for temporary protection would help to ensure the stability of the entire Common European Asylum System. Most of the problems which have affected the sustainability of the CEAS appears to have come from uncoordinated and unilateral responses to crises around Europe, from the movements of refugees and migrants due to the Libyan civil armed conflict to the present Syrian refugee crisis.<sup>15</sup> The pressures on Member States like Malta, Italy, Greece and, now, Bulgaria might have been eased if the Parliament and/or the Commission had had the possibility to decide on whether to activate the temporary protection directive.

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<sup>13</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>14</sup> The ICJ does not believe that the regulation required by article 78.2(c) can be considered equivalent to that of paragraph 3 of the same article as, otherwise, the treaty drafters would not have inserted letter c) in the legislative duties of the EU.

<sup>15</sup> On the lack of use of the Temporary Protection Directive during the crises of Libya and Syria, please see, among others, Madeline Garlick and Joanne van Selm, "From commitment to practice: the EU response", from Force Migration Review no. 39, *North Africa and displacement 2011-2012*, June 2012, page 20; Human Rights Watch, "EU: Provide Protection for Syrian Refugees", 23 December 2012. To present the Directive, approved in 2001 as a reaction to the Kosovo crisis, has never been used.

**Finally, the ICJ considers that further measures may be needed in order to effectively and fully discharge the obligations of the EU and its Member States under article 80 TFEU to respect the principle of solidarity in border checks, asylum and immigration.**

The only current resettlement programme concerns Malta (EUREMA) and works on a voluntary basis. Despite the existence of this programme, more refugees from this country are resettled in the United States than in EU Member States, and, in 2012, the USA hosted almost three times more refugees coming from Malta than EU countries.<sup>16</sup> **For these reasons, further reflection should be undertaken into resettlement mechanisms which are more binding on Member States and centred on the rights and needs of the refugee or asylum seeker.**

## 5. Border control and migration

The ICJ shares the opinion of the UN Special Rapporteur on the human rights of migrants that, “within the European Union policy context, irregular migration remains largely viewed as a security concern that must be stopped [and that this] is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights”.<sup>17</sup> **The European Union should shift the focus of its migration policies from a security-centred approach to one that has as its first priority the respect, protection and fulfilment of the rights of migrants who are either trying to reach its territory or are present on it without required documentation.**

The ICJ has been engaged in the current legislative discussion on the Commission’s proposal for a regulation establishing rules for the surveillance of the external sea borders in the context of operation cooperation coordinated by FRONTEX. The ICJ supports the efforts by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) to ensure the full respect of the principle of *non-refoulement* in Frontex sea operations and to give priority to the duty of the EU and Member States to search and rescue and bring to safety migrants in distress in the high seas.<sup>18</sup>

The ICJ considers, however, that the continued occurrence of deaths of migrants in the Mediterranean Sea cannot be adequately addressed at the national level, as demonstrated by the ongoing dispute between Italy and Malta as to the appropriate delimitation of their respective duties to search and rescue under the law of the sea. The ICJ calls attention to the letter of then Vice-President and Commissioner Jacques Barrot of 15 July 2009, in relation to the Italian push-backs on the high seas examined by the European Court of Human Rights in the *Hirsi* case. According to the Commissioner, “[t]he Commission is of the opinion that border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone, the exclusive economic zone or on the high seas, fall within the scope of application of the SBC [Schengen Borders Code]. In that connection, our preliminary legal analysis would suggest that the activities of the Italian border guards correspond to the notion of ‘border surveillance’ as set forth in Article 12 of the SBC, because they prevented the unauthorised crossing of an external sea border by the persons concerned and resulted in them being returned to the third country of

<sup>16</sup> Official statistics by UNHCR Malta available at <https://drive.google.com/folderview?id=0B6aJpCO6sQYhTDJIb0NPdWNHakU&usp=sharing> .

<sup>17</sup> *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, Report of the UN Special Rapporteur on the human rights of migrants, François Crépeau, UN Doc, A/HRC/23/46, 24 April 2013, para. 31, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf)

<sup>18</sup> See, *Joint Briefing on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, ICJ, Amnesty International and ECRE, 2 September 2013, available at <http://www.icj.org/joint-submission-on-eu-draft-regulation-on-surveillance-of-external-sea-borders/> .

departure.”<sup>19</sup> **The ICJ recommends that the Commission reflect on whether the EU has competence to draft a regulation on uniform standards for search and rescue in the high seas in compliance with international law, including international human rights law and the international law of the sea, or, if they lack such competence, propose a modification of the EU Treaties.**

The ICJ takes note of the Commission’s Communication on the work of the Task Force Mediterranean (TFM) of 4 December 2013<sup>20</sup> centred around cooperation with third countries, the fight against trafficking, smuggling and organized crime, reinforced border surveillance, but also on “regional protection, resettlement and reinforced legal avenues to Europe” and “assistance and solidarity with Member States dealing with high migration pressure”. **The ICJ considers that these last two dimensions should be prioritized in the work of the EU.**<sup>21</sup>

**The ICJ further suggests that the Commission examine the possibility of reforming parts of the EU Return Directive 2008/115/EC and increase the number of its inquiries into the application in practice of the effectiveness of laws and procedures governing the possibility for voluntary return in Member States under the Directive. Among the legislative reforms needed, the ICJ considers that those aimed at reducing incidence of detention of migrants should be prioritized. In this respect, the maximum limit of eighteen months of detention is excessive for any case of detention with a view to deportation undertaken with the requisite due diligence.** The ICJ recalls that detention with a view to deportation or for the prevention of unlawful entry are the only lawful grounds for administrative detention for migrants under the European Convention on Human Rights.<sup>22</sup> Furthermore, this excessive length and the lack of any binding and prior alternative measures for detention in the Regulation may contravene the international legal obligations, particularly the principles of necessity and proportionality in respect of deprivation of liberty under international law, including the International Covenant on Civil and Political Rights.<sup>23</sup>

**The ICJ welcomes and supports the proposal by the Commission and the TFM to “carry out the evaluation and possible modification of the EU acquis on facilitating unauthorised entry, transit and residence, by reconciling effective fight against smuggling with the need to avoid criminalising humanitarian assistance”.**<sup>24</sup> Indeed, Council Directive 2002/90/EC by providing discretion to Member States to exclude criminalization of “facilitation” of illegal entry for humanitarian grounds creates the risk of punishing conduct aimed at saving the lives of migrants. **Furthermore, the ICJ considers that an evaluation should be undertaken to consider the extent to which legislation such as Council Directive 2001/51/EC, obliging carriers to return third country nationals when they are refused entry, does not result in the effective establishment of a system of privatization of the migration and asylum access regimes, whereby**

<sup>19</sup> *Hirsi Jamaa and Others v. Italy* ECtHR, GC, Application No. 27765/09, Judgment of 23 February 2012, par. 34.

<sup>20</sup> *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Doc. COM(2013) 869 final, 4 December 2013, available at [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204\\_communication\\_on\\_the\\_work\\_of\\_the\\_task\\_force\\_mediterranean\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf).

<sup>21</sup> With regard to the other priorities outlined by the TFM and privileged by the European Council conclusions of 20 December 2013, the ICJ would like to stress that, although not dismissing them in principle, they carry with them the risk of giving rise to situations of complicity of EU institutions and/or Member States in human rights violations occurring in the third countries or in cooperation with them (see, article 14 of the *UN Draft Articles of the International Law Commission on the international responsibility of international organizations for wrongful acts under international law*).

<sup>22</sup> See, article 5.1(f) ECHR.

<sup>23</sup> See, for a complete collection of international law and jurisprudence on the issue, *Migration and International Human Rights Law*, Practitioners Guide No. 6, International Commission of Jurists, Geneva, 2011, Chapter 4.

<sup>24</sup> *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, Doc. COM(2013) 869 final, 4 December 2013, para 3.8. See also, para 4.6.



**private carriers retain the power to decide on who can access EU territory to ask for international protection and who is an undocumented migrant.**

## **6. Counter-terrorism and human rights**

### *6.1. The NSA mass surveillance and the EU*

The revelations provided by whistleblower and former United States National Security Administration (NSA) contractor Edward Snowden have lifted the veil of secrecy on a vast programme of surveillance and on the interactions and possible complicities of EU Member States in this endeavour.<sup>25</sup> Apart from the laudable action of the European Parliament and of its LIBE Committee to set up an inquiry, neither the European Council, nor the Council of the European Union or the European Commission have acted to meaningfully address the adverse impact on human rights engendered by this surveillance programme.

The ICJ considers the NSA surveillance scandal to be a red line for the credibility and legitimacy of the European Union and its Member States in terms of rule of law and fundamental rights protection, in particular for the rights to privacy and to the protection of personal data secured by articles 7 and 8 of the EU Charter, article 17 ICCPR and article 8 ECHR. Without a strong reaction and a shift in intelligence and security practices, the double standard discourse will grow so strong that these institutions will lose their legitimacy on matters of human rights beyond EU borders. In particular the ICJ believes that any criticism of mass surveillance by undemocratic regimes and/or by governments responsible for human rights violations or, even, for crimes under international law, will fall on deaf ears without a change of direction on this issue by the EU.

The ICJ fully supports the LIBE inquiry on this issue<sup>26</sup> and, on a general level, the draft recommendations of the Rapporteur, presently under discussion in the LIBE Committee. The ICJ believes that all the EU institutions, and not only the European Parliament, should dedicate their utmost efforts to press Member States to open investigations and inquiries into this programme's massive and illegal surveillance of persons present within the EU. They should use all their diplomatic and economic power to push the USA to collaborate or avoid putting obstacles to the discovery of the truth.

**Furthermore, the ICJ suggests that the EU institutions should consider legislative reforms in this area, including, if necessary, a treaty modification:**

- ***Full revision of information sharing and security collaboration agreements with any "Five Eyes" country:<sup>27</sup> any international agreement of collaboration with one or more of the "Five Eyes" countries should be examined in light of the fundamental rights protections that apply within the EU and should be suspended or denounced if non compliant with them.***

<sup>25</sup> For a full collection of the revelations originated by the documents provided by Edward Snowden, see "The NSA files" on the website of *The Guardian*, at <http://www.theguardian.com/world/the-nsa-files> .

<sup>26</sup> See the draft report of the LIBE NSA inquiry together with its working documents at <http://www.europarl.europa.eu/committees/en/libe/draft-reports.html?linkedDocument=true&ufolderComCode=LIBE&ufolderLegId=7&ufolderId=13778&urefProcYear=&urefProcNum=&urefProcCode=#menuzone>

<sup>27</sup> The "Five Eyes" countries (USA, UK, Canada, Australia and New Zealand) are part of a unofficial intelligence community under which they share any sort of information as they were one intelligence service. This community is heavily dominated by its US component as demonstrated by the revelations that, despite an existing "no-spy" agreement among these countries, the US has been spying on UK citizens with the permission of the UK secret services. See, *The Guardian*, "US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data", 20 November 2013, <http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data> [accessed on 17 January 2014].

- ***Third party control of fundamental rights compliance of any international security agreement:*** a mechanism should be set up, for example by giving additional competence to the Fundamental Rights Agency, to independently assess the fundamental rights compliance of any international security cooperation agreement. It is advisable that any of these procedures be public and in collaboration with international experts, for example, the relevant UN Special Rapporteurs. The mechanisms could be part of a more general “fundamental rights compliance” mechanism.
- ***Regulation on whistleblowers:*** the European Union should legislate to provide adequate protection for whistleblowers, including EU citizens denouncing “internal” wrongdoings as well as any other “foreign” person denouncing wrongdoings having an effect on EU interests, competences, legislation or the EU Charter rights. This regulation should also encompass obligations to grant international protection of some sort to “foreign” whistleblowers.<sup>28</sup>
- ***Considering the establishment of a European intelligence supervisor or tasking Parliament to supervise intelligence services:*** the EU should give competence to the LIBE Committee, or to another independent body, to supervise any collaboration and exchange of information at the EU level both where it involves the EU institutions and where it is among EU Member States. The EU could explore, within this context, the creation of a European network of parliamentary surveillance committees with power to request and share information and the development of substantive standards built on the “Thswane principles”.

#### 6.2. Accountability for renditions

The involvement of EU Member States in the US-led system of renditions and secret detentions exposed the weakness of the rule of law in those States in the face of pressures to counter terrorism, and led to multiple and systematic violations of human rights within the EU, and to international crimes. With the partial exception of acts by Italy in the case of Abu Omar,<sup>29</sup> there has been a persistent and systematic failure to conduct effective investigations, initiate prosecutions or provide remedies to victims, in the States involved. It is striking that, in the face of this serious situation, the European Council, the Council of the European Union and the European Commission have taken little action to promote accountability.<sup>30</sup> By contrast the European Parliament and the Parliamentary Assembly of the Council of Europe have both conducted inquiries on the issue of complicity of European countries with the US-led rendition, secret detention and interrogation programme, the European Court of Human Rights has already ruled on its first case concerning complicity in renditions, in *El Masri v. former Yugoslav Republic of Macedonia*, and several other cases against Lithuania, Romania, Poland and Italy are pending before the Court.

The lack of accountability in EU Member States for cases of complicity in US renditions that could amount to crimes under international law reinforces the proposition that this matter cannot be solved at the national level alone, where too many interests block effective investigations, and that some responsibility should be assumed at the European level by EU institutions initiating their own investigations within their competence and supporting effective national investigations. If this is not done, it increases the risk that, in the near future, there

<sup>28</sup> See, principles 37-43 of the Thswane Principles.

<sup>29</sup> However, the case is not yet closed. See, *Il Fatto Quotidiano*, “Abu Omar, Consulta sul Segreto di Stato dà ragione al governo. Il processo retrocede”, 14 January 2014.

<sup>30</sup> See, among other reports, *Open Secret : Mounting evidence of Europe’s complicity in rendition and secret detention*, Amnesty International, Doc. No. EU 01/023/2010, 2010.



may be the possibility that a EU citizen will be indicted before the courts of a non-EU State or the International Criminal Court, in the absence of a national prosecution.

The ICJ commends the work of the European Parliament on renditions and secret detentions and supports the recommendations contained its resolution of 10 October 2013 on “alleged transportation and illegal detention of prisoners in European countries by the CIA”. **The ICJ recommends that the Commission should:**

- **develop proposals to enhance accountability of EU Member State intelligence services for violations of human rights in counter-terrorism, including by establishing a mechanism for independent EU oversight of cross-border intelligence activities related to counter-terrorism;**
- **harmonize legislation and mechanisms to ensure access to effective remedies and fight impunity for crimes under international law or arising from violations of fundamental rights, and if restrictions on EU competence impede such measures, support an appropriate treaty amendment to establish competence.**