



Studies in Intelligence

INTELLIGENCE OVERSIGHT IN THE TWENTY-FIRST CENTURY

ACCOUNTABILITY IN A CHANGING WORLD

Edited by
Ian Leigh and Njord Wegge



Intelligence Oversight in the Twenty-First Century

This book examines how key developments in international relations in recent years have affected intelligence agencies and their oversight.

Since the turn of the millennium, intelligence agencies have been operating in a tense and rapidly changing security environment. This book addresses the impact of three factors on intelligence oversight: the growth of more complex terror threats, such as those caused by the rise of Islamic State; the colder East–West climate following Russia’s intervention in Ukraine and annexation of Crimea; and new challenges relating to the large-scale intelligence collection and intrusive surveillance practices revealed by Edward Snowden. This volume evaluates the impact these factors have had on security and intelligence services in a range of countries, together with the challenges that they present for intelligence oversight bodies to adapt in response. With chapters surveying developments in Norway, Romania, the UK, Belgium, France, the USA, Canada and Germany, the coverage is varied, wide and up-to-date.

This book will be of much interest to students of intelligence studies, security studies and International Relations.

Ian Leigh is Professor of Law at Durham University, UK. His previous books include: *Who’s Watching the Spies?: Establishing Intelligence Service Accountability* (with Hans Born and Loch Johnson, 2005) and *International Intelligence Cooperation and Accountability* (with Hans Born and Aidan Wills, Routledge, 2011).

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Foreword

The date 22 July 2011 is a day that changed Norway: 77 innocent lives, mostly children and young adults, were taken.

These attacks showed that there are limits to what the secret services can do when it comes to preventing terrorism. A lone-wolf terrorist who managed to keep a low profile still had the ability to hide from the police and the secret services.

Under a totalitarian regime where everyone is under constant surveillance, such an attack is quite unthinkable.

However, such a society is very much unwanted in today's democratic Norway. We therefore have to find a balance between effective secret services that are capable of detecting and stopping terrorist attacks – alongside other threats such as espionage, cyber threats and military threats, and at the same time keep the secret services in check in such a way that human rights and privacy are respected. To keep that balance, an independent oversight body is essential.

The Norwegian EOS Committee was established in 1996. The background was, among other things, the Lund Commission that revealed how the Norwegian secret and intelligence services had been operating outside the boundaries of the law in previous decades. Several people who were members of or sympathetic to left-wing parties were put under surveillance, for no reason other than their political viewpoints.

The members of the EOS Committee are appointed by the Norwegian Parliament (Stortinget). This was the first time the Police Security Service was put under oversight by an independent body. Another first was to subject the Norwegian Intelligence Service to external oversight, which had not been the case before the establishment of the EOS Committee.

Some democratic countries had established intelligence oversight several years before Norway, but some others still do not have independent oversight bodies. Finland, for instance, is now in the process of making a new law for the intelligence services, to include for the first time external oversight of the Finnish Defence Intelligence Agency.

The EOS Committee has in its 22-year-long history seen several remarkable developments in its relationship with the services. It seems that the services over the years have come to understand that they are dependent on the oversight regime to maintain their democratic legitimacy.

Generally speaking, the secret services have also opened up to the general public, and information that some years ago seemed unthinkable to declassify is now available to the public.

The aim of the EOS committee is to discover and prevent violations of individual rights, to ensure that the work of the services is not damaging the interests of society, and that the services' activities are within the boundaries of the law. The EOS Committee also has a responsibility to take the security of the state and the relationship with foreign states into consideration when conducting its oversight. The Committee does not oversee whether the services are working efficiently, how they are organized or how they use their allocated funds.

The Norwegian oversight law was updated last year, and the Norwegian government is now working on a new law for the Norwegian Intelligence Service. The Parliament is also awaiting a proposed law that could give the Norwegian Intelligence Service a new capability – access to information from cables that cross Norwegian borders.

Both rapid technological development and the challenges regarding so-called foreign terrorist fighters who have travelled abroad to fight for ISIL, Al-Qaida or similar groups, have made the work of the intelligence services more challenging than before.

It is important also that the oversight bodies, which have much fewer resources than the services, are able to keep up with the rapid development regarding threats, technology and law.

Thus, the EOS Committee is now very pleased to have been given the funds to establish a technological unit in its secretariat. This means that we will be able to have a better understanding of the technical systems of the services, and that we may conduct better searches in their systems – to which we have direct access – to perform oversight even more effectively.

Another challenge is more difficult to address – the oversight gap when the intelligence services share information with international partners.

When it comes to the threat of terrorism and to people travelling from Norway to conflict areas, the sharing of personal data is especially important for the services.

When intelligence sharing is international, and the oversight is limited to national mandates, an oversight gap appears. The EOS Committee has access to the agreements the secret services have with their international partners, and the Committee has access to see what kind of data is shared. But we have no access to see how the data is being used or processed by the cooperating international services.

The Norwegian EOS committee has supported several publications about intelligence oversight financially. It is still a small minority of the world's countries that has an effective and independent oversight of the intelligence services. Therefore, we hope that books like this will help spread the oversight message throughout the world – and maybe also inspire greater international cooperation between the existing oversight bodies.

Eldbjørg Løwer
Chair of the EOS Committee
Oslo, 12 March 2018



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Introduction

The aim of this book is to discuss how the new and increasingly tense security climate of international relations in recent years has affected intelligence agencies and their oversight. In particular, we address the following developments: first, the growth of more advanced and complex terror threats, such as those that materialized with the rise of the Islamic State; second, the colder East–West climate following Russia’s intervention in Ukraine and annexation of Crimea; and, third, new challenges pertaining to large scale intelligence collection and intrusive surveillance practices revealed by Edward Snowden. The objectives are not only to clearly explain the challenges arising from these three themes, and evaluate the oversight and review efforts that have been made to date in a range of countries, but also to explore some possible solutions for improving the oversight of intelligence and security agencies in this new landscape. The book comprises a combination of general chapters investigating intelligence oversight in relationship to developments in International Relations and Law, as well as a selected number of individual country studies.

Intelligence oversight has now become an established subfield within intelligence studies.¹ A steadily growing body of literature on intelligence accountability has tended to focus on either in-depth case studies of national intelligence governance structures or comparative studies of intelligence oversight and of review conducted by parliaments, independent bodies, inspectors-general, and the courts.² Several collections deal with comparisons between multiple states.³ This volume is the first of its kind, however, to deal with intelligence accountability issues arising from the ‘new normal’ in International Relations.

While the Cold War period represented a situation with stable threat scenarios, the period since the breakdown of the Soviet Union in 1991 has been more complex. In Europe, the Yeltsin period gave rise to hopes to a new thaw in East–West relationships; a development largely reversed by Putin’s more nationalist posture, best illustrated the annexation of Crimea. At the same time there has been an increased emphasis on the security threat posed by new forms of state aggression, notably ‘hybrid’ warfare and state-sponsored cyber-attacks. Many commentators are questioning whether the result is a new Cold War. In the Middle East, the Arab Spring has made the region much more volatile, and in the USA, 9/11 2001 turned the focus of the intelligence community in many

2 *Introduction*

countries upside down. Additionally, in Europe and North America today, the growing prominence of populist and nationalist movements adds new uncertainties.

The fight against international terrorism has provided the rationale for a dramatic increase in multilateral and bilateral intelligence cooperation by the intelligence and security services. The scale of this collaboration has increased in terms of the volume of information shared and the number of joint operations. At the same time, the scope of intelligence cooperation has broadened to include a greater range of states (particularly non-traditional allies in the Middle East and Asia) and a wider variety of intelligence operations. These widening and intensified cooperation activities represent a growing challenge to oversight bodies ensuring accountability.

While many of these developments date from 9/11 in particular and are now relatively well documented,⁴ the rise of IS since 2013 and the migration crisis caused by the war in Syria and events in response to the Arab Spring pose new challenges for the agencies, notably because of the distinctive *modus operandi* of IS supporters. While some recent high-profile terror attacks, such as those on concert audiences at the Bataclan in Paris and Manchester Arena involved explosive devices, others have involved decidedly low technology – lorries or trucks driven into pedestrians (as in attacks in Nice, Berlin, Barcelona and London) or with bladed weapons (swords and kitchen knives) – which are much harder to guard against. This is particularly the case when the perpetrators are lone individuals with no previous security footprint, who have been radicalized online. In addition, following what now (in 2018) looks to be the fall of the territorial IS, once claimed to be a new ‘caliphate’, surviving ‘foreign fighters’, with newly acquired combat experience, are currently arriving on western shores, creating new threats, but also challenges pertaining to surveillance and prosecution – as well as integration and de-radicalization. The response in various countries in terms of broadening concepts of extremism and steps to counter them take the agencies into territory not seen since the decline in counter-subversion activity at the death of the Cold War. The impact of the attacks in Europe, especially in Belgium and France in 2015 and 2016, has significantly accelerated international counter-terrorism cooperation.⁵

Simultaneously, new massive technological advancements in SIGINT (Signals Intelligence), for example, collection of and access to metadata for an increasing number of countries, have given the services new powerful tools, which also represent a significant challenge for overseers to control. The growing imperative to counter cyber-attacks has led to calls for increased powers and capabilities for the services. The Edward Snowden revelations have given the public an unprecedented glimpse of the work and working methods of the security and intelligence agencies, particularly on the SIGINT side with the US National Security Agency (NSA) and ‘the Five Eyes’ (USA, UK, Canada, Australia and New Zealand) at the forefront, leading to inquiries, legal challenges and fresh legislation in several countries. Once again, there is an existing literature on surveillance, some of it technical or journalistic, and some philosophical

and legal. Another strand within intelligence studies, mainly historical, focuses on specific agencies, such as the NSA or the UK Government Communications Headquarters (GCHQ). A small number of recent academic studies, from legal and other perspectives, have begun to address aspects of Snowden's disclosures, but without the specific focus on the implications discussed here.⁶

In this collection, country studies have been chosen that cast specific light on the effect of Snowden's disclosures (notably from the US, Canada, Germany, UK). The underlying questions are twofold. First, whether the effect has been to encourage more or less openness by the agencies and whether they have prompted new forms of debate with the public and policymakers. Second, there is the question of the impact on intelligence oversight and the issue of democratic control of the services. One related issue is whether overseers have or should have a role in educating the public and informing parliamentarians about legislative reform when it comes to the need for and use of surveillance capabilities.

Two introductory chapters in Part I set out the overarching themes of the book. These deal with the impact of key developments in international relations and relevant transnational legal developments over recent years and with how those changes influence the intelligence services and their oversight. The second chapter follows up this thematic introduction by reviewing existing legal, and 'best practices', standards for oversight, as well as the challenges that exist today with respect to making intelligence oversight legitimate, efficient and effective in the future. The themes are then explored through eight chapters in Part II ('National perspectives'), investigating current trends within the intelligence, surveillance and oversight landscape with respect to specific countries. The country chapters investigate these three topics: (i) international terrorism; (ii) the new situation in international relations; and (iii) the Snowden disclosures. Each of these topics is dealt with through two sub-questions, focusing respectively on the impact on the work of the services (priorities, working methods, patterns of cooperation) and on the oversight dimension. These include discussion of how far changing operations, new additional resources or powers of the services have been matched by new practices, or changed or additional resources/powers of the oversight bodies. Hence, the overall question is how both services and their oversight bodies have adjusted to the new security environment.

The countries studied in this volume are Norway, Romania, Belgium, France, the UK, the USA, Canada and Germany. The countries are, for the most, mature and well-functioning Western democracies, even though with substantial differences in some key areas under investigation. The countries are selected as they represent important states both with respect to the work, capacities and standing of the intelligence services, but also with respect to how intelligence oversight is organized. Inevitably, the three themes are not all equally prominent as concerns in each country surveyed, due to a variety of historical, geographical and other factors. We have therefore attempted to arrange the chapters so that each comes to the fore as the reader moves through the book.

The country studies are followed by a concluding chapter that sums up the findings, seeks to identify common trends and developments and assesses how

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developments in International Relations relate to, and play together with, the development of intelligence oversight.

Although the book stands alone, in another sense it can be viewed as part of a trilogy, drawing inspiration from a unique collaboration with the EOS Committee stretching back some 15 years. It follows two previous edited collections, in 2005 and 2011 respectively, dealing with intelligence oversight in old and new democracies⁷ and with accountability for intelligence cooperation.⁸ Like those earlier books, this one grew out of a conference hosted in Oslo by the EOS Committee – on this occasion as part of its twentieth anniversary celebrations in 2016. We are grateful to the committee for its vision, support and interest in our project, and we thank its Chair, Eldbjørg Løwer, for contributing with a foreword. It is a sign perhaps of the maturity of intelligence oversight in Norway that having generously hosted the meeting and supported our contributors, that the committee has given the editors and contributors an entirely free hand. Conversely, of course, nothing in the various contributions in this volume can be taken to represent the views of the EOS Committee. Finally, we must thank the large number of anonymous reviewers, both academic and those with a professional interest and background in intelligence and oversight, who generously and often to very short timetables commented on the draft chapters. We are grateful too for valuable the assistance of Emil Øvrebø in editing the final manuscript.

Ian Leigh and Njord Wegge
Durham and Oslo, 26 March 2018

Notes

- 1 For a recent survey of the literature by two New Zealand officials see S Richardson and N Gilmour, *Intelligence and Security Oversight: An Annotated Bibliography and Comparative Analysis* (Palgrave 2016).
- 2 The longest established branch is US-focused, most recently: Genevieve Lester, *When Should State Secrets Stay Secret? Accountability, Democratic Governance, and Intelligence* (CUP, 2015). In the UK see H Bochel, A Defty and J Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (MacMillan 2014).
- 3 For instance H Born, L Johnson and I Leigh, *Who is Watching the Spies* (2005), Born and Caparini (eds), *Containing Rogue Elephants* (2007), Peter Gill, *Intelligence Governance and Democratisation* (Routledge 2016) and Z Goldman and S Rascoff (eds), *Global Intelligence Oversight* (Oxford 2016).
- 4 While many other works address questions to do with global terrorism, from the perspectives of political studies or law, few do so from the point of intelligence oversight.
- 5 EU observer 26 September 2016. 'Spy agencies launch "real-time" terror tracker'. Available at: <https://euobserver.com/justice/135231>
- 6 D Lyon, *Surveillance After Snowden* (2015) and D Fidler (ed.) *A Snowden Reader* (Indiana UP 2015); WJ Schünemann and M-O Baumann (eds), *Privacy, Data Protection and Cybersecurity in Europe* (Springer 2017); D Cole, F Fabbrini and S Schulhofer (eds), *Surveillance, Privacy and Transatlantic Relations* (Hart 2017).
- 7 H Born, L Johnson and I Leigh (eds), *Who's Watching the Spies?* (Potomac Books 2005).
- 8 H Born, I Leigh and A Wills (eds), *International Intelligence Cooperation and Accountability* (Routledge 2011).

PART I

Intelligence oversight, international relations and law



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1 Intelligence and oversight at the outset of the twenty-first century

Ian Leigh and Njord Wegge

Western intelligence services in Europe and North America share many historical roots, where the experiences and ordeals of World War II and the Cold War stand out as formative. As Nazi-Germany and the Imperial Japanese forces attacked and occupied large parts of Europe and Asia/Pacific, Western democracies had a common cause in developing effective intelligence and security services capable of intercepting enemy communication, catching spies and saboteurs, and working covertly behind enemy lines in occupied territories. Comparable similarities are also characteristic for the Cold War period, where the joint fight against communism united the intelligence and security services, establishing deep patterns of secret cooperation between the Western European and North American services.

The gradual and uneven introduction of various means and models of intelligence oversight is a story with greater diversity between the same countries. At the same time, in spite of the differences, Europe and America have, for generations, shared democratic norms where rule of law, independent courts and balance of power with real checks on the executive have been cornerstones for the state and its civil society. These are principles preceding institutionalized intelligence oversight, representing hard-fought values that evolved through centuries to avoid tyranny and abuse of power.

The way oversight mechanisms have been introduced and established over the last few decades, in mature as well as young democracies, is a story generally well-documented in previous research.¹ Nevertheless, current developments in international relations are today again influencing the intelligence and oversight landscape in ways less known to the public. In this chapter we aim to further elaborate and discuss the key topics, as presented in the introduction. We will in this context particularly assess the problems for intelligence work and oversight related to the last decades of increased threats from Islamic terrorism, a more assertive Russia, but also how technological development has impacted the work of the services, their methods and the needs and methods for oversight, as revealed by Edward Snowden. Finally, as leaked information about how activities conducted by intelligence services in various democratic countries might have infringed on democratic norms and human rights, we think the debate brought forward in this book is of high relevance, and a timely contribution to a growing debate on intelligence governance of the future.

The evolution of oversight

In the decade following the end of the Cold War it looked as though the progress of good governance was as inevitable as the spread of capitalism. For the former Soviet-bloc states this entailed a wave of reforming legislation intended to make the often feared and hated security apparatus of the state subject to democratic institutions. Although the results were undoubtedly patchy, with substantial variations from country to country,² the direction of travel seemed clear – towards accountability, transparency and the rule of law. In Western Europe, also, the mood towards increased openness seemed infectious – it was especially noticeable in countries like the UK and France,³ which loosened their longstanding culture of secrecy in security and intelligence matters. The change was to an extent embraced by the security and intelligence agencies themselves, as, suddenly bereft of the *raison d'être* that had sustained them for half a century, they struggled to find a new mission. At the same time, many Western states sought to withdraw a 'peace dividend', typically cutting defence and intelligence budgets.

Bringing security and intelligence agencies more clearly under the rule of law and systems of democratic accountability entailed a process of legal reform in many countries. While external oversight was rather unusual just a few decades ago, independent oversight has today become an accepted norm among democracies. There is now a substantial body of international human rights law, international standards and best practice⁴ for states to draw upon when framing legislation for their security and intelligence agencies. In recent decades the role of international and supranational courts, in particular the European Court of Human Rights and, more recently, the EU Court of Justice, has been highly significant, a topic investigated below. While their rulings are only legally binding on member states,⁵ nonetheless their influence has been felt more broadly, both in developing international standards and because of their potential impact on the terms of intelligence cooperation.

The groundwork for the security jurisprudence of the European Court of Human Rights was laid during the Cold War and, not surprisingly in view of that pedigree, it embodies a fair measure of deference towards member states' assessments of their national security needs, under the Court's margin of appreciation doctrine.⁶ Nonetheless, building on these foundations, in the past 30 years the Court has filled in the detail of what good governance looks like in a number of areas where the rights of individuals are impinged upon by security and intelligence agencies or by executive decisions based on collected intelligence:⁷ for example, in the fields of interception of communications,⁸ the handling of personal data by security agencies (in particular concerning the legacy of Cold War-era security files)⁹ and deportation on grounds of national security.¹⁰ The latter question is particularly apposite post 9/11, as countries like the UK have attempted to rid themselves of foreign-born terrorist suspects and radical Islamist preachers that they were unwilling to prosecute.¹¹ At the same time, in recent years the Court has interpreted the right of freedom of expression and

information to include a right for an NGO to request information from a security agency¹² and has given protection to a whistle-blower seeking to expose illegal interception of communications by the Romanian Intelligence Service.¹³ Some gaps remain – especially concerning strategic surveillance, or large-scale collection of metadata, – but these are likely to be addressed in pending litigation following the Snowden disclosures.¹⁴

In a number of the foregoing decisions the European Court of Human Rights has scrutinized parts of national systems for accountability of the security and intelligence agencies. In this context, the Strasbourg court has treated systems of accountability as components of the requirements that a limitation on a given human right be for the ‘protection of national security’, ‘in accordance with the law’,¹⁵ ‘necessary in a democratic society’ and accompanied by ‘effective remedies’ at the national level. The examination of Parliamentary oversight by the Court is, then, not direct as such. Rather it is a by-product of its assessment of states’ systems for the control of intrusive powers and of effective remedies for those who complain of violation of their Convention rights, particularly under Articles 8 and 13. The Court has in effect endorsed Parliamentary oversight committees as a safeguard where they sit alongside other procedures. Where, however, the national oversight arrangements do not involve a Parliamentary body in authorization or review of surveillance or in handling complaints, the European Convention is less likely to have even this indirect effect.

Growth of international terrorism post 9/11 2001

As contributors to this book note, although the end of the Cold War was a defining moment, leading to intelligence reform, particularly in the European states represented in this collection, as well as many other Eastern European states, the era of reform did not stop in the early 1990s. Several of the countries discussed here – notably Canada, France, Germany and the UK¹⁶ – had experienced both domestic and international terrorism long before 9/11. Nonetheless, the events of 9/11 brought international terrorism dramatically higher on the political agenda in many states, giving a peremptory answer to those critics who had begun to question whether there was any continuing need for traditional security and intelligence agencies in the new world order.

The focus on international terrorism was not entirely new – Al Qaeda and a number of other international terrorist groups from the Indian subcontinent, for example, had come on to the radar of Western security and intelligence agencies during the 1990s. The bombings of the US embassies in Tanzania and Kenya in 1998, as well as the attack on USS Cole in Yemen’s Aden Harbour two years later, were in particular an eye-opener in the West concerning the threat from terrorism. The scale of the threat was new, however, and exacerbated by a range of factors: the dispersal of battle-hardened fighters from the wars in Afghanistan and the Balkans, hostility throughout the Islamic world towards the West, fanned by the first Gulf War, the rise of Salafism, and the collapse of effective authority in ‘failed states’ hosting such groups and their training camps. These fed into a

new type of terrorism, where different groups of violent Islamists across many countries from the Middle East to Africa and South-East Asia were ‘franchised’ or loosely affiliated to Al Qaeda, drawing ideological inspiration from Bin Laden.

The nature of the threat to be countered by the security and intelligence agencies has not only grown numerically (or rather exponentially), it has also constantly evolved. Despite early attempts by Tony Blair and others to disavow the idea of the ‘War on Terror’ equating to violent manifestation of Samuel Huntington’s prediction of a ‘Clash of Civilizations’,¹⁷ experience over the past 15 years suggests otherwise. The head of the UK’s Security Service (MI5) spoke candidly in 2016 of the threat from ISIL being an enduring one, likely to last at least a generation.¹⁸ Countries like Belgium, France and the UK have experienced increasing numbers of homegrown Islamist terrorists, radicalized by contact with extremist teachers or, in recent years, through material available online. In some cases, these are individuals previously unknown to the authorities, or with a police record only as habitual petty criminals, making them challenging to identify and attacks difficult to prevent – particularly if executed at short notice with a kitchen knife or a hired vehicle. Chapter 6 in this volume, written from the perspective of a Belgian overseer, investigates this challenge in greater detail.

The Islamic State, with the promise of establishing a Caliphate, proved a magnet that drew thousands of radical Islamists from Western Europe, not only veterans of previous conflicts but also whole families and school children. The wave of refugees following the civil war in Syria and the regional instability after the Arab Spring has presented an enormous security challenge to EU states, not least in differentiating between victims of violence and persecution and returning terrorist fighters.

Adding to that, the wave of refugees reaching Europe has also added to the recruitment of right-wing extremists, experienced by countries such as the UK, Germany, Sweden and Norway, in addition to the longer-term trend in Eastern Europe, and more generally to the growth of populist movements. Recent decades had already seen something of an upsurge in far-right violence directed partly against Muslims in Western countries and partly against the political class seen as supporting them.¹⁹ In response, the phenomenon of far-right political violence is now been treated as a terrorist security threat in some countries.²⁰

Following the attacks of 9/11 there followed a season of ad hoc inquiries – particularly in the US,²¹ but copied elsewhere with subsequent attacks – about the efficiency or fitness of the agencies. Intelligence oversight bodies had an ambiguous role, since by implication inquiries into alleged intelligence failures also questioned the effectiveness of earlier review by overseers. A second result was the introduction of draconian and exceptional counter-terrorism legislation, resembling wartime emergency powers.²² The incursions on fundamental rights involved were made more acceptable to public opinion by being framed as exceptional (although of Council of Europe states only the UK entered a derogation under Article 15 ECHR post 9/11). In response to challenges from

civil libertarians, politicians and policy-makers turned the tables and invoked a 'right to security' for the population as a whole.²³ Third, a new mood of international solidarity after the attacks ushered in unprecedented degrees of international cooperation and coordination, far beyond the traditional alliances, as states made common cause against the transnational threat of terrorism. International bodies attempted to reconcile the contradictions by proposing guidelines for fighting terrorism while respecting human rights.²⁴

Less obviously – and only slowly apparent over the decade that followed – the response also brought a retreat from accountability and transparency and a descent into lawlessness, led by the US but with varying degrees of complicity from its intelligence partners. The now-familiar catalogue of abuses was sanitized by its own Orwellian 'New Speak': 'extraordinary rendition' (state kidnapping and transportation for the purpose of illegal disappearance, detention and torture), 'black sites' (secret prisons hosted by other countries for the same purposes) and 'enhanced interrogation' (using torture and inhuman and degrading treatment).²⁵ These were practices certainly not associated with liberal democracies, but rather practices associated with non-democracies and authoritarian states. From a legal point of view, the calculated attempt to avoid accountability through legal black holes (notably, the establishment of Guantanamo Bay) and through perverse reasoning (especially in the notorious 'torture memo')²⁶ were truly shocking and went far beyond misplaced legal ingenuity. These measures were correctly labelled as a threat to the rule of law²⁷ and some prominent critics argued that the threat to democratic values from the backlash was more severe than from terrorism itself.²⁸

Some of the more egregious abuses of the 'War on Terror' arising from cooperation with the US agencies have been addressed by the European Court of Human Rights in highly significant rulings, against the former Yugoslav Republic of Macedonia, Italy and Poland, respectively.²⁹ In 2012, the Grand Chamber of the Court found Macedonia liable for its involvement in the CIA's detention and rendition of a German citizen, Khaled El-Masri.³⁰ The Court found Macedonia in violation of Articles 3 and 5 of the Convention, protecting individuals from torture inhuman and degrading treatment and the right to liberty respectively.³¹ The cooperation of Italy in the abduction on Italian soil of Abu Omar by CIA operatives and his rendition in 2003 was likewise found to constitute a violation of Articles 3, 5, 8 (the right to respect for private life) and 13 (the right to an effective remedy) of the Convention.³²

Equally striking was the Court's decision in *Al-Nashiri v. Poland*³³ concerning the applicant's allegations that he had been detained incommunicado and tortured at a secret prison run by the CIA on Polish territory and subjected to rendition in his removal to Morocco and then Guantanamo Bay, as part of the US High Value Detainees programme. The Court acknowledged the difficulties involved in gathering and producing evidence caused by the restrictions on their communication with the outside world, the extreme secrecy surrounding the US rendition operations and the Polish Government's failure to cooperate in its examination of the case. Despite these obstacles it undertook a thorough