SHORT NOTE ON *ABU ZUBAYDAH V LITHUANIA* JUDGMENT 2018

On 31 May 2018, the European Court of Human Rights (“the Court”) issued a unanimous judgment finding that Lithuania was legally responsible for a series of violations of Abu Zubaydah’s rights: torture and ill treatment, unlawful secret detention, violations of private life, and the failure to investigate or provide a remedy. The case concerned the Lithuanian role in housing a “black site” for the secret detention of “high value detainees” as part of the notorious CIA-led extraordinary rendition and torture programme (“ERP”). Lithuania was the last European state to allow the CIA to operate such a centre on its territory from 2005 to 2006, and one of an estimated 57 states to have participated in the ERP.

The case was brought on behalf of the first victim of the ERP, who has been described by a former interrogator as the “guinea pig” for the development of “enhanced interrogation” techniques and whose brutal torture in the programme is well documented. Captured in Pakistan in 2002, he was transferred to a black site in Thailand, and from there consecutively moved to Poland, Morocco, Guantanamo, Lithuania, Afghanistan and finally back to Guantanamo in 2006. One of the so-called “forever prisoners,” he has been held in arbitrary detention, without habeas review, charge, or trial ever since.

The Facts as Established by the Court

The judgment focused on Lithuanian responsibility; however, in an unusually long and detailed judgment the Court also provided a comprehensive review of the facts in relation to our client’s case, and ERP in general. As such, it makes an important contribution to the historical record in an area that the Court noted remains “shrouded in secrecy.”

The judgment draws together a noteworthy array of sources of information including: detailed testimony of expert witnesses (para 542); flight-path and aircraft analysis to map routes of disguised CIA flights; national enquiries from within the Lithuanian parliament, the US Senate Intelligence Committee, and various international bodies from within the UN, the Council of Europe and the European Parliament; evidence from the state’s own investigative file; and, finally, myriad reports by NGOs and the media.

The Court’s fundamental conclusions of fact were that, taken together, the totality of the evidence “established beyond reasonable doubt” that:

* “*[A] CIA detention facility, codenamed Detention Site Violet according to the 2014 US Senate Committee Report, was located in Lithuania*…” from February 2005 to March 2006 (para 532).
* Despite the obscured flight paths including dummy flight plans, CIA renditions flights took our client from Poland to Guantanamo in 2003, from Guantanamo to Morocco in 2004 (corresponding with the anticipation of Guantanamo detainee access to counsel), and on to Lithuania in October 2005 (para 497). He was later transferred to Afghanistan and Guantanamo in 2006.
* Lithuania *“knew of the nature and purpose of the CIA activates on its territory…[yet in various ways] cooperated in the preparation and execution of the CIA rendition secret detention and interrogation operations on its territory”* (para 576).

The Court referred to specific sources of evidence pointing towards the knowledge, approval and collaboration of Lithuanian officials, including at the highest levels. It noted for example that the US Senate Intelligence report established that there was high-level approval accompanied by the covert transfer of millions of dollars (eg. para 460), while the Lithuanian parliamentary enquiry found high-level agreement to establish two dwellings capable of housing detainees (para 553). “Active cooperation” also took the form of facilitating dummy flight plans - a “deliberate effort to cover up the CIA flights” (para 560). It was uncontested that CIA planes landed in Lithuania with persons and cargo on board, that normal customs and immigration controls were not applied (para 562), and that logistical support was provided with transfers to and from the airport and at the site. The Lithuanian role was supported by various sources of evidence including from the truncated Lithuanian criminal investigation, which as noted below the state relied upon in its defence (para 522).

The Court considered the information in the public domain by 2005/6, specific evidence of knowledge, and the circumstances of the cooperation, to conclude categorically that Lithuania knew the CIA operated a detention facility on its soil (571-). Despite its knowledge, the state “*cooperated in the preparation and execution of the CIA rendition” (para 576)*,*“facilitated the whole process of the operation of the HVD programme on their territory, created the conditions for it to happen and made no attempt to prevent it from occurring” (*para *642).*

Whether *all* relevant actors knew, and whether they knew *all* the details, was immaterial. As was the case in Poland, it was “*inconceivable that the rendition aircraft could have crossed the country’s airspace, landed at and departed from its airports, or that the CIA could have occupied the premises offered by the national authorities and transported detainees there, without the State authorities being informed of or involved in the preparation and execution of the HVD Programme on their territory. Nor can it stand to reason that activities of such character and scale, possibly vital for the country’s military and political interests, could have been undertaken on Lithuanian territory without the Lithuanian authorities’ knowledge and without the necessary authorisation and assistance being given at the appropriate level of the State”* (para 575).It was likewise “inconceivable” that facilitation and transportation support could have been provided without any awareness of prisoners being brought in.

The Court’s approach to evidence and the burden of proof is worth noting. Consistent with other cases, it indicated its flexible approach, such that the level of “persuasion required” and burden of proof is “intrinsically linked to the facts”. It cited the exceptional evidentiary difficulties we faced e.g.: the “veil of secrecy surrounding the CIA rendition programme;” by its nature the ERP left no trace of the applicant (paras 534-540); and the inability to receive a direct account due to US refusal to declassify any statement by Abu Zubaydah or to allow access to ‘the outside world’ (paras 484-487). Inevitably, the case had to be established principally by reference to publicly available evidence.

It also found that the government’s “firm denials” and failure to provide any “satisfactory and convincing explanation,” in face of prima facie evidence, meant that strong and concordant inferences could be drawn (paras 482, 488). The government’s approach of blanket denial throughout proceedings and its persistent objection that there was “not a shred of evidence” against it, were robustly rejected by the Court. Absent plausible evidence presented by the state, the weighty dossier of “circumstantial” evidence more than met the Court’s standard.

The Law and Violations

The Court noted that the rationale behind ERP was specifically to “remove persons from any legal protection” and described extraordinary rendition as “*anathema to the rule of law”* (para. 583). In its conclusions of law, the Court was unequivocal in its condemnation of the state on all counts. Lithuania was responsible for failing to prevent violations and protect persons on its territory, through what is variously referred to as its role in “preparation,” “participation” “facilitation,” “cooperation,” “intentional collaboration” and “acquiescence and connivance.”

The following violations were established:

* **Article 3** (torture and ill-treatment). The Court did not need to establish the details of what had happened to him specifically in Lithuania during that time, as there was “*no room for speculation*” that the inhumane conditions in which he was held (para 552) themselves violated Article 3, a situation made possible by Lithuanian involvement. The procedural obligations to prevent torture and ill treatment were violated.
* Secret detention plainly violated **Article 5,** as “*the whole purpose of the programme was to remove persons from any legal protection*”. Perhaps in response to the applicant’s argument that he was victim of enforced disappearance of persons (as other UN bodies have established), the Court referred to breaches of the obligations to prevent such “disappearance” of persons.
* Non-refoulement (**Articles 3 and 5**) through his transfer from Lithuania, despite foreseeable risk of further rendition and on-going arbitrary detention in Guantanamo.
* **Article 8** right to private and family life, was violated through the impact on his personal development and “dignity,” at the core of the Convention and this case.
* **Article 13** was violated, along with **Article 3**, through the state’s failure to carry out a prompt, thorough and effective investigation as required in cases of this nature and to satisfy the right to truth and its obligations in respect of accountability (eg. para 676).

This last point was critical and contentious throughout the case. Lithuania had conducted a short superficial investigation back in 2009 (following the parliamentary Seimas report) and “reopened” it following the US Senate Intelligence Committee report in 2015. Lithuania therefore argued that it had investigated and was still doing so, such that domestic remedies had not been exhausted, there was no violation and the facts were covered by ‘investigative secrecy.’ The Court considered available information on the Lithuanian investigation in some detail and rejected these claims, finding a failure to meet convention standards of promptness, thoroughness and effectiveness (paras 607-621). There had moreover been ‘no meaningful progress’ since the re-opening in 2015, and virtually no publicly available information, despite the fact that “*the importance and gravity of the issues require particularly intense public scrutiny”* (paras 619, 610).

The judgment also emphasizes the importance of truth, consolidating this emerging right in Strasbourg case law: *“the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened. An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts”* (para 610).

The Court’s emphasis on individual accountability is also noteworthy in this case, especially in light of widespread continuing impunity for rendition crimes: *“the Court would further underline that the securing of proper accountability of those responsible for enabling the CIA to run Detention Site Violet on Lithuanian territory is conducive to maintaining confidence in the adherence of the Lithuanian State’s institutions to the rule of law”* (para 620).

Damages/‘Just Satisfaction’

Finally, the Court’s approach to the award of ‘just satisfaction’ (damages or reparation) under article 46 is somewhat unusual, responding to the applicant’s arguments on appropriate reparation in a case of this type, some (but not all) of which it summarises.

Worthy of note is the emphasis on the Lithuanian role in contributing to his current situation of on-going arbitrary detention, as giving rise to the on-going duty to take all possible measure to redress that situation now: “*by enabling the transfer of the applicant to another CIA detention site, the Lithuanian authorities exposed him to a foreseeable risk of continued secret, incommunicado and otherwise arbitrary detention, liable, in his case, to continue for the rest of his life, in breach of Article 5 […] as well as to further ill-treatment and conditions of detention, in breach of Article 3 […]in the opinion of the Court, the treaty obligation of Lithuania under Article 46 of the Convention to take the necessary individual measures to redress as far as possible the violation found by the Court, require that the Lithuanian authorities attempt to make further representations to the US authorities with a view to removing or, at the very least seeking to limit, as far as possible, the effects of the Convention violations suffered by the applicant” (*para *292)*.

With regard to the need to conduct a criminal investigation, it noted that such an investigation is in the Court’s view feasible and that there were ‘no insurmountable practical obstacles’. It found that “*an ongoing failure to provide the requisite investigation will be regarded as a continuing violation”*(para682*).*

In light of the ‘extreme seriousness’ of the violations involved in this case, it awarded Abu Zubaydah 100,000 euros in compensation, which the state is now obliged to pay.

Brief Note on the Applicant’s Situation

The importance of this judgment can be seen on numerous levels, as the highlights above may suggest. These include clarification of obligations for the future, demonstrating that even in the opaque world of counter-terrorism, state secrecy and inter-state intelligence cooperation, there is a measure of oversight and accountability. The important contribution to historical narrative around roles and responsibility in this nefarious programme has also been noted.

The true significance of this case may however depend in large part on its impact on the on-going violations signaled by the Court. First, the case epitomizes the on-going refusal of states to fully grapple with their involvement with these heinous crimes, hiding behind state secrecy, sham investigations, and “friendly” relations between states. The Court’s emphasis on the right to truth is therefore key - as a human rights issue in itself, and a pre-requisite to learning lessons and non-repetition. Given the prevalence of impunity in almost all participating states, the Court’s emphasis on meaningful investigation and accountability should have resonance beyond Lithuania and provide another tool to press for accountability.

Importantly, the judgment links the travesty of the rendition program to the on-going violations of Abu Zubaydah’s rights today. We should use it to refocus urgent attention on a man who has now been held in arbitrary detention for a staggering 16 years and 2 months. There is a real risk that after so long, the current status quo of ‘forever prisoners’ is normalizing. As the judgment suggests, the many states that contributed, including Lithuania, should now be held to their duties to do everything possible to bring this injustice to an end and bring him back within the rule of law. I hope it will be a useful tool for lawyers, advocates and others engaged in these uphill struggles.

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