

al-Hawsawi v. Lithuania: Counter-Terrorism and International (In)Security in the Humanitarian Age

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I. OVERVIEW

The applicant in *al-Hawsawi v. Lithuania* is a former member of the terrorist group Al-Qaeda, who was involved in the planning and execution of the 9/11 terrorist attacks.¹ Following the events of September 11, 2001, the Central Intelligence Agency (CIA) established the High-Value Detainee Program (HVD Program) as a way to collect intelligence from targets abroad.² As part of the program, the CIA, claiming support from the Department of Justice (DOJ), utilized enhanced interrogation techniques (EITs) to interrogate detainees, such as the applicant, in several of their foreign locations.³ Some of these techniques include isolation, sleep deprivation, and waterboarding.⁴ In 2006, the U.S. government closed the program and transferred the remaining detainees, including the applicant, to the naval base in Guantánamo Bay.⁵ In 2014,

1. *al-Hawsawi v. Lithuania*, App. No. 6383/17, ¶ 8 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

2. *Id.* at ¶ 9.

3. *Id.* at ¶ 15.

4. *Id.* at ¶ 17.

5. *Id.* at ¶ 28.

the U.S. Senate Intelligence Committee released a report stating that the CIA failed to keep other U.S. agencies informed of their actions concerning the HDV Program or provided them inaccurate information about the status of detainees, including the applicant.⁶ The report also stated that the CIA counted on the support of its host nations to keep operations secret, even compromising the medical care available to its detainees.⁷ Lithuania was the site of one of these facilities, named Detention Site Violet.⁸ Aside from his treatment in this site, the applicant in this case has been subjected to isolation and deprived of most contact with the outside world during his current tenure in the Guantánamo prison camp.⁹

Mr. al-Hawsawi alleges instances of torture and ill-treatment that resulted in the deterioration of both his physical and mental well-being.¹⁰ The government of Lithuania was charged with violating several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹ The overarching issue in this case was whether the Government of Lithuania, in allowing the CIA to conduct activities pertaining to the HVD Program within their borders, can be held liable for the CIA's actions, and found to have violated the Convention.¹² Specifically, the government was charged with failure to effectively investigate the CIA's activities in their territory, being complicit to the CIA's activities, and ignoring the risk of inhumane treatment, including the applicant's undisclosed and unlawful detention in Lithuania.¹³ They were also charged with interfering with Mr. al-Hawsawi's right to fair criminal proceedings and trial, as well as surrendering him to a situation in which he is at risk for the death penalty, referring to his upcoming trial at the Military Commission in Guantánamo.¹⁴ The European Court of Human Rights (ECHR) held that the Lithuanian government, as it pertained to Mr. al-Hawsawi's treatment in CIA custody in Lithuania and his later transfer to the prison camp in Guantánamo Bay, had violated all applicable articles of the Convention for the Protection of Human Rights and Fundamental Freedoms. *al-Hawsawi v. Lithuania*, App. No. 6383/17, (Jan. 16, 2024).

6. *Id.* at ¶ 41.

7. *Id.* at ¶ 46.

8. *Id.* at ¶ 52.

9. *Id.* at ¶ 56.

10. *Id.* at ¶ 1.

11. *Id.*

12. *Id.* at ¶ 117.

13. *Id.* at ¶ 3-6.

14. *Id.* at ¶ 7-8.

II. BACKGROUND

The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950.¹⁵ Article 1 of the Convention states that the participating countries have an obligation to protect everyone within their jurisdiction when it comes to exercising the rights outlined in the rest of the Convention.¹⁶ Article 3 of the Convention strictly prohibits the use of torture and inhumane treatment.¹⁷ The right to freedom and security of an individual, which includes a prohibition against unlawful detention, is enshrined in Article 5 of the Convention.¹⁸ The Convention also includes the protection of an individual's right to privacy when it comes to his personal and family life in Article 8.¹⁹ Additionally, Section 1 of Article 6 requires a fair trial and criminal proceeding for a detained individual.²⁰ Furthermore, Article 2 Protocol 6 establishes that the death penalty is strictly prohibited.²¹ Article 3 of Protocol 6, however, provides that a state can codify exceptions to the prohibition of the death penalty during times of war.²² Lastly, Article 13 of the Convention requires that those whose rights have been infringed on under the previous articles are entitled to an effective remedy as a matter of law.²³

In *Abu Zubaydah v. Lithuania*, the European Court of Human Rights found that, in order to determine whether the Lithuanian government had jurisdiction over the applicant in a CIA detention site, the first step was to determine whether the events constituting a violation of the Convention actually took place in Lithuania, as well as whether the violations are attributable to government officials or actors.²⁴ In this case, the Court found that the Lithuanian government has an obligation to take active measures as to ensure no one within their territory is subjected to torture or degrading treatment.²⁵ Therefore, the government was found to be in

15. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

16. *Id.* at Art. 1.

17. *Id.* at Art. 3.

18. *Id.* at Art. 5.

19. *Id.* at Art. 8.

20. *Id.* at Art. 6.

21. *Id.* at Protocol 6, Art. 2.

22. *Id.* at Protocol 6, Art. 3.

23. *Id.* at Art. 13.

24. *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶ 411 (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

25. *Id.* at ¶ 642.

violation of both Articles 1 and Article 3 of the Convention.²⁶ In this case, the Court also found Lithuania to be in violation of Article 5 of the Convention.²⁷ Specifically, the Court held that the government had a duty to act in a way that protects a person from being arbitrarily detained, including situations in which an individual is in custody of foreign authorities or officials.²⁸ Not only did the Court fail to act in accordance with this standard, but its actions went starkly against it, as it collaborated with the CIA to allow the detention of individuals within their territory without concerning itself with the treatment of people inside the facility, despite having reason to suspect detainees were likely subjected to inhumane conditions.²⁹

Another similar case is that of *Al Nashiri v. Romania*, in which the European Court of Human Rights analyzed the case of another CIA-detainee in a so-called “black site” facility in Romania.³⁰ In this case, the Court reiterates that, absent direct knowledge or involvement of the state in foreign activities within their territory, the state is still liable for indirect knowledge or suspicion of actions by a foreign state within the former state’s jurisdiction which violate international law.³¹ Notably, this case also found a violation of Article 3 where the Romanian government allowed an extra-judicial transfer of the detainee.³² The Court held that allowing an individual to leave a country’s jurisdiction, where the government has reason to suspect that the individual will be subjected to ill-treatment in their new location, amounts to a violation of the Convention’s prohibition against torture.³³

In response to the global attention on the issue garnered by an article in *The Washington Post*, the Lithuanian Parliament released Resolution No. XI-459, also titled Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the Alleged Transportation and Confinement of Persons Detained by the Central Intelligence Agency of the United States of America in the

26. European Convention on Human Rights, *supra* note 15 at Art. 1, 3.

27. Abu Zubaydah v. Lithuania, App. No. 46454/11, ¶ 648 (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

28. *Id.*

29. *Id.* at ¶ 649.

30. Al Nashiri v. Romania, App. No. 33234/12, (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183685>.

31. *Id.* at ¶ 395.

32. *Id.* at ¶ 595.

33. *Id.*

Territory of the Republic of Lithuania (Seimas Report) in 2009.³⁴ The Seimas Report states that, at first, the Parliamentary Assembly of the Council of Europe as well as the European Parliament did not include Lithuania in the results of their investigation into the locations of the CIA's black sites in Eastern Europe.³⁵ However, that result was more than likely due to a lack of cooperation and limited participation of the Lithuanian government in the proceedings.³⁶

The Report also makes clear that, as of February 2006, the Ministry of Foreign Affairs and other Lithuanian government institutions had not provided any information that would suggest there was a CIA location in Lithuania, nor that any of the countries' airports had been used in the illegal transportation of terrorist detainees.³⁷ The Seimas Committee first received confirmation of the Lithuanian black site when an American news channel broke the news in August 2009.³⁸ The Lithuanian authorities interrogated by the Seimas Committee continued to deny this information.³⁹

The Seimas Report establishes, first of all, that U.S. aircraft used to transport CIA detainees to and from black sites had flown through Lithuanian airspace on dozens of occasions.⁴⁰ The Committee also found that CIA aircraft landed in Lithuanian airports on several of those instances.⁴¹ It further established that members of the State Security Department of the Republic of Lithuania aided U.S. officials in gaining unrestricted access to aircraft in Lithuanian airports.⁴² Additionally, the Lithuanian State Border Guard Services was denied inspection of some of the aircraft.⁴³ Said aircraft were also not subject to customs investigation.⁴⁴ This is why the suspected detainees in those aircraft were able to enter Lithuanian territory without being identified.⁴⁵

34. *Findings of the Parliamentary Investigation by the Committee on National Security and Defence Concerning the Alleged Transportation and Confinement of Persons Detained by the Central Intelligence Agency of the United States of America on the Territory of the Republic of Lithuania*, Seimas Resolution No. XI-659, annex, 1 (Jan. 19, 2010).

35. *Id.*

36. *Id.*

37. *Id.* at 2.

38. *Id.*

39. *Id.*

40. *Id.* at 4.

41. *Id.* at 6.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

Regarding the issue of whether the CIA actually operated an HVD detention center in Lithuania, the Committee found that there was not enough evidence to definitively say that it did.⁴⁶ However, the Committee did find that, due to the fact that it was enclosed with its perimeter protected, the layout of the building suggested that the nature of the compound was for the detention and interrogation of individuals.⁴⁷ Additionally, the limited presence of Lithuanian officials made it possible for the CIA to use the building at their discretion without intervention from foreign officials.⁴⁸ Lastly, the Committee found that certain members of the Lithuanian authorities knew of the cooperation between the government and the CIA, but not the extent or details of said partnership, except for the fact that it was part of post-9/11, counter-terrorism measures.⁴⁹

III. COURT'S DECISION

In the noted case, the Court found that the government of Lithuania had violated the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁰ Firstly, the Court held that, under Article 1 of the Convention, the actions of the CIA fall under Lithuania's jurisdiction, and the government is therefore responsible for Mr. al-Hawsawi's treatment.⁵¹ Subsequently, the Court found that the government was in violation of Article 3 of the Convention.⁵² This is because the Lithuanian authorities failed to investigate allegations of inhumane treatment and allowed such treatment to occur within their borders.⁵³ The government was also held to have violated Articles 5 and 8 of the Convention in allowing the applicant's unidentified detention in their territory.⁵⁴ This detention amounted to an infringement on the applicant's right to liberty.⁵⁵ In allowing the applicant to be relocated to Guantánamo, the Lithuanian government infringed on the applicant's

46. *Id.* at 7.

47. *Id.*

48. *Id.*

49. *Id.* at 8.

50. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 1-9 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

51. *Id.* at ¶ 1; European Convention on Human Rights, *supra* note 15 at Art. 1.

52. *Id.* at ¶ 2-3 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

53. European Convention on Human Rights, *supra* note 15 at Art. 3.

54. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 4-5 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; European Convention on Human Rights, *supra* note 15 at Art. 5.

55. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 5 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; European Convention on Human Rights, *supra* note 15 at Art. 8.

right to a fair trial, pursuant to Article 6 of the Convention.⁵⁶ By doing this, the government also violated the Convention's Protocol 6 prohibition against the death penalty.⁵⁷ Lastly, the Court held that the Lithuanian government violated Article 13 of the Convention, as the applicant was not awarded any remedies.⁵⁸

A. Extent of Lithuania's Knowledge of the CIA's HDV Program in Their Territory

In the noted case, the Court found that the government had not successfully refuted evidence proving that the Lithuanian authorities had knowledge of the CIA's HVD Program's operations within their territory.⁵⁹ The Court relied on precedent that established the government's knowledge of the CIA's presence in the country.⁶⁰ Furthermore, the Lithuanian authorities approved the development of Detention Site Violet, which demonstrated that government officials were aware that it was being used for unlawful detentions and interrogations.⁶¹ In allowing the latter acts to be performed within its jurisdiction, the Lithuanian government exposed all detainees to possible violations of the Convention.⁶²

The Court found the government to be in violation of the Convention's Article 3, the prohibition against inhuman treatment, both in the procedural and substantive sense.⁶³ Previously, the Court has held that, when read together, Articles 1 and 3 of the Convention create a procedural duty for a country to investigate alleged instances of ill-

56. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 7 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; European Convention on Human Rights, *supra* note 15 at Art. 6.

57. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 8 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; European Convention on Human Rights, *supra* note 15 at Protocol 6.

58. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 9 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; European Convention on Human Rights, *supra* note 15 at Art. 13.

59. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 164 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

60. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 61 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; Abu Zubaydah v. Lithuania, App. No. 46454/11, (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

61. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 61 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; Abu Zubaydah v. Lithuania, App. No. 46454/11, (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

62. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 61 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; Abu Zubaydah v. Lithuania, App. No. 46454/11, (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

63. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 197-188 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

treatment through an official investigation.⁶⁴ The Court held that, in failing to conduct an investigation into the CIA's activities, Lithuania ignored its responsibilities under Article 3 of the Convention.⁶⁵ The court used its findings in a previous case as evidence for a lack of an investigation of this sort.⁶⁶ Additionally, the Court found that the government had failed to make any notable progress to further inquire into the knowledge of their officials regarding the HVD Program after the Seimas Committee's investigation in 2010.⁶⁷

In terms of Lithuania's violation of Article 3 in its substantive aspect, the Court held that, due to the government's knowledge of the CIA's HVD Program, Lithuania can be held liable for the actions taken by U.S. officials in their territory.⁶⁸ Additionally, the Court held that the government's knowledge regarding Mr. al-Hawsawi's transfer from Lithuania to Guantánamo Bay also amounted to a violation of Article 3.⁶⁹ The Court also found Lithuania in violation of Article 5 of the Convention because it failed to meet its responsibility to protect individuals from secret detention.⁷⁰ The Court reasoned that the government ensured the secrecy of the HVD Program, in part, by facilitating access to the facility where detainees were held and interrogated.⁷¹ The Court relied on precedent which established that Lithuanian authorities could be held liable for a violation of this article, as they developed the CIA facility in a way that optimized the infrastructure for the detainment of individuals.⁷² Additionally, the Court also found that allowing the applicant to be

64. Al Nashiri v. Poland, App. No. 28761/11, (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146044>.

65. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 196 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>.

66. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 189 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; Abu Zubaydah v. Lithuania, App. No. 46454/11, (May 31, 2018), <https://hudoc.echr.coe.int/fre?i=001-183687>.

67. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 190 (Jan. 16, 2024), <https://hudoc.echr.coe.int/eng?i=001-230250>; Findings of the Parliamentary Investigation by the Committee on National Security and Defence Concerning the Alleged Transportation and Confinement of Persons Detained by the Central Intelligence Agency of the United States of America on the Territory of the Republic of Lithuania, No. XI-659, annex (Jan. 19, 2010); Abu Zubaydah v. Lithuania, App. No. 46454/11.

68. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 216; Al Nashiri v. Poland, App. No. 28761/11, (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146044>; Abu Zubaydah v. Lithuania, App. No. 46454/11.

69. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 217.

70. *Id.* ¶ 229; European Convention on Human Rights, *supra* note 15 at Art. 1, 5.

71. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 228.

72. *Id.* ¶ 229; Al Nashiri v. Poland, App. No. 28761/11.

transferred to Guantánamo, knowing there was a risk of continued unlawful detention, also violated Article 5.⁷³

B. Lithuania's Complicity in the Furtherance of Human Rights Abuses and Ill-Treatment of Mr. al-Hawsawi

Furthermore, the Court found in favor of al-Hawsawi with respect to an Article 8 violation of his right to privacy.⁷⁴ While in American custody, Mr. al-Hawsawi has been deprived of virtually any contact with his family. Additionally, in allowing him to be transferred to Guantánamo, where it could have reasonably been inferred that he would continue to be deprived of said communication, Lithuania engaged in further violations of the Article.⁷⁵ The Court reasoned that, since the applicant's detention was deemed to be unlawful, the government's interference with his right to private and family life was not in accordance with the law.⁷⁶ Therefore, there was a clear violation of Article 8.

The Court also found that Lithuania violated Article 6, Section 1 of the Convention.⁷⁷ In allowing Mr. al-Hawsawi to be transferred to Guantánamo, the government violated his right to a fair, reasonable, and impartial trial.⁷⁸ While a proceeding or impending trial needs to meet quite a high standard of unfairness to violate the section in question, the Court found that the inconsistent use of evidence and unexplained delays in Mr. al-Hawsawi's trial all contributed to the finding that the impending proceeding in Guantánamo violates Article 6 guidelines.⁷⁹

Then, the Court found a violation of Articles 2 and 3 of the Convention when read in accordance with Article 1 of Protocol 6.⁸⁰ Articles 2 and 3 are concerned with an individual's right to life and the prohibition against torture, respectively.⁸¹ Article 1 of Protocol 6 codified into law the abolition of the death penalty.⁸² The Court found that Lithuania violated these provisions in allowing Mr. al-Hawsawi to be transferred to Guantánamo when he faced the risk of being subjected to

73. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 229; European Convention on Human Rights, *supra* note 15 at Art. 5.

74. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 288; European Convention on Human Rights, *supra* note 15 at Art. 8.

75. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 233.

76. *Id.* at ¶ 236; European Convention on Human Rights, *supra* note 15 at Art. 8.

77. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 288.

78. *Id.* ¶ 239.

79. *Id.* ¶ 239-243.

80. *Id.* ¶ 242.

81. European Convention on Human Rights, *supra* note 15 at Art. 2, 3.

82. European Convention on Human Rights, *supra* note 15 at protocol 6 Art. 1.

the death penalty.⁸³ Furthermore, the Court found that the government broke the law when it surrendered the detainee without seeking an assurance that he would not be subject to torture or the death penalty.⁸⁴

Lastly, the Court found that Lithuania violated the Convention's Article 13, read in accordance with Articles 3, 5, and 8.⁸⁵ Article 13 enshrines the right to remedy for any violations of the rights established in the Convention.⁸⁶ In this case, the government failed to aid Mr. al-Hawsawi in seeking proper remedy after violations of his Article 3 right to not be tortured, his Article 5 right to security, and his Article 8 right to privacy.⁸⁷ Specifically, the Court found that, since his transfer from Lithuania was never investigated by a proper judicial authority, the government breached its duty to look into potential remedies, especially after establishing that they had reason to believe al-Hawsawi had been subjected to ill-treatment while in CIA custody.⁸⁸

IV. ANALYSIS

The Court, for the most part, correctly applied binding precedent to the facts of the case and examined the Convention provisions at issue accordingly. In doing so, the Court strengthened previous precedent regarding the status of detainees in CIA black sites over Europe. As a result of the Court's decision, Lithuania now has to conduct a proper investigation into the activities of American officials in their territory in order to prevent any further human rights violations.⁸⁹ This will have positive implications all over, but in Europe especially, where countries like the United Kingdom have escaped liability for their role in U.S. counter-terror procedures.⁹⁰ The possible bias behind this reasoning can be explained by the renewed need for European states to portray some semblance of accountability for abuses committed in the past.⁹¹ The timing of the noted case is particularly important, as these countries must paint themselves as humanitarian actors in the wake of their public calls

83. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 252.

84. *Id.* at ¶ 254.

85. *Id.* at ¶ 260.

86. European Convention on Human Rights, *supra* note 15 at Art. 13.

87. *al-Hawsawi v. Lithuania*, App. No. 6383/17, ¶ 260.

88. *Id.* at ¶ 262.

89. *Landmark Ruling Highlights Lithuanian Complicity in CIA Torture, Prompts Questions About UK Role*, Redress (Jan. 16, 2024), <https://redress.org/news/landmark-ruling-highlights-lithuanian-complicity-in-cia-torture-prompts-questions-about-uk-role/>.

90. *Id.*

91. *Id.*

for the end of human rights abuses in active war zones, such as Gaza and Ukraine.⁹²

However, the Court was irresponsible in drawing conclusions that resulted in a conviction against Lithuania for violating the Convention's Article 3 prohibition of torture without proof of ill-treatment in the government's jurisdiction. Even if the newly broad interpretation of what constitutes a violation under Article 3 was appropriate, the Court did not rely on direct evidence to reach this conclusion. Furthermore, the Court's decision will have serious implications on the interpretation of statutes within the international framework, which will lead policy makers to encounter more hardships when attempting to regulate counter-terrorism measures, discrimination of non-combatants, and cooperation in times of global insecurity.

A. *The Court's Error in Finding the Government of Lithuania in Violation of the Convention's Article 3*

The Court's analysis of the alleged Article 3 violations of the Convention was flawed in that it was irresponsible in drawing certain conclusions from inconclusive and indirect evidence. Firstly, the Court continues to expand the conduct that is deemed to be unlawful when a country that is bound by the Convention aids an ally. Specifically, the Court necessarily found Lithuania liable for Article 3 violations when Mr. al-Hawsawi's tortuous treatment did not occur within the state's borders.⁹³ Even so, this conclusion was reached by indirect evidence.

Lithuanian officials held an incomplete notion of the detention facility's function. However, even without a complete notion of what was going on inside the detention facilities, the Court held that the government should have taken action to prevent possible ill-treatment. The Court incorrectly found for Mr. al-Hawsawi regarding both the procedural and substantive alleged violations of Article 3. Specifically, the Court used several cases as precedent, namely *El-Masri v. The Former Yugoslav Republic of Macedonia*, *Husayn (Abu Zubaydah) v. Poland*, and *Al Nashiri v. Poland*, which differ enough from the noted case to prevent a broader-than-usual application of the Convention's Article 3.

In *El-Masri*, the Court found that the former Republic of Macedonia acted in violation of Article 3 by failing to prevent acts of torture endured

92. *Id.*

93. R. Scott Adams, *Lessons Learned from the Latest Rendition Cases at the European Court of Human Rights*, Lieber Institute West Point (July 2, 2024), <https://ieber.westpoint.edu/lessons-learned-latest-rendition-cases-european-court-human-rights/>.

by an individual at the hands of the CIA *inside the respondent state's territory*.⁹⁴ Additionally, the Court held that the state violated Article 3 by surrendering the individual to American custody, knowing there was a chance the individual would endure further ill-treatment.⁹⁵ Similarly, in *Husayn (Abu Zubaydah)* and *Al Nashiri v. Poland* the Court found that Poland violated Article 3 by failing to take measures knowing there was a reasonable risk that individuals were being subjected to ill-treatment within their borders, which was the case.⁹⁶ Additionally, in both cases, the Court found that allowing the detainees to be transferred out of Polish territory, knowing they would be exposed to more risk, also constituted part of the Convention's Article 3 violation.⁹⁷

Mr. al-Hawsawi contends that Lithuania, in failing to carry out an efficient investigation into the CIA's actions in Detention Site Violet, violated the procedural aspect of Article 3.⁹⁸ The Court ultimately agrees with al-Hawsawi, citing the above cases as precedent. Additionally, the Court uses the reasoning that the investigation lacked transparency and respect for Mr. al-Hawsawi's due process rights under other articles of the Convention.⁹⁹

The Court does not cite any binding precedent, at least in this part of the opinion, in which a state has been convicted for an Article 3 violation, notwithstanding evidence that the individual was not subjected to torture within the state's territory. However, the Court in the noted case found it sufficient that Lithuania allowed Mr. al-Hawsawi be transferred to a location in which he was likely to endure torture and inhumane treatment. While this constituted part of an Article 3 conviction in the past, including in the Court's cited jurisprudence, it has been shown to be enough on its own for a country to be prosecuted for an act that did not occur within its territory.

Furthermore, a conviction against the government for an Article 3 violation in the procedural and substantive aspects was unnecessary. Finding in favor of Lithuania in this relatively small aspect of the litigation would not have come in the way of the Court's search for justice

94. el-Masri v. The Former Yugoslav Republic of Macedonia, App. No. 39630/09, ¶ 223 (Dec. 13, 2012), <https://hudoc.echr.coe.int/eng?i=001-115621>.

95. *Id.*

96. Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, ¶ 512 (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146047>; Al Nashiri v. Poland, App. No. 28761/11, ¶ 517 (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146044>.

97. Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, ¶ 513; Al Nashiri v. Poland, App. No. 28761/11, ¶ 518.

98. al-Hawsawi v. Lithuania, App. No. 6383/17, ¶ 169.

99. *Id.*

considering the other violations of the Convention that the government actually committed. Specifically, Article 13, which seeks to provide adequate remedy, was nevertheless correctly applied to Articles 5 and 8.¹⁰⁰ It was therefore superfluous to engage in a dragged-out analysis of Article 3 when direct evidence was unavailable and lackluster at best.

The Court, in both the procedural and substantive aspects, does rely on one additional case, that of *Abu Zubaydah v. Lithuania*.¹⁰¹ In this case, the court found that the state had a positive obligation to engage in procedural measures in order to ensure that no individual was subjected to ill-treatment within their borders.¹⁰² Additionally, this case found that Lithuania was liable for Article 3 violations due to the mental anguish the victim was exposed to, regardless of whether the presence of physical torture can be proven or not.¹⁰³ However, the way that the Court went about establishing facts and admitting evidence in *Abu Zubaydah* differs greatly from how it did so in the noted case. Specifically, the Court in *al-Hawsawi v. Lithuania* drew the majority of its conclusions from heavily redacted government statements and expert testimony from an academic.¹⁰⁴ In contrast, the Court in *Abu Zubaydah* included corroborated information from the United Nations, the Council of Europe, and other international organizations to supplement the facts reconstructed in the opinion.¹⁰⁵

This phenomenon made it harder for the government to meet the burden of proof beyond a reasonable doubt, since the only requirement for evidence to be admissible was that it would have probative value to a reasonable person.¹⁰⁶ This subsequently led to the introduction of several heavily redacted documents, which resulted in the Court drawing strong inferences against Lithuania due to the government's failure to disclose documents or provide adequate explanations of how events occurred¹⁰⁷ This had a harsher effect on the Court's Article 3 analysis than it did the others since the examination into alleged Article 3 violations was governed by a lower standard than that in the majority of the preceding cases. The Section 3 decision, therefore, continued to lower the standard

100. *Id.* at ¶ 270.

101. *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶ 172.

102. *Id.*

103. *Id.*

104. *al-Hawsawi v. Lithuania*, App. No. 6383/17, ¶ 169.

105. *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶ 172.

106. *al-Hawsawi v. Lithuania*, App. No. 6383/17, ¶ 169.

107. *Id.*

and broaden how Article 3 of the Convention and similar statutes are read in the context of international law.

B. Likely Repercussions of the Court's Decision on International Security Measures

The Court's conclusions are likely to have noticeable effects on the international framework, particularly when it comes to statutory interpretation. Even if cases are tried as violations of the European Convention on Human Rights, they are binding on the majority of NATO members, providing important context to the broader scheme of international law. Firstly, it will create a need for countries to reexamine their current counter-terrorism measures and restructure them as needed in order to conform to emerging, broad interpretations of human rights law. Secondly, it will bring up an issue of justice, as the Court's decision brings the global community a step closer to bridging the gaps between dangerous criminals and civilians when it comes to their role in international proceedings. Lastly, these effects will undoubtedly change the way in which states interact with each other in terms of cooperation, especially in an increasingly insecure world.

The holding in the noted case emphasizes the need for countries to restructure their counter-terror measures to procedures that conform to the newest advances in international legislation and human rights law. This will not occur without a large expenditure in resources for such an unprecedented change. For example, the U.S. already said they developed EITs because members of terrorist organizations are trained in surviving standard interrogation techniques. Therefore, policymakers must spend additional resources figuring out novel methods to detain war criminals while protecting their rights and simultaneously keeping costs low.

One way in which states might choose to do this is by resorting to the next most efficient method available for persecuting terrorist-adjacent targets. It is quite possible that, in choosing to not spend additional government resources in the development of new methods, states choose to forgo the use of detention as intelligence-gathering as a whole. As it is commonly known, Western powers more than often resort to the use of targeted killings using remote weapons, such as drones, for the elimination of high-value targets. Without a less life-threatening but still aggressive approach, it is inevitable that states, in the midst of the ongoing War on Terror, will resort to a more fatal alternative, instead of choosing to do nothing at all. That is to say, it is very likely that the noted case's

holding, in choosing to protect a set of arbitrarily defined set of rights, has sacrificed human lives in the fight for a war criminal's dignity.

V. CONCLUSION

The European Court of Human Rights applied precedent inconsistently throughout the opinion in the noted case. In doing so, the Court broadened the activities for which a third party can be liable under Article 3 of the European Convention for Human Rights, the prohibition against torture. While the general outcome of the noted case would not have changed had the Court not found Article 3 violations, the reasoning behind the decision is likely to lead to changes in the approach to international law. Specifically, the wrongful analysis of precedent and the authorization to bring in subpar evidence could subsequently affect the way in which states now conduct their counter-terrorism activities. In its haste to set precedent, which would essentially turn the Convention into a catch-all that eventually categorizes any mistreatment of detainees as illegal, the ECHR came dangerously close to blurring the line between civilians and dangerous criminals in terms of the protections that should be awarded to each of them. This will not only have a negative impact on the efficiency and success rate of current counter-terrorism measures, but it will also cause states to resort to extreme alternatives when it comes to neutralizing individual threats in their efforts to maintain the security of their citizens. In an attempt to protect their standing in the international humanitarian stage, the ECHR has, intentionally or not, chosen to protect the rights of war criminals that pose the highest of threats to our democracies. In doing so, the Court has compromised the security of their own citizens and, most importantly, their unalienable right to live free of the imminence of violence.

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