Husayn (Abu Zubaydah) v. Poland

Application no. 7511/13

WRITTEN SUBMISSIONS ON BEHALF OF

AMNESTY INTERNATIONAL AND

THE INTERNATIONAL COMMISSION OF JURISTS

INTERVENERS

pursuant to the Section Registrar's notification dated 3 October 2013 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

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17 October 2013

Introduction

This submission is presented on behalf of Amnesty International and the International Commission of Jurists ('the interveners') pursuant to the leave to intervene granted by the President of the Court under Rule 44 § 3 of the Rules of the Court. The interveners' submissions address in particular: (A) the relevant knowledge imputable to Contracting Parties at the relevant time; (B) the obligation to investigate and bring to justice the alleged perpetrators of gross violations of Convention Rights; (C) the right to truth; and (D) the right of the general public to know the truth and the application of the State secrets doctrine. The interveners' observations supplement, and are complementary to, their two third party interventions already before this Section of the Court in the case of *Al-Nashiri v Poland*[1], now joined to the present case.

A. Relevant knowledge imputable to the Contracting Parties at relevant times[2]

On 16 September 2001, US Vice President Richard Cheney said that, in response to the attacks of 11 September, US intelligence agencies would operate on "the dark side", and agreed that US restrictions on working with "those who violated human rights" would need to be lifted.[3] Amnesty International warned in November 2001 that the USA might exploit its existing rendition policy in the context of what it was calling the "global war on terror" to avoid human rights protections.[4] From early 2002 it became clear that non-US nationals outside the USA suspected of involvement in international terrorism were at a real risk of secret transfer and arbitrary detention by US operatives.[5]

From January 2002 through 2003 the USA transferred more than 600 foreign nationals to the US naval base in Guantánamo Bay, Cuba, with reports from the outset of ill-treatment during transfers,[6] and holding them without charge or trial or access to the courts, lawyers or relatives.[7] By mid-July 2003, there were "approximately 660" detainees held there.[8]

Cases of arbitrary detention and secret transfer continued to emerge during 2002.[9] In April 2002, Amnesty International reported that, in addition to the case of Abu Zubaydah, "the US authorities had transferred 'dozens of people' to countries where they may be subjected to interrogation tactics – including torture […]. In some cases, it is alleged that US intelligence agents remained closely involved in the interrogation."[10] Other cases that emerged in late 2002 involved individuals

[1] See submissions and supplementary submissions to the Court (Fourth Section) of 5 November 2012 and 15 February 2013 in *Al Nashiri v. Poland*, App. No. 28761/11, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/ICJAI-AmicusBrief-AlNashiri_v_-Poland.pdf and http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJAI-SupplAmicusBrief-AlNashiri_v_-Poland_15022013.pdf.

[2] Annex A provides hyperlinks to, and relevant excerpts of, selected Amnesty International documents by way of illustration. See also submissions to the Grand Chamber of 29 March 2012 in *El-Masri v the former Yugoslav Republic of Macedonia* [GC], App. No. 39630/09, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Macedonia-written-submission-legal-submission-2012.pdf; to the Court (Second Section) of 22 April 2013 in *Abu Zubaydah v Lithuania*, App. No. 46454/11, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/04/ABU-ZUBAYDAH-v-LITHUANIA-AI-ICJ-AMICUS-220413-Final.pdf; and to the Court (Third Section) of 13 March 2013 in *Al Nashiri v Romania*, App. No. 33234/12, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/03/AlNashiri_v_Romania-ICJAIJointSubmission-ECtHR-final.pdf.

[3] The Vice President appears on Meet the Press with Tim Russert, NBC Television, 16 September 2001, transcript at http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html. *Washington Post* journalist Bob Woodward reported that, on 17 September 2001, President Bush had approved the CIA Director's request for "exceptional authorities" for the agency, including close alliances with "Arab Liaison Services", namely intelligence services in countries including Algeria, Egypt and Jordan, and that the President had understood that this meant the USA would be working with human rights violators, including torturers. *Bush at War*, by Bob Woodward. Simon & Schuster UK Ltd. November 2002, pages 76-77. See also document 3 (pages108-109), Annex A.

[4] "In its 'war against terrorism' the US government…may resort to tactics to circumvent extradition protections…there is a history of US conduct – including the use of abduction – that fuels such concern". See document 1 in Annex A, published with more detail in document 2, Annex A.

[5] On 17 January 2002, for example, Amnesty International warned that six Algerian men in Bosnia and Herzegovina suspected of involvement in "international terrorism" were at imminent risk of transfer from local to US custody and to onward rendition and human rights violations (Document 4, Annex A). The men were indeed transferred to US custody and then secretly flown to arbitrary detention at the US naval base in Guantánamo Bay in Cuba. (Documents 5 and 6, Annex A). The representative in Bosnia and Herzegovina for the UN High Commissioner for Human Rights described the transfer as an "extrajudicial removal from sovereign territory", asserting that the "rule of law" had been "clearly circumvented" (Page 13, document 7 Annex A).

[6] See, for example, Document 8, Annex A.

[7] In November 2002, the Court of Appeal of England and Wales referred to arbitrary detention in the "legal black hole" of Guantánamo, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, 6 November 2002, referred in *El Masri v the former Yugoslav Republic of Macedonia* [GC], App. No. 39630/09, 13 December 2012, § 106.

[8] Transfer of detainees completed. US Department of Defense News Release, 18 July 2003, http://www.defense.gov/releases/release.aspx?releaseid=5540

[9] In March 2002, for example, the *Washington Post* reported that with the assistance of the CIA, Pakistani national Muhammad Saad Iqbal Madni – who, it later emerged, was transferred to Guantánamo in July 2002 – had been taken into custody in Indonesia in January 2002 and rendered to Egypt in an "unmarked, US-registered Gulfstream V jet parked at a military airport in Jakarta". US behind secret transfer of terror suspects, *Washington Post*, 11 March 2002. The US Deputy Secretary of Defense referred to "great cooperation from the Indonesian authorities in locating and arresting and rendering one particularly dangerous person… I think there's good reason not to get into too many details." Interview, New York Times, 21 March 2002, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3368.

[10] See page 14 of document 7 in Annex A.

transferred to arbitrary detention, including secret detention, in US custody.[11] Other detentions remained unacknowledged by the USA.[12]

In December 2002, the *Washington Post* reported on a secret CIA facility at Bagram, Afghanistan, and the agency's use of "stress and duress" techniques, including sleep deprivation, stress positions and hooding, and the use of renditions by the agency.[13]

Thus, as early as the end of 2002, any Contracting Party was or should have been aware that there was substantial credible information in the public domain that the USA was engaging in practices of enforced disappearance, arbitrary detention, secret detainee transfers, and torture or other ill-treatment.

During 2003 and 2004, further information continued to emerge.[14] In June 2003, for example, Amnesty International reported that the CIA was involved in the arrest in Malawi of five men and their rendition out of that country to an undisclosed location.[15] In August 2003, Amnesty International reported that Indonesian national Riduan Isamuddin, also known as Hambali, was being interrogated in US custody in incommunicado detention at an undisclosed location after his arrest in Thailand.[16]

In its annual reports covering the years 2002 and 2003, Amnesty International made multiple references to human rights violations in the context of US counterterrorism operations, not only in the entries on the USA, but also in a number of other country entries.[17] Paper copies of these reports were widely distributed, including to media and governments.

By mid-2003 no Contracting Party could reasonably have found credible the USA's assurances that it was committed to human rights and the rule of law in the counter-terrorism detention context, including the prohibition of torture and other ill-treatment.[18]

B. The duty to investigate and bring to justice alleged perpetrators of gross violations of Convention rights

It is this Court's settled jurisprudence that Contracting Parties have investigative obligations in respect of any credible information disclosing evidence of violations of Convention rights, including at least violations of articles 2, 3, 4, 5, 8 and 14.[19] Such obligations do not expire with the mere establishment of the whereabouts or death of the victim.[20]

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[11] For example, see documents 7 and 10-12 in Annex A (including involvement of US agents in interrogations in Gambia of an Iraqi and a Jordanian national in Gambia and their subsequent transfer from Gambia to Guantánamo Bay via detention in Afghanistan).

[12] See documents 13 and 14 in Annex A (Including list of detainees presumed in secret US custody at undisclosed locations – pages 6-7 of document 13).

[13] US decries abuse but defends interrogations, *Washington Post*, 26 December 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

[14] On 26 June 2003, the Parliamentary Assembly of the Council of Europe adopted resolution 1340(2003) protesting at the conditions of detention in Afghanistan and Guantánamo, at the use of military commissions and mentioning transfers of prisoners, including children, from Afghanistan to Guantánamo, Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay, http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17130&lang=EN.

[15] See Documents 15 and 16, Annex A.

[16] See Document 17, Annex A. See also, UN Working Group on Arbitrary Detention, UN Doc.: E/CN.4/2004/3, 15 December 2003, §§ 53 and 69.

[17] See Documents 18 and 19 in Annex A.

[18] *A fortiori*, see for following imputable knowledge: adoption on 26 April 2005 by the Parliamentary Assembly of the Council of Europe of a resolution 1433(2005) (http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm, § 10(vii)); Secretary General's report under Article 52 on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, 28 February 2006, SG/Inf (2006) 5, § 3, https://wcd.coe.int/ViewDoc.jsp?id=976731&Site=COE. See also *El-Masri v the former Yugoslav Republic of Macedonia* [GC], App. No. 39630/09, § 38.) A follow-up letter was sent to Contracting Parties on 7 March 2006 (Secretary General's supplementary report under Article 52 on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, 14 June 2006, SG/Inf (2006)13, § 1, https://wcd.coe.int/ViewDoc.jsp?id=1010167&Site=CM). See also, Parliamentary Assembly of the Council of Europe, Synopsis of the Meeting Held in Paris on 13 December 2005, 19 December 2005, Synopsis No 2005/137, p. 1, http://www.assembly.coe.int/committee/JUR/2005/JUR137E.pdf). On 19 December 2005, Senator Dick Marty wrote to the Chairpersons of all National Delegations of the Parliamentary Assembly of the Council of Europe asking them to respond to a questionnaire on these issues, (Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II, Doc AS/Jur (2006) 03 rev, 22 January 2006, § 22 and Appendix II, http://assembly.coe.int/main.asp?link=/committeedocs/2006/20060124_jdoc032006_e.htm). In this report, Senator Marty stated "'Rendition' affecting Europe seems to have concerned more than a hundred persons in recent years. Hundreds of CIA-chartered flights have passed through numerous European countries. It is highly unlikely that European governments, or at least their intelligence services, were unaware" (§ 66). Subsequently Senator Dick Marty published his first report on 12 June 2006, (Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Alleged Secret Detentions and Unlawful Inter-State Transfers of detainees involving Council of Europe Member States, Report, 12 June 2006, Doc. 10957, http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=11527&Language=EN).

[19] *McCann and others v the United Kingdom* [GC], App. No. 18984/91, 27 September 1995, §§ 160-164; *Assenov and others v Bulgaria*, App. No. 90/1997/874/1086, 28 October 1998, §§ 101-106; *Mentes and others v Turkey* [GC], App. No. 23186/94, 28 November 1997; *Nachova and others v*

The UN Committee against Torture (CAT) has noted, in connection with the obligation to ensure redress under article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment that "[a] State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a *de facto* denial of redress and thus constitute a violation of the State's obligations under article 14."[21] These obligations extend to enforced disappearance, which has been recognized by several United Nations bodies and regional human rights courts as amounting *per se* to a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[22]

This Court specifically held in *El Masri* that the duty to investigate alleged renditions arises under articles 3 and 5 ECHR. Such investigation must be, *inter alia*, "capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth."[23] With regard to conduct violating article 3 ECHR, this Court has emphasized that, in the absence of such an investigation, "the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity".[24] Thus the obligation to investigate is linked with the preventative obligations under article 3 ECHR "to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions […including] ill-treatment administered by private individuals".[25] In this regard the interveners submit that the absence of an effective *ex officio* investigation capable of leading to the identification, prosecution and punishment of those responsible for an enforced disappearance would render the "general legal prohibition of torture and inhuman and degrading treatment and punishment […] ineffective in practice" and would amount to a violation of rights under article 3 ECHR, since enforced disappearance is both conducive to and constitutive of a violation of these rights.[26] The

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Bulgaria [GC], App. No. 43577/98, 6 July 2005, §§ 110-113. The Court's jurisprudence directs that any such investigation must: a) be effective in practice as well as in law (*Aksoy v Turkey*, App. No. 21987/93, 18 December 1996, §95); b) be prompt and thorough (*El-Masri, op. cit.*, §183; *Assenov and Others, op. cit.*, § 103 and *Batı and Others v Turkey*, App. Nos. 33097/96 and 57834/00, 3 June 2004, § 136, ECHR 2004-IV); c) be independent in law and in practice (*El-Masri, op. cit.*, § 184; *Oğur v Turkey*, App No. 21594/93, 20 May 1999, §§ 91-92; *Mehmet Emin Yüksel v Turkey*, App. No. 40154/98, 20 July 2004, § 37); d) allow for the participation of the victim (*El-Masri, op. cit.*, § 185; see, *mutatis mutandis*, *Oğur*, *op. cit.*, § 92; *Ognyanova and Choban v Bulgaria*, App. No. 46317/99, 23 February 2006, § 107; *Khadzhialiyev and others v Russia*, App. No. 3013/04, 6 November 2008, § 106; *Denis Vasilyev v Russia*, App. No. 32704/04, 17 December 2009, § 157; and *Dedovskiy and Others v Russia*, App. No. 7178/03, § 92, 15 May 2008, ECHR 2008); and e) be "capable of leading to the identification and punishment of those responsible" (*El-Masri, op. cit.*, § 182; *Assenov and Others, op. cit.*, § 102, *Corsacov v Moldova*, App. No. 18944/02, 4 April 2006, § 68; and *Georgiy Bykov v Russia*, App. No. 24271/03, 14 October 2010, § 60). Further, investigations must be initiated *ex officio*, and it is not required that there be a criminal complaint lodged by the victims or their relatives (*El-Masri, op. cit.*, § 186. See, *mutatis mutandis*, *Gorgiev v the former Yugoslav Republic of Macedonia*, App. No. 26984/05, 19 April 2012, § 64). See also, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies), Principle V; UN Commission on Human Rights, 61st sess., provisional agenda item 17, *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (2005), Principle 19. As highlighted in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 21 March 2006, Resolution 60/147, the obligation to investigate is a key component of the States' international legal obligations to "respect, ensure respect for and implement international human rights law and international humanitarian law", Principle 3.

[20] See, *Er and others v Turkey*, App. No. 23016/04, 31 July 2012, § 50. See also, Human Rights Committee (CCPR), General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, § 18, emphasizing the obligation of State parties under the Covenant to bring to justice those responsible for crimes under international law such as torture and other ill-treatment and enforced disappearance.

[21] UN Committee against Torture (CAT), General Comment No. 3, *Implementation of article 14 by States parties*, 13 December 2012, UN Doc. CAT/C/GC/3, § 17.

[22] See, *inter alia*, CCPR: General Comment No. 31, *op. cit.*, § 18; *Chihoub v Algeria*, Communication No. 1811/2008, § 8.5; *Aboufaied v Libya*, Communication No. 1782/2008, § 7.4; *Berzig v Algeria*, Communication No. 1781/2008, § 8.5; *Zarzi v Algeria*, Communication No. 1780/2008, § 7.5; *El Abani v Libya*, Communication No. 1640/2007, § 7.3; *Benaziza v Algeria*, Communication No. 1588/2007, § 9.3; *El Hassy v Libya*, Communication No. 1422/2005, § 6.8; *Cheraitia and Kimouche v Algeria*, Communication No. 1328/2004, § 7.6; *Alwani v Libya*, Communication No. 1295/2004, § 6.5; *Boucherf v Algeria*, Communication No. 1196/2003, § 9.6; *Bousroual v Algeria*, Communication No. 992/2001, § 9.8; *Sarma v Sri Lanka*, Communication No. 950/2000, § 9.5; *Celis Laureano v Peru*, Communication No. 540/1993, § 8.5; *Rafael Mojica v Dominican Republic*, Communication No. 449/1991, § 5.7. See also, *inter alia*, United Nations' General Assembly resolution 47/133, *Declaration on the Protection of all Persons from Enforced Disappearance*, article 2; CAT, *Concluding observations on the Unites States of America*, CAT/C/USA/CO/2, § 18; CAT, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, § 14; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly*, A/61/259, §§ 55-56. See also, Inter-American Court of Human Rights: *Godínez-Cruz v. Honduras*, 17 August 1990, C No. 10, §§ 164, 166 and 197; *Velasquez Rodriguez v. Honduras*, 17 August 1990, C No. 9, §§ 156 and 187. See, African Commission on Human and Peoples' Rights, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, 204/97, § 44; Human Rights Chamber for Bosnia and Herzegovina, *Palic v Republika Srpska*, Case No. CH/99/3196, § 74.

[23] *El-Masri, op. cit.*, § 193.

[24] *Ibid.*, § 182.

[25] *Đurđević v Croatia*, App. No. 52442/09, § 51; *Bureš v The Czech Republic*, App. No. 37679/08, § 121.

[26] Also, on secret detention, see, CAT, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, § 17 ("The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a

interveners submit that effective *ex officio* investigations capable of leading to the identification, as well as to the prosecution and punishment of the persons responsible for gross violations of article 5 ECHR, such as enforced disappearance and secret detention, are likewise necessary to preserve the general legal prohibition against arbitrary detention.[27] This Court has "frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities"[28] and stressed that "[t]he unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5".[29]

This Court has recognised that the duty to investigate implies an obligation to act "with the required determination to identify and prosecute those responsible".[30] Criminal proceedings are a critical element of ensuring an effective remedy for gross violations of Convention rights.[31] They will also typically be the primary means through which the victims' right to truth can be realised, including in respect of identification of the perpetrators.[32] The Committee of Ministers' *Guidelines on Eradicating impunity for serious human rights violations* provide that "States have a duty to prosecute where the outcome of an investigation warrants this. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice".[33]

Where State authorities or agents have been complicit in unlawful acts, the obligation to bring prosecutions, where there is sufficient evidence, also extends to accessories and to those who may have been negligent.[34] As the Committee against Torture emphasized, where such authorities "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts".[35] Similar considerations apply to the crime of enforced disappearance when committed by non-state officials or private actors, since conduct constituting elements of the crime *per se* constitute violations of the prohibition against torture and other forms of ill-treatment.

The interveners submit that, in regard to State parties' involvement or complicity in systematic human rights violations such as those that have occurred in the CIA-administered secret detention

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violation of the Convention."); CAT, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, § 11; UN General Assembly, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment*, A/RES/67/161, § 23.

[27] See, *Bitiyeva and X v Russia*, App. Nos. 57953/00 and 37392/03, § 118. See also, CCPR, General Comment 29, *States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, § 11; Inter-American Court of Human Rights, *Gomes Lund y otros (Guerrilha do Araguaia) v. Brasil*, 24 November 2010, C No. 219, § 109; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, A/HRC/13/42, § 292(e) ("Institutions strictly independent of those that have been allegedly involved in secret detention should investigate promptly any allegations of secret detention and "extraordinary rendition". Those individuals who are found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated").

[28] *Chitayev and Chitayev v Russia*, App. No 59334/00, § 172.

[29] *Ibid.*, § 172 (see also § 173); *Kurt v Turkey*, App. No. 15/1997/799/1002, § 124; *Çakici v. Turkey*, App. No. 23657/94, § 104; *El-Masri op. cit.*, §§ 230 and 233.

30 *Velev v Bulgaria*, App. No. 43531/08, 16 April 2013, § 53; *Shishkovi v. Bulgaria*, App. No. 17322/04, 25 March 2010, § 38.

[31] See, *Brecknell v United Kingdom,* App. No. 32457/04, § 66; *Bazorkina v Russia*, App. No. 69481/01, 27 July 2006, § 117; *El-Masri, op. cit.*, § 140: "The Court notes that it has already found in cases against the respondent State that a criminal complaint is an effective remedy which should be used, in principle, in cases of alleged violations of Article 3 of the Convention (see, *Jasar v the former Yugoslav Republic of Macedonia*, No. 69908/01, 15 February 2007; *Trajkoski v the former Yugoslav Republic of Macedonia*, No. 13191/02, 7 February 2008; *Dzeladinov and Others v the former Yugoslav Republic of Macedonia*, No. 13252/02, 10 April 2008; and *Sulejmanov v the former Yugoslav Republic of Macedonia*, No.69875/01, 24 April 2008)", and *ibid.* § 261 under article 13 ECHR. This point was also underlined, for example, by the Inter-American Commission on Human Rights in the case of *Masacre Las Hojas v El Salvador*, Case 10.287, Report No. 26/92, 24 September 1992, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993).

[32] *El-Masri, op. cit.*, §§191-193; Inter-American Court of Human Rights, *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232, § 170; UN Human Rights Council Resolution 9/11 of 24 September 2008, Article 1; Resolution 12/12 of 1 October 2009, Article 1.

[33] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, Article VIII. See also *UN Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat Impunity,* UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly Resolution 60/147, Principle 4 states: "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

[34] *Oneryildiz v Turkey*, App. No. 48939/99, 30 November 2004, § 93; Inter-American Court of Human Rights, *Las Palmeras v Colombia*, 26 November 2002, C No. 96, § 67.

[35] CAT, General Comment No. 2, *Implementation of article 2 by State parties*, CAT/C/GC/2, §18; CAT, General Comment 3, *op. cit.*, §7.

and rendition programme, failure to instigate timely and effective prosecutions in appropriate cases will violate the Convention rights, including rights under articles 3 and 5 ECHR, and will fatally undermine public confidence in Contracting Parties' adherence to the rule of law throughout the Council of Europe. Moreover, the failure to investigate and prosecute situations where security forces are alleged to have been involved in unlawful acts can foster a general sense of impunity for their actions or omissions and is not compatible with Convention guarantees.[36]

Quality of the investigation

The Convention principle that the investigation should be effective in practice as well as in law requires that the authorities make a serious attempt to find out what has happened, by taking active and thorough steps to secure potential evidence relating to the alleged crimes, including eyewitness testimony and forensic evidence.[37] The investigation may fail to meet the requisite standard of thoroughness where the authorities fail to interview, or to attempt to interview, relevant witnesses[38] or explore the background circumstances that may shed light on a particular incident.[39] Also, this Court has emphasized that, "[e]ven though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official investigation are similar".[40]

Furthermore, the State's duty to initiate and continue an investigation cannot be limited by the fact that alleged victims find themselves in situations where it is impossible for them to produce evidence of violations of their Convention rights. This is the case not only regarding detentions by public authorities, but also in cases of detention by third parties.[41] It is also established that, where an individual is held within the exclusive control of the authorities, and there is a *prima facie* indication that the State may be involved in the violations alleged, the burden of proof shifts to the State, which will have to provide a satisfactory and convincing explanation, since the events in issue may lie wholly, or in large part, within the exclusive knowledge of the authorities.[42] The interveners submit that these principles apply in cases of enforced disappearances, including those within the renditions system, in which the application of the doctrine of State secrecy has meant that information regarding the violations of human rights entailed in particular cases of rendition remains exclusively or primarily within the knowledge of the US and other State authorities.[43]

Scope of the investigation and of the prosecution

In order to meet Convention standards of thoroughness and effectiveness, the investigation must also be comprehensive in its scope and must address all aspects of the human rights violations concerned, including those constituting crimes under international law. In the case of *Alzery v Sweden*, concerning the CIA-led rendition of the applicant from Sweden to Egypt, the UN Human Rights Committee underlined Sweden's obligation under article 7 ICCPR to "ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence."[44] The Committee criticised the fact that "neither Swedish officials nor foreign agents

[36] *Mahmut Kaya v Turkey*, App. No. 22535/93, § 99.
[37] *El-Masri, op. cit.* , § 183*; Gul v Turkey*, App. No. 22676/93, 14 December 2000, §§ 89-91; *Boicenco v Moldova,* App. No. 41088/05, 10 June 2008, § 123.
[38] *Assenov and others, op. cit.*, § 103; *Tanrikulu v Turkey* [GC], App. No.23763.94, 8 July 1999, § 104-110; *Zelilof v Greece*, App. No. 17060/03, 24 May 2007, § 62.
[39] *Gul v Turkey*, *op. cit.*, § 91.
[40] *Bureš v The Czech Republic*, *op. cit.*, § 122.
[41] See *M. and Others v Italy and Bulgaria* regarding victim of rape within her family, App. No. 40020/03, 31 July 2012, §§ 100-101, 106.
[42] *Varnava and others v Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 [GC], § 184, citing also *Akkum v Turkey*, App. No. 21894/93, 24 March 2005, § 211; and, amongst many cases concerning the situation in Chechnya, *Goygova v Russia*, App. No. 74240/01, 4 October 2007, §§ 88-96, and *Magomed Musayev and Others v Russia*, App. No. 8979/02, 23 October 2008, §§ 85-86.
[43] The UN Working Group on Enforced or Involuntary Disappearances (WGEID) has equated "suspension or cessation of an investigation into disappearance on the basis of failure or inability to identify the possible perpetrators" to measures similar to an amnesty law, and as such prohibited under the UN Declaration on Enforced Disappearance and, implicitly, the International Convention for the Protection of All Persons from Enforced Disappearances (ICED), WGEID, General Comment on article 18, 27 December 2005, § 3(a), UN Doc. E/CN.4/2006/56 at § 49. The *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* recommended by UN General Assembly resolution 55/89 of 4 December 2000, specify that the "investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry", § 3(a).
[44] CCPR, *Mohammed Alzery v Sweden*, Communication No 1416/2005, 10 November 2006, §11.7.

were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences."[45]

In *Oneryildiz v Turkey*, for example, the Grand Chamber found a violation of article 2 in its procedural aspect, having regard to the scope of the criminal proceedings in the case, which addressed only the negligence of relevant officials, and did not relate to the right to life or to life-endangering activities at issue in the case, or allow for the establishment of responsibility for the deaths.[46] In its General Comment No. 2, the CAT affirmed that, in light of the obligation to prosecute crimes of torture under article 4 of the Convention, it would be a violation of that obligation to prosecute a crime of torture solely as ill-treatment where elements of torture were also present.[47]

In the context of criminal investigations arising from Contracting Parties' involvement in the US-led secret detention and renditions programs, an inappropriately restrictive focus on the part of the investigating authorities – for example one that constrains their ability to address any and all relevant possible crimes under domestic and international law, including those arising from violations of the Convention – will not satisfy investigative and further procedural obligations under the Convention.

Delays and limitation periods

In order to be effective, an investigation must be initiated promptly once the matter has come to the attention of the authorities and must be conducted with reasonable expedition.[48] As regards the latter requirement, this Court has, for instance, criticized situations where multiple adjournments of an investigation occurred.[49]

The obligation to ensure an effective investigation will not be met where significant delays combine with a restricted scope of a criminal investigation, for example, one which deliberately focuses only on offences which are subject to limitation periods under domestic law when the allegations relate to offences that are imprescriptible under international law. This Court has found violations of investigative obligations under article 13 read in conjunction with Article 3, where time bars, coupled with delays in proceedings, have led to dismissal of prosecutions for treatment amounting to a violation of article 3. It has held that, "where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred."[50] These findings reflect wider principles of international human rights and international criminal law, as affirmed by the CAT,[51] the Inter-American Court of Human Rights,[52] the ICTY,[53] the Human Rights Committee,[54] and the *International Convention for the Protection of All Persons from Enforced Disappearance*,[55] which require that, in crimes involving gross violations of human rights, either time bars should be removed altogether, or they should be proportionate to the gravity of the crime.[56]

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[45] *Ibid.*
[46] *Oneryildiz v Turkey*, *op. cit.*, §§ 116-117
[47] CAT, General Comment No. 2, *op. cit*., § 10.
[48] *Bureš v The Czech Republic*, *op. cit.*, § 126.
[49] *Magomed Musayev and Others v. Russia*, *op. cit.*, § 103; *Yusupova and Zaurbekov v Russia*, App. No. 22057/02, § 65.
[50] *Abdulsamet Yaman v Turkey*, App. No. 32446/96, 2 November 2004, §55 and §59-60.
[51] CAT, General Comment No. 2, *op. cit.*, § 5: "other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violated the principle of non-derogability". See also, CAT, General Comment No. 3, *op. cit.*,§ 38, and § 40: "[o]n account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them".
[52] Inter-American Court of Human Rights, *Gomes Lund y otros (Guerrilha do Araguaia) v Brazil*, 24 November 2010, C No. 219, §171.
[53] The International Criminal Tribunal for Yugoslavia (ICTY), in *Prosecutor v Anto Furundzija (Trial Judgment)*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, 10 December 1998, has stipulated that "torture may not be covered by a statute of limitations", see § 157.
[54] CCPR, General Comment No. 31, *op. cit.*, § 18: "unreasonably short periods of statutory limitation in cases where such limitations are applicable" should be removed in respect of "those violations recognized as criminal under either domestic or international law, such as torture and cruel, inhuman and degrading treatment; summary and arbitrary killing; and enforced disappearance". See also CCPR, General Comment No. 20: *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), § 15.
[55] ICED, Article 8.
[56] The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *op. cit.*, provide in Principle IV that: "Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law." The *UN Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat Impunity, op. cit.*, state in principle 23 that "prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible."

As this Court has stated, a violation of the Convention may be found when the authorities are inactive[57] or where an investigation is "from the very beginning and throughout it, defined very narrowly."[58] It has further held that "the termination of pending investigations into abductions solely on the grounds that the time-limit has expired is contrary to the obligations under Article 2 of the Convention"[59] and in another case has criticised the "excessively narrow legal framework in which the investigation was conducted."[60] This is consistent with the broader finding that "any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness."[61]

As such, where an investigation or prosecution into allegations of crimes under international law – which are either imprescriptible or subject to longer periods of limitation – is limited to national law crimes for which the statute of limitations is short or close to expiry, it will clearly not be effective and thus in violation of the Convention. Such an investigation will be ineffective if it is limited in this way at the outset, but also if it is closed because of the limitation period.

Involvement of victims in the investigation

This Court's established jurisprudence is that, to be effective, an investigation must involve the victim of an alleged human rights violation or his or her next-of-kin "to the extent necessary to safeguard his or her legitimate interests".[62] Information must be promptly[63] provided on all significant developments in the investigation[64] and victims or their relatives must be heard by the investigative authorities and must be provided with relevant documents and decisions.[65] In particular, as the CAT contended, "under no circumstances may arguments of national security be used to deny redress for victims".[66] These duties extend to providing the victims with reasons explaining why a prosecution has not been pursued.[67]

C. The right to truth

In *El-Masri,* the Grand Chamber has recognised "the right to the truth regarding the relevant circumstances"[68] of cases of renditions and enforced disappearances, under the State's duty to investigate violations of their obligations under articles 3 and 5 ECHR. It has also underlined the right to truth can extend not only to an applicant and his or her family, "but also for other victims of similar crimes and the general public, who had the right to know what had happened."[69] Precisely in the light of those considerations, among others, the Grand Chamber went on to conclude that the Respondent State was responsible for violations of the procedural limb of articles 3 and 5 and of article 13 taken in conjunction with articles 3, 5 and 8 of the Convention in connection with the

[57] In *Association "21 December 1989" and others v. Romania*, the Court found that an investigation into violations of the right to life was insufficient where it was ended due to prescription, as a result of the inaction of the authorities themselves. *Association "21 December 1989" and others v Romania***,** App. Nos. 33810/07 and 18817/08, 24 May 2011, § 144.
[58] *Finogenov and others v Russia*, App. Nos. 18299/03 and 27311/03, 20 December 2011, §§ 275 and 282.
[59] *Aslakhanova and others v Russia*, App. Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012, § 237.
[60] *Nachova and others*, *op. cit.*, § 115.
[61] *Ibid.,* § 113; *Kelly and Others v the United Kingdom*, App. No. 30054/96, 4 May 2001, §§ 96-97, and *Anguelova v Bulgaria*, 13 June 2002, App. No. 38361/97, §§ 139 and 144.
[62] *McKerr v the United Kingdom,* App. No 28883/95 § 115*; Oğur v Turkey*, *op. cit.*, § 92; *Ognyanova and Choban v Bulgaria*, *op. cit.*, § 107.
[63] *Denis Vasilyev v Russia*, *op. cit.*, § 157.
[64] *Khadzhialiyev and Others v Russia*, *op. cit.*, § 106
[65] *Dedovskiy and Others v Russia*, *op. cit.*, § 92. These principles are also reflected in Article 24(2) ICED which states that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard." See also § 4 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Recommended by General Assembly resolution 55/89 of 4 December 2000, establish that "[a]lleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence."
[66] CAT, General Comment No. 3, *op. cit.*, § 42. See also, Principle 10(A)(2), *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*, adopted on 12 June 2013 available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles. The principles were adopted on 12 June 2013 by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries. They give guidance to governments, legislative and regulatory bodies, public authorities, policy makers, the courts, other oversight bodies, and civil society on issues surrounding national security and the right to information. The Tshwane Principles have been welcomed by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (see, *Report to the UN General Assembly*, A/68/362, § 65), by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the OAS Special Rapporteur on Freedom of Expression and Access to Information, the Special Rapporteur on Freedom of Expression and Access to Information in African, and the OSCE Representative on Freedom of the Media (see statements at http://www.opensocietyfoundations.org/press-releases/new-principles-address-balance-between-national-security-and-publics-right-know).
[67] *Hugh Jordan v the United Kingdom*, App. No. 24746/94, 4 May 2001, § 42
[68] *El-Masri, op. cit.*, § 191.
[69] *Ibid.*, § 191.

ineffectiveness of the summary investigation that State authorities had carried out since it could not be regarded as one that was "capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth."[70]

This landmark Court ruling recognizes both the individual and collective dimensions of the right to truth as held by the UN General Assembly,[71] the UN Human Rights Council,[72] the *UN Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat Impunity,*[73] and the Inter-American Court of Human Rights, whose jurisprudence holds that the right to truth is triggered by the violation of the right to access to justice, remedy and information, under articles 1(1), 8(1), 25, and 13 of the American Convention. [74] The same approach has been endorsed by the Council of Europe Committee of Ministers in its *Guidelines on Eradicating impunity for serious human rights violations*, approved on 30 March 2011.[75] The Guidelines recommend that "States […] should publicly condemn serious human rights' violations",[76] and that they should provide "information to the public concerning violations and the authorities' response to these violations".[77] Furthermore, the right to reparation, as recognised in the Guidelines, requires public disclosure of the truth regarding serious violations of human rights as an essential element of measures of satisfaction and guarantees of non-repetition.[78] This reflects the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and of Serious Violations of International Humanitarian Law* as part of the content of the obligation of reparation in its forms of satisfaction[79] and guarantees of non-repetition.[80]

In light of the foregoing, the interveners submit, in accordance with the joint concurring opinion in *El-Masri* of Judges Tulkens, Spielmann, Sicilianos and Keller, and with the general approach of other international human rights bodies, that the right to truth, as reflected in the Convention system, should be considered as a central aspect of article 13 of the Convention, at least when it is linked to the procedural obligation under articles 3, 5 and 8.

More specifically, the interveners maintain that the right to an effective investigation, under, *inter alia*, articles 3 and 5, read together with article 13, entails a right to truth concerning the violations of Convention rights perpetrated in the context of the 'secret detentions and renditions system'. This is so, not only because of the scale and severity of the human rights violations concerned, but also in light of the widespread impunity for these practices, and the suppression of information about them, which has persisted in multiple national jurisdictions. The interveners point to the

[70] *Ibid.*, §§ 193, 194, 243, 259-262.; see also § 242 with respect to the procedural limb of article 5 where the Grand Chamber refers back to its analysis of the investigation into the alleged ill-treatment of the applicant; and also § 259, in respect of article 13, where the Grand Chamber again refers back to its analysis and its recognition of the impact of the ineffectiveness of the investigation on the right to truth.

[71] Resolution 65/196.

[72] Resolution 9/11 of 24 September 2008; Resolution 12/12 of 1 October 2009; Resolution 21/7 of 27 September 2012. In 2011, the UN Human Rights Council established a special procedure on the promotion of truth, justice, reparations and guarantees of non-recurrence: Resolution 18/7 of 29 September 2011. See also, UN Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*. See, paragraph 4: "the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right […] In this regard, the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives".

[73] *UN Updated Set of Principles for the Promotion of Protection of Human Rights through Action to Combat Impunity,* UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 2: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations".

[74] *Contreras et al. v. El Salvador*, *op. cit.*, §§ 173, 26 and 170: the right to know the truth has the necessary effect that, in a democratic society, the truth is known about the facts of grave human rights violations. This is a fair expectation that the state must satisfy, on the one hand by the obligation to investigate human rights violations and, on the other, by the public dissemination of the results of the criminal and investigative proceedings". See also, *Familia Barrios v. Venezuela*, 24 November 2011 (Merits, Reparations and Costs), C No. 237, in Spanish, § 291; *Gelman v. Uruguay*, 24 February 2011 (Merits and Reparations), C No. 221, § 243; *Radilla-Pacheco v Mexico*, C No. 209, 23 November 2009, §§ 180, 212, 313 and 334; *Fleury y otros v. Haiti*, 23 November 2011 (Merits and Reparations), C No. 236, in Spanish; *Gelman v. Uruguay*, *op. cit.*, § 256; *Gomes Lund y otros (Guerrilha do Araguaia) v. Brazil*, *op. cit.*, § 257; *Caracazo v. Venezuela*, 29 August 2002, C No. 95, §§ 117, 118.

[75] Article VI. The Guidelines stress that "States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system", Article I.3. Also, "impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims" (*ibid*, Preamble).

[76] Article III.2.

[77] Article III.3.

[78] Article XVI.

[79] Principle 22(b), (e), (g) and (h) (satisfaction) : « Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;[…] Public apology, including acknowledgement of the facts and acceptance of responsibility; […] Commemorations and tributes to the victims; Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels"; see also CAT, General Comment No. 3, *op. cit.*, § 16.

[80] Principle 23 (non-repetition).

failure of the USA to ensure accountability, and access to an effective remedy and the truth relating to the treatment of individuals held in the context of US programmes of secret rendition, interrogation and detention operated between 2001 and 2009.[81] In this context, the interveners submit that, where renditions or secret detentions have taken place with the co-operation of Convention Contracting Parties, or in violation of those States' positive obligations of prevention, the positive obligations of those States require that they take all reasonable measures open to them to disclose to victims, their families and society as a whole, information about the human rights violations those victims suffered within the renditions system.

D. The right of the general public to know the truth and the application of the State secrets doctrine[82]

The interveners contend that to allow a State to rely on secret evidence and argument to defeat or defend against violations of Convention rights, in particular against a claim for gross human rights violations such as torture or enforced disappearance for which the State is alleged to be responsible, would be fundamentally inconsistent with the right to an effective remedy, including the right to the truth about human rights violations as affirmed by the Grand Chamber in *El-Masri*.[83] In this case, the Grand Chamber went on to apply the right to the truth to the specific facts in *El-Masri*, finding that, "[t]he concept of 'State secrets' has often been invoked to obstruct the search for the truth […]. State secret privilege was also asserted by the US government in the applicant's case before the US courts […]."[84]

With specific regard to the right of the general public to know the truth,[85] the interveners, *mutatis mutandis*, commend this Court for unanimously holding in the recent case of Bucur and Toma v Romania that "*la Cour admet qu'il est dans l'intérêt général de maintenir la confiance des citoyens dans le respect du principe de légalité par les services de renseignements de l'État. En même temps, le citoyen a un intérêt à ce que les irrégularités reprochées à une institution publique donnent lieu à une enquête et à des éclaircissements. Cela dit, la Cour considère que l'intérêt général à la divulgation d'informations faisant état d'agissements illicites au sein du SRI est si important dans une société démocratique qu'il l'emporte sur l'intérêt qu'il y a à maintenir la confiance du public dans cette institution. Elle rappelle à cet égard qu'une libre discussion des problèmes d'intérêt public est essentielle dans un État démocratique et qu'il faut se garder de décourager les citoyens de se prononcer sur de tels problèmes*".[86]

The interveners also draw the Court's attention to the resolution of the Parliamentary Assembly of the Council of Europe of 6 October 2011, in which it declared that "information concerning the responsibility of state agents who have committed serious human rights violations, such as murder,

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[81] The interveners refer to their submissions to the Grand Chamber of 29 March 2012 in *El-Masri*, *op. cit*., http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Macedonia-written-submission-legal-submission-2012.pdf;. See also, for example, Amnesty International, USA: Life, liberty and the pursuit of human rights: A submission to the UN Human Rights Committee, 16 September 2013, §§C and E(5), http://www.amnesty.org/en/library/info/AMR51/061/2013/en, and Annex A, 'ongoing lack of accountability/remedy'.

[82] The State's reaction across Europe has been characterised by resort to secrecy, deployment of doctrine of state immunity, and other measures designed to block accountability. See, for example, Amnesty International, USA: Chronicle of Immunity Foretold: Time for change on counter-terrorism violations after another year of blocking truth, remedy and accountability, 17 January 2013, http://www.amnesty.org/en/library/info/AMR51/003/2013/en; Amnesty International, 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; Amnesty International, Lithuania: Lithuania: Unlock the truth in Lithuania: Investigate secret prisons now, 29 September 2011, http://www.amnesty.org/en/library/info/EUR53/002/2011; 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, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0309+0+DOC+XML+V0//EN&language=EN, especially §§ 7-8, 10-20; Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives, 1 March 2013, UN Doc. A/HRC/22/52, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf; Amnesty International, Unlock the truth: Poland's Involvement in CIA Secret Detention, June 2013, http://www.amnesty.org/fr/library/info/EUR37/002/2013/en; European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0418&language=EN&ring=P7-RC-2013-0378

[83] See also, CAT, General Comment No. 3, *op. cit.*, §§ 30, 38 and 42: "States parties shall also make readily available to the victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge […] States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: […] state secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress […] The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims."

[84] *El-Masri*, *op. cit.*, § 191.

[85] *El-Masri, op. cit.*, 191

[86] *Bucur et Toma v Romania*, App. No. 40238/02, 8 January 2013, § 115.

enforced disappearance, torture or abduction, does not deserve to be protected as secret. Such information should not be shielded from judicial or parliamentary scrutiny under the guise of 'state secrecy'".[87] Furthermore, the European Parliament in its resolution of 11 September 2012 declared that it "recall[ed], however, that in no circumstance does state secrecy take priority over inalienable fundamental rights and that therefore arguments based on state secrecy can never be employed to limit states' legal obligations to investigate serious human rights violations".[88]

The interveners highlight that the *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*,[89] welcomed by the Parliamentary Assembly of the Council of Europe in its resolution 1954(2013) as "based on existing standards and good practices of States and international institutions",[90] stress that "there is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security [and that] such information may not be withheld on national security grounds in any circumstances".[91] The obligation of disclosure is therefore absolute and reflects the right of the general public to know the truth about these egregious violations of international law, especially to ensure accountability and the right to an effective remedy. The principles have also been reflected in the recent resolution of the Parliamentary Assembly[92] which stressed that "information about serious violations of human rights or humanitarian law should not be withheld on national security grounds in any circumstances".[93] The Parliamentary Assembly has expressed its support for the Tshwane Principles and called on the competent authorities of all Member States of the Council of Europe to take them into account in modernizing their legislation and practice concerning access to information.[94]

The interveners submit that, on the basis of international human rights law and jurisprudence, including European standards, and this Court's case-law, the doctrine of state secrets cannot be applied by a Contracting Party to impede any investigations, prosecution or trial of crimes under international law involving violations of Convention rights, including cases involving torture and enforced disappearance, in particular when the State may have co-operated or acquiesced in the said violations of Convention's rights, as in cases arising from the CIA rendition, secret detention and interrogation programmes. Allowing such limitation to the duty to investigate would also be antithetical to and inconsistent with the Grand Chamber's judgment in *El-Masri* in respect of the right to truth as well as with UN standards and international jurisprudence, not only in its individual dimension but also as a right of the general public to know the truth about gross violations of human rights.

[87] PACE Resolution 1838(2011), adopted on 6 October 2011, available at http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18033&Language=EN, § 4.

[88] 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)), §3, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0309%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN. The European Parliament called "on the relevant authorities not to invoke state secrecy in relation to international intelligence cooperation in order to block accountability and redress, and insist[ed] that only genuine national security reasons can justify secrecy, which is in any case overridden by non-derogable fundamental rights obligations such as the absolute prohibition on torture".

[89] *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*, adopted on 12 June 2013 available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles.

[90] PACE Resolution 1954(2013), adopted on 2 October 2013, § 7.

[91] *Global Principles on National Security and the Right to Information ("the Tshwane Principles)*, Principle 10(A)(1).

[92] PACE Resolution 1954(2013), § 9.5.3.

[93] PACE Resolution 1954(2013), § 9.6.

[94] PACE Resolution 1954(2013), § 8 as well as PACE Recommendation 2024 (2013), adopted on 2 October 2013, § 1.3.

Annex A

Document 1: News release, 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…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. To do otherwise, the report concludes, will only serve to undermine the search for justice") (launching document 2)

Document 2: USA: No return to execution, pages 17-25, http://www.amnesty.org/en/library/info/AMR51/171/2001/en

Document 3: USA: Human Dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en

Document 4: Bosnia-Herzegovina: 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.

Document 5: Bosnia-Herzegovina: Letter to the US Ambassador regarding six Algerian men, 18 January 2002, http://www.amnesty.org/en/library/info/EUR63/003/2002/en. (Amnesty International transmitted this urgent fax on 18 January, and made public the same day, to the US Ambassador in Bosnia and Herzegovina, calling for six Algerian men who had that day been handed over to US custody to be brought before a court and not transferred out of the country.

Document 6: Bosnia-Herzegovina: Unlawful detention of six men from Bosnia and Herzegovina in Guantánamo Bay, 29 May 2003, http://www.amnesty.org/en/library/info/EUR63/013/2003/en.

Document 7: 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

Document 8: News release, 15 January 2002, http://www.amnesty.org/en/library/info/AMR51/009/2002/en. ("Amnesty International is also concerned about alleged ill-treatment of prisoners in transit and in Guantánamo, including reports that they were shackled, hooded and sedated during transfer, their beards were forcibly shaved...").

Document 9: News release, 14 April 2002, http://www.amnesty.org/en/library/info/AMR51/054/2002/en (launching document 7) ("As the memorandum details, the USA has denied or threatens to deny the internationally recognized rights of people taken into its custody in Afghanistan and elsewhere, some 300 of whom have been transferred to Camp X-Ray in Guantánamo Bay. Among other things, Amnesty International is concerned that the US Government has: transferred and held people in conditions that may amount to cruel, inhuman or degrading treatment, and that violate other minimum standards relating to detention; refused to grant people in its custody access to legal counsel, despite ongoing interrogations which may lead to prosecutions; refused to grant people in its custody access to the courts to challenge the lawfulness of their detention; refused to disclose full information about the circumstances of many of the arrests, including whether they occurred in Afghanistan, Pakistan, or elsewhere; undermined human rights protections in cases of people taken into custody outside

Afghanistan and transferred to Guantánamo Bay; undermined the presumption of innocence through a pattern of public commentary on the presumed guilt of the Guantánamo detainees; threatened to apply a second-class justice system by selecting foreign nationals for trial before military commissions – executive bodies lacking clear independence from the executive and with the power to hand down death sentences, and without the right of appeal to an independent and impartial court; raised the prospect of indefinite detention without charge or trial, or continued detention after acquittal by military commission, or repatriation that may threaten the principle of *nonrefoulement*; failed to show that it conducted an impartial and thorough investigation into allegations of human rights violations against Afghan villagers detained by US soldiers in Afghanistan.")

Documents 10-12: Amnesty International Urgent Action, USA/Gambia: Incommunicado detention/Fear of ill-treatment/Health concern, 11 December 2002, http://www.amnesty.org/en/library/info/AFR27/006/2002/en; and updates 11 January 2003, http://www.amnesty.org/en/library/info/AFR27/002/2003/en, and 8 November 2004, http://www.amnesty.org/en/library/info/AFR27/001/2004/en.

Documents 13. Beyond the law: Update to Amnesty International's April Memorandum to the US Government on the rights of detainees held in US custody, 13 December 2002, http://www.amnesty.org/en/library/info/AMR51/184/2002/en, ("Amnesty International is also concerned that a number of people have been publicly reported to have been taken into US custody but are apparently not in Guantánamo and their whereabouts remain unknown. It is feared that such individuals may not have access to any outside representatives, including the ICRC. Incommunicado detention in an undisclosed location is in clear violation of international law and standards. Amnesty International urges the US government to provide clarification on the whereabouts and legal status of the following individuals if still detained…").

Document 14: (launching Document 13) 13 December 2002 news release, http://www.amnesty.org/en/library/info/AMR51/186/2002/en

Documents 15 and 16: Amnesty International Urgent Action, USA/Malawi: Incommunicado detention/Fear of ill-treatment/legal concern, 26 June 2003, http://www.amnesty.org/en/library/info/AMR51/093/2003/en, and update, http://www.amnesty.org/en/library/info/AMR51/116/2003/en

Document 17: Amnesty International Urgent Action, USA: Incommunicado detention/Fear of ill-treatment, 20 August 2003, http://www.amnesty.org/en/library/info/AMR51/119/2003/en.

Document 18. Amnesty International Report 2003 (covering year 2002)

Published May 2003,

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

'2002 In Focus', page 9 (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-Herzogovina, page 53;

Gambia, page 107;

Pakistan, page 191;

Syria, page 240;

United States of America, page 264.

Document 19, Amnesty International Report 2004 (covering year 2003)

Published May 2004

Full report available at http://www.amnesty.org/en/library/info/POL10/004/2004

'Resisting abuses in the context of the 'war on terror', page 5-6, "The current framework of international law and multilateral action is undergoing the most sustained attack since its establishment half a century ago… The US naval base at Guantánamo Bay, Cuba, remained under the spotlight in 2003. Over 600 detainees continued to be held in indefinite detention at the base. They were held outside the protection of US courts, effectively in a legal vacuum without precedent. The US authorities made clear that these detainees were held primarily to be interrogated or simply to be 'kept off the streets'. A handful of them faced the prospect of unfair trial before deeply flawed military commissions. Other detainees were held by, or apparently on behalf of, the US authorities in secret locations around the world."

Entries on:

Gambia, page 52-53

Malawi, page 63

Canada, page 104

USA, pages 135-136

Afghanistan, pages 146-147

Pakistan, page 181

Bosnia-Herzegovina, page 212

Sweden, page 255

Iraq, pages 282- 283

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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.

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"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

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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

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Amnesty International Urgent Action

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And update 24 October 2002, http://www.amnesty.org/en/library/info/AMR51/161/2002/en

And update 14 March 2003, http://www.amnesty.org/en/library/info/AMR51/040/2003/en

And update 17 August 2003, http://www.amnesty.org/en/library/info/MDE24/030/2003/en

And update 6 October 2003, http://www.amnesty.org/en/library/info/MDE24/036/2003/en

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