

Al Nashiri v Poland

Application no. 28761/11

**WRITTEN SUBMISSIONS ON BEHALF OF
AMNESTY INTERNATIONAL AND
THE INTERNATIONAL COMMISSION OF JURISTS
INTERVENERS**

pursuant to the notification dated 12 October 2012 that the President of the Chamber (Fourth Section) had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

5 NOVEMBER 2012

A. Knowledge imputable to Contracting Parties at relevant times¹

1. On 13 November 2001, US President George W. Bush signed a military order authorizing the indefinite detention without trial, and without access to any court in the United States of America (USA) or elsewhere, of foreign nationals deemed by the President to be involved in international terrorism.² In the same order he authorized military commissions, executive bodies in which the ordinary rules of criminal justice would not apply, for the trial of non-US nationals accused of broadly defined terrorism-related offences in proceedings that would flout international fair trial standards and provide for the death penalty, with the President having ultimate authority over the commissions and over clemency. President Bush's support for the death penalty was internationally known, and the first two federal executions in nearly 40 years had been conducted in June 2001, shortly after the President took office.³ The interveners expressed concern publicly that the military order threatened the rule of law and fundamental principles of justice and expressed particular alarm that the death penalty could be imposed after such unfair trials.⁴ From late November 2001, Amnesty International warned that the USA's past record on "renditions" raised the prospect that it would turn to this practice to circumvent human rights protections in the post-9/11 counter-terrorism context.⁵ Reports of US renditions to secret detention began as early as October 2001⁶ and continued through 2003.

2. Detentions at the US Naval Base in Guantánamo Bay, Cuba, began on 11 January 2002.⁷ On 21 March 2002, the US Department of Defense published rules for the military commissions, which showed these were purely executive bodies with the power to hand down death sentences, that the President was the final authority, and that "any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly."⁸ Amnesty International condemned the flagrant deficiencies of this system as "particularly troubling given the lack of due process safeguards during interrogation and the fact that the commissions will have the power to hand down death sentences."⁹ In major reports issued in April and June 2002, Amnesty International warned that the USA was engaging in arbitrary detainee transfers into and from its custody and that some individuals had disappeared into secret US detention.¹⁰

3. In a US federal court in January 2003, the then-Director of the Defense Intelligence Agency (DIA) asserted that providing an "enemy combatant" access to a lawyer or the courts would damage interrogations.¹¹ Interrogations of "enemy combatants in the War on Terrorism", he said, were being conducted "at many locations worldwide by personnel from DIA and other organizations in the Intelligence Community".¹² He suggested that incommunicado detention in this context could last for "years" (as would occur in the case of detainees held in the program of secret detention operated by the CIA).¹³

4. In April 2003, the USA told the UN Commission on Human Rights that "enemy combatants" in US custody could be denied access to courts and legal counsel indefinitely, and that international human rights law did not apply to such detentions, which were controlled only by the laws of war as interpreted by the USA under its theory of a global war against al-Qa'ida and associated groups.¹⁴

5. By June 2003 it was well-known that those who had been transferred to Guantánamo included individuals picked up far from Afghanistan. By then, for example, six Algerian nationals handed over to the USA by authorities in Bosnia

¹ In Annex A, the interveners provide the hyperlinks to selected Amnesty International documents by way of illustration.

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, <http://www.fas.org/irp/offdocs/ea/mo-111301.htm>

³ The second of these executions went ahead despite a finding by the Inter-American Commission on Human Rights that the death sentence had been obtained in an "arbitrary and capricious manner" and that the execution would amount to a "deliberate and egregious violation" of US obligations under international law. IACHR report 52/01, Case 12.243, 4 April 2001, <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm>.

⁴ Amnesty International, USA: Presidential order on military tribunals threatens fundamental principles of justice, 15 November 2001; International Commission of Jurists, Open Letter to President Bush on Military Commissions, http://old.icj.org/news.php3?id_article=2609&lang=en.

⁵ See USA: No return to execution - the US death penalty as a barrier to extradition, November 2001, and News Release, 29 November 2001.

⁶ See, for example, case of Yemeni national Jamil Qasim Saeed Mohammed, handed over to US custody by Pakistan agents and flown out, reportedly to Jordan. *Cole suspect turned over by Pakistan*. Washington Post, 28 October 2001; Pakistan hands over man in terror probe, Los Angeles Times, 28 October 2001, <http://articles.latimes.com/2001/oct/28/news/mn-62724>.

⁷ By June 2003 there were about 670 detainees held there. None had had access to legal counsel or to any court.

⁸ Department of Defense Military Commission Order No. 1, 21 March 2002, <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>.

⁹ USA - Military commissions: Second-class justice, 22 March 2002.

¹⁰ Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002, (and update, December 2002). Pakistan: Transfers to US custody without human rights guarantees, 19 June 2002.

¹¹ Declaration of Vice Admiral Lowell Jacoby, Director, Defense Intelligence Agency filed with Respondents' Motion for Reconsideration, *Padilla v. Rumsfeld*, US District Court for the Southern District of New York, 9 January 2003.

¹² *Ibid.*

¹³ The US-led rendition and secret detention programme was a large-scale, cross-border, organised programme comprising, *inter alia*, a network of secret detention sites, a.k.a. "black sites", run covertly by the USA's Central Intelligence Agency (CIA) under presidential authority granted after the 11 September 2001 attacks in the USA. It depended on the collusion, including tacit, of many states, and it involved the abduction of hundreds of persons from around the world suspected of involvement in or having knowledge of international terrorism, eventually, in some cases, with a view to their standing capital trials in the USA or in territory subject to its jurisdiction. The secret detention program was first confirmed publicly by President Bush on 6 September 2006. 'Remarks on the war on terror', <http://www.gpo.gov/fdsys/pkg/PPP-2006-book2/pdf/PPP-2006-book2-doc-pg1612-2.pdf>.

¹⁴ For example, see UN Doc.: E/CN.4/2003/G/73, 7 April 2003 and UN Doc.: E/CN.4/2003/G/80, 22 April 2003.

and Herzegovina had been held at Guantánamo for a year and a half.¹⁵ The case was also reported in Amnesty International's 2003 annual report (covering 2002) published in May 2003 and distributed widely to governments and the media, which also cited two cases of individuals held incommunicado in Gambia from November 2002 with the involvement of the USA. Their rendition to US custody in Afghanistan and thence to Guantánamo was publicized in early 2003.¹⁶ The Amnesty International 2003 report¹⁷ documented that there were over 600 detainees then at Guantánamo and reported on the USA's resort to secret detention and transfer of detainees to possible torture in third countries. The report¹⁸ and documents published during 2002 provided further credible evidence of the USA's use of secret detention and rendition in the context of the "war on terror", including the use of undisclosed and incommunicado detention by US forces in Afghanistan.¹⁹ They named a number of detainees whose fate and whereabouts had been unknown since being taken into US custody during 2002, but not believed to have been taken to Guantánamo. These included Abu Zubaydah, apprehended in Pakistan in March 2002 and whose whereabouts in US custody remained unknown by June 2003.²⁰

6. In short, during 2002 and 2003, credible information emerged that the USA had committed and was continuing to commit gross human rights violations, including enforced disappearances by means of arbitrary, incommunicado and secret detention outside US territory, as well as secret detainee transfers, of individuals the US authorities suspected of involvement in or having knowledge of international terrorism. Also, as set out above, prior to and during this time, the USA was known to have pursued the imposition and carrying out of death sentences, including against individuals charged with domestic and international terrorism²¹ and in cases where it had bypassed due process safeguards customary in ordinary extradition procedures, including by abduction as a preferred means of obtaining custody of suspects.²²

7. Thus, by June 2003, any Contracting Party would have known²³ that the USA was engaging in use of the death penalty; the secret detention of individuals it suspected of involvement in or having information about international terrorism; holding people incommunicado or virtually incommunicado in indefinite military detention without charge or trial; and preparations to subject individuals to an unfair trial by military commission, at Guantánamo²⁴ or elsewhere, without access to civilian courts, including in respect of individuals facing capital charges. *A fortiori*, an even greater and more specific degree of knowledge in relation to the human rights violations that took place on the Contracting Party's territory and beyond should be imputed to the Contracting Party that had entered into a secret agreement with the USA with a view to cooperating in purported counter-terrorism operations and the maintenance of secrecy with respect to such operations.

B. The rendition and secret detention programme involved multiple egregious breaches of Contracting Parties' Convention obligations

8. The US-led rendition and secret detention programme entailed multiple, composite and cumulative grave human rights violations, such as torture or other ill-treatment; enforced disappearances;²⁵ incommunicado detention;

¹⁵ The US Department of State recorded the case under "arbitrary arrest" in its 2002 human rights assessment issued on 31 March 2003. "On October 11, the BiH's Human Rights Chamber determined that the BiH and Federation governments violated human rights conventions in transferring four of six Algerian terrorism suspects to the custody of a foreign government in January." <http://www.state.gov/j/drl/rls/hrrpt/2002/18356.htm>. That the "foreign government" was the USA, and the six were in Guantánamo, was widely reported elsewhere.

¹⁶ See Amnesty International Urgent Action 359/02, 11 December 2002 and updates.

¹⁷ Amnesty International Report 2003 (covering 2002).

¹⁸ Amnesty International 2003 report also documented the abduction of a UK national, Moazzam Begg, in Pakistan in February 2002 and his subsequent detention in US custody in Afghanistan, where he was held "without charge or trial in harsh conditions", prior to transfer to Guantánamo.

¹⁹ For example, Memorandum to the US Government, April 2002, *op. cit.*

²⁰ See US Department of Defense news briefing, 3 April 2002, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3390>.

²¹ See, for example, references to Khalfan Khamis Mohamed and Mohamed Rashed Daoud al-Owhali in USA: No return to execution, *op. cit.*, November 2001, and case of Timothy McVeigh, An open letter to President George W. Bush calling for a moratorium on federal executions, 9 May 2001, and Urgent Action update, 11 June 2001.

²² See case of Mir Aimal Kasi in No return to execution, *op. cit.*, November 2001; Amnesty International Urgent Action update, 15 November 2002.

²³ See, *inter alia*, *Hirsi* at § 128, citing in turn *M.S.S.*, § 353 and *Saadi*, § 147.

²⁴ Described by a UK court in 2002 as a "legal black-hole" operating in violation of the international prohibition of arbitrary detention. See *Abbasi & Anor., R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598 (06 November 2002), § 64.

²⁵ According to, *inter alia*, the definition of enforced disappearances adopted by the International Convention for the Protection of All Persons from Enforced Disappearance (ICED), enforced disappearances entail state agents -- or others acting with the state's authorization, support or acquiescence -- placing people outside the protection of the law through arrest, detention, abduction or other deprivation of liberty followed by a refusal to acknowledge such a deprivation of liberty or by the concealment of the victims' fate or whereabouts. See, *inter alia*, Article 2, ICED. Further, the Court has emphasised the seriousness of enforced disappearances and unacknowledged detention as violations of Article 5 ECHR. See *Kurt v Turkey*, no 24267/94, 25 May 1998, §129. The Court has characterised four days' unacknowledged detention as a "complete disregard of the safeguards enshrined in Article 5" and a "particularly grave violation of [the] right to liberty and security secured by Article 5", see *Chitayev and Chitayev v Russia*, no 59334/00, 18 January 2007, §173, where it also found that failure to keep detention records is "incompatible with the very purpose of Article 5 of the Convention", § 125. In *Kurt* the Court also emphasised that "the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5." §124.

systematic arbitrary deprivation of liberty;²⁶ nullification of the rights to recognition before the law,²⁷ a fair hearing and access to an effective remedy against human rights violations, including through pre-trial detention without judicial review, or deliberate and systematic refusal of access to a lawyer.²⁸ The programme entailed the perpetration of multiple crimes under international or national law,²⁹ contrary to international obligations binding on both the USA, and on all Council of Europe Member States involved, including rights protected under Articles 2, 3, 5, 6 and 13 of the Convention and Article 1 of Protocol No. 6 to the Convention concerning the abolition of the death penalty. Further, since the programme was conceived and operated through the above-mentioned means, it was “anathema to the rule of law and the values protected by the Convention”,³⁰ whether its victims would be arbitrarily detained indefinitely or would eventually face criminal, including capital charges, on US territory or elsewhere under its jurisdiction.

9. International law recognises that, in cases of enforced disappearance, the combination of the flagrantly unlawful deprivation of liberty in the form of secret, unacknowledged, incommunicado detention³¹ and the removal of the ‘disappeared’ person from the protection of law, result inevitably in a violation of the detainee’s right to be free from torture and inhuman or degrading treatment or punishment.³²

10. Further, in a finding consistent with the approach espoused by other human rights bodies in relation to the suffering endured by the family members of the victims of enforced disappearances,³³ in *Kurt v Turkey* the Court considered, *inter alia*, that the applicant “has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time”.³⁴ The Court found that there had been a violation of Article 3 in respect of the suffering endured by the

²⁶ The prohibition of arbitrary deprivation of liberty is a rule of customary international law. See, *inter alia*, UN Human Rights Committee (HRC), GC no. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 11; HRC, GC no. 24, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, § 8; Working Group on Arbitrary Detention (WGAD), Opinion No. 15/2011 (People’s Republic of China, concerning Mr. Liu Xiaobo), 3 February 2011, § 20; WGAD, Opinion No. 16/2011 (People’s Republic of China, concerning Ms. Liu Xia), 8 February 2011, § 12; ICRC (Jean-Marie Henckaerts and Louise Doswald-Beck, eds), Customary International Humanitarian Law (Cambridge: Cambridge University Press, 2005), Rule 99 (Vol. I pp. 344-353, Vol. II Ch. 32, Sec. L, pp. 2328-2362; and Restatement (Third) of Foreign Relations Law of the United States § 702 (1986), see § 102 (1987) on sources of international law for the purpose of the Restatement, including customary international law § 102(1)(A). Further, there is strong support for the proposition that this prohibition has the character of a *ius cogens* norm, particularly in connection with prolonged arbitrary detention. *Ibid.* See also L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status (Helsinki, 1988), pp. 425 ff., T. Meron, “On a Hierarchy of International Human Rights”, 80 (1986) AJIL 1.

²⁷ For example, the HRC has stated that the right to recognition as a person before the law may be violated if an individual last seen in the hands of the authorities was intentionally removed by them from the protection of the law for a prolonged period and relatives’ efforts to obtain effective remedies have been impeded. See *Grioua v Algeria*, HRC, UN Doc. CCPR/C/90/D/1327/2004 (2007), §§7.5 (Article 9) and 7.8-7.9 (Article 16); *El Abani v Libyan Arab Jamahiriya*, HRC, UN Doc. CCPR/C/99/D/1640/2007 (2010) §§7.6 (Article 9) and 7.9 (Article 16). See also, Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116 § 127.

²⁸ In *Al-Moayad v. Germany* the Court held that there would be a flagrant violation of the right to fair trial where there was a “denial of justice”, including through pre-trial detention without judicial review, or deliberate and systematic refusal of access to a lawyer, especially for someone detained in a foreign country. *Al-Moayad v. Germany* (dec.), no. 35865/03, 20 February 2007, § 101.

²⁹ For example, enforced disappearance has been recognized as a crime under international law since the judgment of the Nuremberg Tribunal in 1946: *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Nuremberg 30 September and 1 October 1946 (Nuremberg Judgment), Cmd.6964, Misc. No.12 (London: H.M.S.O. 1946), p. 88. It is considered a crime under the *Inter-American Convention on the Forced Disappearance of Persons*, Preamble; International Law Commission 1996 *Draft Code of Crimes against the Peace and Security of Mankind*, Article 18 (i); *Rome Statute of the International Criminal Court*, Article 7 (1)(i) and 7(2)(i); International Criminal Court, Elements of Crimes, Article 7 (1)(i); ICED.

³⁰ In *Babar Ahmad and Others v. UK* the Court observed that “extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention.” and involved “violation of the most basic rights guaranteed by the Convention”, *Babar Ahmad and Others v. UK*, nos. 24027/07, 11949/08 and 36742/08, Partial Decision as to the Admissibility, 6 July 2010, § 114. See also *Abdulhakov v. Russia*, no. 14743/11, 2 October 2012 (not yet final), § 156. The Court has repeatedly held that the rule of law is one of the fundamental principles of a democratic society and it is inherent in all Convention Articles (see *Amuur v. France* judgment of 25 June 1996, Reports 1996-III, pp. 850-51, § 50).

³¹ The UN General Assembly (UN General Assembly resolution A/RES/66/150 17 December 2007, § 15; UNGA res. 63/166, 12 December 2008, § 20; UNGA res. A/RES/66/150, 19 December 2011, § 22), the Inter-American Court of Human Rights (*Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), § 187; repeated in *Godínez Cruz Case*, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1989)) and the UN Special Rapporteur on torture (Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2001/66, 25 January 2001, § 665) have repeatedly found that prolonged incommunicado detention, even on its own, violates the prohibition of torture or other ill-treatment. Further, the European Commission for Democracy through Law noted in its Opinion on the International Legal Obligations of Council of Europe States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners that “Incommunicado detention [...] is clearly not ‘in accordance with a procedure prescribed by law’ of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review... incommunicado detention... in view of its secret character... is by definition in violation of the ECHR.” Henceforth: the Venice Commission Opinion on Secret Detention, §§124-5. In addition, the UN Working Group on Arbitrary Detention (WGAD) has stressed “that detaining terrorist suspects under such conditions, without charging them and without the prospect of a trial in which their guilt or innocence will eventually be established, is in itself a serious denial of their basic human rights and is incompatible with both international humanitarian law and human rights law.”, WGAD report to 62nd session of the Commission on Human Rights, E/CN.4/2006/7 12 December 2005.

³² In the *El-Megreisi* case the HRC found that the enforced disappearance of the victim violated the torture prohibition based solely on his prolonged incommunicado detention. HRC, *El-Megreisi v. Libya Arab Jamahiriya*, No. 440/1990, UN Doc. CCPR/C/50/D/440/1990 (1994), § 2.2 and § 5.4. Further, in the *Rafael Mojica* case the HRC concluded: “aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7”. *Rafael Mojica v. Dominican Republic*, No. 449/1991, UN Doc. CCPR/C/51/D/449/1991 (1994), § 5.7; See also, the Human Rights Chamber for Bosnia and Herzegovina in a case involving a five-month period of incommunicado detention, considered enforced disappearance to be *per se* a violation of article 3 of the Convention. *Palić v. Republika Srpska*, case No. CH/99/3196, 11 January 2001, §§ 71-74. The UN Committee against Torture has found, in regard to the USA, that detaining persons indefinitely without charge is *per se* a violation of the Convention. Conclusions and Recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, § 22.

³³ See for instance *Godínez Cruz Case*, §§ 48-9; *Velasquez Rodriguez Case*, § 51; *Blake v. Guatemala*, Inter-Am.Ct.H.R. (Ser. C) No. 36 (1998), §§ 96-97; HRC, *Abdelhakim Wanis El Abani (El Ouerfeli) v. Libya*, No. 1640/2007, UN Doc. CCPR/C/99/D/1640/2007 (2010), § 8.

³⁴ *Kurt*, § 133.

applicant, i.e., the mother of the disappeared. Since, in certain circumstances, the suffering of family members due to the enforced disappearance of their relatives has been found to amount to prohibited ill-treatment, the interveners submit that, in turn, the mental harm inflicted on the “disappeared” themselves violates Article 3 of the Convention, and *a fortiori* where the latter have been subjected to enforced disappearance for a prolonged period as was the case with the so-called high value detainees in the rendition and secret detention programme.

11. In light of the above, the interveners submit that international law recognizes that enforced disappearances, such as those that characterised the rendition and secret detention programme, constitute a violation of the right to freedom from torture and inhuman or degrading treatment or punishment, in addition to constituting gross violations of Article 5.

12. Further, the interveners contend that any Contracting Party that colluded with the USA in the rendition and secret detention programme, including through secretly making their territory available for “black sites”, should be held liable under the Convention for the gross and systematic human violations committed on their territory and beyond.

C. State responsibility for co-operation in the rendition and secret detention programme

13. The interveners submit that any Contracting Party’s responsibility under the Convention for co-operation in renditions and secret detentions should be established in light of international law principles of state responsibility. In the development of its jurisprudence in accordance with the principles of interpretation, the Court has *inter alia* relied on the Articles on State Responsibility³⁵ of the International Law Commission (“ILC Articles”), which reflect customary international law.³⁶

States are responsible for acts of co-operation in internationally wrongful acts

14. International law, reflected in Article 16 of the ILC Articles, establishes that “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”³⁷ The interveners submit that -- in accordance with Article 16 of the ILC Articles -- the responsibility of Contracting Parties that co-operated in the rendition and secret detention programme can be established from the point where those states had actual or constructive knowledge of the violations of international human rights obligations inherent in that programme; and where the action of the Contracting Party contributed to the apprehension, transfer or continued detention of an individual within the programme. Furthermore, in the Court’s jurisprudence and under Article 7 of the ILC Articles, the co-operation of government agents, even without the authorisation of the government, engages the responsibility of the state.³⁸

15. State responsibility may arise from either active co-operation in, or passive tolerance of, renditions or secret detentions. Under international law, responsibility for assistance in an internationally wrongful act may arise either from positive steps taken to assist another state in a wrongful act, or from failure to take action, required by international legal obligations, that would have prevented a wrongful act by another state.³⁹ Consistent with these principles, the Convention imposes responsibility on states for both acts and omissions that entail co-operation in acts contrary to the Convention. Under the positive obligations doctrine,⁴⁰ states have obligations to take measures to prevent action by third parties leading to violations of Convention rights. A state’s positive obligation of prevention will be violated where the state “knew or ought to have known” that the individual in question was at real and immediate risk of violation of his or her Convention rights, and failed to take reasonable measures of protection.⁴¹

³⁵ Articles of the International Law Commission on responsibility of states for Internationally Wrongful Acts. See also commentaries, 2008, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The articles were relied on by the Court in *Ilascu and others v Moldova and Russia*, no.48787/99, 8 July 2004, § 320-321; and in *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland* (No.2) no. 32772/02, § 86.

³⁶ The International Court of Justice (ICJ) has recognised that the rules concerning assistance in the commission of a wrongful act, as enshrined in Article 16 of the ILC Articles, form part of customary international law: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ, Judgment of 26 February 2007, § 420.

³⁷ ILC Articles on State Responsibility, Article 16; See further Commentary to Draft Article 16, paras.1- 6.

³⁸ Article 7, ILC Articles; *Ireland v UK*, §159. See also Venice Commission Opinion on Secret Detention where the Commission affirmed that “the responsibility of the Council of Europe member States is engaged also in the case that some section of its public authorities (police, security forces etc) has co-operated with the foreign authorities or has not prevented an arrest without government knowledge.” Secret Detention Opinion, para.119.

³⁹ ILC Articles, Commentary, op cit, Chapter IV, para. 4 “a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct.”; See also *Corfu Channel, Merits, Judgment*, I.C.J. Reports 1949, p. 4, at p. 22. See also, *Mohammed Alzery v. Sweden*, HRC Communication No 1416/2005, 10/11/2006 CCPR/C/88/D/1416/2005. “11.6 [...] at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party (see also article 1 of the Convention against Torture). [...]”

⁴⁰ *Osman v UK*, [GC] no.23452/94, 28 October 1998; *X and Y v the Netherlands*, (1985) 8 EHRR 235. *Kaya v. Turkey*, no.22535/93, 28 March 2000; *Storck v. Germany*, no.61603/00, 16 June 2005; *Costello Roberts v. UK*, no.13134/87, 25 March 1993; *Hatton v. UK* [GC], no.36022/97, 8 July 2003; *Keenan v. UK*, no.27229/95, 3 April 2001. See also Reply by the Committee of Ministers to Parliamentary Assembly Recommendation 1801 (2007) on Secret detentions and illegal transfers of detainees involving Council of Europe member states, 16 January 2008, § 3.

⁴¹ *Osman*, op cit, § 116.

While such obligations must not “impose an impossible or disproportionate burden on the authorities”, the latter must do “all that could be reasonably expected of them” to prevent violations and end those that are ongoing.⁴²

16. Thus, acts of co-operation by agents of Contracting Parties in renditions or secret detentions by the agents of a foreign state leading to arbitrary detention, enforced disappearances, torture or other ill-treatment, will incur the Convention responsibility of the Contracting Party. In addition, failure to take effective measures to prevent such operations, in circumstances where the state authorities knew or ought to have known of the risk that they would be carried out, will violate Convention positive obligations, read in light of Article 16 of the ILC Articles. This is reflected in the conclusions of the Venice Commission Opinion on Secret Detention. With particular reference to states’ obligations in respect of arrests by foreign authorities on their territory, it found that: “any form of involvement of the Council of Europe Member State or receipt of information prior to the arrest taking place entails responsibility under Articles 1 and 5 ECHR (and possibly Article 3 in respect of the modalities of the arrest)”.⁴³ With regard to secret detention facilities, the Venice Commission recalled that “[a]ctive and passive co-operation by a Council of Europe member State in imposing and executing secret detentions engages its responsibility under the European Convention on Human Rights.”⁴⁴ In this regard the Venice Commission cited the principle established by the Court that “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention”.⁴⁵ This principle applies equally in respect of acts of agents of foreign States. Thus the Contracting Party is responsible for the failure to protect and the arbitrary detention or other violations of Convention rights that result.

Additional responsibilities of the state are engaged in regard to jus cogens obligations

17. States are subject to additional obligations to refrain from co-operation in internationally wrongful acts where those acts amount to “a serious breach,” that is, “a gross or systematic failure” by a state to fulfil “an obligation arising under a peremptory norm of general international law.”⁴⁶ In those circumstances, states must not only refrain from co-operation in the wrongful acts but, irrespective of whether they have been implicated in the acts or not, they must also “co-operate to bring to an end through lawful means”⁴⁷ such a breach and must not recognise as lawful a situation created by the breach.⁴⁸ The interveners submit that these obligations arise in relation to the rendition and secret detention programme. The system involved violations of the prohibitions on torture, enforced disappearances and prolonged arbitrary detention, which are violations of *ius cogens* norms.⁴⁹

International State responsibility equally applies for actions under the terms of “operating agreements”

18. It is an accepted principle of this Court’s jurisprudence that “[t]he State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention”⁵⁰ and that, *a fortiori*, “it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention.”⁵¹ In *Al-Saadoon and Mufdhi*⁵² the Court held that “this principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty and the grave and irreversible harm risked by the applicants”. The interveners submit that, *mutatis mutandis*, the same reasoning would apply to other gross human rights violations such as those integral to the rendition and secret detention programme, and thus, in turn, to any agreements between a Contracting Party and the USA in furtherance of that programme. Further, any such “operating agreements” that might have been in place between a Contracting Party and officers of a third

⁴² *Ibid*, §§ 115 and 116. These positive obligations are reflected elsewhere in international human rights law, including under the ICCPR (Article 2 ICCPR. UN CCPR, GC 31, para.8) and CAT (Article 2 UNCAT).

⁴³ Venice Commission Opinion §.118 and § 159(b).

⁴⁴ Secret Detention Opinion, Conclusions, paras. 126.

⁴⁵ *Ilascu and others v Moldova and Russia*, no.48787/99, 8 July 2004, judgment of 8 July 2004, § 318.

⁴⁶ Articles 41.1 and 41.2 ILC Articles.

⁴⁷ Article 41.1 ILC Articles.

⁴⁸ Article 41.2 ILC Articles. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, at p. 200, § 159.

⁴⁹ As stated above, the programme entailed violations of the prohibitions on torture, enforced disappearances and prolonged arbitrary detention – violations of *ius cogens* norms. *Goiburú et al v Paraguay*, Inter-American Court of Human Rights, Judgment of September 22 2006, ser. C No. 153 § 84 (disappearances); *Prosecutor v Anto Furundzija*, Case No.: IT-95-17/1-T, judgment, 10 December 1998 (torture); and *supra* footnote 26 on the *ius cogens* character of the prohibition of prolonged arbitrary detention. See also, the latest reference in *Questions relating to the obligation to prosecute and extradite (Belgium v. Senegal)*, International Court of Justice, Judgment of 20 July 2012, § 99. Further, the violations were both systematic – they were carried out in an organized and deliberate way – and gross – they flagrantly contravened and challenged the legitimacy of the international law prohibitions on these acts, in the context of action to counter terrorism. See ILC’s Commentary to Article 40, § 8: “To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.”

⁵⁰ *Al-Saadoon and Mufdhi v The United Kingdom*, no.61498/08, 2 March 2010 § 128; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, no.45036/98, 30 June 2005 § 154; *Matthews v The United Kingdom*, no.24833/94, 18 February 1999, §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no.42527/98, § 47.

⁵¹ *Al-Saadoon and Mufdhi*, op cit, § 138.

⁵² *Al-Saadoon and Mufdhi*, op cit, § 138, as well as Convention case-law summarised therein, §§ 126-128.

State in the context of the programme cannot exclude the jurisdiction of this Court under Article 1 ECHR nor exempt a Contracting State from its Convention obligations.

19. States retain responsibility for conduct occurring on their territory, even when they have been prevented from exercising authority or control over part of it.⁵³ The Court has recognised a limitation of jurisdiction or responsibility of a Contracting State for conduct occurring on its territory only in very limited circumstances, where competencies are transferred to an international organisation that provides an equivalent protection of human rights to that of the Convention.⁵⁴ However, even in this case, the Court has constantly held that “absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention.”⁵⁵

20. The Venice Commission Opinion on Secret Detention highlighted that “[o]n 4 October 2001, the Allies agreed on a series of measures to assist the US-led campaign against Al-Qaeda and related terrorism.”⁵⁶ However, even if any alleged “operating agreement” were to fall under the umbrella of NATO, the Commission stressed that “[a]rticle V of the North Atlantic Treaty does not contain an obligation for member States of the Council of Europe to allow irregular transfers of prisoners or to grant blanket overflight rights, for the purposes of fighting against terrorism [and that] neither Article 5 of the North Atlantic Treaty nor any Agreements in execution thereof can, or claim to, diminish the obligations and responsibilities of member States of the Council of Europe under human rights treaties”.⁵⁷ The Commission also stated that even if “the arrest is effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe member State concerned may remain accountable under the European Convention on Human Rights, as it is obliged to give priority to its *jus cogens* obligations, such as they ensue from Article 3”.⁵⁸

21. The interveners contend that the conclusion of “operating agreements” for the purpose of transferring certain powers or competencies within a Contracting Party’s jurisdiction or territory, does not exempt that Contracting Party from its Convention obligations. Further, the interveners submit that any “operating agreements” within the context of the CIA secret detention, interrogation and rendition programmes do not fall within the “sovereignty transfer” exceptions related to international organisations. In any event, an agreement reached in this context could never be considered “to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides”⁵⁹, and, as such, would not qualify for this exception. Finally, the interveners contend that any agreements concluded as part of or in furtherance to, the CIA secret detention and rendition programme⁶⁰ would be null and void under article 53 of the *Vienna Convention on the Law of Treaties*, as being contrary to *jus cogens* norms. As such, they could not be relied upon by a Contracting State to exempt them from respecting their Convention obligations.

D. Non-refoulement obligations under the Convention

22. The principle of *non-refoulement* is well established in international human rights law.⁶¹ The Court has consistently found that a number of Convention rights entail, implicitly, an obligation not to transfer (*refouler*) people when there are substantial grounds for believing that they face a real risk of violations of those rights in the event of their deportation, expulsion, extradition, handover, return, surrender, transfer or other removal from the state’s jurisdiction.⁶² In those circumstances, human rights law enjoins the removal of the individuals concerned from the Contracting

⁵³ *Ilascu v Moldova and Russia*, op cit, para.333.

⁵⁴ This may occur in the establishment of an international organisation with a consequent transfer of competence. *Bosphorus*, op cit. The Court has recognised a further exception in the case of occupation of a territory by armed forces of one or more Contracting States but only when acting under the authority and direction of the United Nations Security Council under Chapter VII of the UN Charter (see, *inter alia*, *Behrami and Behrami*).

⁵⁵ *Bosphorus*, op cit, § 154; *Waite and Kennedy v Germany*, no. 26083/94, 18 February 1999, § 67. Further, The Court has stressed that “[...] State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion.” *M.S.S. v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 338. See also, *Ilascu and others*, confirmed in *Catan and others*, *Catan and others v Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, for liability for acts occurring in territory of a Contracting Party occupied by another State.

⁵⁶ Secret Detention Opinion, Conclusions, §§ 113-114.

⁵⁷ Secret Detention Opinion, Conclusions, § 115. Further, the Commission concluded that “there is no international obligation for [Council of Europe member states] to allow irregular transfers of prisoners to or to grant unconditional overflight rights, for the purposes of fighting terrorism”, Conclusions, § 153. See also European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0309+0+DOC+XML+V0//EN&language=EN>, §§ 40-41.

⁵⁸ Secret Detention Opinion, Conclusions, § 159(a).

⁵⁹ *MSS*, § 338.

⁶⁰ As such “anathema to the rule of law and the values protected by the Convention”, *Babar Ahmad and others* op. cit, § 114.

⁶¹ Explicitly codified in, *inter alia*, Art 3, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Art 16, ICED; Art. 19, Charter of Fundamental Rights of the European Union; Art 33, 1951 Convention relating to the Status of Refugees; and Principle 5, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

⁶² This principle was first recognised in the context of Article 3, *Soering*, § 88. *Non-refoulement* obligations have arisen equally in respect of Article 2: see, *inter alia*, *Z and T v UK*, Admissibility Decision, no. 27034/05, 28 February 2006. See also, the HRC, GC No. 31, CCPR/C/21/Rev.1/Add.13, 26/05/2004, § 12.

Parties' jurisdiction.⁶³ The principle dictates that, irrespective of all other considerations, states are not absolved from responsibility "for all and any foreseeable consequences" suffered by an individual following removal from their jurisdiction.⁶⁴ The *refoulement* prohibition is absolute.⁶⁵ Further, as an obligation directed at securing rights in ways that are both practical and effective, the *non-refoulement* principle is thus a fundamental component implicit in other Convention rights beyond Article 3 of the Convention.⁶⁶ Since *Soering*, the Court has recognised as much with respect to the right to a fair trial.⁶⁷ Additionally, in *Tomic v. UK*⁶⁸ and *Z and T v UK*,⁶⁹ it considered the possibility that being exposed to a risk of arbitrary or unfair procedures reaching a certain level of flagrancy would raise an issue under Article 5. The UN Human Rights Committee (HRC) has also recognised that *non-refoulement* is also a fundamental component of, *inter alia*, the right to liberty and security of person under article 9 of the Covenant,⁷⁰ as has the UN Working Group on Arbitrary Detention (WGAD).⁷¹ In *Othman*, the Court confirmed that a state is in violation of the *non-refoulement* obligation implicit in Article 5 if it "removes an applicant to a State where she or he was at real risk of a flagrant breach of that article." It found that the applicant's deportation to Jordan would be in violation of the *non-refoulement* obligation entailed in Article 6 as a result of the real risk of a flagrant denial of justice at his trial in Jordan.⁷²

23. In light of the above, the interveners contend that *non-refoulement* obligations under the Convention will be engaged by Contracting Parties' real or constructive knowledge of a real risk of egregious human rights violations that the rendition and secret detention programme entailed, including under Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 ECHR. Further, those *non-refoulement* obligations also apply in respect of the Contracting Parties' failure to take steps to prevent any prohibited transfers; and the Contracting Parties are responsible under the Convention for any reasonably foreseeable post-transfer violations.

E. State responsibility for renditions and post-transfer violations

24. Although the Court has not yet directly addressed the responsibility of states for co-operation in the rendition and secret detention programme,⁷³ it has considered a partially analogous situation in its jurisprudence on human trafficking. The latter, like the rendition and secret detention programme, is a cross-border criminal enterprise involving multiple and gross human rights violations, though typically carried out by non-state actors and without the active co-operation of state authorities. It is submitted that the Court's analysis of state obligations in relation to cross-border trafficking operations, in *Rantsev v Cyprus and Russia*,⁷⁴ should inform its consideration of state obligations relating to the rendition and secret detention programme, involving active, passive and organized inter-state cooperation.

25. As stated above, the responsibility of Contracting Parties that co-operated in the secret detention and rendition programme for acts within their jurisdiction can be established from the point where those states had actual or constructive knowledge of the violations of international human rights law inherent in that programme; and where the action of the Contracting Party contributed to the apprehension, transfer or continued detention of an individual within it. These obligations relate both to violations within the jurisdiction of a Contracting Party, and, in certain circumstances, following transfer out. State responsibility may arise from either active co-operation in, or passive tolerance of, renditions operations.

⁶³ The *non-refoulement* principle extends and applies extraterritorially in circumstances where states exercise jurisdiction: *Hirsi Jaama and Others v Italy*, [GC] no. 27765/09, 23 February 2012, §§ 70-82; *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010; and *Al-Saadoon and Mufdhi*, op cit.

⁶⁴ See, *inter alia*, *Soering* §§ 85-86; *Hirsi*, §115; *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, § 126. Further, This Court has found states liable in cases of indirect *refoulement* -- also known as chain *refoulement* (see, *inter alia*, *M.S.S. v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, §§ 192, 286, 300, 321) -- as well as constructive *refoulement* (see *M.S. v. Belgium*, no. 50012/08, 31 January 2012, where the Court found that the applicant could not be regarded as having validly waived his right to the protection against *refoulement* guaranteed by Article 3).

⁶⁵ *Soering*, § 88; *Ireland v. UK*, no. 5310/71, 18 January 1978, § 163; *Chahal v UK*, no. 22414/93, 15 November 1996, § 79; *Selmouni v. France* [GC], no. 25803/94 28 July 1999, § 95, *Al-Adsani v UK*, No. 35763/97, Judgment, [GC] 21 November 2001 § 59; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, 12 April 2005, § 335; *Indelicato v. Italy*, no. 31143/96, 18 October 2001, § 30; *Ramirez Sanchez v. France* [GC], no. 59450/00, 4 July 2006, §§ 115-116; *Saadi*, § 127.

⁶⁶ See, in relation to Article 9, *Z and T v. UK*, op cit. See also, *inter alia*, UN HRC GC 31, § 12, referring as an example to the real risk of harm contemplated by articles 6 and 7 ICCPR as a trigger for *non-refoulement* obligations, thus recognizing that a real risk of different types of harm may give rise to *non-refoulement* obligations.

⁶⁷ *Soering*, § 113. See, also, *inter alia*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005, §§ 90 and 91; *Al-Saadoon and Mufdhi*, § 149; *Bader and Kanbor v. Sweden*, no. 13284/04, 8 November 2005, § 47; *Al-Moayad v. Germany*, op cit, §§ 100 and 102; *Ahorugeze v Sweden*, no. 37075/09, 27 October 2011 (request for referral to the GC pending), §§ 113-116; and *Othman (Abu Qatada) v UK*, no. 8139/09, 17 January 2012, §§ 258-285.

⁶⁸ *Tomic v. UK*, no. 17837/03, Admissibility decision, 14 October 2003.

⁶⁹ Op cit.

⁷⁰ See *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 December 1997, § 8.7.

⁷¹ Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/4/40, 9 January 2007, § 49, emphasising the need for States to "include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism".

⁷² *Othman (Abu Qatada) v. UK*, no. 8139/09, 17 January 2012 §§ 231-233, and §§ 281-287.

⁷³ This issue is under consideration in the pending case of *El Masri v Macedonia*, no. 39630/09. The Interveners submitted written submissions in that case to the Grand Chamber on 29 March 2012.

⁷⁴ *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, §§ 207-208.

States are responsible for continuing breaches of international obligations

26. The interveners submit that, because of the character of the human rights violations inherent in the rendition and secret detention programme as continuing violations of the Convention, a state that co-operates in an illegal detention of an individual in its jurisdiction and subsequent transfer out, retains certain obligations in regard to the continuing violations to which the detention and transfer give rise. International legal standards of state responsibility, recognised and applied in the Court's jurisprudence,⁷⁵ establish that a breach of an international legal obligation, by either an act or an omission of the state, extends over the entire period during which the conduct continues and remains in breach of the international obligation.⁷⁶

27. Enforced disappearances of the kind that took place within the renditions system, fall into this category of composite and continuing violations. This Court has confirmed, in *Varnava v Turkey*, that enforced disappearances amount to continuing violations of the Convention rights, for as long as the disappeared person remains unaccounted for, and for as long as there is a failure to investigate.⁷⁷ Arbitrary detention amounts to a continuing violation of the Convention and state obligations will endure for as long as these acts are ongoing.⁷⁸ Other violations of Article 5 and other rights will continue for as long as these acts are ongoing. This will include, for example, the procedural right under Article 5(3) to be brought promptly before a judge⁷⁹ and, therefore, to trial within a reasonable time, also a right pursuant to Article 6 ECHR. Therefore, when a rendition involving arbitrary detention, the deprivation of due process rights and enforced disappearance in violation of Articles 5 and 6 ECHR is perpetrated (in part) due to a Contracting Party's actions or omissions, in violation of its Convention obligations, this engages the continuing responsibility of the Contracting Party, beyond the point at which the act of co-operation took place, for as long as the violations of the Convention rights continue.

Additional responsibilities of the state are engaged in regard to jus cogens obligations

28. As noted above, States have additional obligations to refrain from co-operation in internationally wrongful acts where those acts amount to "a serious breach".⁸⁰ In relation to post-transfer violations, states must "co-operate to bring to an end through lawful means"⁸¹ such a breach and must not recognise as lawful a situation created by the breach.⁸² The interveners submit that these obligations apply to the rendition and secret detention programme which involved the systematic violation of *jus cogens* norms.

Right to a remedy and reparations

29. The right to an effective remedy for violations of Convention rights, protected under Article 13 ECHR as well as in procedural aspects of substantive Convention rights, imposes positive obligations of review and reparation.⁸³ Article 13 requires remedies that are "effective" in practice as well as in law, and which are not unjustifiably hindered by the acts or omissions of State authorities. Under international standards, the legal consequence of the breach of an international obligation is an obligation of cessation of the wrongful act and of reparation. The most appropriate forms of reparation must be granted according to the individual circumstances of the case; this may include measures of cessation, non-repetition, as well as measures of restitution.⁸⁴ The State should try with all available means to re-establish the situation prior to the breach and through restitution, to "restore the victim to the original situation before the gross violations of international human rights law ... occurred."⁸⁵ Within the Convention protection system, these obligations of remedy and reparation are expressed through Article 46.1 and Article 41 ECHR.

⁷⁵ In *Ilascu and others* the Court considered that, "in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see also draft Article 15 § 2 of the work of the ILC)", *Ilascu and others*, op cit., § 321. Further, such composite acts in violation of international obligations may be made up of a series of acts some of which in themselves also constitute violations of the State's international obligations, see Commentary to Article 15 ILC Articles, §.9.

⁷⁶ Article 14 ILC Articles.

⁷⁷ *Varnava v Turkey* [GC], nos. 16064/90, and others, 18 September 2009, § 148 and § 208. See also *Palic v Bosnia and Herzegovina*, no.4704/04, 15 February 2011, §§.46-47.

⁷⁸ *Longa Yonkeu v Latvia*, no.57229/09, 15 November 2011, §§ 103-110 and §§ 131-132.

⁷⁹ Regarding continuing violations of Articles 3 and 5 in detention, see also *Ilascu and others* op cit, §§ 401-403. Regarding right to be brought promptly before a judge, see also *HRC Vladimir Kulomin v. Hungary*, UN Doc. CCPR/C/50/D/521/1992 (1996), §11.2.

⁸⁰ See ILC Articles, Chapter III Serious Breaches of Obligations under Peremptory Norms of General International Law: Articles 40, 41.1 and 41.2.

⁸¹ Article 41.1 ILC Articles

⁸² Article 41.2 ILC Articles. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at p. 200, § 159.

⁸³ Including Art. 5(4) and (5), Art. 6; Art. 8; Art. 1 of Protocol No. 1: *Iatridis v. Greece*, no. 31107/96, Judgment of 25 March 1999, § 65; see also, *mutatis mutandis*, *Kudla v. Poland*, no. 30210/96, [GC] Judgment of 26 October 2000, §§ 146-160.

⁸⁴ ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Article 31; UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, principles 18, 19, 23.

⁸⁵ Principle 19, UN *Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*, Human Rights Res. 2005/33, UN Doc. E/CN.4/RES/2005/35; G.A. Res. 60/147, UN Doc. A/RES/60/147 (2006). Principle 19 goes on to state that "Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."

30. The content of the right to a remedy depends on the nature of the substantive right at issue: it carries particular obligations where one of the most fundamental Convention rights is in issue or where there has been a particularly serious violation of the applicant's Convention rights.⁸⁶ Following wrongful removal from the territory of a Contracting State to a situation of continuing violation of Convention rights, effective protection of those rights, as well as rights under Article 13, may also require reasonable, appropriate, practical and effective remedial measures, including certain positive obligations and diplomatic representations to the State in which the individuals are held, as addressed below. It should be noted in this regard that the USA itself has failed to ensure state or individual accountability for the gross human rights violations committed in the context of the rendition and secret detention programme and to provide any meaningful remedy to the victims.⁸⁷

Certain positive obligations apply to post-transfer violations of Convention rights

31. The fact that, in a rendition, elements of the violation(s) of rights typically take place outside the jurisdiction of the state where the individual was initially apprehended, does not preclude the responsibility of that state. In general, under the Convention jurisprudence, positive obligations to prevent, investigate and provide remedies apply only in regard to acts taking place within the jurisdiction of the state.⁸⁸ However, the Court has held that where an act taking place within the state's jurisdiction has a direct causal connection with acts contrary to the Convention rights, occurring outside the state, then certain positive obligations apply.⁸⁹ In *Rantsev v Cyprus and Russia*, the Court held that it was within its competence to consider Russia's responsibility for violations of the Article 2 and 4 rights of a victim of trafficking, transferred by private actors from Russia to Cyprus, despite the fact that the majority of the violations of the victim's rights took place outside Russia. It was open to the Court to consider whether Russia had taken "measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked..." as well as the circumstances leading to her death.⁹⁰ Where the State Party has co-operated in the earlier stages of a violation that continues outside the state, the causal connection will be clear. This will be the case where the rendition and transfer out of the jurisdiction is preceded by a Contracting Party hosting a secret detention site on its territory.

32. This point has been underlined in individual measures ordered by the Court for a Contracting Party to take action following the wrongful transfer of a detainee to a non-contracting party in respect of the treatment of detainees.⁹¹ International bodies have made clear the obligation to restore the situation of a wrongfully transferred person to the position they were in before the violation occurred. In several cases, the UN treaty bodies have required states to allow the applicants to return safely without obstacles to the territory of the violating state.⁹² This has given effect to the principle explained by the South African Constitutional Court that a state must "do whatever may be in their power to remedy the wrong here done to... [a victim] by their actions, or to ameliorate at best the consequential prejudice caused to him".⁹³

33. It is therefore submitted that, in cases of such illegal transfers, where the act or omission of a Contracting Party, taking place within its jurisdiction, has a direct causal connection with a detention and subsequent rendition involving a continuing violation of Convention rights, taking place partly on its territory and partly elsewhere, both the state's negative and positive Convention obligations are engaged. In such cases, the responsibility of the state is to refrain from any act that would facilitate the rendition operation, and to take such preventative, investigative and remedial measures as are available to it within the limits of its jurisdiction, to prevent, remedy or investigate the continuing violation of Convention rights.

Obligations to make meaningful representations

34. As demonstrated above, Contracting Parties have positive obligations both to prevent or stop violations of human rights, and to make reparation. Where a Contracting Party has co-operated in the violation of Convention rights, the positive obligation to take reasonable, appropriate, practical and effective measures requires the State to make diplomatic representations to the State in which the individuals are held.

⁸⁶ *Chahal v. UK*, op cit., § 150.

⁸⁷ See Annex A and, *inter alia*, Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, 30 August 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>.

⁸⁸ *Al-Adsani*, op cit., § 38.

⁸⁹ *Ibid*, §§ 39-40.

⁹⁰ *Rantsev*, op cit., §§ 207-208.

⁹¹ *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23 January 2012, § 211.

⁹² See, for example, HRC, *Jimenez Vaca v Colombia*, UN Doc. CCPR/C/74/D/859/1999 (2002), § 9; see also UN Committee against Torture, *Dar v Norway*, UN Doc. CAT/C/38/D/249/2004 (2007), § 16.4, in which it was recognised that the facilitation of the applicant's return to Norway and provision of a residence permit remedied the violation.

⁹³ *Mohamed & Another v. President & Ors*, CCT 17/01 (2001), quotation from § 72.

35. Consistent with this requirement, in *Hirsi Jamaa and Others v Italy*⁹⁴, following the wrongful transfer of the applicants to Libya in breach of Italy's Convention obligations, the Court, under Article 46 ECHR ordered the Italian Government to "take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated." In another case, the Court observed that "[...] even in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."⁹⁵ In *Al-Saadoon and Mufdhi*, the Court held that, under Article 46 ECHR, the UK government must "tak[e] all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty"⁹⁶ because of the continuing suffering of the applicants. Similarly, the HRC, in cases where it has found that a previous transfer to face the death penalty has violated obligations under Article 6 or 7 ICCPR, has requested states party to "make such representations as might still be possible to avoid the imposition of the death penalty."⁹⁷

36. The interveners submit that *a fortiori* a Contracting Party will be obliged to make diplomatic representations in respect of a detainee outside of its jurisdiction where it has co-operated and colluded in acts that are either continuing or have a strong causal connection with human rights violations taking place post-transfer. Diplomatic representations are one of the few measures realistically available to a state once a detainee has been transferred out of the jurisdiction of a Contracting Party in breach of the Convention and are, moreover, the least intrusive measures potentially available, and consistent with measures of "retorsion" in line with principles on state responsibility.⁹⁸ Further, representations on a remedial basis are increasingly accepted and expected as an appropriate means to secure compliance with human rights obligations, as recognised by, for example, the HRC⁹⁹ and the Parliamentary Assembly of the Council of Europe (PACE).¹⁰⁰ Such a requirement would apply particularly where a Contracting Party is in breach of *jus cogens* obligations, and is responsible for bringing such violations to an end.

37. Diplomatic representations are not restricted to attempting to ensure that a detainee is not subsequently tortured or otherwise ill-treated, but will also extend to other violations of the Convention.¹⁰¹ Thus, the interveners submit that in a situation where a Contracting Party has co-operated in the secret detention and rendition programme, involving violations of Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 ECHR, the Contracting Party may have obligations under those provisions, read in conjunction with Articles 13 and 46 ECHR, to make diplomatic representations in respect of the treatment and detention of the detainee, respect for the fair trial rights of the detainee and protection of the detainee from the death penalty.

Conclusions

38. In conclusion the interveners contend that: by December 2002 and certainly by June 2003, any Contracting Party knew or ought to have known that the USA had and were committing gross human rights violations in the context of the rendition and secret detention programme; *a fortiori*, an even greater and more specific degree of knowledge about what took place on a Contracting Party's territory and beyond should be imputed to any Contracting Party that had entered into a secret agreement with the USA in furtherance of the programme; such collusion by Contracting Parties renders them responsible under the Convention for human rights violations on their territory and beyond; the Contracting Parties' responsibility should be established in light of international law principles of state responsibility; the above-mentioned knowledge of the gross human rights violations engaged the Contracting Parties' *non-refoulement* obligations under the Convention; and given all the foregoing, the Contracting Parties have additional remedial obligations for post-transfer violations such as the making of effective diplomatic representations.

⁹⁴ Op cit., § 211.

⁹⁵ *Ilascu* op. cit., § 331.

⁹⁶ Op cit., § 171.

⁹⁷ *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (7 January 1994), para.18. See also *Roger Judge v. Canada*, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (20 October 2003) para.12.

⁹⁸ I.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it, the adoption of countermeasures in order to induce the third State to comply with his obligations and the commencement of judicial proceedings where jurisdiction exists. See ILC, Commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, Introductory Commentary to Part Three, Chapter II, § (3); See ILC Articles on State Responsibility, Arts 49–54.

⁹⁹ In its General Comment No 31, § 2, the HRC has recognised diplomatic representations as "a reflection of legitimate community interest".

¹⁰⁰ PACE has called on Member States "[...] to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not", and "[...] to respect the erga omnes nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees." See PACE, Resolution 1433 (2005) "Lawfulness of detentions by the United States in Guantánamo Bay", 26 April 2005, §10 (i) and (viii), at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm>; see also Recommendation 1699 (2005), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/EREC1699.htm>.

¹⁰¹ *Ilascu* op. cit., § 331.

Annex A

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Published 28 May 2003,

Full report available at <http://www.amnesty.org/en/library/info/POL10/003/2003>.

‘2002 In Focus’, page 9 of above (The USA was treating “alleged al-Qa’ida members and associates as ‘enemy combatants’ – a concept applied to detainees regardless of the circumstances in which they were captured or taken into custody (including those who were not taken prisoner during armed conflict). Arguing that it was ‘at war’ with al-Qa’ida, the USA asserted that it was entitled to detain ‘enemy combatants’ until the ‘war’ ended – which means they could be detained indefinitely and without the rights afforded to prisoners of war or criminal suspects.”)

Entries on:

Afghanistan, page 25;

Bosnia-Herzegovina, page 53;

Gambia, page 107;

Pakistan, page 191;

Syria, page 240;

United States of America, page 264.

USA/Afghanistan

Amnesty International Urgent Action

Incommunicado detention/fear of torture or ill-treatment, 22 November 2002,

<http://www.amnesty.org/en/library/info/AMR51/176/2002/en>

Possible incommunicado detention/health concerns/fear of torture or ill-treatment,

<http://www.amnesty.org/en/library/info/ASA11/009/2003/en> (detainee held at an undisclosed location by US forces in Afghanistan for three months after arrest on 1 January 2003. In late March 2003, he was transferred to Guantánamo Bay; see update,

<http://www.amnesty.org/en/library/info/AMR51/051/2003/en>.

USA/Bosnia-Herzegovina

News release

“Transfer of six Algerians to US custody puts them at risk”, 17 January 2002,

<http://www.amnesty.org/en/library/info/EUR63/001/2002/en>

“Human rights chambers decision in the Algerians case must be implemented by Bosnia”, 11 October 2002,

<http://www.amnesty.org/en/library/info/EUR63/017/2002/en>

Public report

Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay, 29 May 2003,

<http://www.amnesty.org/en/library/info/EUR63/013/2003/en>

USA/Gambia

Amnesty International Urgent Action

Incommunicado detention/Fear of ill-treatment/Health concern, 11 December 2002,

<http://www.amnesty.org/en/library/info/AFR27/006/2002/en>;

and update 9 January 2003, <http://www.amnesty.org/en/library/info/AFR27/002/2003/en>;

and update 23 January 2003, <http://www.amnesty.org/en/library/info/AFR27/003/2003/en>.

USA/Pakistan

News release

Pakistan: Government breaks its own laws to participate in "war against terrorism", 19 June 2002,

<http://www.amnesty.org/en/library/info/ASA33/015/2002/en>

Public report

Pakistan: Transfers to US custody without human rights guarantees, June 2002,

<http://www.amnesty.org/en/library/info/ASA33/014/2002/en>

USA

News release

USA: Kidnapping of criminal suspects sanctioned by United States Supreme Court, 12 August 1992,

<http://www.amnesty.org/en/library/info/NWS11/032/1992/en>

USA: Presidential order on military tribunals threatens fundamental principles of justice, 15 November 2001,

<http://www.amnesty.org/en/library/info/AMR51/165/2001/en>

USA: No return to execution. New AI report on the US death penalty as a barrier to extradition, 29 November 2001,

<http://www.amnesty.org/en/library/info/AMR51/176/2001/en> (“Amnesty International fears that in its ‘war against terrorism’ the

US government – a strong proponent of judicial killing – may resort to tactics to circumvent extradition protections. As the report illustrates, there is a history of US conduct – including the use of abduction – that fuels such concern. Amnesty International believes that for justice to be done, and to be seen to be done, governments must maintain scrupulous standards of legality and transparency.”)

USA - Military commissions: Second-class justice, 22 March 2002, <http://www.amnesty.org/en/library/info/AMR51/049/2002/en>

USA: Treatment of prisoners in Afghanistan and Guantánamo undermines human rights, 14 April 2002, <http://www.amnesty.org/en/library/info/AMR51/054/2002/en>

Pakistan: Imminent execution of Mir Aimal Kasi raises fears for others taken into US custody without human rights safeguards, 1 November 2002, <http://www.amnesty.org/en/library/info/ASA33/034/2002/en>

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USA: No return to execution - the US death penalty as a barrier to extradition, November 2001,

<http://www.amnesty.org/en/library/info/AMR51/171/2001/en>

Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002,

<http://www.amnesty.org/en/library/info/AMR51/053/2002/en>;

Update, December 2002, <http://www.amnesty.org/en/library/info/AMR51/184/2002/en>.

Death penalty

Amnesty International Urgent Action update, 8 December 2000, <http://www.amnesty.org/en/library/info/AMR51/184/2000/en>

(“Texas has now carried out 40 executions this year, the highest number of executions by any state in any year since the USA resumed executions in 1977. The three executions were the 150th, 151st, and 152nd carried out under the governorship of George W. Bush Jr, who is currently waiting to discover if he will be the next US President”)

Four “juvenile offenders” were executed in Texas in 1998 under the governorship of George W. Bush for crimes committed when they were under 18 years old, in violation of US treaty obligations, customary international law, and arguably a peremptory norm of international law. See generally USA: On the wrong side of history, September 1998,

<http://www.amnesty.org/en/library/info/AMR51/058/1998/en>.

The execution of foreign nationals denied their consular rights was also a well-known aspect of the Texas death penalty as was the failure of the governor and his appointees on the Board of Pardons and Paroles to stop such executions from proceeding. See USA: Violation of the rights of foreign nationals under sentence of death, January 1998,

<http://www.amnesty.org/en/library/info/AMR51/001/1998/en>.

USA: Texas cited for defying the Vienna Convention, 15 June 1997,

<http://www.amnesty.org/en/library/info/AMR51/034/1997/en>;

USA: Adding insult to injury: the case of Joseph Stanley Faulder, November 1998, <http://www.amnesty.org/en/library/info/AMR51/086/1998/en>;

USA: Killing without mercy: Clemency procedures in Texas, May 1999, <http://www.amnesty.org/en/library/info/AMR51/085/1999/en>.

Also generally, USA: The death penalty in Texas: lethal injustice, March 1998, <http://www.amnesty.org/en/library/info/AMR51/010/1998/en>.

See also Amnesty International Urgent Actions, <http://www.amnesty.org/en/library/info/AMR51/213/1999/en> and update <http://www.amnesty.org/en/library/info/AMR51/013/2000/en>; <http://www.amnesty.org/en/library/info/AMR51/146/2000/en> and update <http://www.amnesty.org/en/library/info/AMR51/169/2000/en>; <http://www.amnesty.org/en/library/info/AMR51/067/2000/en>

<http://www.amnesty.org/en/library/info/AMR51/104/2000/en>.

See also published letter to Governor Bush from Amnesty International Secretary General: “There is indeed no doubt that in the next few hours, a spotlight of an international nature will be focussed on the USA – specifically on your office, and the power invested in you to reprieve those condemned to death in Texas. After those hours have passed, citizens and governments across the world will be able to make their own assessment of the respect for global human rights standards held, not only by the highest executive officer of an individual US state, but also by a potential future leader on the world stage.”

<http://www.amnesty.org/en/library/info/AMR51/011/2000/en>

An open letter to President George W. Bush calling for a moratorium on federal executions, 9 May 2001,

<http://www.amnesty.org/en/library/info/AMR51/069/2001/en> and Urgent Action update, 11 June 2001,

<http://www.amnesty.org/en/library/info/AMR51/084/2001/en>

Amnesty International news release, 18 June 2001, Second federal execution in eight days as fairness is sacrificed for finality,

<http://www.amnesty.org/en/library/info/AMR51/090/2001/en> Urgent Action,

<http://www.amnesty.org/en/library/info/AMR51/074/2001/en> and update

<http://www.amnesty.org/en/library/info/AMR51/091/2001/en>

Case of Mir Aimal Kasi, see Amnesty International Urgent Action, 30 September 2002,

<http://www.amnesty.org/en/library/info/AMR51/155/2002/en> and update, 15 November 2002,

<http://www.amnesty.org/en/library/info/AMR51/171/2002/en>

Ongoing lack of accountability/remedy in the USA

USA: ‘Congress has made no such decision’: Three branches of government, zero remedy for counter-terrorism abuses, February 2012, <http://www.amnesty.org/en/library/info/AMR51/008/2012/en>;

USA: Remedy blocked again: Injustice continues as Supreme Court dismisses rendition case, 25 May 2011,

<http://www.amnesty.org/en/library/info/AMR51/044/2011/en>;

USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, February 2011,

<http://www.amnesty.org/en/library/info/AMR51/005/2011/en>;

USA: Former President's defence of torture highlights need for criminal investigations, 9 November 2010, <http://www.amnesty.org/en/library/info/AMR51/103/2010/en>;
USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, <http://www.amnesty.org/en/library/info/AMR51/008/2010/en>;
USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, <http://www.amnesty.org/en/library/info/AMR51/120/2009/en>;
USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>; and
Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention, 15 November 2010, <http://www.amnesty.org/en/library/info/EUR01/023/2010/en>.

Annex B

International Commission of Jurists

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Amnesty International

Amnesty International is a worldwide movement of people working to promote respect for and protection of internationally-recognized human rights principles. It monitors law and practices in countries throughout the world in the light of international human rights, refugee and humanitarian law and standards. The movement has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. It has consultative status before the United Nations Economic and Social Council and the United Nations Educational, Scientific and Cultural Organization, has participatory status at the Council of Europe, has working relations with the Inter-Parliamentary Union and the African Union, and is registered as a civil society organization with the Organization of American States.