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State Secrets Privilege Vis-à-Vis Protection of Human Rights: Controversies in the Case of Abu Zubaydah

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Purpose:

This paper analyses the dilemma regarding secret state privilege and the necessity to protect human rights. The purpose of the paper is to emphasize that in some occasion's secret state privileges have been used to provide impunity and/or avoid further investigation which can point to acts of torture or acts that are contrary to international human rights law and international criminal law.

Design/Methods/Approach:

The descriptive method has been used for reviewing primary and secondary sources accompanied with the comparative method in order to make retrospective between different cases.

Findings:

The results show that human rights are often sacrificed by invoking secret state privilege. Extraordinary renditions have been used to transfer detainees from one state to another without any legal reason for purpose of interrogations which often end with torture. The main question is: should human rights be violated in the name of national security and fighting terrorism? The logical answer is no - the respect for human rights should be the top of the iceberg and no sacrifice can be done when the right to life and prohibition of torture are in question. Indeed, the Zubaydah case triggers the issue related to impunity for acts of torture and oversight on the government and security and intelligence agencies acts. Moreover, it raises questions about the very nature and purpose of secret state privilege by elaborating that even an information that has entered the public domain falls within the secret state privilege.

Originality/Value:

The content of the article deals with current topic and the controversies which surround the state secret privileges in several cases as well as comparison between different courts' decisions which have in common the issue of invoking secret state privileges in the name of national security.

Keywords: state secrets privilege, human rights, extraordinary rendition, torture

UDC: 342.7

Privilegij državne tajnosti v zvezi z varstvom človekovih pravic: polemike v primeru Abu Zubaydah

Namen prispevka:

Prispevek analizira dilemo glede državnih privilegijev tajnosti in nujnosti varovanja človekovih pravic. Namen prispevka je poudariti, da so bili včasih državni privilegiji tajnosti uporabljeni, da bi se izognili nekaznovanju ali nadaljnjim preiskavam, ki bi lahko pokazale na dejanja mučenja ali dejanja, ki so v nasprotju z mednarodnim pravom človekovih pravic in mednarodnim kazenskim pravom.

Metode:

Deskriptivna metoda je bila uporabljena za pregled primarnih in sekundarnih virov skupaj s primerjalno metodo, da bi naredili retrospektivo med različnimi primeri.

Ugotovitve:

Rezultati kažejo, da so človekove pravice (pre)pogosto žrtvovane s sklicevanjem na tajnost. Izredne izročitve so bile uporabljene za premeščanje pripornikov iz ene države v drugo brez kakršnega koli pravnega razloga zaradi zasliševanj, ki se pogosto končajo z mučenjem. Glavno vprašanje je: Ali naj se človekove pravice kršijo v imenu nacionalne varnosti in boja proti terorizmu? Logičen odgovor je ne – spoštovanje človekovih pravic bi moralo biti vrh ledene gore in pri pravici do življenja in prepovedi mučenja ni dovoljeno žrtvovanje. Zadeva Zubaydah dejansko sproža vprašanje, povezano z nekaznovanjem dejanj mučenja in nadzorom nad dejanji vlade in agencij. Poleg tega odpira vprašanja o sami naravi in namenu državne tajnosti, saj pojasnjuje, da celo informacija, ki je prišla v javno domeno, spada v domeno privilegija državne tajnosti.

Izvirnost/pomembnost prispevka:

Vsebina prispevka se ukvarja z aktualno tematiko in polemikami okoli državnih privilegijev tajnosti v več primerih ter primerjavo med odločitvami različnih sodišč, ki jim je skupno vprašanje sklicevanja na tajnost v imenu nacionalne varnosti.

Ključne besede: privilegij državne tajnosti, človekove pravice, izredne izročitve, mučenje

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1 INTRODUCTION

Terrorism is one of the main concerns over the past decades. The terrorist attacks of September 11, 2001 just triggered the fact that terrorism became one of the greatest fears for democratic states. However, in the same time, it gave 'carte blanche' to States to use different and sometimes unauthorized programmes and torture techniques which constitute violation of the fundamental human rights

and standards established in the criminal justice systems worldwide. In those hard times, fighting terrorism has become a priority for many governments and extraordinary renditions excellent tool to achieve 'victory' in the name of national security. Undoubtedly, in their restless efforts to fight terrorism, governments have often used disproportionate force and acted arbitrarily in the name of national security and preserving state's sovereignty. In those attempts, states often crossed lines of 'what is right and what is necessarily' in order to fulfill their plans. The 'war on terror' just accelerated the use of extraordinary rendition programmes for detaining and interrogating high value detainees who were suspected of committing acts of terrorism or their affiliation to some terrorist groups.

This paper is aimed at addressing the issue that often human rights are sacrificed by invoking state secrets privilege. Refusal of the courts to fully analyze the cases is justified under the state secrets privilege, a claim used by governments in order to have the judiciary stop ruling in the issues which, according to them, must remain secret in order to protect national security (Borenstein, 2019). To preserve secrecy, legal doctrines were created and practiced in several states.

State secrecy provides an interesting viewpoint on national and supranational standards over counterterrorism measures since it has been invoked in many occasions with a purpose to protect state agents from prosecution being aware that they violated international criminal law norms as well as international human rights standards. Moreover, the paper raises questions about the very nature and purpose of state secret privilege by elaborating that even an information that has entered the public domain falls within the secret state privilege. The obvious result is that a compromise should not be done between allegedly protecting national security when the obvious reason is to protect agencies and state agents who acted arbitrarily and contrary to the international conventions and violated fundamental human rights. The Zubaydah case triggers the issue related to impunity for acts of torture and oversight on the government and agencies acts. Moreover, it raises questions about the very nature and purpose of secret state privilege: is it the protection of national security or protection of illegal acts?

Extraordinary renditions and state secret privileges are often connected due to the fact that the notion of the state secrecy is strictly interlinked by the concept of protection of national security and state's sovereignty. However, it is evident that these prerogatives especially when accompanied by the lack of effective scrutiny on the national authorities make the resort to state secrecy at attractive means to hide the truth about serious violations of fundamental rights.

2 EXTRAORDINARY RENDITIONS AND STATE SECRETS PRIVILEGE

State secrets can be defined as an authorization of a State not to disclose information that can cause harm to its national security or to defend the State's sovereignty or national community. If we carefully analyze this definition, we can notice two types of interests involved. The interest which justify the invocation of state secrets in order to protect national interests vis-à-vis interests of the public to know the reasons for the secrecy or the interests of individuals concerned by the secrecy. Therefore, the practical articulation of the dialectic relationship between secrecy

and publicity impacts on the level of democracy of certain government. State secrecy being a structural character of any exercise of political authority where the more information is made public and the more the reasons for secrecy are to be found in the community's interests, the more the system could be regarded as inherently democratic (Carpanelli, 2016). Undoubtedly, the state secrecy is linked to state sovereignty and protection of thereof, but this protection can be also considered as a double-edged sword which has good and bad consequences. The first one implies to the protection of the state sovereignty and the state itself from threats which can cause harm, and the second one is granting immunity from either criminal or civil proceedings in cases of human rights abuses. Thus, the price is too high when human rights are at stake especially those inviolable and non-derogable.

States resort to extraordinary renditions when they have no legal base for arrest of the person suspected for crime or terrorism, when they cannot wait for the judicial proceeding of extradition and when the fight against terrorism emerges. The last one is the most dangerous excuse for using extraordinary renditions for obtaining information, conducting interrogation or unlawful detentions. All these acts constitute violations of the guaranteed human rights when the person is held incommunicado and often tortured or subject to other forms of ill-treatment. Although protection of state secrecy has become an emerging legal issue in the war against terrorism, respect of human rights should be the 'top of the iceberg', not contrary. No circumstances such as war, public emergency or terrorist threat can justify the use of torture or other form of ill- treatment. The prohibition is universally accepted as a fundamental principle of customary international law and therefore is binding upon all states regardless of whether they have ratified any of the international treaties. Melzer (2021) argues that the prohibition of torture and ill-treatment requires States to adopt a holistic approach to eradicate, prevent, investigate and prosecute any abuse and to ensure adequate and effective reparation to victims and their families. This includes a duty to integrate all these elements into national legislation and policies. Even in states of emergency when derogations are allowed in accordance with the international laws as well as the national law of the concerned state, still the state must fulfill its obligations *inter alia* including the right to life, prohibition of torture, the right not to be deprived of liberty unless for reasons prescribed by the law, right to be informed, right to a fair trial etc. Some states have tried to justify torture or ill-treatment based on the treaty exception of lawful sanctions. However, jeopardizing the right to life and prohibition of torture cannot be considered as an attempt of exception especially when *jus cogens* and peremptory norms are in question.

States have measures of discretion in cases of evaluation threats to national security and when deciding how to combat these threats. This liberty has been provided after the 9/11 attacks when the war on terror begun and fighting terrorism has become a priority for many governments and different sorts of measure and mutual cooperation was developed. However, this liberty does not mean that every threat can be considered as a breach to national security. The threat must have a reasonable basis in presented facts and evidence that will support the claim that national security is at stake and those actions must be undertaken in order to

prevent bigger problems which could harm the national security of the concerned State. In the framework of the fight against terrorism, restrictive measures have been often taken against suspected terrorists on the basis of secret evidence. In several countries, for instance, preventive detention and deportation measures have been warranted against individuals suspected of being involved in terrorist activities solely or partially based on information never disclosed to them. Such closed proceedings have indeed become a common feature in cases involving national security (Carpanelli, 2016).

It is widely known that in their restless effort to fight terrorism governments have often used disproportionate force and acted arbitrarily, continuously breaching their obligations under international human rights law. One of the most controversial measures is the extraordinary rendition by which states transfer without any legal process, a person to the custody of another state in order for them to be detained and interrogated (Borenstein, 2019). Very often these extraordinary renditions were performed by the Central Intelligence Agency (CIA) where the program was surrounded by a high level of secrecy and occasionally states from Europe also helped the CIA in detaining and black sites and capturing a person who was of interest for the CIA program. Due to the controversies surrounding the extraordinary renditions as well as breaching several human rights instruments especially in cases where the CIA tortured persons for whom afterwards was proved that they have none connection to terrorism, in 2006, the Military Commission Act was passed by the Congress and approved by the US President, although the secret detention or extraordinary rendition programme was not authorized by any law (Satterthwaite, 2009). Consequently, in 2007, the US President issued an executive order stating that the CIA carries out a program of detention and interrogation and in 2008 the Supreme Court ruled that the Military Commissions Act from 2006 was unconstitutional.

The fear from terrorism in many countries had an effect in broadening the powers given to the executive branch under the premise that it would fight against terrorism successfully. However, this unlimited power can be devastating when human rights are in question and when there is a debate whether the activity of the intelligence agencies is of constitutional relevance and whether the state secrets privilege as a doctrine is an evidentiary rule not provided by law (a discretion of the judiciary). Executive branch of the government when commits abuse and becomes arbitrary, in that case, upon the system of checks and balances and the principle of separation of powers, the executive must be subject to oversight. Having too much power often leads to abuses and misuse of that power for 'some greater good' enshrined in the name of national security. However, state secrets privilege cannot be above all instances of law. For that reason exists the judicial (or constitutional) review.

According to Giupponi and Fabbrini (2010), the activity of the intelligence agencies raises several issues of constitutional relevance. On the one hand, the functions, the organization and the responsibilities of the intelligence agencies are peculiar and quite distinct from those of other regular administrative bodies. On the other hand, intelligence agencies operate within a constitutional system based on the rule of law and must be subject to forms of overview (Giupponi

& Fabbrini, 2010). Undoubtedly, the activity of intelligence agencies aims at gathering information which is useful for the safeguarding of the independence and the integrity of the State externally and for the protection of the State and its democratic institutions internally.

2.1 Overview of Related Cases where State Secret Privileges were Invoked in The United States and Similar Practice Developed by the European Court of Human Rights

The doctrine of secret state privilege is well known in the United States judicial system. According to the developed practice, there are two major cases which distinguish the use of secret state privilege as a way of protection of sensitive national security information from being disclosed in civil litigation. The first case is the 1876 case of *Totten v. United States*, where the Court held that the judiciary lacks jurisdiction to hear a suit in which the underlying subject matter is a state secret if the suit would inevitably lead to the disclosure of matters which the law itself regards as confidential, The second one, is based on the Court's 1953 decision in *United States v. Reynolds*, where the Court has permitted the government to invoke the state secrets privilege more narrowly to protect only certain pieces of sensitive evidence if there is a reasonable danger that disclosure during litigation will expose military matters which, in the interest of national security, should not be divulged (Elsea & Liu, 2022).

Many questions arise from the above-mentioned cases regarding the applicability of the state secret privilege. Some questions refer to the issue how far courts should scrutinize the government's assertions of the risk of disclosure once the privilege has been formally invoked. Another worrying issue is the doubt what is the real purpose of the secret state privilege in certain cases? Whether the goal is to protect the national security or to protect agencies and state agents which culpability may be determined in appropriate procedure if that sort of information is disclosed? If we analyze the cases of *El-Masri* and *Aby Zubaydah* it seems more than certain that the purpose is the second issue to protect state agents and to defend the 'extraordinary renditions' as a necessary asset in the fight against terrorism. This so-called adopted policy is contrary to extradition which is legal procedure for transferring of a person accused or convicted of a crime. In extraordinary renditions, these elements lack, there is no legal ground for prosecution, and there is no due process of law and access to court. In many cases, the person is held incommunicado and subject to torture while interrogation with a purpose to obtain information.

In the case of *El Masri,* he claimed that CIA unlawfully detained, interrogated him and held incommunicado. Due to this reason, on December 6, 2005, El-Masri filled a civil case in the US Federal District Court for the Eastern District of Virginia, suing the former Director of the CIA (United States District Court, E.D. Virginia, 2006). The Court held that the case threatened the disclosure of relevant state secrets, thus it was dismissed. Consequently, El-Masri managed to obtain justice and the right to truth. The European Court of Human Rights (ECHR) on December 13, 2012 delivered its landmark decision declaring violation under

Article 3, 5, 8 and 13 ECHR. In the submitted application, El-Masri alleged that in the period from December 31,2003 to May 23, 2004 he had been subjected to a secret rendition operation in which agents from Macedonia had arrested him, held him incommunicado, questioned and ill-treated him. He was held 23 days in a hotel in Skopje where El-Masri started his first hunger strike. Afterwards they handed him over at Skopje Airport to CIA agents who then transferred him to Afghanistan in a secret interrogation facility called Salt Pit where he had been detained and ill-treated for over four months (EHCR, 2012). The El-Masri pre-flight treatment as Skopje Airport where he was beaten, sodomized and forcibly tranquiled when he was handed over to the CIA agents was described at the CIA protocol so-called "capture shock treatment". The rendition was based on the determination by officers in the CIA's ALEC Station that "El-Masri knows key information that could assist in the capture of other al-Qaida operatives that pose a serious threat of violence or death to US persons and interests and who may be planning terrorist activities" (Stefanovska, 2021). On July 16, 2007, the CIA inspector general issued a Report of investigation on the rendition and detention of Khaled El-Masri, concluding that available intelligence information did not provide a sufficient basis to render and detain El-Masri and that the Agency's prolonged detention of El-Masri was unjustified (Senate Select Committee 2014). When it was established that El-Masri has no relevant information and is not the person of interest for the CIA, they left him in Albania near the border with Macedonia.

The second case, *Mohamed v. Jeppesen Dataplan, Inc*. (United States Court of Appeals for the Ninth Circuit, 2010) involved a claim by five plaintiffs against Jeppesen Dataplan, Inc. for violation of the Alien Tort Statute stemming from the company's role in providing transportation services for the extraordinary rendition program. The plaintiffs alleged that Jeppesen Dataplan, Inc. "provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting the five plaintiffs among their various locations of detention and torture (United States Court of Appeals for the Ninth Circuit, 2010). In both *El-Masri* and *Jeppesen*, the government asserted the state secrets privilege and argued that the suits should be dismissed because the issues involved in the lawsuits could not be litigated without risking disclosure of privileged information.

At the end of 2021, the Supreme Court of the United States decided in another important case involving the state secrets privilege. In *United States v. Zubaydah* (Supreme Court of the United States, 2022), the Court determined that a court cannot declare that classified information apparently in the public domain is not subject to the state secrets privilege when the United States has not officially confirmed or denied such information. The overview of the case, as well as dilemmas which aroused regarding the invocation of state secret privilege will be a matter of elaboration below in this paper in order to discuss about justification and different opinions among judges.

While domestic courts were unable or unwilling to review the invocation of the state secret privilege, the ECHR created a substantive practice of human rights violations due to the use of state secret privilege in order to justify the extraordinary renditions as a base of obtaining information or protecting national

security. The ECHR has accepted this quite provoking challenge and managed to determine violations of the Convention's rights in the cases of Abu Omar, El-Masri and Al Nashiri as the most intriguing and landmark cases concerning extraordinary rendition and invocation of state secret privileges.

In the case of *El-Masri v. the F.Y.R Macedonia* (ECHR, 2012), the Grand Chamber of the ECHR determined violations of the Convention's rights and the most important segments of the judgment reflect to: (a) lack of effective investigation by Macedonian authorities and the right to the truth which points to the possibility of abuse of the concept of state secret privilege when systematic politics and secret prisons are in stake; (b) responsibility about detention; (c) lack of requesting diplomatic assurances that El-Masri would endure no ill-treatment; (d) no legitimate request for extradition by CIA agents; (e) interference with the right to private and family life and (f) denial of the right to an effective remedy (Stefanovska, 2021). Besides establishing torture 'beyond reasonable doubt', the Court could not address the culpability of CIA agents, but however this judgment is of extreme importance because it tackles the CIA for the first time as an agency that conducts extraordinary renditions in contrary to the international law standards.

The second case concerned the extraordinary rendition of Abd Al Rahim Hussayn Muhammad Al Nashiri who has been suspected of the terrorist attack on the US Navy ship USS Cole in the harbor of Aden Yemen in October 2000. He has also been suspected of playing a role in the attack on the French oil tanker in the Gulf of Aden in 2002. At the time of his capture, Al Nashiri was considered by the US authorities to be one of the key operations including planning the September 11, 2001 attacks. Since his capture in March 2002, he has not been charged with any criminal offense and remained in indefinite detention in Guantanamo. Al Nashiri claimed that he was a victim of extraordinary rendition by the CIA and he was transferred to secret detention site in Poland with the knowledge of Polish authorities for the propose of interrogation during which he was tortured. He was subject to unauthorized interrogation methods. The application of Al Nashiri before the Strasbourg Court was based on the US documents which were released in 2009 where Al Nashiri fell into the category of high-value detainee. Al Nashiri complained before the ECHR for torture, ill-treatment and incommunicado detention in Poland while in US custody, his transfer from Poland and the Poland's failure to conduct an effective investigation (ECHR, 2015). The Court found violation of Articles 3, 5, 6, 8 and 13 ECHR. The Court held that the criminal investigation in Poland had failed to meet the requirements of a prompt, thorough and effective investigation for the purposes of Article 3 ECHR where Poland had been required to take measures to ensure that individuals within its jurisdiction were not subjected to torture or inhuman and degrading treatment or punishment.

The last case concerned Nasr Osama Mustafa Hassan (also known as Abu Omar), an Egyptian imam and refugee in Italy who was subject to the US extraordinary rendition in cooperation with the SISMI (Italian Intelligence and Security Service). Abu Omar in the application submitted to the ECHR together with his wife Nabila Ghali explained that he was stopped by Italian authorities and handed over to CIA, when afterwards he was transferred to a secret

detention in Egypt, tortured and interrogated in 2004. After his first release, he was imprisoned again and then, since 2007, forced to house detention. Before initiation a procedure before the ECHR, the Tribunal of Milan convicted twenty-three American authorities, but was forced to dismiss the charges against five Italian agents because the state secret privilege was invoked and confirmed by the Italian Prime Minister. However, invoking a secret state privilege by SISMI agents was a controversial issue due to the fact that the trial was already ongoing. The state secret was claimed on information already in the public domain, due to the inquires of the European Parliament and the Council of Europe (the Fava Report and Marty Reports). According to the Constitutional Court, a belated assertion of secrecy should not be disregarded by ordinary courts, irrespective of public knowledge on facts and information (Vedaschi, 2018). Although critical evidence was obtained before the secrecy's assertion, the late invocation of state secret would prevent ordinary courts from using such pieces of evidence.

On February 23, 2016, the ECHR delivered the judgment where it ruled that the Italy's cooperation with the CIA extraordinary rendition programme violated Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the ECHR (European Court of Human Rights, 2016). Regarding the state secret privilege, the ECHR went on note that the information implicating the SISMI agents had been widely circulated in the press and therefore found it difficult to imagine how invoking state secrecy had been apt to preserve the confidentiality of the events once the information in question has been disclosed. Thus, in Court's view, the executive decision to apply state secrecy when the information was known to the public was with a purpose to protect those SISMI agents from prosecution and grant them impunity. The Court noted that in spite of the efforts of the Italian investigators and judges to identify the persons responsible and secure convictions, the latter remained ineffective owing to the attitude of the executive (ECHR, 2016). Therefore, the Court as previously stated in El-Masri, Al Nashiri and Abu Zubaydah that similar treatment of "high-value detainess" for the pruposes of the CIA's extraordinary rendition programme was to be classified as torture within the meaning of Article 3 ECHR. Moreover, the cooperation of the Italian authorities and by allowing the US authorities to abduct Abu Omar, they had knowingly exposed him to real risk of treatment contrary to Article 3 ECHR.

The case of Abu Omar, once again proves the validity of the hypothesis raised in this paper and the valid assumption that the real reason for invocation of state secrecy is not to protect a sensitive information from being disclosed or to protect national security, the real reason behind the state secret privilege is to protect those agents and authorities who are aware that they committed acts which are contrary to international criminal law and international human rights law and to grant them impunity from prosecution.

3 HUMAN RIGHTS IMPLICATIONS IN EXTRAORDINARY RENDITIONS

In many occasions, state secrecy has been observed as a mean to hide the truth concerning serious violations of human rights and grant de facto impunity to perpetrators. The war on terror has paved the way to the increased use of extraordinary renditions although they existed and were practiced many years before the 9/11 attacks and the trend for gathering secret intelligence information as evidence in proceedings against suspected terrorists. The problems lies in the fact that agencies tend towards extraordinary renditions when they have legal procedures such as extradition and deportation. On this way they are violating the guaranteed human rights norms and in the same time create an impression that suspected terrorists are detained without evidence and without clear prosecution act. Undoubtedly, when state secrecies are used as a shield to protect agencies from criminal liability, it is obvious that violation of peremptory norms is at question and as well as the right to the truth when extraordinary renditions involve torture or other forms of cruel and ill-treatment. Thus, according to Amato (2019), the apposition of the state secret privilege not only constitutes a tool for governments to avoid any investigation, but also becomes a violation of the right to the truth. The right does concern both the right for the victim, the family and the community in general to access information, and also States' obligation to take all the necessary positive measures to protect the entitlement to know in particular through effective investigations (Amato, 2019). Instruments of international human rights law and rulings demonstrate that the state secrets privilege cannot eliminate the right of the victims, their relatives or society to know the truth about these violations and that states cannot, on behalf of national security, breach their obligations under customary international law and human rights law toward the right to truth, to an effective investigation, to an effective remedy, and to judicial protection (Borenstein, 2019). Victims have the right to justice, and this means that their claims must be herd, that they have the right to know about the facts and people who victimized them, to see them punished, to receive proper redress, and this rights cannot be arbitrarily taken from them.

The International Convention for the Protection of All Persons from Enforced Disappearance prescribes that every victim has the right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information. The Strasbourg court practice in respect to the right to the truth has reiterated in several cases (such as El-Masri v. the F.Y.R Macedonia) that deprivation of the person of being informed of what had happened, including getting on accurate account of the suffering he had allegedly endured and the role of those responsible is entitled to him and guaranteed with several human rights instruments. Therefore, as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 ECHR.

Finally, the right to the truth can be observed as a closure for the suffering of the victim and path towards his healing and of his family. Moreover, it can be considered as a final step towards ending the ill-treatment and long-term consequences from torture. In this connotation, state secrecy appears as a 'villain'

with an objective to stop the search for the truth and acquiring the right which belongs to the person by all means prescribed with the international conventions.

4 THE CASE OF ABU ZUBAYDAH

In the case of *United States v. Zubaydah* (Supreme Court of the United States, 2022), the Supreme Court ruled that the U.S. Government could invoke state secret privilege to bar two former government officials from testifying in a foreign judicial proceeding (in Poland). The decision was quite controversial due to the fact that most of the testimony the government contractors would render was already known to the public, thus the first question imposed was: What will be protected by invoking state secret privilege, when the purpose of the secrecy is to protect from disclosure an information which could harm the national security of the state? How this protection will work when the information is known to the public?

In order to analyze the judgment of the Supreme Court, we must start from the beginning with the facts of the case and its procedural background. In 2002, Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) was captured by Pakistani authorities who believed he was a high-level member of Al-Qaida. Afterwards he was detained at the CIA site, allegedly in Poland, where he was subject of enhanced interrogation techniques. Two independent contractors working for the CIA allegedly proposed, developed and supervised the torture techniques applied on Abu Zubaydah (Mattei, 2022). Eventually he was transferred from the CIA cite to Guantanamo Bay.

In 2014 the ECHR delivered a judgment against Poland finding that Abu Zubaydah has been held by the CIA in Poland and that the Polish authorities failed to conduct investigation. Afterwards, for the purposes of ongoing investigation in Poland, Abu Zubaydah initiated proceedings in the U.S and filled an application in the District court where he sought subpoenas for discovery from the former CIA contractors who allegedly played a major role in Abu Zubaydah torture. The District court granted the application and subpoenas were served on the former CIA contractors (United States Court of Appeals for the Ninth Circuit 2019). Upon appeal the Ninth Circuit rejected the government's blanket assertion of state secrets privileges over everything in the discovery request. The Court applied the three-step Reynolds analysis for determination of the need for state secret privilege. First, the Court confirmed that there has been a formal claim of privilege. The second step referred to determination whether the information was really privileges and in the third step the Court had to decide how the matter should proceed in the light of successful claim of privilege (U.S. Supreme Court, 1953). The Court ruled that the fact that CIA operated in Poland could not be considered as a state secret privilege, while the identity of the contractors should remain secrecy. Regarding the step three, the Court held that because the district court failed to make a meaningful attempt to separate the information, the dismissal was inappropriate because the contractors in another case already provided non-privileged information. Moreover, the panel majority ruled that three categories of information were not covered by the state secrets privileges such as: (a) the

fact that the CIA operated a detention facility in Poland in the early 2000s; (b) information about the use of interrogation techniques and (c) conditions of confinement in the detention facility and details of the Abu Zubaydah's treatment there. Additionally, the panel majority concluded that because the CIA contractors were private parties and not Government agents, they could not confirm or deny anything on the Government's behalf.

The majority of the judges in the Supreme Court do not deny that some of the information and related details appeared in publicly available documents, but still decided to reverse the judgement of the Ninth Circuit and to remand the case. In the response by the Government, the CIA director said that the contractor's response whether they deny or confirm that Poland had cooperated with the CIA would significantly harm the U.S national security interests. It is quite controversial the opinion of the majority of judges in the Supreme Court that sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege (Supreme Court of the United States, 2022). According to them, the Government has provided a reasonable explanation why the contractors' confirmation or denial could harm national security interests mainly due to the 'clandestine' relationships with foreign intelligence services. For those reasons the majority concludes that state secrets privilege applies to the existence or nonexistence of a CIA facility in Poland.

There are many controversies and contradictory facts in the judgment delivered by the Supreme Court. First of all, the Government previously concluded that the treatment of Abu Zubaydah constituted torture where the CIA used enhanced interrogation techniques including water boarding, stress positions, cramped conferment and sleep deprivation (Office of the Press Secretary, 2014). Second, the ECHR determined in its judgment that CIA operated a detention facility in Poland and that Poland failed adequately to investigate the human rights violations. Third, the Government has failed to meet its burden of showing that a reasonable danger of harm to national security would follow if sharing the information sought due to the fact that many information were already publicly known such as: (a) the Executive Summary of a Senate Select Committee on Intelligence Reporting concerning the CIA use of enhanced interrogation techniques; (b) the judgment of the ECHR in Abu Zubaydah case; (c) testimonies from the CIA former contractors and (d) and one of the CIA contractor's memoir of his involvement with the CIA's enhanced interrogation techniques (Supreme Court of the United States, 2022).

From a legal point of view, the judgment of the Supreme Court presents a dangerous precedent because it allows the Government by invoking state secret privilege to suppress operational details concerning the specifics of cooperation with a foreign government although that cooperation is well known to the general public because it has been condemned by an international court (the ECHR in several cases) due to human rights violations. How in certain circumstances the Government may assert the state secret privilege to bar the confirmation or denial of information that has entered the public domain through unofficial sources? What is the justification for this reasoning? What is the purpose to protect information that is widely known, when the step two in Reynolds analysis is not confirmed – whether the information was privileged? How the national security

may be harmed when the information is publicly available? This is in correlation with the fact that in several cases including the above mentioned and the case of *Matko v. Slovenia*, the impunity of the agents is *per se*, considered, albeit not explicitly and openly as the interest of the state i.e. of the state nomenclature. It seems that the authorities adhere to this pattern of reasoning in many occasions. The logical answer leads only to impunity of those involved in torture and application of enhanced interrogation techniques.

From intelligence point of view, with this reasoning, the Supreme Court makes selective enforcement of the privilege and posts a standard which dangerously empowers the executive and allows agencies like CIA to commit human rights violations without a possibility to take responsibility for those acts. In this concrete case, it is not the question whether Abu Zubaydah is a terrorist and has committed terrorist acts and other acts which threatens the national security – the criminal justice systems has resources to investigate and prove those allegations, but human rights cannot be and must not be violated in the name of national security. Contrary, it gives the agencies 'carte blanche' to operate, use torture in procedures contrary to the law in order to achieve something that will be questionable by the judiciary, but at the end the state secret privilege will rescue them from impunity. On this way the executive promotes lack of transparency and accountability which can greatly affect the rule of law and the respect for fundamental human rights.

5 CONCLUDING OBSERVATIONS

In fighting the war on terror, it was believed that the extraordinary rendition programmes will have success in combatting terrorism, while the results show the contrary where these extraordinary renditions were surrounded by controversies in several publicly known cases. Governments worldwide successfully prevented the courts from litigating claims involving these programmes by asserting the state secrets privileges. One of them is the U.S. Government which after the 9/11 attacks used extraordinary renditions around the world in fighting acts of terrorism.

It would be understandably justified if the purpose of the governments was to protect the national security from potential threats, but in Abu Zubaydah case, there were several controversies which point that the goal of the Executive branch is achieving impunity for acts committed mainly by CIA agents which include extraordinary renditions, torture and implementation of enhanced interrogation techniques which became publicly acknowledged.

The debate about the use of state secrets privilege after the Abu Zubaydah case will continue whether the assertion of the secrecy is justified and necessary especially when the information has entered the public domain. How the information will be protected when it is already known to the public? What is the ultimate goal of state secrets privileges – protection of national security or protection of agencies and agents which committed crimes under the international criminal law and international human rights law? Is it acceptable to sacrifice fundamental human rights in order to avoid accountability? After the judgment of the Supreme Court in the case of Abu Zubaydah it is more than obvious that these issues will be raised in future dilemmas regarding the state secrecy. However, at

this point it is obvious that the governments need to fight terrorism, but the very threat has shown that derives from state secrecies because they jeopardize the fundamental human rights. In order to preserve the very essence of state secrets privileges when an information will be necessary to be prevented from disclosure in order to protect the national security, the oversight upon agencies like the CIA must be enhanced in order to prevent future gross human rights violations. The democratic oversight should be conducted jointly by the branches of power (Legislature, Executive and Judiciary) each in the own sphere regarding the legal, operational and financial aspect of the oversight. On this way the democracy will be preserved, the rule of law will be maintained and the human rights will be protected.

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