

*RULE 9 SUBMISSIONS**COMMITTEE OF MINISTERS, COUNCIL OF EUROPE**Abu Zubaydah v Poland***I. Introduction**

These submissions are presented to the Committee of Ministers (COM) in relation to the implementation of the judgment *Husayn (Abu Zubaydah) v Poland* 2014, which became final on 16 February 2015. The European Court of Human Rights (ECtHR) found it established beyond reasonable doubt that Poland was responsible for the secret detention and torture of our client by US agents on Polish soil. It found Poland responsible for the failure to carry out an effective investigation and to ensure adequate transparency in light of our client's and society's 'right to truth.' Poland was also responsible for allowing the transfer of the victim from Poland on to other 'black sites' and ultimately to Guantanamo Bay where, as set out below, he remains in arbitrary, indefinite, virtually incommunicado detention without charge to the present day. Poland was found in violation of articles 3,5,6,8 and 13 of the Convention.

These submissions provide the COM with basic information in relation to Mr. Zubaydah's case and current situation (Part II), in light of the COM's request to the Polish authorities that they keep it informed of his situation<sup>1</sup>, and make concrete recommendations on measures that the COM should recommend the Polish government take in order to give effect to the Court's judgment in this case. We suggest that the COM's recommendations to the Polish state address three categories of issues: 1) Poland's representations that it is seeking information and assurances from the US government; 2) the process of truth, justice and accountability in Poland; and 3) the need to identify and implement general measures directed at ensuring non-repetition of crimes such as these in the future.

At its first review of the judgment, on 13 February 2015, the COM commendably "called upon the Polish authorities to urgently seek assurances that the applicants are not exposed to such flagrant denials of justice". Part III of these submissions addresses the diplomatic assurances, including specifically what sort of representations and assurances are relevant to the on-going 'flagrant denial of justice' in our client's case.

The Polish plan of action in relation to implementation is due to be submitted to the Committee on 16 August 2015, although preliminary information has been made available to the

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<sup>1</sup> Decision of 13 February 2015. To our knowledge the government has not sought access to the client nor approached his counsel for information.

Committee.<sup>2</sup> We would urge the Committee to engage with the Polish government in a timely manner in order to seek to shape the parameters of the action plan. As noted at Part IV of these submissions, it is crucial that the plan for implementation include both individual and general measures, provide detailed information and plans in relation to a thorough and effective investigation, transparency and acknowledgment, as well as broader measures directed at guarantees of non-repetition.

## **II. Information on Abu Zubaydah's case and current situation.**

Abu Zubaydah was first captured by the CIA in 2002 and promptly disappeared into secret 'black site' detention in multiple states, including Poland, from where he was unlawfully transferred on, via other black sites, to on-going arbitrary detention in Guantanamo Bay. Since then where he has been held without charge, without trial, without any review of the lawfulness of his detention, without access to remedy, in complete arbitrary detention. His case is perhaps uniquely well-documented, in part as he was the first so-called high value detainee ("HVD") in the extraordinary rendition programme and the one for whom the now notorious enhanced interrogation techniques ("EITs") were designed, leading a former FBI official to describe him as the 'guinea pig' for the EITs. There is no shortage of evidence, including official documentation, making clear the nature of his torture, and its authorization at the highest levels. The ECHR's judgment carefully details relevant fact and findings in this respect.

Since the judgment, in December of 2014, the US Senate Select Intelligence Committee completed a damning report on CIA torture, a 524 page redacted summary of which has been published.<sup>3</sup> With no less than 1001 references to Abu Zubaydah, the Senate summary provides considerable detail on his case. Undoubtedly, more relevant information is contained in the full report and Poland should, if it has not already, request a full, unredacted version of the report from the US authorities. A few aspects of the summary are worth highlighting here.

- First is the extent to which the Senate report is consistent with and underscores the relevance and accuracy of the ECtHR's findings of fact. If anything the Report reveals that abu Zubaydah's treatment was "brutal and far worse" than previously disclosed.<sup>4</sup>

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<sup>2</sup> The update is available here:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2747920&SecMode=1&DocId=2269862&Usage=2>

<sup>3</sup> Note 1 above. As the COM will be aware, the full report is over 6,000 pages long, and the information therein derived from multiple sources including, for the most part, CIA files.

<sup>4</sup> See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary, Approved Dec. 13, 2012,

Passages note for example how he was waterboarded to the point that bubbles emerged from his mouth and he had to be resuscitated,<sup>5</sup> and subject to ‘sexual violence, deliberate withholding of medical care as an interrogation technique and rectal feeding.’<sup>6</sup>

- Second the Senate Report makes clear that abu Zubaydah was not who US government officials thought he was when he was captured and tortured. Moreover, the Senate Report lays bare the deliberate and repeated efforts by US government officials to mislead the public and various oversight bodies about abu Zubaydah.<sup>7</sup>
- More significantly perhaps, for present purposes, the Senate report tellingly refers to CIA agents having sought (and received) assurances that Abu Zubaydah would be held incommunicado for the remainder of his life. The report cites a CIA cable: *“especially in light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life”*. It cites also the reply cable: *“Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.”*<sup>8</sup>

#### Abu Zubaydah’s current situation

The chilling commitment that was made before our client was subjected to systematic torture – to subject him to indefinite incommunicado detention to protect his torturers – sadly corresponds to the reality of what has happened to him since. The extreme regime of secrecy imposed on counsel means that there are strict limits on what can be said about him publicly, or to the COM.

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Updated for Release April 3, 2014, available at

<http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>, ([Senate Report](#)) at 3.

<sup>5</sup> “Waterboarding was physically harmful, inducing convulsions and vomiting: abu Zubaydah [...] became unresponsive with bubbles rising through his open, full mouth.” Senate Report, at 3.

<sup>6</sup> E.g. Senate Report, footnote 584: “Abu Zubaydah’s treatment also included, for example, sexual violence in the form of anal penetration (*Id.* at 491) and the deliberate withholding of medical treatment leading to permanent physical damage as an interrogation tactic.”

<sup>7</sup> See eg Senate Report, Findings and conclusions noting that CIA reports acknowledge that Zubaydah was “miscalc” as a senior terror leader and that claims about his involvement with al Qaida were “inaccurate.” See also, ‘misconceptions’ about Afghanistan training camps with which abu Zubaydah was associated resulting in reporting that miscalc abu Zubaydah as a senior al Qaida lieutenant (at 466) and the CIA assessment that concluded that “I do not believe that AZ was as wired with al Qaida as we believed him to be prior to capture” and at 410 (“abu Zubaydah was not a member of al Qaeda”).

<sup>8</sup> Senate Report at 35.

However, it is well known that he continues to be held in arbitrary detention to the present date (see judgment 118-121). The following are key features of his current situation:

- He has been detained for 13 years and has never been charged with any crime. Counsel have requested that he be charged and tried, even by military commission, on the basis that even a fundamentally flawed process is better than no process at all.

- He has never had the lawfulness of his detention reviewed. It should be noted that the Government's preliminary update refers to our client not having had the lawfulness of his detention reviewed since 2007, reflecting information in the Committee of Ministers website. He has in fact never had the lawfulness of his detention reviewed. The government refers specifically to the administrative Combatant Status Review Tribunal (CSRT) procedure, which was a perfunctory procedure, before Zubaydah even had access to a lawyer, during which he saw no evidence against him, and which has since been rejected as inadequate by the US supreme court and abolished. Although in theory abu Zubaydah has the right to challenge the legitimacy of his detention in a habeas corpus hearing, in practice, there is no meaningful process afforded to him. Despite the requirement that such a hearing be prompt, preliminary motions have been awaiting ruling for 6 years. Despite more than a dozen fully briefed motions awaiting judgment, there has been no response of any kind from the court in over four years.<sup>9</sup>

- He has had no access to judicial remedies in respect of the multiple grave violations of his rights by the United States, (or in any other state). Multiple impediments, including legislation blocking access by Guantanamo detainees and a broad invocation of the state secrecy doctrine, completely block access by the client to US courts to seek a remedy in respect of his torture and the on-going denial of justice. The ECtHR proceedings have provided his only access to a court of law.

- He is subject to an absolute ban on all communication with the outside world. All information from or about Abu Zubaydah is presumptively classified; see the Judgment, where the Court refers to our submissions in which he is described as "a man deprived of his voice, barred from communicating with the outside world or with this Court and from presenting evidence in support of his case".

- The US government appears to intend to hold him indefinitely in arbitrary detention for the remainder of his life. The government has explicitly maintained that some people will be held indefinitely, on the basis that it is not 'feasible' to try or to release them. Although these

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<sup>9</sup> See the latest motion: "Petitioner's Motion to Recuse Judge Roberts for Nonfeasance, Including Protracted Failure to Rule on More than a Dozen Fully Briefed Motions Filed by a Man Imprisoned Without Chart for Nearly Thirteen Years," Husayn v Gates, 08-cv-1360 (D.D.C. Feb. 2015). The actual motion is under seal. Such is the disarray in current habeas proceedings that **even if he did have a meaningful habeas hearing, currently the judge could not order his release;** see eg. Kiyemba v Obama, 605 F.3d 1046 (D.C.Cir. 2010).

individuals have not been identified, there is every reason to expect that that is their intention for Abu Zubaydah. Although the far-reaching allegations made publicly against him were dropped once he had access to a lawyer, the government continues to assert the right to hold him according to ‘law of war authority,’ in plain violation of international law.

In this and other rendition cases, the Court has described “extraordinary rendition” as “detention ... which by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention”. The complete circumvention of legal process that was present when he was captured and disappeared in 2002 and maintained during his secret detention and torture in Poland in 2005, still continues to the present day.

### **III. Representations seeking Assurance from the United States**

The previous COM decision of 13 March “called on Polish authorities to urgently seek assurances the applicants are not exposed to flagrant denial of justice.” The exact representations made by Poland have not been made available publicly, and we would urge that they be disclosed. However, based on available information, it appears that in fact Poland addressed only the fair trial and death penalty issues which arise in relation to Mr al Nashiri’s case and not the specific nature of the flagrant denial of justice in our client’s case.

As the Committee of Ministers website reflects: “in addition to the flagrant denial of justice that the risk of trial by mil comm. represents, *“the Court also notes that Mr Husayn has not been listed for trial and his indefinite detention without charge in itself amounts to a flagrant denial of justice.”* It is imperative that the Committee continue to insist that diplomatic representations adequately address the flagrant denial of justice that is central to our client’s case.

It is also suggested that the assurances sought must reflect what flagrant denial of justice means in the context of Abu Zubaydah’s situation. Key elements to the assurances to prevent the on-going FDJ therefore include the following:

- 1) Assurances should be sought from the US government to either charge or release Abu Zubaydah. It is crucial that there be some assurances that he will not simply be detained indefinitely without charge.
- 2) Assurances should be sought that the blanket ban on all communication from Abu Zubaydah with the outside world be reconsidered and lifted. Only by lifting the complete silencing of our client can he be removed from effective incommunicado detention and the denial of justice that this represents.
- 3) Assurances should be sought that he can access courts of law, for meaningful review of the lawfulness of his detention and to seek an effective remedy in respect of the violations of his fundamental rights.

While the victim in this case is currently subject to myriad violations of his rights, it is understood that it is not the purpose of these implementation proceedings to address the full and vast array of rights issues arising in Guantanamo Bay, but it is imperative, as the COM has recognised, to address the urgent and on-going ‘flagrant denials of justice’ in this case. To do so, our client must be brought back within a rule of law framework, within which he is charged or released, allowed to state his case and to access justice and seek effective remedies, in accordance with the most basic hallmarks of any lawful detention regime.

As regards the means of such representations, Poland should be urged to make such representations itself, but also to seek to do so collectively with other states, including through appropriate European institutions. The Judgment reflects our submissions to the effect that it should ‘*make such representations and interventions, individually or collectively, as may be most effective in an effort to bring an end to the on-going violations of his rights*’ (para. 563).

### **III. Process of truth, justice and accountability in Poland**

The finding of violations of the rights to truth and the duty to investigate are key elements of the judgment in this case and must be key elements of any implementation plan. Yet since the judgment, there is little apparent shift of approach or apparent progress within the Polish investigation.

It is a matter of concern that scant attention is paid to these issues in the government’s preliminary update to the committee. The COM is urged to ensure that due attention is paid to the progress of the investigation in the Action Plan, including:

- Explaining which concrete measures have been taken to give effect to the duty to conduct a thorough, independent and effective investigation and to address the violations in this respect highlighted in the Court’s judgment;
- Ensuring transparency and countering the blanket approach to secrecy adopted to date, by clarifying publicly the scope of the investigation (which should cover appropriate crimes and the range of those responsible at all levels for torture and disappearance on Polish soil), the steps taken and whether charges have been laid, in line with the Court’s significant findings on the right to ‘truth’;
- Ensuring access to the file by the victim’s representatives, and that all investigative steps are taken with the involvement of the Polish lawyers representing our client, in accordance with his ‘injured party status’ under Polish law. Despite the Court’s decision referring to the right of victim participation in proceedings,<sup>10</sup> and such a right being provided for in Polish law, Abu Zubaydah’s lawyers’ knowledge of the status of the

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<sup>10</sup> See eg Judgment at 480.

investigation and any developments is largely dependent on media reported leaks rather than through respect for the victim's right to access the case file.

Finally, acknowledgment of the underlying facts and the violations of our client's rights, and Polish responsibility for them, constitute a critical step in this process. Concerns that have been raised by the government regarding investigative sensitivities, including regarding the identification of individuals subject to investigation, do not apply to or impede official recognition of the existence of the black site and Polish state responsibility. The facts underlying Polish involvement in the rendition programme are set out in the ECHR judgment and have been confirmed subsequently in the US Senate report, among other sources. Indeed statements at a press conference by the former Polish Prime Minister and President following the release of the US Senate report acknowledged the existence of secret prison and agreements with US to make this possible. In these circumstances, for the state to refuse to acknowledge even the existence of the black site, or its cooperation with the US, while purporting to implement the court's judgment, would flout the court's findings on the importance of truth and transparency. The official acknowledgement of underlying facts that are now rendered beyond plausible doubt, and recognition of Poland's responsibility for violations of our client's rights, is a simple step which the Polish state should be encouraged to take.

#### **IV. General measures and guarantees of non-repetition.**

Individual accountability is essential, but it is not in itself sufficient. Meaningful implementation of a judgment of this nature requires a process of reflection, democratic and judicial accounting and where necessary reform, to ensure that such violations, including crimes under international law, cannot happen again.

It is a matter of some concern that the preliminary plan only refers to translation of the judgment under 'general measures.' It is acknowledged that this is not the final plan, which is due only in August, but we would urge the COM to ensure that the action plan entails a suitably comprehensive and reflective approach to identifying and adopting those measures necessary to safeguard against repetition in the future.

While it is for the Polish authorities to identify the steps in this national process, it is suggested that the COM request that Poland:

- Commits to adopting a comprehensive approach to its action plan, including those general measures that may be necessary to understand and address the causes and contributing factors in relation to the violations in this case;
- Provides information in the action plan on the nature of the process of reflection and reform;
- Identifies areas where legislative and/or institutional reform is under consideration, including in respect of the operation and oversight of intelligence agencies. In this respect, the COM is reminded that at para. 492 of the Judgement the Court noted: "The

instant case, apart from raising an issue as to an effective investigation of alleged ill-treatment contrary to Article 3 of the Convention, also points out in this context to a more general problem of democratic oversight of intelligence services (see also paragraphs 256-259 above). The protection of human rights guaranteed by the Convention, especially in Articles 2 and 3, requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations. The circumstances of the instant case may raise concerns as to whether the Polish legal order fulfils this requirement.”

## **V. Conclusion**

The importance of these cases, and their effective implementation through the present process, cannot be overstated. This stems in part from the nature and gravity of the crimes, involving torture and enforced disappearance of persons on European soil, their systematicity and the extent of the involvement of Poland and other European states, which is now beyond dispute. The significance of the process is heightened by the fact that these are not isolated cases, but part of a pattern of cases in Poland, in neighbouring states (where cases are pending before the Court) and beyond the region.

The critical importance of the cases, and of this process, also stems from the on-going nature of violations, as epitomized by our client’s case. He continues in the same state of arbitrary detention and flagrant denial of justice for which Poland (and other European states) have been found responsible, and to which they contributed directly through their violations and by allowing his transfer from Polish soil on to further arbitrary detention.

In our submission, there is a real opportunity, at the outset of this implementation process, to shape its effectiveness. Poland was criticized for its failure to cooperate with the ECtHR, and found in violation of Article 38 of the Convention. There is an opportunity for a change of approach on its part, and full, meaningful engagement with the implementation process. There is also an opportunity for the COM to ensure that this powerful legal judgment on paper has meaningful effect in practice. As set out in these submissions this involves concerted follow-up with the United States on the on-going violations resulting from Polish wrongs, as foreshadowed in the Committee’s decision of 13 February, and a comprehensive approach to investigation and accountability in Poland and measures aimed at identifying and implementing broader guarantees of non-repetition.

Respectfully submitted



A handwritten signature in black ink, appearing to read 'Helen Duffy', written in a cursive style.

on behalf of co-counsel to Abu Zubaydah

Helen Duffy

28 May 2015