Al Nashiri v. Poland

Application no. 28761/11

WRITTEN SUPPLEMENTARY SUBMISSIONS ON BEHALF OF

AMNESTY INTERNATIONAL AND

THE INTERNATIONAL COMMISSION OF JURISTS

pursuant to the Chamber's decision to invite interveners to submit supplementary comments in the light of the judgment of the Court's Grand Chamber in the case of El-Masri v. the former Yugoslav Republic of Macedonia (no. 39630/90)

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15 FEBRUARY 2013

Introduction

1. Amnesty International and the International Commission of Jurists ('the interveners') are grateful to have been invited to submit further comments in the present case in the light of the judgment of the Court's Grand Chamber made on 13 December 2012 in the case of *El-Masri v. the former Yugoslav Republic of Macedonia* (no. 39630/90, "*El-Masri*").[1] The interveners invite the Court to note that the following observations complement and supplement their written submissions of 5 November 2012 in the present case.

2. The interveners will make the following short supplementary submissions on:
   A. enforced disappearances in the light of the *El-Masri* judgment;
   B. diplomatic representations in light of the Grand Chamber's findings on responsibility for violations outside the jurisdiction in *El-Masri*;
   C. the gross human rights violations that detainees previously held in the USA's secret detention and rendition programme are currently enduring; and
   D. the relevance of the Grand Chamber's observations in *El-Masri* in relation to any potential resort to *ex parte* materials and procedures.

A. Supplementary submissions on enforced disappearances in the light of the *El-Masri* judgment

3. The interveners commend to this Court the Grand Chamber's reliance in its judgment in the *El-Masri* case on the definition of enforced disappearance in Article 2 of the UN International Convention for the Protection of All Persons from Enforced Disappearance (ICED).[2] Further, the interveners note that such reliance was entirely consistent with the Court's long-established jurisprudential doctrine that "[T]he Convention … should so far as possible be interpreted in harmony with other rules of international law of which it forms part…".[3] In this section, the interveners provide this Court with some observations arising from the Grand Chamber's approach to enforced disappearances in *El-Masri*, which they hope will assist this Court in its determination of the present case.

4. The interveners note that in *El-Masri* the Grand Chamber first referred to its long-established case-law under Articles 1 and 3 of the Convention according to which in certain circumstances "…. The burden of proof […] may be regarded as resting on the authorities to provide a satisfactory and convincing explanation […] In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government […]."[4] The Court then reiterated that "these considerations apply also to disappearances examined under Article 5 of the Convention".[5] Certain inferences, as the Grand Chamber underlined, are capable of shifting the burden of proof from the applicant to the Contracting Party so that the latter in effect has to disprove that it was responsible for an enforced disappearance.

5. In this context, the Grand Chamber emphasised that those considerations apply even where, for example, "although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since".[6] The interveners commend the Grand Chamber's approach in this respect and invite this Court to take additional notice of the fact that enforced disappearances frequently take place without any official summons by the authorities,[7] and in situations where the authorities are in control of most of the information surrounding the violation.

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[1] Letter of T.L. Early, Section Registrar, dated 24 January 2013 to the interveners notifying them of the Chamber's decision in this respect.
[2] See, in particular, *El-Masri*, §§ 240-241.
[3] *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, § 274.
[4] *El-Masri*, § 152.
[5] *El-Masri*, § 153.
[6] *El-Masri*, § 153.
[7] See, for example, the recent practices documented in Pakistan and Russia by Amnesty International: Amnesty International, *Russian Federation: The Circle of Injustice: Security operations and human rights violations in Ingushetia*, 21 June 2012 (AI Index: EUR 46/012/2012), available at: http://amnesty.org/en/library/info/EUR46/012/2012/en, and Amnesty International, *Pakistan: 'The Hands of Cruelty': Abuses by Armed Forces and Taliban in Pakistan's Tribal Areas*, 13 December 2012, (AI Index: ASA 33/019/2012), available at: https://www.amnesty.org/en/library/asset/ASA33/019/2012/en/a38b1e69-afee-4e73-bcf2-1405fa0c71fc/asa330192012en.pdf.

6. In light of these considerations, the interveners submit that the Grand Chamber provided an example of the set of circumstances that would justify a shift of the burden of proof from the applicant to the respondent state, as it would often be otherwise impossible for the victim to prove the enforced disappearance. As such, the interveners contend that, consistent with the Grand Chamber's observations on enforced disappearances in *El-Masri*, the burden of proof should also shift in additional circumstances as long as they disclose the required "concordant inferences".[8] One such additional scenario may be where allegations that an applicant was taken into state custody are supported by witness testimony. With respect to this, the interveners invite this Court to take notice of the fact that such burden shifting has indeed been the practice, for example, of the UN Human Rights Committee (HRC).[9]

7. Further, the interveners invite this Court to use the Grand Chamber's reliance on the ICED definition of enforced disappearance in *El-Masri* as a helpful springboard to a holistic approach to these gross human rights violations. Such an approach would be premised on considering enforced disappearances as composite and cumulative violations of the Convention, rather than positing them merely within the confines of Article 5 thereof.

8. In the light of this, the interveners commend to this Court the approach of the HRC which has consistently analysed enforced disappearance with this multiplicity of violations in mind.[10] For example, in a recent case, the HRC has summed up its jurisprudence on enforced disappearance as follows:

   The Committee recalls its jurisprudence under which acts leading to enforced disappearances constitute a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). They may also constitute a violation or a grave threat to the right to life (art. 6).[11]

9. The United Nations Declaration on the Protection of Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992, affirms in article 1(2): Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

10. The interveners would like to draw the Court's attention to the consistent jurisprudence of the Inter-American Court of Human Rights, as reflected in its judgment in the recent case *Garcia y Familiares vs. Guatemala*, where the Inter-American Court found it appropriate to:

    recall the legal basis that supports a holistic perspective to the enforced disappearance of persons in light of the plurality of acts which, united by a single aim, breach permanently existing "legal values" [i.e, bienes jurídicos] *protected by the Convention. In this way, the legal analysis of the enforced disappearance must result from the complex violation of human rights that it entails. As a result, when analysing a presumption of enforced disappearance, it must be taken into account that the deprivation of liberty of the individual must be considered only as the beginning of the configuration of a complex violation lasting in time until the fate and whereabouts of the victim are known. The analysis of a potential enforced disappearance must not* [be] *focused in a fragmented, divided and isolated way merely on the detention, or*

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[8] *El-Masri*, § 153.

[9] See, for example, Human Rights Committee, *Quinteros v. Uruguay*, Communication No. 107/1981, Views adopted 21 July 1983, § 11; also *Salem Saad Ali Bashasha v. The Libyan Arab Jamahiriya*, Communication No. 1776/2008, Views adopted 2 November 2010, § 7.2.

[10] See e.g. Human Rights Committee, *Yamina Guezout and others v. Algeria*, Communication No. 1753/2008, Views adopted 9 July 2012, §§ 8.5-8.9 (finding violations of Articles 7, 9, 10, 16 and 2(3) of the Covenant); *Kamel Djebrouni v. Algeria*, Communication No. 1781/2008, Views adopted 31 October 2011, § 9 (finding violations of Articles 6(1), 7, 9, 10(1), 16 and 2(3) read in conjunction with 6(1) of the Covenant).

[11] Human Rights Committee, *Khaled Il Khwildy and others v. Libya*, Communication No. 1804/2008, Views adopted 1 November 2012, § 7.4. Footnote omitted. See similarly Tahar *Mohamed Aboufaied v. Libya*, Communication No. 1782/2008, Views adopted 21 March 2012, § 7.3.

the possible torture or the risk of death, but the focus must be on the collection of facts presented before the Court […].[12]

11. Furthermore, the interveners contend that this Court should take proper notice of the prominence that Khaled El-Masri's incommunicado detention at the Hotel in Skopje[13] played in the Grand Chamber's ruling, namely that "the treatment to which the applicant was subjected while in the hotel amounted on various counts to inhuman and degrading treatment in breach of Article 3 of the Convention."[14] In particular, the Grand Chamber observed that the "applicant's suffering was further increased by the secret nature of the operation and the fact that he was kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework."[15] In the light of this, the interveners submit that the Grand Chamber considered incommunicado detention at the hotel as a key factor that had increased the applicant's suffering, and as such, one of the most egregious "counts" underlying its finding of inhuman and degrading treatment in respect of his detention in Macedonia. The interveners further contend that the aforementioned approach by the Grand Chamber to incommunicado detention in its ruling in El-Masri would assist this Court's consideration in this case.

12. In addition to *El-Masri*, the Court, in the recent case of *Lenev v. Bulgaria*, in finding that the applicant was subjected to torture took note *inter alia*, "of the manner in which the applicant was placed under arrest, the fact that he was taken to a 'secret base' used by the police instead of a regular place of detention…".[16]

13. While the Grand Chamber's finding that the applicant in *El-Masri* was -- by virtue of his "abduction and detention"[17]-- subjected to enforced disappearance appears to have been made in the exclusive context of Article 5 of the Convention, presumptively any person subjected to an enforced disappearance would experience treatment contrary to Article 3, in light of the "anguish" that unacknowledged detention, however long, would induce.[18]

14. In *El-Masri,* the Grand Chamber considered that the applicant's detention at the hotel in Macedonia "must have caused him emotional and psychological distress",[19] adding that his "uncertainty about his fate" meant he "undeniably lived in a permanent state of anxiety."[20] In describing the anguish the applicant endured while in Macedonia the Grand Chamber foreshadows the "ongoing situation of uncertainty and unaccountability" that

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[12] *Garcia y Familiares vs. Guatemala*, IACtHR, Judgment of the 29 September 2012 (Merits, Reparations and Costs), available only in Spanish (unofficial translation into English provided by the interveners): *99. El Tribunal estima adecuado recordar el fundamento jurídico que sustenta una perspectiva integral sobre la desaparición forzada de personas en razón de la pluralidad de conductas que, cohesionadas por un único fin, vulneran de manera permanente, mientras subsistan, bienes jurídicos protegidos por la Convención. De este modo, el análisis legal de la desaparición forzada debe ser consecuente con la violación compleja de derechos humanos que ésta conlleva. En este sentido, al analizar un supuesto de desaparición forzada se debe tener en cuenta que la privación de la libertad del individuo sólo debe ser entendida como el inicio de la configuración de una violación compleja que se prolonga en el tiempo hasta que se conoce la suerte y el paradero de la víctima. El análisis de una posible desaparición forzada no debe enfocarse de manera aislada, dividida y fragmentada sólo en la detención, o la posible tortura, o el riesgo de perder la vida, sino más bien el enfoque debe ser en el conjunto de los hechos que se presentan en el caso en consideración ante la Corte […].*

[13] The Grand Chamber observed "…the applicant's suffering was further increased by the secret nature of the operation and the fact that he was kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework (see also paragraph 101 above, and paragraph 236 below).", *El-Masri*, § 203.

[14] *El-Masri*, § 204.

[15] *El-Masri*, § 203.

[16] *Lenev v. Bulgaria*, no. 41452/07, 4 December 2012, § 116.

[17] *El-Masri*, § 240.

[18] Indeed the Grand Chamber in *El-Masri* reiterated that "Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault (see *Iljina and Sarulienė v. Lithuania*, no. 32293/05, 15 March 2011, § 47). There is no doubt that the applicant's solitary incarceration in the hotel intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress. The applicant's prolonged confinement in the hotel left him entirely vulnerable. He undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he was subjected. The Court notes that such treatment was intentionally meted out to the applicant with the aim of extracting a confession or information about his alleged ties with terrorist organisations (see *Dikme v. Turkey*, no. 20869/92, §§ 82 and 95, ECHR 2000-VIII).", El-Masri, § 202.

[19] *El-Masri*, § 202.

[20] *El-Masri*, § 202.

characterised his enforced disappearance for the entirety of his captivity.[21] In the light of this, the interveners contend that the Grand Chamber's rationale for holding the respondent state responsible "for violating the applicant's rights under Article 5 of the Convention during the entire period of his captivity"[22] could have applied, *mutatis mutandis*, to the Article 3 type of suffering that the applicant had endured throughout his detention.

15. The Grand Chamber also found that the "treatment" to which the applicant was exposed included being "consistently refused access to anyone other than his interrogators";[23] and "incarceration in the hotel [which] intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress".[24] The Grand Chamber determined that such treatment "was intentionally meted out to the applicant with the aim of extracting a confession or information about his alleged ties with terrorist organisations".[25] These very same factors mirror key components of the definition and experience of an enforced disappearance in terms of the refusal of access to the outside world and the uncertainty as to one's fate. The interveners contend that a logical next step following on from the Grand Chamber's reasoning set out above would be to conclude that enforced disappearance also amounts to a violation of Article 3 of the Convention.

16. As the Grand Chamber reiterated in *El-Masri*, Article 3 "does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault".[26] This is also consistent with the Court's previous jurisprudence in relation to family members who suffer "anguish" that "endured over a prolonged period of time".[27] From the Court's own findings in *El-Masri,* the applicant no doubt suffered similar anguish. This type of "anguish" would seem to be symptomatic of cases where people are subjected to enforced disappearance, as supported by the jurisprudence of the Inter-American Court of Human Rights, the Committee against Torture, and the HRC highlighted in our submission of 5 November 2012.[28]

17. As noted, the HRC has also been consistent in considering cases of enforced disappearance *inter alia* under Article 7 of the Covenant. Thus in its recent decision in the case of *Khwildy and others*, the HRC concluded, *inter alia*, the following:

    > *The Committee further notes from the information before it that Abdussalam Il Khwildy was subjected to enforced disappearance from April 1998 to May 2003, and from October 2006 to May 2008. On the basis of the information at its disposal, the Committee considers that both of Abdussalam Il Khwildy's enforced disappearances constitute a violation of article 7 of the Covenant.*[29]

18. In light of the above, the interveners commend to this Court the Grand Chamber's finding in respect of the enforced disappearance of the applicant in the *El-Masri* case. In addition, they invite this Court to consider furthering the interpretation of the Convention consistently with international law which has recognized, as set out above, that enforced disappearances, such as those that characterised the rendition and secret detention programme, constitute violations of Article 3, in addition to constituting gross violations of Article 5.

B. Supplementary submissions on diplomatic representations in light of the Grand Chamber's findings on responsibility for violations outside the jurisdiction in *El-Masri*

19. In their written submissions of 5 November 2012, the interveners have already contended that, consistent with this Court's jurisprudence, "*a fortiori* a Contracting Party will be obliged to make diplomatic representations in respect of a detainee outside of its jurisdiction where it has co-operated and colluded in acts that are either continuing or have a strong causal connection with human rights violations taking place post-transfer.

[21] *El-Masri*, § 240.
[22] *El-Masri*, § 241.
[23] *El-Masri*, § 200.
[24] *El-Masri*, § 202.
[25] *El-Masri*, § 202.
[26] *El-Masri*, § 202.
[27] *Kurt v Turkey*, no 24267/94, 25 May 1998, § 133.
[28] See the interveners' submissions to this Court in the present case dated 5 November 2012, paragraphs nos. 8-12 and corresponding footnotes.
[29] *Khwildy and others*, § 7.5.

Diplomatic representations are one of the few measures realistically available to a state once a detainee has been transferred out of the jurisdiction of a Contracting Party in breach of the Convention and are, moreover, the least intrusive measures potentially available, and consistent with measures of 'retorsion' in line with principles on state responsibility. […] Such a requirement would apply particularly where a Contracting Party is in breach of *jus cogens* obligations, and is responsible for bringing such violations to an end."[30] As the Grand Chamber held in *El-Masri*, the rendition and secret detention programme entailed violations of the prohibitions on torture, enforced disappearances and prolonged arbitrary detention – all violations of jus cogens norms.[31]

20. In *El-Masri* the Grand Chamber found that the responsibility of the Macedonian authorities under Article 5 of the Convention was engaged throughout the whole period of the enforced disappearance of Khaled El-Masri, including his unacknowledged and secret detention in Afghanistan because "they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer".[32] The Court recognized that the unacknowledged detention of the applicant amounted to an "enforced disappearance" and that, "in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned".[33]

21. In light of the recognition by the Court of "extraordinary renditions" as a form of enforced disappearance in many cases and of the continuing nature of the violations involved in renditions and secret detentions, the interveners submit that a Contracting Party that was involved or assisted or had been complicit in such a gross violation of the Convention rights, has an obligation to make all and any efforts to put an end to the violation and its consequences affecting the victim's rights. This position is reinforced when the enforced disappearance has led to a situation in which the victim has consequently been – and continues to be - subjected to flagrant violations of his or her right to a fair trial and to liberty, and to the risk of the death penalty. As such, the interveners submit that the *El-Masri* judgment strengthens their contention that in a "situation where a Contracting Party has co-operated in the secret detention and rendition programme, involving violations of Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 ECHR, the Contracting Party may have obligations under those provisions, read in conjunction with Articles 13 and 46 of the ECHR, to make diplomatic representations in respect of the treatment and detention of the detainee, respect for the fair trial rights of the detainee and protection of the detainee from the death penalty."[34]

C. Brief remarks on the gross human rights violations that detainees previously held in the USA's secret detention and rendition programme are currently enduring

22. The interveners submit that, as of 14 February 2013, 166 detainees were held at the US naval base in Guantánamo Bay, Cuba, over three years past President Barack Obama's deadline for closing the detention facility. A number of detainees previously held in the USA's secret detention and rendition programme, involving violations of Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 of the Convention, are currently held at Guantánamo where they continue to face ongoing human rights violations including flagrant denial of their fair trial rights.

23. On 2 January 2013, President Obama signed the National Defense Authorization Act, containing provisions blocking transfer of Guantánamo detainees to the US mainland and elsewhere in furtherance of what was already foreseen by the National Defense Authorization Act of 2012. On 13 December 2012, the US Senate

[30] The interveners written submissions of 5 November 2012, § 36; *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23 January 2012, § 211; *Al-Saadoon and Mufdhi v. United Kingdom,* Application no. 61498/08, 2 March 2010, § 171; *Ilascu and others v. Moldova and Russia*, no.48787/99, 8 July 2004, § 331.
[31] *Goiburu et al v Paraguay*, Inter-American Court of Human Rights, Judgment of September 22 2006, ser. C No. 153 § 84 (disappearances); *Prosecutor v Anto Furundzija*, Case No.: IT-95-17/1-T, judgment, 10 December 1998 (torture); and supra footnote 26 on the jus cogens character of the prohibition of prolonged arbitrary detention. See also, the latest reference in *Questions relating to the obligation to prosecute and extradite (Belgium v. Senegal)*, International Court of Justice, Judgment of 20 July 2012, § 99. See further the interveners written submissions of 5 November 2012, § 17.
[32] *El-Masri*, § 239.
[33] *El-Masri*, § 240.
[34] The interveners written submissions of 5 November 2012, § 37.

Select Committee on Intelligence (SSCI) voted to approve the report of its review into the CIA's secret detention and interrogation programme. The 6,000 page report, according to the Committee Chairperson, contains details of each detainee held in CIA custody and the conditions under which they were detained.[35] It remains classified. At the outset of the review, the then CIA Director announced that the Chair and Vice Chair of the SSCI had assured him that the goal of their review was not criminal accountability for the past but to inform "future policy decisions.[36] Furthermore, all outstanding US criminal investigations relating to the CIA secret interrogation programme were ended by August 2012, with no charges filed.[37]

24. In the light of the above, the interveners contend that the US government is unwilling to address the detentions in a legal framework that recognizes or respects human rights law. Detainees face indefinite detention without trial -- even after acquittal by military commission -- or trial by military commissions that lack structural independence, in trials conducted on a remote island base the location and operation of which continues to place serious obstacles in the way of effective legal representation.[38]

25. All six men currently facing trial at Guantánamo were previously held in the CIA's secret detention programme for "high-value" detainees. All operational details of that now terminated programme are classified Top Secret/Special Compartmented Information. It is also official that the USA intends to seek the death penalty against all six.[39]

26. Despite a 2009 announcement by the US Department of Justice that five Guantánamo detainees would be brought to the USA to stand trial in ordinary federal court "before an impartial jury under long-established rules and procedures,"[40] in 2011, citing congressional blocking,[41] the administration has charged them for trial by military commission under essentially untested procedures under the Military Commissions Act of 2009 in flagrant denial of their fair trial rights.[42] Asked in 2009 about the views of people offended by the prospect of

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[35] Feinstein Statement on CIA Detention, Interrogation Report, 13 December 2012, http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635

[36] Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Senate Review of CIA's Interrogation Program, 5 March 2009, https://www.cia.gov/news-information/press-releases-statements/senate-review-of-cia-interrogation-program.html; Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the New Review Group on Rendition, Detention, and Interrogation, 16 March 2009, https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html

[37] Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, 30 August 2012, http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html. See also 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

[38] For example, "Since October of 2011 I have been unable to send any written communication in to my client… [I]n order to write something to Mr Bin'Attash, beginning in October of 2011, it was going to be subjected to seizure review, translation and other prying eyes on behalf of the government. My ethical duties as an attorney prohibit me from doing that because they are matters that relate to the representation of Mr Bin'Attash. Since October of 2011, 15 months, I have been unable to send a letter to Mr Bin'Attash. Now, that might not seem like a big deal if I were practicing in federal court in the North District of Illinois in Chicago, my home city, because I could leave my office and I could walk the three blocks to the Metropolitan Correctional Center and I could go in and see my client and I could talk to him and we could have a conversation and I could bring my notes in and we could review things. But of course that's not the situation here at all. I live in Washington, DC. Mr Bin'Attash is here in Guantánamo Bay. In order for me to have a conversation with Mr Bin'Attash I have to make plane arrangements 14 days in advance to come down here for a week at a time so that I can have a short conversation with Mr Bin'Attash. It makes the situation impossible. And then when I get down here, I'm not even permitted to bring in a list of things that I need to discuss with Mr Bin'Attash or any draft motions that I might want to review with Mr Bin'Attash or, in fact, provide him with information I think might be relevant to the next commission proceeding. It has probably irretrievably affected my ability to communicate with Mr Bin'Attash. And when I say 'my', I mean everybody on the defense team for Mr Bin'Attash." Defense lawyer for Walid bin Attash, Yemeni national, capital defendant, Pre-trial hearing, Guantánamo, 28 January 2013. Transcript at http://www.mc.mil/CASES/MilitaryCommissions.aspx

[39] Charges have been sworn against a seventh, who was originally subjected to US rendition from Azerbaijan to Afghanistan and then to Guantánamo in 2002, but by mid-February 2013 these charges had not been referred on for trial.

[40] US Department of Justice press conference, http://www.justice.gov/opa/pr/2009/ag-prconf-2009-11-13.pdf

[41] Statement of the Attorney General on the Prosecution of the 9/11 Conspirators, 4 April 2011, US Department of Justice, http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html

[42] "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals", UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and

the trial of a Guantánamo detainee being held in federal court where the constitutional protections afforded to US citizens would apply, President Obama responded: "I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him".[43] The President is the final clemency authority in federal and military capital cases and as Commander in Chief of the Armed Forces has ultimate constitutional authority over the military commission system where that detainee is now facing trial.

27. In the light of the above, the interveners submit that any imposition of the death penalty after these military commission trials would violate the defendants' right to life.[44]

28. With regard to the actual functioning of the military commission proceedings, the interveners report that, on 6 December 2012, the military judge, a US Army Colonel, overseeing military commission proceedings issued a protective order aiming, *inter alia*, to prevent disclosure of which "foreign countries" the defendants were held in by the CIA prior to their transfer to Guantánamo; which "enhanced interrogation techniques" were used against them, including "descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations"; the "names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation" of the detainees; and descriptions of the "conditions of confinement." This applies, "without limitation" to the "observations and experiences" of the defendants themselves. To prevent disclosure of such information at any trial proceedings, there will be a 40-second delay in broadcast from the courtroom to the public gallery.[45] At a pre-trial hearing on 28 January 2013 in the case of five defendants facing the death penalty, transmission was cut by an unknown person during discussion of a Joint Defense Motion to Preserve Evidence of Any Existing Defense Facility, that is, CIA 'black sites', to the apparent surprise of the military judge.[46]

D. The relevance of the Grand Chamber's observations in *El-Masri* in relation to any potential resort to *ex parte* materials and procedures

29. In *El-Masri* the Grand Chamber has also now recognised "the right to the truth regarding the relevant circumstances"[47] 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".[48] The Grand Chamber went on to apply the right to the truth to the specific facts in *El-Masri*, holding that, "[h]aving regard to the parties' observations, and especially the submissions of the third-party interveners, the Court also wishes to address another aspect […] 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 concept of 'State secrets' has often been invoked to

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endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 5. The trial of civilians by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is "necessary and justified by objective and serious reasons", and where "with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials". See UN Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 23 August 2007, § 22.

[43] Obama on terror trials: KSM will die. 18 November 2009, http://www.politico.com/news/stories/1109/29661.html

[44] "The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)." Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, § 59.

[45] *USA v. Khalid Sheikh Mohammad et al.,* Protective Order #1 to protect against disclosure of national security information, Military Commission Trial Judiciary, Guantánamo Bay, Cuba, 6 December 2012.

[46] See transcript of 28 January 2013, available at http://www.mc.mil/CASES/MilitaryCommissions.aspx. See also '9/11 defendant's attorney says U.S. is listening in on client conversations', Washington Post, 13 February 2013, http://www.washingtonpost.com/world/national-security/911-defendants-attorney-says-us-is-listening-in-on-client-conversations/2013/02/11/345ef972-746c-11e2-aa12-e6cf1d31106b_story.html; At Guantánamo, microphones hidden in attorney-client meeting rooms, Washington Post, 12 February 2013, http://www.washingtonpost.com/world/national-security/at-guantanamo-microphones-hidden-in-attorney-client-meeting-rooms/2013/02/12/812c7662-7552-11e2-95e4-6148e45d7adb_story.html?wpisrc=nl_headlines For further information on concerns over alleged violations of attorney-client confidentiality, see USA: 'Heads I win, tails you lose'. Government set to pursue death penalty at Guantánamo trial, but argues acquittal can still mean life in detention, 8 November 2001, http://www.amnesty.org/en/library/info/AMR51/090/2011/en, page 5.

[47] *El-Masri*, § 191.

[48] *El-Masri*, § 191.

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 […]."[49]

30. The interveners welcome this Court's refusal, in the instant case, to acquiesce to the Respondent State's offer to make available *ex parte* materials[50] for the Court's consideration. The interveners consider that to do so would be antithetical to and inconsistent with what the Grand Chamber's judgment in the *El-Masri* case has held in respect of the right to truth as well as UN standards and jurisprudence.[51] The same would apply in respect of the adoption of and resort to special procedures whereby the European Court of Human Rights could and would admit information from a Contracting Party *ex parte* and on which it could ultimately rely in the determination of a given case, so long as the court deployed so-called "special advocates" in relation to such *ex parte* material.[52]

31. The interveners contend that to allow a state to rely on secret evidence and argument, including by the use of special advocates, to defeat or defend against violations of the 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*.[53]

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[49] *El-Masri*, § 191.

[50] *Ex parte* material, i.e. to which the applicant and his or her representatives of choice would be denied access and which would therefore constitute secret evidence before this Court, on which this Court would be invited to and may ultimately rely in the determination of this case. See Polish Government's communication to this Court dated 5 September 2012 disclosed to the interveners following the Chamber's decision on 22 January 2013 to discontinue the application of Rule 33 § 2 of the Rules of the Court and to lift confidentiality in respect of the observations submitted to date by the Polish Government and the Applicant.

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

[52] See page 10 of the written third party submissions of the UN Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson QC, to this Court in the present case.

[53] UN Committee against Torture, General Comment no 3, 13 December 2012, §§ 30, 38 and 42 [emphasis added]: The UN Committee against Torture has affirmed that the right of victims of torture to redress under article 14 of the UN Convention against Torture entails, among other things, that:

> *Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation… **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.*
>
> *…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…*

Annex A

International Commission of Jurists

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

Amnesty International

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