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State responsibility

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# CIA Black Sites and Extraordinary Rendition Before the European Court of Human Rights – Some Thoughts from a Secondary Liability Perspective

**T**he European Court of Human Rights (ECtHR) has dealt with the operation of CIA ‘black sites’ in certain European countries and the subsequent renditions of terrorist suspects from these countries to other places controlled by the CIA in a series of lengthy judgments.

What this CIA program of temporary detention sites and secret renditions involves, has been aptly summarised in one of the ECtHR judgments:

(...) secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme. The rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention, to mention only the right to be brought before a judge and be tried within a reasonable time or the habeas corpus guarantees. To this end, the whole scheme had to operate outside the jurisdiction of the US courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities (...).

The rendition operations had largely depended on the cooperation, assistance and active involvement of the countries which put at the USA's disposal their airspace, airports for the landing of aircraft transporting CIA prisoners, and facilities in which the prisoners could be securely detained and interrogated and ensured the secrecy and smooth operation of the HVD [High Value Detainee, GS] Programme. While, as noted above, the interrogations of captured terrorist suspects was the CIA's exclusive responsibility and the local authorities were not to be involved, the cooperation and various forms of assistance provided by those authorities, such as customising the premises for the CIA's needs, ensuring security and providing the logistics were the necessary condition for the effective operation of the CIA secret detention facilities(...).<sup>1</sup>

The first of these judgments was rendered in 2012 with the case of El Masri v. Macedonia; with Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland following in 2014; Nasr and Ghali v. Italy in 2016; and Abu Zubaydah v. Lithuania and Al Nashiri v. Romania in 2018. Currently still pending before the ECtHR is the case of Al-Hawsawi v. Lithuania (application communicated to Lithuanian government on 30 January 2019).

These cases do not all share the same factual pattern, but they all have the following in common: The states concerned have assisted the US, in particular the CIA, in its war on terror by accepting on their territories secret detention sites, run by the CIA, where individuals were unlawfully detained and subjected to inhuman treatment. They have also allowed aircraft used for the rendition flights to fly over, land in, and take off from their airspace and territory respectively, and have actively facilitated the CIA agents by handing over detainees. What is more, after a period of ill-treatment and arbitrary detention in these European states, the individuals concerned were, with the assistance of aforementioned states, removed from national territory and sent to detention sites in third States where they were also subjected to ill-treatment and arbitrary detention.

The judgments all contain a lengthy analysis of the facts, as the states concerned often deny jurisdiction over the alleged violations (because of these operations being run by the CIA without control over it by the respondent state) and often dispute the facts or claim to have no knowledge of what has happened to the applicants on their territories.

It exceeds the scope of this blog to deal with all aspects of this interesting ECtHR case law. Instead, we will focus on three aspects which are of interest when analysing these cases from a secondary liability perspective.

## **Burden of proof**

First, determining the facts in these cases raises issues concerning the burden of proof. In case law of the ECtHR relating to violations of article 2 and 3, the court applies strong presumptions of fact with respect to death and injury occurring during custody if the events lie within the exclusive knowledge of the authorities.<sup>2</sup> These considerations also apply to disappearances examined under article 5 when it is established that the person was summoned and has not been seen since.<sup>3</sup> Interestingly, the ECtHR also applies such a reversal of the burden of proof in the rendition cases. If the applicant manages to make a *prima facie* case, the burden of proof is on the state to provide

a satisfactory alternative account of what occurred. If the government fails to do so, the court may find that the applicant's allegations have been established beyond a reasonable doubt.<sup>5</sup> The rationale is that if the state hides essential information or makes it impossible for the victim to prove certain facts indispensable to his or her case, it is for the state to disprove the alleged facts.<sup>6</sup> In *Al Nashiri v. Romania* for example, the ECtHR also took into account the fact that due to the restrictions on the applicant's contact with the outside world and the secrecy surrounding the extraordinary rendition programme as a whole, it was difficult for him to gather and produce evidence.<sup>7</sup> As a consequence, the ECtHR had to rely on a considerable amount of circumstantial evidence, including various public or declassified reports.<sup>8</sup>

The reversal of the burden of proof appears reasonable, but nevertheless raises a few questions. It remains uncertain at what exact moment the reversal of the burden of proof is triggered, what efforts need to be made to obtain information from the state first in order to eventually shift the burden of proof, and what degree of unreasonable refusal to provide information warrants the reversal. These questions remain to be developed in future litigation, also in light of the fact that the ECtHR does explicitly recognise the importance and right of states to protect national security.<sup>9</sup> Thus, there may be some room for states to withhold essential information on account of national security interests, but it is uncertain how far this goes. The ECtHR, so much follows from the judgments, has little understanding for states that wilfully accept activities on their territories in violation of the Convention and who then claim ignorance or deny or withhold the facts. After all, it is the Court's task under article 19 of the convention to ensure that state parties meet their duties in securing the rights laid down in it.<sup>10</sup>

For human rights litigators who practice domestically, the reversal of the burden of proof in proceedings against the state may be an interesting new tool. It cannot be said that this reversal of the burden of proof has a direct effect on national law of evidence in civil or administrative human rights litigation against the state, because it may be too much connected to proceedings before the ECtHR. At the same time, national courts may be more inclined to reverse the burden of proof when dealing with an alleged ECHR-violation than they would be in other cases. In light of the requirement of exhaustion of local remedies it also makes sense to anticipate the assessment of the facts, including the application of the evidentiary principles, as it is likely to be performed at the ECtHR.

### **Principal or secondary liability**

The ECtHR judgments are also interesting from a point of view of substantive secondary liability. As in other ECtHR case law, there is no dogmatic distinction between principal liability and secondary liability. There is reference to article 16 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS),<sup>11</sup> which concerns state responsibility for aiding or assisting in the commission of internationally wrongful acts, but no further elaboration on the issue to what degree situations of assistance engage liability under the ECHR. The ECtHR confines itself to setting the parameters for jurisdiction (article 1 ECHR), applying them to the case at hand, and then provides principles for substantive liability, equally applying them to the case at hand. The distinction between principal and secondary liability and how this relates to the DARS, especially its

article 16, needs to be inferred from the various findings of the ECtHR.

As to the *actus reus* in these cases, there is a variety of acts that can be attributed to the respondent states. The complicating factor is that the conduct of the actor that is directly committing the ECHR violations, namely the CIA, is first and foremost attributable to the US. This would appear to characterise the role of the European states as essentially that of an aider and abettor (or, in the terminology of State responsibility, an ‘aider and assister’), by placing their territories at the disposal of the CIA and otherwise facilitating the CIA in operating the black sites. An alternative framing of liability is, however, equally possible. Direct liability on the basis of an omission, namely the failure to prevent or bring to an end human rights violation by the CIA on national territory, is also a reasonable inference from these judgments.

As far as exposing individuals to human rights violations elsewhere, the judgments follow the firmly established Soering standard.<sup>12</sup> This remains a type of liability that is difficult to categorise under the DARS. It is the risk of a (serious) human rights violation elsewhere that still needs to occur that triggers liability. Exposing an individual to such conditions could be regarded as an act of assistance in the violation, but this would be stretching the scope of article 16 DARS. The future violation as such, the unlawful detention or the mistreatment, is not facilitated by the sending state. This makes the ECtHR ‘Soering-liability’ a *sui generis* type of liability, designed to specifically prevent human rights violations from occurring.

This *sui generis* liability appeared to be limited to article 3 violations and serious article 6 violations (the test here being a ‘flagrant denial of justice’).<sup>13</sup>

However, from the El-Masri judgment one could conclude that exposure to article 5 and article 8 violations elsewhere is now also within the jurisdictional ambit of the ECHR. In fact, in El-Masri, the ECtHR held Macedonia responsible for exposing the applicant to the real risk of treatment contrary to article 3, which is fully in line with the Soering principle. However, the ECtHR also held Macedonia responsible for exposing the applicant to a real risk of a flagrant violation of article 5 and the violation of his rights under article 5 for the entire period of his captivity:

The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant’s detention [in Afghanistan, JT] (...) the Court concludes that the respondent Government is to be held responsible for violating the applicant’s rights under Article 5 of the Convention during the entire period of his captivity.<sup>14</sup>

In the same fashion, the ECtHR seems to have held the state responsible for the article 8 violations the applicant suffered both in Macedonia and Afghanistan. Although the court’s discussion of the alleged article 8 violations is rather brief, its conclusion that Macedonia’s “actions and omissions likewise [to the article 3 and 5 violations, SP] engaged its responsibility under Article 8 of the Convention”<sup>15</sup> points in this direction.

This seems to be a clear departure from the Soering standard, according to which the extraditing

(or ‘assisting’) state was merely responsible for its own conduct. Responsibility under article 16 DARS also proscribes that the assisting State is only responsible for its own conduct, as liability for assistance in the main unlawful conduct is always derivative in nature. It is thus not entirely clear on what basis the ECtHR established Macedonia’s responsibility in this regard. The ECtHR came back on this extension of its Soering standard in the subsequent rendition cases. There, it limited the state party’s responsibility to article 5 and 8 violations which took place during the applicant’s detention on the state’s territory and the subsequent transfer, thus excluding the period of extraterritorial detention.<sup>16</sup>

In conclusion, it thus remains unclear on what basis the ECtHR expanded Macedonia’s liability to extraterritorial violations of article 5 and 8 in *El-Masri*. On the one hand, it is telling that in similar subsequent situations the court came back on this expansion. On the other hand, the precedent is there and the extraordinary rendition jurisprudence is innovative in respect to the scope of Soering liability by extending it to article 5 and 8 violations. It remains to be seen whether it can be repeated in some form in future cases.

### The cognitive standard

Finally, the judgments contain interesting findings on the *mens rea* aspect of State responsibility under the ECHR. Starting with *El-Masri*, the ECtHR adopts a ‘knew or ought to have known’-standard,<sup>17</sup> which it continuously applied in the subsequent cases.<sup>18</sup> As a result, a state can be held liable for assisting another state in serious human rights violations if it knows or *should have known* that by doing so it exposes an individual to a real and foreseeable risk of being subjected to such violations (e.g. under article 3). Arguably, this can considerably extend the liability of states for human rights violations elsewhere. However, the rendition cases do not really inform us how the ‘ought to have known’-standard should be construed in this context. The facts of the rendition cases do not always make it necessary to establish this, because it is often concluded that there is *actual knowledge* of the human rights violations or the risks thereof. This leads to the main caveat with respect to lowering the cognitive standard to that of constructive knowledge: in the particular context of these cases, there can be no denying that the implicated states knowingly provided cooperation and support for the detention programme and that they were offered a financial reward – an amount redacted to a multiple of USD million – which they accepted.<sup>19</sup> There can also be no denying that the state was fully aware of the aircraft used for the rendition flights could have crossed the country’s airspace, landing at and departing from its airports, and the fact the CIA used the premises offered by the authorities to transport detainees.<sup>20</sup> It is inconceivable that a sovereign state would be oblivious to facts of this nature and proportion. As the ECtHR held:

Nor can it stand to reason that activities of such a character and scale, possibly vital for the country’s military and political interests, could have been undertaken on Romanian territory without Romania’s knowledge and without the necessary authorisation and assistance being given at the appropriate level of the State authorities.<sup>21</sup>

Although actual knowledge can be construed from the facts, especially when the burden of proof is reversed in these types of cases to the State’s disadvantage, the inclusion of a should have known-standard by the ECtHR is certainly significant. One merit of the current *mens rea* standard

appears to be that the ECtHR does not wish to follow the ILC's stringent 'knowledge of the circumstances' test supplemented by the requirement of proving that the assisting state acted 'with a view to facilitating' the conduct of the principle.<sup>22</sup> As such, the ECtHR has established its own, less stringent, standard, which may be applied to situations of assistance to (serious) human rights violations. Time will tell whether and under which circumstances a state party to the ECHR which has assisted in human rights violations committed by others will be held liable *solely* under the should have known-standard.

1. Al Nashiri v Romania, para. 690. See also Al Nashiri v. Poland, para. 530; Husayn (Abu Zubaydah) v. Poland, para. 524; and Abu Zubaydah v. Lithuania, para. 656.
2. El-Masri para. 152.
3. *Id.*, para. 153.
4. *Id.*, para. 165; Al Nashiri v. Romania, para. 522.
5. El-Masri v. Macedonia, para. 165-7.
6. El-Masri v. Macedonia, paras. 151-3; Al Nashiri v. Poland, paras. 395-6; Husayn (Abu Zubaydah) v. Poland, paras. 395-6; Al Nashiri v. Romania, para. 492-3.
7. Al Nashiri v. Romania, para. 497.
8. *Ibid.*
9. See e.g. El-Masri v. Macedonia, para. 257; Al Nashiri v. Poland, paras. 549; Husayn (Abu Zubaydah) v. Poland, paras. 543; and Al Nashiri v. Romania, para. 708.
10. El-Masri v. Macedonia, para. 151; Al Nashiri v. Poland, para. 394; Husayn (Abu Zubaydah) v. Poland, para. 394; Abu Zubaydah v. Lithuania, para. 481; and Al-Nashiri v. Romania, para. 491.
11. El-Masri v. Macedonia, para. 97; Abu Zubaydah v. Poland, para. 201; Al Nashiri v. Romania, para. 210.
12. Soering v. The United Kingdom, paras. 85-91.
13. Soering v. The United Kingdom, para. 113; Othman v. The United Kingdom paras. 281-5.
14. El-Masri v. Macedonia, paras. 239-241.
15. *Id.*, para. 249.
16. Husayn (Abu Zubaydah) v. Poland, paras. 525 and 533; Abu Zubaydah v. Lithuania, paras. 657 and 665; Al Nashiri v. Romania, paras. 691 and 698.
17. El-Masri v. Macedonia, paras. 198 and 218.
18. Husayn (Abu Zubaydah) v. Poland, paras. 442-5; Abu Zubaydah v. Lithuania, paras. 571-6; Al Nashiri v Romania, paras. 583-588.
19. Al Nashiri v. Romania, paras 391, 548-549, 584.
20. Al Nashiri v. Romania, para. 588.
21. *Ibid.* See also Al Nashiri v. Poland, paras. 441-442 and Husayn (Abu Zubaydah) v. Poland, paras. 443-444.
22. Cf. Article 16 DARS, and Commentary thereto.

State responsibility

Aiding and abetting

ECHR

ECtHR

Soering liability