Al Nashiri v Romania

Application no. 33234/12

WRITTEN SUBMISSIONS ON BEHALF OF

AMNESTY INTERNATIONAL AND

THE INTERNATIONAL COMMISSION OF JURISTS

"INTERVENERS"

pursuant to the notification dated 20 February 2013 that the President of the Chamber (Third Section) had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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13 MARCH 2013

Introduction

1. Amnesty International and the International Commission of Jurists ("the interveners") will make submissions on: A) the prohibition of arbitrary deprivation of liberty as a rule of customary international law; B) knowledge imputable to Contracting Parties at relevant times; C) the duty to investigate credible allegations of human rights violations and the right to truth; and D) evidential approach to enforced disappearances.

A. The prohibition of arbitrary deprivation of liberty as a rule of customary international law

2. As the Grand Chamber held in *El-Masri v. the former Yugoslav Republic of Macedonia* ("*El-Masri*"),[1] the rendition and secret detention programmes entailed violations of the prohibitions on torture, enforced disappearances and prolonged arbitrary detention – all violations of *jus cogens* norms. In their submissions to the Grand Chamber in that case,[2] the interveners stressed, *inter alia*, that "[t]he prohibition of arbitrary deprivation of liberty is a rule of customary international law, and there is strong support for the proposition that it has the character of a *jus cogens* norm, particularly in connection with prolonged arbitrary detention." With respect to this, the interveners draw the Court's attention to the recent adoption by the UN Working Group on Arbitrary Detention ("WGAD") of "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law".[3]

3. In particular, WGAD found that the prohibition of all forms of arbitrary deprivation of liberty is part of treaty law; it forms part of customary international law; and it constitutes a *jus cogens* norm. In its deliberation WGAD emphasised that the specific content of the prohibition of all forms of arbitrary detention remains fully applicable in all situations; and, further, that "secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of a human being under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection".

B. Knowledge imputable to Contracting Parties at relevant times

4. The interveners showed in their submissions in *El-Masri v. Macedonia* and *Al Nashiri v. Poland* that, at least by June 2003, there was substantial credible evidence in the public domain that in the context of what the USA called the global "war on terror", US forces were engaging in enforced disappearances, secret detentions, arbitrary detentions, secret detainee transfers, and torture or other ill-treatment. Further, the submissions showed that, by presidential military order, the USA had established military commissions – executive tribunals with the power to hand down death sentences – for prosecution of selected non-US nationals accused of involvement in terrorism in proceedings that would not comport with international fair trial standards. The interveners also noted the abject failure to date of the USA to ensure truth, remedy and accountability for crimes under international law, particularly in relation to the secret detention and rendition programmes.[4] In this regard, the interveners note the recent report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[5]

5. In its annual reports covering the years 2004 and 2005, distributed widely to governments and the media, Amnesty International reported on the growing body of evidence of human rights violations committed by US forces in the counter-terrorism context and that these violations, including secret detention and rendition, were continuing.[6] In addition to individual country entries, the global overview pages of both reports addressed US abuses in the "war on terror". In the report covering 2005, for example, this overview told how during the year, it had become "increasingly clear how far many countries had colluded or participated in supporting US abusive policies and practices in the 'war on terror', including torture, ill-treatment, secret and unlimited detentions, and unlawful cross-border transfers."[7] These publications

[1] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, judgment, 13 December 2012.

[2] Enclosed with the present submissions, the interveners have provided – for the Court's ease of reference – their submissions to the Grand Chamber of 29 March 2012 in the *El-Masri* case (Annex A); as well as their original submissions to the Court (Fourth Section) of 5 November 2012 in the case of *Al Nashiri v. Poland*, no. 28761/11, (Annex B); and their supplementary submissions in *Al Nashiri v. Poland* of 15 February 2013 (Annex C).

[3] Human Rights Council, 22d sess., Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, §§ 37-75, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf.

[4] This section does not repeat the information the interveners provided the Court in their submissions in the El-Masri and Al Nashiri cases; instead, the examples included here are of information that became available after January 2004 and before September 2006.

[5] Human Rights Council, 22d sess., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/22/52, 1 March 2013, § 1, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf.

[6] "A number of detainees, reported to be those considered by the US authorities to have high intelligence value, were alleged to remain in secret detention in undisclosed locations… Allegations that the US authorities were involved in the secret transfer of detainees between countries, exposing them to the risk of torture and ill-treatment, continued", Amnesty International report 2005, covering 2004. "There were continued reports that the US Central Intelligence Agency (CIA) operated a network of secret detention facilities in various countries… Allegations of US involvement in the secret and illegal transfer of detainees between countries, exposing them to the risk of torture and ill-treatment continued", Amnesty International report 2006, covering 2005.

[7] In hard copy report, last paragraph page 8, http://www.amnesty.org/en/library/asset/POL10/001/2006/en/52433fd0-d46f-11dd-8743-d305bea2b2c7/pol100012006en.html.

also reported, for example, on the opening in Canada of a public inquiry into the case of Maher Arar,[8] transferred in 2002 from the USA to Syria where he was tortured, and on investigations into the cases of two men handed over to US custody by Swedish authorities in 2001, subjected to ill-treatment in Sweden before and during their handover and transport to Egypt where they were reportedly tortured.[9]

6. In May 2004, because of the sheer scale and range of evidence of human rights violations committed by the USA in its "war on terror", Amnesty International called for an independent commission of inquiry into all aspects of the USA's detention, interrogation and rendition policies and practices.[10]

7. In May 2004, Amnesty International publicized allegations that Chinese government personnel had participated in the ill-treatment during interrogation at Guantánamo of Uighur detainees.[11]

8. In June 2004, the *Washington Post* published a leaked 1 August 2002 memorandum written in the US Department of Justice's Office of Legal Counsel at the request of the Central Intelligence Agency (CIA). The memo advised, *inter alia*, that "under the circumstances of the current war against al Qaeda and its allies", presidential authority could override the USA's anti-torture law, that even if an interrogation method did violate that law "necessity or self-defense could provide justifications that would eliminate any criminal liability", and that there was a "significant range of acts" that, while constituting cruel, inhuman or degrading treatment or punishment, "fail to rise to the level of torture" and need not be criminalized.[12]

9. Another leaked memorandum published in 2004 by NBC News had been drafted in 2002 by the White House Counsel. It stated that "the war against terrorism…places a high premium" on obtaining "information from captured terrorists and their sponsors", and that not applying the Geneva Conventions to such detainees would reduce the threat of future domestic prosecution of US interrogators for war crimes.[13]

10. A February 2004 confidential report of the International Committee of the Red Cross (ICRC) on Coalition abuses in Iraq, leaked in 2004 and published in the media at that time, found that detainees labelled by the USA as "high-value" were at particular risk of torture and other ill-treatment and "high value detainees" had been held for months in a facility at Baghdad International Airport in conditions that violated international law.[14]

11. At a news briefing in June 2004, US Secretary of Defense Donald Rumsfeld said that in November 2003, at the request of CIA Director George Tenet, he had ordered US military personnel in Iraq to keep a particular detainee off any prison register.[15] In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. In public

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[8] Arar Commission, official press release, 5 February 2004, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/05-07-09/www.ararcommission.ca/eng/06.htm.

[9] "Sweden," in Amnesty International Report 2005, p. 241, see http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=429b27f78.

[10] Amnesty International, "USA: Amnesty International Calls for a Commission of Inquiry into 'War on Terror' Detentions," 18 May 2004 , http://www.amnesty.org/en/library/info/AMR51/087/2004/en. The 28 April 2004 broadcast on US television and subsequent worldwide publication of photographs of US soldiers subjecting detainees in US custody in Abu Ghraib prison in Iraq to torture and other ill-treatment triggered the subsequent leaking or other public disclosure in 2004 of numerous previously undisclosed or classified US government documents that indicated the degree to which the USA was seeking to circumvent its obligations under international law relating to torture and other ill-treatment. The USA viewed its military intervention in Iraq from mid March 2003 as part of its "war on terror". For example, "the war in Iraq is…part of the global war on terror." Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs, Department of Defense News Briefing, 8 December 2004, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1978; President Bush: Remarks to military personnel at Fort Hood, Texas, 12 April 2005 ("The terrorists have made Iraq a central front in the war on terror"). The Authorization for Use of Military Force Against Iraq Resolution in 2002 passed by US Congress, also framed the use of force as part of the "war on terrorism".

[11] Amnesty International Urgent Action, 25 May 2004, http://www.amnesty.org/en/library/info/AMR51/090/2004/en.

[12] Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002, http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf.

[13] Memorandum for the President. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Alberto R. Gonzales, 25 January 2002, http://www.torturingdemocracy.org/documents/20020125.pdf. Of note also was that on 6 May 2002, the USA informed the UN Secretary General that the USA would not ratify the Rome Statute of the International Criminal Court (ICC), and considered that it therefore had "no legal obligations" arising from the USA's signature to the treaty. US Secretary of Defense Donald Rumsfeld asserted that the ICC's "flaws… are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over US service members, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow". Secretary Rumsfeld statement on ICC treaty, US Department of Defense News Release, 6 May 2002, http://www.defense.gov/releases/release.aspx?releaseid=3337). The USA embarked upon a campaign to press other countries to enter impunity agreements with a view to preventing US nationals accused of genocide, crimes against humanity or war crimes from being surrendered to the ICC. See 'International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes', August 2002, http://www.amnesty.org/en/library/info/IOR40/025/2002/en.

[14] Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation. February 2004, http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

[15] "With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of *Ansar al-Islam*. And we did so. We were asked to not

testimony to the Senate Armed Services Committee on 9 September 2004, US Army General Paul Kern said that the number of "ghost detainees" held in Iraq was "in the dozens, to perhaps up to 100". Ghost detainees were secret detainees kept off prison registers by the military, usually at the request of the CIA. One of the Abu Ghraib photos published in 2004 depicted the body of a "ghost detainee", Manadel al-Jamadi, who died in CIA custody in November 2003, with cause of death recorded as "homicide". Among other things, the report of a US military investigation issued in August 2004 noted that the CIA's "detention and interrogation practices led to a loss of accountability [and] abuse" in Iraq.[16]

12. In June 2004, a 2 December 2002 memorandum signed by Secretary Rumsfeld was declassified by the US administration. The memorandum had authorized "counter-resistance" techniques for use at Guantánamo, including stress positions, sleep deprivation, sensory deprivation, stripping, hooding, exploitation of phobias, and prolonged isolation. After a March 2003 draft version of a Pentagon Working Group report on "detainee interrogations in the global war on terrorism" was leaked to the press, the administration declassified the final version of the report, dated 4 April 2003, and made the report public at a press conference on 22 June 2004.[17] The report recommended the use of various techniques, including environmental manipulation, threat of rendition, isolation, sleep deprivation, removal of clothing, exploitation of phobias, prolonged standing, and hooding.[18]

13. In October 2004, Amnesty International published a 200-page analysis of US violations in the "war on terror" and of the US government documents that had come into the public domain, and including case details of secret transfers of detainees, the alleged existence of secret US detention facilities, and torture and other ill-treatment.[19]

14. In a ruling in November 2004, a US federal judge found in relation to the military commission system that the fact that "the accused himself may be excluded from proceedings… and evidence may be adduced that he will never see" was a "dramatic deviation" from the US constitutional right to a fair trial that "could not be countenanced by any American court".[20]

15. In December 2004, the *Washington Post* reported that one of the locations for CIA secret detentions had been the US naval base at Guantánamo Bay.[21]

16. In May 2005, Amnesty International published a 150-page report on US abuses in the "war on terror", which included cases of alleged torture or other ill-treatment, deaths in custody, military commission proceedings, rendition flights, and the cases of "high-value detainees" allegedly held in CIA custody in secret locations in Afghanistan and elsewhere and being subjected to enforced disappearance.[22] The cases described included those of Tanzanian national Ahmed Khalfan Ghailani and German national Khaled el-Masri.[23]

17. In June 2005, *Time* magazine revealed that it had obtained a copy of the interrogation log in the case of Mohammed al Qahtani, a Saudi Arabian detainee in military custody at Guantánamo labelled as "high value" and subjected to torture and other ill-treatment in late 2002 and early 2003.[24]

18. In August and November 2005, Amnesty International published the accounts of the human rights violations three Yemeni men said they had endured when held in the CIA's secret detention programme.[25]

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immediately register the individual. And we did that." Secretary Rumsfeld, Defense Department regular briefing, 17 June 2004, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3347.

[16] See Amnesty International, USA: Human Dignity Denied: Torture and Accountability in the "War on Terror," October 2004, p. 115, http://www.amnesty.org/en/library/info/AMR51/145/2004/en.

[17] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 4 April 2003, http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

[18] These and other documents were described in Amnesty International, Human Dignity Denied, pages 57-73.

[19] Amnesty International, Human Dignity Denied.

[20] *Hamdan v. Rumsfeld*, Memorandum opinion, US District Court for the District of Columbia, 8 November 2004. The military commissions as established under President Bush's November 2001 military order were ruled unlawful by the US Supreme Court in June 2006, only to be replaced by a close version under the Military Commissions Act of 2006, then revised in 2009.

[21] "At Guantánamo, a prison within a prison," *Washington Post*, 17 December 2004.

[22] USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en, particularly pages 116-130. See also USA: US detentions in Afghanistan: an aide-mémoire for continued action, 7 June 2005, http://www.amnesty.org/en/library/info/AMR51/093/2005/en

[23] In the same report, Amnesty International reported that it had not received a reply to the letter written in August 2004 to CIA and US administration officials raising allegations that Khaled el-Masri had been subjected to rendition, secret detention and ill-treatment. See, USA: Guantánamo and beyond, *op cit*, page 122.

[24] Inside the interrogation of Detainee 063, *Time* magazine, 20 June 2005. Further information about this case continued to emerge during 2005 and 2006. An unclassified version of the Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, was published in June 2005 and contained details of the Special Interrogation Plan approved in Mohamed al-Qahtani's case, http://www.defenselink.mil/news/Jul2005/d20050714report.pdf. See also pages 15-24 of Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en.

[25] Torture and secret detention: testimony of the 'disappeared' in the 'war on terror', 4 August 2005, http://www.amnesty.org/en/library/info/AMR51/108/2005/en; Secret Detention in CIA 'Black Sites', 8 November 2005, http://www.amnesty.org/en/library/info/AMR51/177/2005/en.

19. On 21 November 2005, the Secretary General of the Council of Europe invoked the procedure under Article 52 of the Convention and wrote to the Ministers of Foreign Affairs of all Contracting Parties about allegations of European collusion in secret rendition flights.[26] A follow up letter was sent to Contracting Parties on 7 March 2006.[27] On 13 December 2005, the President of the Parliamentary Assembly of the Council of Europe asked the Assembly's Committee on Legal Affairs and Human Rights to investigate allegations of "extraordinary rendition".[28] Pursuant to this request, 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.[29] Subsequently Senator Dick Marty published his first report on 12 June 2006.[30]

20. In December 2005, Amnesty International publicised that six planes used by the CIA for renditions had made some 800 flights into and out of Europe.[31] It called on European states to investigate if their territory had been used for renditions and to ensure no future activity that would aid or assist in the violations of international law associated with the US rendition programme.[32] Amnesty International also issued a major report on renditions in April 2006.[33]

21. Throughout 2004 and 2005 and into 2006, hundreds of men continued to be held without charge or trial, or judicial review of their detentions, at the US naval base in Guantánamo Bay.[34]During 2004 and 2005, the US administration charged a number of Guantánamo detainees for trial by military commission[35] despite widespread international condemnation of these bodies.[36]

22. Reporting to the UN Committee against Torture in 2005 and 2006, the US administration adopted a policy of "no comment" in relation to the evidence that its counter-terrorism operations included secret detentions, a policy which the Committee condemned.[37] In its findings on the USA's second and third periodic reports under the International Covenant on Civil and Political Rights, filed in 2005, the UN Human Rights Committee expressed concern in July 2006 at the "credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end".[38]

23. By June 2003 it was clear that states knew or should have known about the USA's rendition and secret detention programmes, and about the grave human rights violations it entailed as well as allegations of torture and other ill-treatment by US personnel, the indefinite detention regime at Guantánamo and the prospect for unfair trials by military commission there. As detailed above, the body of evidence regarding the USA's rendition and secret detention programmes only grew

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[26] 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*, § 38.

[27] 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.

[28] 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.

[29] 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.

[30] 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.

[31] USA: 800 secret CIA flights into and out of Europe, 8 December 2005, http://www.amnesty.org/en/library/info/AMR51/198/2005/en.

[32] In the same month US Secretary of State Condoleezza Rice publicly defended "rendition" as "a vital tool in combating transnational terrorism". BBC, *Full Text: Rice defends US Policy*, 5 December 2005, http://news.bbc.co.uk/1/hi/world/americas/4500630.stm.

[33] Below the radar: Secret flights to torture and 'disappearance', 4 April 2006, http://www.amnesty.org/en/library/info/AMR51/051/2006/en.

[34] Despite the US Supreme Court's ruling in *Rasul v. Bush* in June 2004 that the US federal courts had jurisdiction to consider *habeas corpus* petitions, it quickly became clear that the US administration would employ its newly improvised Combatant Status Review Tribunals, and a litigation strategy to undermine *Rasul*. See Section 6 of Guantánamo and beyond, *op. cit*., pages 44-51.

[35] See US Department of Defense news releases, 24 February 2004, http://www.defense.gov/releases/release.aspx?releaseid=7088; 29 June 2004, http://www.defense.gov/releases/release.aspx?releaseid=7504; 7 July 2004, http://www.defense.gov/releases/release.aspx?releaseid=7525; 14 July 2004, http://www.defense.gov/releases/release.aspx?releaseid=7553; 7 November 2005, http://www.defense.gov/releases/release.aspx?releaseid=9052.

[36] Close allies of the USA were among the critics. See, for example, UK Foreign and Commonwealth Office, Human Rights Report 2004, "the proposed military commissions would not provide sufficient guarantees of a fair trial according to international standards".

[37] See e.g., List of issues to be considered during the examination of the second periodic report of the United States of America. Response of the USA, http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf, "[I]t is the policy of the United States not to comment on allegations of intelligence activities". See Concluding observations of the Committee, "The Committee considers the 'no comment' policy of the State party regarding the existence of such secret detention facilities, as well as on its intelligence activities, to be regrettable".

[38] UN Doc.: CCPR/C/USA/CO/3/Rev.1, http://www.unhchr.ch/tbs/doc.nsf/0/34d0a773a44de02bc125725a0034cbdf/$FILE/G0645961.pdf, § 12.

between June 2003 and September 2006. The USA's use of the death penalty remained well-known during this period, and the US administration pursued the death penalty from 2002 to 2006 in the high-profile federal prosecution of Zacarias Moussaoui for terrorism offences, as well as moving ahead with a military commission system with the power to hand down death sentences.[39]

C. The duty to investigate credible allegations of human rights violations and the right to truth

24. Further to their written submissions in the *El-Masri* case on, *inter alia*, the right to truth,[40] in this section the interveners make submissions about the relationship between the Contracting Parties' duty to investigate credible allegations of human rights violations and the right to truth.

25. Consistent with other relevant international law and the approach by global and regional human rights institutions, bodies and experts, the Grand Chamber in *El-Masri* correctly recognised "the inadequate character of the investigation in" that case and, in turn, "its impact on the right to the truth regarding the relevant circumstances of the case".[41] Further, and again consistent with, for example, the individual and collective dimensions of the right to truth as reiterated in several cases in the Inter-American system,[42] in *El-Masri* the Grand Chamber, "underline[d] the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened."[43] 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 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."[44]

26. 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 Article 3, 5 and 8.

27. The Convention case-law has long established that Contracting Parties have an obligation to investigate any credible information disclosing evidence of violations of Convention rights, and that any such investigation must be prompt, thorough,[45]independent in law and in practice,[46]allowing for the participation of the victim[47] and "capable of leading to the identification and punishment of those responsible".[48] In this context, the interveners stress the importance that such investigations be initiated *ex officio*, and need not rely on a criminal complaint lodged by the victims or their relatives.[49] Once the basis of a *prima facie* case of misconduct disclosing evidence of violations of Convention rights on the part of the authorities has been made out, the State cannot exempt itself from its obligation under the Convention to initiate a prompt and thorough investigation by relying on the failure of the victim to complain to the authorities, or a delay in

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[39] See USA: Guantánamo and beyond, *op. cit*., pages 79-83.

[40] See Annex A enclosed with these submissions, section F, §§ 37-40.

[41] *El-Masri*, § 191, where the Grand Chamber held that "Having regard to the parties' observations, and especially the submissions of the third-party interveners, the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the States concerned were not interested in seeing the truth come out. The concept of "'State secrets" has often been invoked to obstruct the search for the truth (see paragraphs 46 and 103 above). State secret privilege was also asserted by the US government in the applicant's case before the US courts (see paragraph 63 above). The Marty inquiry found, moreover, that "the same approach led the authorities of 'the former Yugoslav Republic of Macedonia' to hide the truth" (see paragraph 46 above)."

[42] *Garcia y Familiares vs. Guatemala*, judgment, 29 November 2012, §§ 176-177; *Gudiel Álvarez y Otros vs. Guatemala*, judgment, 20 November 2012, § 301; *Masacre de Santo Domingo vs. Colombia*, judgment, 30 November 2012, §§ 154-158; *Uzcátegui et al. v. Venezuela*, judgment, 3 September 2012, § 240. Also see the Inter-American Commission on Human Rights, *James Zapata Valencia and Jose Heriberto Ramirez Llanos vs. Colombia*, judgment, 21 July 21 2011, Report No. 79/11, Case 10.916, §145.

[43] *El-Masri*, § 191.

[44] *El-Masri*, §§ 193, 194, 243, 259-262.; see also § 242 with respect to the procedural limb of Article 5 where the Grand Chamber refers back 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.

[45] *El_Masri*, §183; *Assenov and Others*, cited above, § 103 and *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV.

[46] *El-Masri*, § 184; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III; *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 37, 20 July 2004; *rgi v. Turkey*, 28 July 1998, §§ 83-84, *Reports* 1998-IV.

[47] *El-Masri*, §para 185; see, *mutatis mutandis*, *Oğur*, cited above, § 92; *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 107, 23 February 2006; *Khadzhialiyev and Others v. Russia*, no. 3013/04, § 106, 6 November 2008; *Denis Vasilyev v. Russia*, no. 32704/04, § 157, 17 December 2009; and *Dedovskiy and Others v. Russia*, no. 7178/03, § 92, ECHR 2008.

[48] *El-Masri*, § 182; *Assenov and Others v. Bulgaria*, § 102, *Corsacov v. Moldova*, no. 18944/02, § 68, 4 April 2006; and *Georgiy Bykov*, § 60. See also, UN Committee against Torture, General Comment No. 3, on the Implementation of Article 14 by States parties, CAT/C/GC/3, 19 November 2012, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf, §§ 16-17, "Satisfaction and the right to truth".

[49] *El-Masri*, § 186. See, *mutatis mutandis*, *Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, § 64, 19 April 2012.

initiating a criminal complaint. The information presented in section B above has long been sufficient to trigger these investigative obligations in several Contracting Parties in relation to their involvement in the US-led rendition and secret detention programmes.

28. The above-mentioned investigative obligations on Contracting Parties are of particular importance in cases of renditions or enforced disappearances, in which the State authorities may be implicated in the human rights violations concerned. As the Grand Chamber has itself put it, "an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".[50] The same obligation to investigate was found by the Court to arise under Article 13.[51] The interveners submit that prompt *ex officio* initiation of an independent and effective investigation is essential to ensure the right to truth of the victim, the victim's family and the public.

29. In a rendition an individual typically experiences continuing violations of his or her rights outside the jurisdiction of the state where the individual was initially apprehended. However, this does not divest Contracting Parties of their duty to investigate credible information disclosing evidence of involvement in renditions. 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, including the duty to investigate.[52] The Grand Chamber in *El-Masri* found that the responsibility of the respondent State was engaged as regards the arbitrary detention of the applicant outside the jurisdiction, following his detention in Macedonia, given the continuing character of the violation of Article 5 involved.[53] The Court characterised the enforced disappearance of *El-Masri* as a "case of a series of wrongful acts or omissions, [in which] 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 […]".[54]This approach followed the jurisprudence concerning continuing violations of Convention rights, established by the Grand Chamber in *Varnava and others v Turkey*.[55] This recognition of Contracting Party's obligations as regards violations that continue outside the jurisdiction should also extend to obligations of investigation and remedy, including in regard to continuing violations of Articles 3 and 5.

30. The above position is entirely consistent with and supported by Article 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance, both of which mandate State Parties to establish jurisdiction to investigate and prosecute the international law crimes of torture and enforced disappearance "when the offences are committed in any territory under its jurisdiction" and "when the alleged offender is a national of that State". As, *mutatis mutandis*, the International Court of Justice has held in the case concerning the extradition of Hissène Habré, *the obligation for the State to criminalize torture and to establish its jurisdiction over it* […] *has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity* […].[56]

31. In the light of this and *a fortiori*, a State within which part of a crime of a continuing nature, like enforced disappearance, has taken place has the duty to establish its jurisdiction over this offence and to begin investigations into those responsible for the entire offence, in cooperation, if possible, with any other State that may provide information.

32. Therefore, in cases of such illegal transfers, as well as torture and enforced disappearance, where the act or omission of a Contracting Party has a direct causal connection with or is part of the operation of a rendition involving a continuing violation of Convention rights, taking place partly on its territory and partly elsewhere, the State has an obligation not only

[50] *El-Masri*, § 192.
[51] *El-Masri*, § 255 and following.
[52] In *Rantsev v Cyprus and Russia*, the Court held that it was within its competence to consider Russia's responsibility for violations of Articles 2 and 4 of the rights of the trafficking victim, transferred by private actors from Russia to Cyprus, despite the fact that the majority of the violations 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. *Rantsev*, *op cit*, §§ 207-208.
[53] *El-Masri*, § 239.
[54] *El-Masri*, § 240.
[55] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148.
[56] International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, § 75. See also, Center for Constitutional Rights and ECCHR, Amicus Brief in Support of the Association for the Dignity of Male and Female Prisoners of Spain, In their Appeal Pending Before the Spanish Supreme Court, in relation to Criminal Complaints Pending Against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes, and John Yoo, In the Audencia Nacional, Madrid, Spain, Case No.134/2009, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/09/2012-09-25-CCR-ECCHR-Amicus-Brief-to-Supreme-Court-FINAL.pdf.

to prevent, but also to take such investigative and remedial measures as are available to it to investigate and remedy the continuing violation of Convention rights.

33. The right to an effective investigation and to an effective remedy under, *inter alia*, Articles 3 and 5, read together with Article 13, requires disclosure of the truth concerning the violations of Convention rights perpetrated in the context of the secret detention and rendition programmes. This is so, not only because of the scale and severity of the human rights violations concerned, but also and in particular because of the widespread impunity for these practices, and the suppression of information about them, which has persisted in multiple national jurisdictions. In this context, the failure of the USA to ensure accountability, and access to remedy and the truth relating to the treatment of victims of the US rendition and secret detention programmes authorised between 2001 and 2009,[57] only underlines the importance of Contracting Parties' obligation to pursue their own investigations, and to disclose their outcome, with the requisite transparency and diligence. Where renditions or secret detentions have taken place with the co-operation of Contracting Parties, or in violation of those states' positive obligations of prevention, the Convention obligations of those states to investigate and provide remedies 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 context of these counter-terrorism operations.

34. In *El-Masri* the Grand Chamber has also now recognised "the right to the truth regarding the relevant circumstances" of such cases, and that the "right to know what had happened" can extend not only to an applicant and his or her family, "but also for other victims of similar crimes and the general public". 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 […]."[58]

35. In this context, 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*".[59]

36. The interveners also make reference to the case of *Association "21 December 1989" and others v. Romania*, where this section of the Court has found investigations into violations of the right to life arising from the use of force against a public demonstration to be insufficient because of the existence of a statute of limitation. On that occasion, the Court recalled that "*l'amnistie est généralement incompatible avec le devoir qu'ont les États d'enquêter sur des actes de torture* […] *et de lutter contre l'impunité des crimes internationaux. Il en est de même en ce qui concerne la grâce* […]."[60]Following the approach of the Court, and in consideration of the fact that renditions may involve – and indeed have involved – the crimes under international law of torture and enforced disappearance, the interveners submit that, *a fortiori*, the doctrine of state secrets cannot be applied to limit the investigation or prosecution of crimes entailing human rights violations. 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 jurisprudence.[61]

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[57] US courts have systematically refused to hear the merits of lawsuits seeking redress for human rights violations committed in this context, citing national security, secrecy and various forms of immunity under US law. See, for example, *Binyam Mohamed et al. v Jeppesen Dataplan, Inc.*, US Court of Appeals for the Ninth Circuit, *en banc* opinion, 8 September 2010; *Certiorari* denied by US Supreme Court, 16 May 2011. At the same time, the operational details of the past detention, rendition and interrogation activities of the CIA remain generally classified as "top secret" and exempted from disclosure under the Freedom of Information Act (5 U.S.C. § 552(b)). See, for example, *American Civil Liberties Union and American Civil Liberties Union Foundation v US Department of Defense and Central Intelligence Agency*, US Court of Appeals for the District of Columbia Circuit, 18 January 2011. Further, criminal investigations into the rendition and secret detention programmes have been all but shut down by the US Department of Justice. See Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees, US Department of Justice 30 June 2011, http://www.justice.gov/opa/pr/2011/June/11-ag-861.html.

[58] *El-Masri*, § 191.

[59] *Bucur et Toma v Romania* 40238/02 – 08 January 2013 – unanimous, § 115.

[60] *Association "21 December 1989" and others v. Romania***,** Requêtes n[os] 33810/07 et 18817/08, 24 mai 2011, § 144. For an application of the same rule to Article 3, see *Abdulsanet Yaman v Turkey*, no. 3246/96. Regarding amnesties, see also *Yeter v Turkey*, no.33750/03 and *Ali and Ayse Duran v Turkey*, no.42942/02; *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 December 1998; UN Human Rights Committee, General Comment No.20: Article 7 (Forty-fourth session, 1992), UN Doc. HRI\GEN\1\Rev.1 at 30 (concerning the prohibition on torture and cruel treatment or punishment), §15. Regarding the application of time limitations to international crimes, see ICTY, *Prosecutor v Furundzija*, holding that "torture may not be covered by a statute of limitations"; UN Human Rights Committee, General Comment No.31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, §18; ICED, Article 8; UN Impunity principles: principle 23.

[61] UN Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances.

37. 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, 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.*[62] Furthermore, the European Parliament in its resolution of 11 September 2012 declared that it *believe*[d] *that only genuine grounds of national security can justify secrecy; 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;* [and] *consider*[ed] *that definitions of classified information and state secrecy should not be overly broad and that abuses of state secrecy and national security constitute a serious obstacle to democratic scrutiny.*[63] It finally [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.*

38. With regard to other international human rights bodies, the recent General Comment no. 3 of the UN Committee against Torture of 13 December 2012, while reiterating the right of victims to have judicial remedies available, stresses that *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. A State party's failure to provide evidence and information, such as records of medical evaluations or treatment, can unduly impair victims' ability to lodge complaints and to seek redress, compensation, and rehabilitation.*[64] In particular, it emphasizes that *[s]pecific 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*.[65]

39. The UN Working Group on Enforced and Involuntary Disappearance held, in its General Commentary on the right to truth and enforced disappearance of 2011, that *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*.[66]

40. The Inter-American Court of Human Rights established in the case *Tiu Tojin v. Guatemala* that *it is important to reiterate that in the case of violations to human rights, state authorities cannot hide behind mechanisms such as official secrets or confidentiality of the information or behind reasons of public interest or national security, to justify not providing the information required by the judicial or administrative authorities in charge of the investigation or pending proceedings.*[67]

41. 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. This is of particular importance in cases arising from the CIA rendition, secret detention and interrogation programmes as they are likely to involve international responsibility for crimes under international law, including enforced disappearance and torture.

D. Evidential approach to enforced disappearances

42. The interveners draw this Court's attention to the Grand Chamber's evaluation of the evidence and establishment of the facts in *El-Masri* and its approach to fact-finding in cases where the fact of, and the facts surrounding, an enforced disappearance are disputed.[68]

43. Further to the supplementary submissions on, *inter alia*, enforced disappearances in the light of the *El-Masri* judgment that the interveners have submitted to the Court (i.e. Fourth Section) in the case of *Al Nashiri v. Poland*,[69] in this section the

[62] http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18033&Language=EN, § 4.
[63] 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)), 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.
[64] UN Committee against Torture, General Comment No. 3 of the Committee against Torture, CAT/C/GC/3, 19 November 2012, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf, §30.
[65] *Ibid*, § 38.
[66] Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf, § 4.
[67] *Tiu Tojin v. Guatemala*, judgment, November 26, 2008, § 77.
[68] *El-Masri*, §§ 149-167.
[69] See Annex C, in particular, §§ 4-6.

interveners make submissions about the fact-finding approach to enforced disappearances as they occurred in the context of the US-led rendition and secret detention programmes.

44. The interveners consider that the starting point, consistent with the Court's case-law, is the Contracting Parties' obligation to ensure that *the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part*.[70] In the light of this, the interveners invite this Court to take notice of the consistent approach adopted by, *inter alia*, the Inter-American Court of Human Rights to the evaluation of the evidence and the establishment of the facts in cases that fit within a certain pattern of gross human rights violations. In the case of *Humberto Sánchez v. Honduras*, for example,[71] Honduras had denied responsibility in connection with the death of Juan Humberto Sánchez, who had been found dead 10 days after he had been detained and released on the same day by state agents. In finding Honduras responsible, the Inter-American Court emphasised: […] *the high evidentiary value of the testimonial and circumstantial evidence and of the pertinent logical inferences in cases of extra-legal executions, with all the difficulties regarding evidence derived from them when they are set within the framework of a practice of grave human rights violations promoted or tolerated by the State. This Court deems that if it is proven for the specific case that it fits within the pattern of extra-legal executions, it is reasonable to assume and conclude that there is an international responsibility of the State* […] *This Court underlines that in light of the proven facts, the State violated the right to life to the detriment of Juan Humberto Sánchez from a triple perspective. First,* […] *there are sufficient grounds to conclude that the death of Juan Humberto Sánchez was due to an extra-legal execution committed by military agents, set within the framework of a pattern of grave human rights violations that occurred at the time of the facts* [...]*. Secondly, since there was a pattern of extra-legal executions tolerated and promoted by the State, this generated a climate that was incompatible with effective protection of the right to life* [….].[72]

45. Similarly, in the case of *Bámaca Velásquez v. Guatemala*, the Inter-American Court considered, *inter alia*, that *the State practice of forced disappearances and extrajudicial executions [….] cause the Court to presume that Bámaca Velásquez was executed*.[73] In particular, the Court had noted that *According to the jurisprudence of this Court* [….] *Due to the nature of the phenomenon* [i.e. enforced disappearances] *and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven.*[74]

46. In the light of the foregoing, *mutatis mutandis*, the interveners contend that context can give rise to a rebuttable presumption, and therefore, the interveners invite the Court to pay due regard to the well-established pattern of gross human rights violations, including enforced disappearances, that characterised the US-led rendition and secret detention programmes since 2001 in the context of its own evaluation of the evidence and establishment of the facts in the present case.

47. Further, the interveners submit that in its establishment of the facts in the *El-Masri* case the Grand Chamber has endorsed this very approach in respect of cases arising from the above-mentioned programmes. In evaluating the evidence and establishing the facts of the case, the Grand Chamber attached […] *particular importance to the relevant material* […], *which is already a matter of public record, issued by different fora disclosing relevant information about the "rendition programme" run by the US authorities at the time. Even though this material does not refer to the applicant's case as such, it sheds light on the methods employed in similar "rendition" cases to those described by the applicant.*[75] It was partly on the basis of the above-mentioned well-established pattern of gross human rights violations, including enforced disappearances, that characterized the US-led programmes of rendition and secret detention, that the Grand Chamber in *El-Masri* concluded that *there is prima facie evidence in favour of the applicant's version of events and that the burden of proof should shift to the respondent Government*.[76]

48. Further, by analogy, the interveners wish to draw the Court's attention to the well-established approach in the Convention's case-law to the assessment of asylum-seekers' credibility. In *F.H. v. Sweden* the Court acknowledged that, *owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support*

[70] *Rantsev v Cyprus and Russia*, no. 25965/04, judgment, 7 January 2010, § 274, in turn referring to *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, *judgment*, § 55, ECHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Saadi v. the United Kingdom* [GC], no. 13229/03, judgment, 29 January 2008, § 62, ECHR 2008; and Article 31 para. 3 (c) of the Vienna Convention of 23 May 1969 on the Law of Treaties.

[71] *Juan Humberto Sánchez v. Honduras*, Inter-American Court of Human Rights, Judgment of June 7, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 99 (2003).

[72] *Ibid*, §§ 108-110.

[73] Inter-American Court of Human Rights, case of *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 25 2000, (Merits), § 173. The Court reached its conclusion on this point having considered that "….It was the Army's practice to capture guerrillas and keep them in clandestine confinement in order to obtain information that was useful for the Army, through physical and mental torture. ….Many of those detained were then executed, which completed the figure of forced disappearance", §§ 120-121.

[74] *Ibid*, § 130, footnotes in the original omitted.

[75] *El-Masri*, § 160.

[76] *El-Masri*, § 165.

thereof.[77] In light of this, the interveners invite the Court to pay due regard, *mutatis mutandis*, to the special circumstances and vulnerable conditions of a victim or alleged victim of CIA rendition and secret detention. In particular, the extensive application of the doctrine of state secrecy, in multiple jurisdictions, to prevent disclosure of information regarding cases of rendition and secret detention, inhibits victims from discharging the burden of proof in establishing the facts of their cases. States should not be allowed to benefit from their concerted attempts to withhold evidence and disclosure of human rights violations. These difficulties will be even more acute when victims are still subject to the rendition and secret detention programmes or their consequences, in continuing violation of Convention rights.

49. The approach to the burden of proof in *Othman v United Kingdom* is, *mutatis mutandis*, also instructive in the determination of the appropriate approach to evaluating the evidence and establishing the facts in the present case. In *Othman*, the Court considered that even if there was only a real risk that the evidence against the applicant was obtained by torture, it would have been unfair to impose on him any higher burden of proof.[78] Most importantly, in eventually determining that the applicant had discharged the burden that could be fairly imposed on him in respect of establishing that the evidence against him was obtained by torture,[79] the Court considered that *due regard must be had to the special difficulties in proving allegations of torture. Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process. It is practiced in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim. All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment* [….] *in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate.*[80]

50. The interveners contend that similar considerations apply in respect of the Court's proper determination of the present case. Indeed, there are, *mutatis mutandis*, special difficulties in proving allegations of enforced disappearances, which are grave human rights violations and international crimes, and which, by definition, entail *a refusal to acknowledge the deprivation of liberty or […] concealment of the fate or whereabouts of the disappeared person.*[81] Further, as affirmed in the February 2010 UN Joint Study on Secret Detention, *most of the time secret detention has been used as a kind of defence shield to avoid scrutiny and control, as well as to make it impossible to learn about treatment and conditions during detention.*[82]

[77] *F.H. v. Sweden*, no. 32621/06, judgment, 20 January 2009, § 95. See also the same point made by Court in the admissibility decision in *N.M. and M. M. v the United Kingdom*, nos. 38851/09 and 39128/09, decision, 25 January 2011, § 59.
[78] *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, judgment, 17 January 2012, § 273.
[79] *Ibid*, § 280.
[80] *Ibid*, § 276.
[81] International Convention for the Protection of All Persons from Enforced Disappearance (ICED), Article 2
[82] UN Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf, § 289.