In the Supreme Court of the United Kingdom

ON APPEAL FROM UKSC/2014/0264
HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)
Neutral citation: [2014] EWCA Civ 1394; reported: [2015] 2 WLR 1105

BETWEEN:

(1) THE RT HON JACK STRAW MP
(2) SIR MARK ALLEN CMG
(3) THE SECRET INTELLIGENCE SERVICE
(4) THE SECURITY SERVICE
(5) THE ATTORNEY GENERAL
(6) THE FOREIGN AND COMMONWEALTH OFFICE
(7) THE HOME OFFICE

Appellants/Defendants

-and-

(1) ABDUL-HAKIM BELHAJ
(2) FATIMA BOUDCHAR

Respondents/Claimants

(1) UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE
(2) UNITED NATIONS CHAIR--RAPPORTEUR ON ARBITRARY DETENTION
(3) REDRESS & ORS

Interveners

CASE FOR THE FIRST AND SECOND INTERVENERS

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I. INTRODUCTION

1. These are the written submissions of the First and Second Interveners ("**the Interveners**") in the appeal concerning the claims of Mr Belhaj and Mrs Boudchar ("**the *Belhaj* appeal**") pursuant to the order of the Court dated 29 July 2015. The *Belhaj* appeal is due to be heard between 9 and 12 November 2015, alongside Appeal No. UKSC/2015/0002 ("**the *Rahmatullah* appeal**"), which raises similar questions of law.

2. The Interveners are grateful for the opportunity to make submissions to the Supreme Court in relation to key aspects of international law raised by these proceedings. The importance of these matters is reflected by the fact that this is the first occasion on which UN Special Rapporteurs have sought to intervene in proceedings before the Court.

3. For the avoidance of doubt, these submissions are presented for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.[1]

(a) The Interveners

(i) The UN Special Rapporteur on Torture

4. The First Intervener, Professor Juan E. Méndez, is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to U.N. Human Rights Council Resolution 16/23 (A/HRC/RES/16/23).

5. Pursuant to Resolution 16/23, the First Intervener acts under the aegis of the Human Rights Council, without remuneration, as an independent expert within the scope of

[1] On the nature of those immunities, see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62.

his mandate which enables him to seek, receive, examine, and act on information from numerous sources, including individuals and States, regarding issues and alleged cases concerning torture and other cruel, inhuman, or degrading treatment or punishment.[2]

6. The First Intervener has previously filed intervener submissions before the United States Supreme Court, the European Court of Human Rights and the Supreme Court of Brazil.

(ii) The UN Chair-Rapporteur of the Working Group on Arbitrary Detention

7. The Second Intervener, Professor Mads Andenas, was the Chair-Rapporteur of the UN Working Group on Arbitrary Detention at the time of the application for leave to intervene in these proceedings, and intervened in the Court of Appeal below. Professor Andenas continues the intervention in these proceedings on behalf of, and at the request of, his successor as Chair-Rapporteur, Mr Seong-Phil Hong. The UN Working Group on Arbitrary Detention was established by Resolution 1991/42 of the Commission on Human Rights (E/CN/.4/RES/1991/42). Its mandate was most recently extended by Human Rights Council Resolution 24/7 (A/HRC/RES/24/7) dated 26 September 2013[3].

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[2] Professor Méndez is the author, with Marjory Wentworth, of TAKING A STAND (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition, and genocide in countries around the world. He was Co-Chair of the Human Rights Institute of the International Bar Association, London in 2010 and 2011; and Special Advisor on Crime Prevention to the Prosecutor, International Criminal Court, The Hague from mid-2009 to late 2010. Until May 2009, Professor Méndez was the President of the International Center for Transitional Justice (ICTJ). Concurrently, he was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003 he was a member of the Inter-American Commission on Human Rights of the Organization of American States, and its President in 2002. He directed the Inter-American Institute on Human Rights in San Jose, Costa Rica (1996-1999) and worked for Human Rights Watch (1982-1996). He teaches human rights at American University in Washington D.C. and at Oxford University in the United Kingdom. He previously taught at Notre Dame Law School, Georgetown, and Johns Hopkins.

[3] Professor Andenas is a Professor of Law at the University of Oslo. He has held senior academic appointments in the United Kingdom, including as Director of the British Institute of International and Comparative Law, London and Director of the Centre of European Law at King's College, University of London. He remains a Visiting Research Fellow of the Institute of European and Comparative Law, University of Oxford and a Senior Research Fellow at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. He is also a member of the Executive Council of the International Law Association. He has been a visiting professor at the University of Rome La Sapienza, the University of Paris I (Sorbonne), and Sciences Po, Paris.

8. Pursuant to those resolutions, the Chair-Rapporteur and the Working Group are mandated to carry out, amongst other things, the following functions:

8.1. To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned;

8.2. To seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;

8.3. To act on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and to bring to their attention these cases; and

8.4. To conduct field missions at the invitation of Governments, and to formulate deliberations on issues of a general nature in order to assist States to prevent and guard against the practice of arbitrary deprivation of liberty and to facilitate consideration of future cases.

9. The Working Group is the only United Nations Charter-based mechanism (as opposed to treaty-based mechanism) whose mandate expressly provides for consideration of individual complaints and a consequent right of petition of

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He was the Chair, Association of Human Rights Institutes (AHRI) in 2008, and has been a member of the International Law Association's Securities Law Committee since 1996. He has been the chair of the Norwegian Association of European Law and a member of the board of the Norwegian Association of International Law from 2009.

Professor Andenas was the Director of the Legal Office of the Royal Norwegian Ministry of Trade and Shipping 1985-86, and in the Royal Norwegian Ministry of Finance 1986-93, first the Director of the Banking Office, and then an Assistant and finally a Deputy Director General in the Economic Policy Department. He was Legal Adviser in the European Bank for Reconstruction and Development in its first phase of operation, responsible for EBRD's law reform assistance and advice on international law. He has worked as a consultant to the World Bank and to the International Monetary Fund.

individuals anywhere in the world. The opinions of the Working Group are reported to the United Nations Human Rights Council, which urges Member States to cooperate and comply with the Working Group and its opinions, and where States make statements about international and domestic law, human rights obligations in conventions and customary international law, and their own and other States' compliance with these. The Working Group promulgates restatements and recommendations, such as its *Deliberation No. 9 on the definition and scope of arbitrary deprivation of liberty in customary international law*, see A/HRC/19/57, 26 December 2011. More recently it has produced its *"UN Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court"* pursuant to UNHRC resolution 20/16 (2012), which are addressed further below.

10. The European Court of Human Rights has recognised that *'in view of the composition, functions, process complaints and investigative powers of this body, the Working Group of the United Nations on Arbitrary Detention should be viewed as "a procedure of international investigation or settlement" within the meaning of Article 35 of the Convention'* (*Peraldi v France*, Application No. 2096/05, Judgment of 7 April 2009, and more recently *Ramazan Cem Gürdeniz v Turkey*, Application no 59715/10, Judgment of 18 March 2014).

(b) The Nature of the Claims

11. As the Particulars of Claim in these proceedings make clear, it is the Respondents' case that they have been the victims of serious unlawful treatment in the form of rendition, extra-judicial and incommunicado detention and torture. They allege that the Appellants are jointly liable for their false imprisonment, which they procured *"by common design with the Libyan and US authorities"*, that *"by common design"* they *"arranged and encouraged unlawful rendition ... and extra-judicial detention"*, that they *"conspired in, assisted and acquiesced in torture, inhuman and degrading treatment, batteries and assaults inflicted upon the Claimants by the US and Libyan authorities"* and that they were *"recklessly indifferent to the illegality of the extra-judicial rendition of the Claimants to Libya, their detention in a US run "black site" in Bangkok and the illegality of the Claimants' detention in Libya where they would be held without the protection of the law and would be tortured"* (see the Particulars of Claim ("**PoC**") at ¶¶89-95).

12. The particulars of such alleged British involvement include **i)** notifying the Libyan authorities of the location of the Respondents (PoC ¶20), **ii)** knowledge and involvement in the rendition of the Respondents, including the possible refuelling of the rendition flight on Diego Garcia ((PoC ¶¶44, 48 & 50), **iii)** the interrogation of the First Claimant by British intelligence officers following his arrival in Libya, and **iv)** the wider political exploitation of the rendition and torture of the Respondents (PoC ¶50, 55 & 58).

13. In response to the Respondents' claims the Appellants maintain that the claims (save the negligence claims pleaded at PoC ¶¶99b-d and 100) should be dismissed by virtue of the doctrine of indirect impleader in state immunity and/or the doctrine of foreign act of state. Beyond this, the Appellants have made a bare denial of liability but have refused to plead to the specific facts alleged.

II. SUMMARY OF THE INTERVENERS' POSITION

14. The focus of these submissions is on the incompatibility of the Appellants' position on the Foreign Act of State doctrine with the international law obligations of the UK. As regards the Appellants' submission on state immunity, the Interveners would only express their agreement with the position of the Respondents at ¶¶43 to 67 of their Joint Case. In particular:

14.1. The doctrine of state immunity is, in international law, a procedural bar which precludes the courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party[4]. It is not concerned with the liability of a State for human rights violations in its own courts;

14.2. There is no support in international law for a doctrine of indirect impleader of the breadth that the Appellants contend for. Article 6(2)(b) of the UN Convention on Jurisdictional Immunities of States and their Property 2004 is

[4] See e.g. *Brownlie*, at p.487.

neither in force, nor reflective of customary international law. Moreover, even if it was, a proper construction of that article provides no support for a doctrine of indirect impleader wide enough to encompass the political or moral concerns of the relevant non-party states said to be at issue in the present proceedings; and

14.3. The reliance by the appellants on the *Monetary Gold* principle for these purposes is misplaced. The *Monetary Gold* principle only applies to (some) international tribunals and derives from the fact that the jurisdiction of such international tribunals is based on the consent of the parties. This principle does not apply to domestic courts and it does not say anything on the scope of the rule of state immunity.

15. By reference to the Foreign Act of State doctrine, the Appellants contend that there can be no determination of the present claims unless and until the Respondents **i)** bring claims and **ii)** obtain successful findings against each of the foreign States involved in the alleged conspiracy, in the domestic courts of those states (¶227 of the Appellants' Joint Case ("**App JC**")).

16. The effect of that position would be to immunise UK officials from claims alleging joint liability for torture and rendition in any case where:

16.1. the claims concern (in a "non-incidental" or "non-collateral" manner) acts by the agents of foreign States (either in or outside of their own territory);

16.2. the factual allegations are contested (even on the basis of a bare denial, as in the present case); and

16.3. for whatever reason (be it political interference, legal immunity, corruption, unfair trials and/or cost) it is not possible to first obtain positive findings, in respect of all necessary facts and legal breaches, against each of the foreign states involved in their own courts.

17. Such a consequence would not be compatible with international law. In particular:

17.1. The prohibition of torture is of the highest standing in international law, and is widely recognised as *jus cogens erga omnes*. That prohibition includes instigating, consenting to, tolerating, acquiescing in, or otherwise supporting torture;

17.2. Rendition of the kind complained of by the Respondents involves a similarly grave violation of international law, because:

17.2.1. it amounts to (at least) inhuman and degrading treatment in and of itself, because such rendition as alleged carried a risk of, and culminated in, treatment properly characterised as torture;

17.2.2. because of the extra-legal detention and enforced disappearance which the process involves;

17.3. States owe positive obligations under International law, amongst other things, to ensure that their legal systems guarantee an effective remedy for individuals whose international human rights have been breached by officials or agents of that state. Those obligations are not confined to cases where **i)** no other state has been involved and/or **ii)** where the factual allegations of the individuals are not contested;

17.4. In the fulfilment of their positive obligations it is routine and often required for States and their courts to examine whether foreign state agents have engaged in torture or other conduct contrary to international law;

17.5. The Foreign Act of State doctrine does not form part of (or draw support from) International law, and provides no justification (as a matter of International law) for the qualification of a State's *jus cogens erga omnes* obligations; and

17.6. International law and practice gives great importance to the rule of law and the holding of the executive to account for human rights violations, in particular in the context of rendition.

18. Brownlie has summarised the position in relation to the Foreign Act of State doctrine, and what the author describes as "*Judicial restraint and act of state*", in this way:

> "*Policy considerations .... have led courts to apply a further rule of non-justiciability, holding a claim to be barred if it requires determination of the lawfulness or validity of acts of a foreign state.... As with the wider doctrine of non-justiciability, exceptions to the doctrine of act of state nonetheless exist. The first is that the acts of a foreign state will be justiciable where their recognition would be contrary to English public policy. The exception arose originally with respect to gross human rights violations in Oppenheimer v Cattermole ([1976] AC 249, 265 (Lord Hodson) 277-8 (Lord Cross)) and was expanded in the decision in Kuwait Airways Corporation v Iraqi Airways Company to include acts of state done in clear violation of international law more generally ([2002] 2 AC 833, 1081, 1102-1103) .... Thus 'clearly established breaches' of international law may be considered part of the public policy of the UK, as are human rights more generally*" (see Brownlie's Principles of Public International Law 8th Edition, 2012 at pp. 72-77; see also *Yukos Capital v OJSC Rosneft Oil* [2012] 2 CLC 549 at ¶¶68-72; Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed. 2012 at 5-043 to 5-053).

19. Brownlie also provides a useful summary of the relationship between international law and the common law:

> "*The presumption in favour of interpreting English law in a way which does not place the UK in breach of an international obligation applies not only to statutes but also to the common law... It has become received wisdom that the common law approach to customary international law is that of 'incorporation', under which customary rules are to be considered 'part of the law of the land' provided they are not inconsistent with Acts of Parliament ..... The position in England is not that custom forms part of the common law but that it is a source of English law that the courts may draw upon as required*" (ibid pp. 67-68).

20. It is against that background that the Interveners hope their submissions on the position in International law will assist the Court in this appeal.

III. THE PROHIBITION OF TORTURE

(a) The prohibition is jus cogens erga omnes in customary international law

21. It is well established that the prohibition of torture is part of customary international law and is also a peremptory (*jus cogens*) norm. It is moreover an absolute prohibition which admits of no exceptions or derogations. The Interveners refer to the following authorities in that regard:

21.1. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422 (at ¶99);

21.2. The European Court of Human Rights' ("**ECtHR**") decisions in *Al-Adsani v United Kingdom* (2002) 34 EHRR 273 at ¶61 and in *Jones v United Kingdom* (2014) 59 EHRR 1 (at ¶¶59 to 69);

21.3. The decision of the ICTY in *Prosecutor v Furundžija* (1999) 38 ILM 317 at ¶¶153 to 157; and

21.4. *Caesar v Trinidad & Tobago*, Judgment of the Inter-American Court of Human Rights ("**IACtHR**") of 11 March 2005, Series C No 123, at ¶100.

22. The high status of the prohibition on torture in international law was likewise recognised domestically in the UK by the House of Lords in *A (No. 2) v Secretary of State for the Home Department* [2006] 2 AC 221[5], in the context of a case concerned with the admissibility of evidence obtained by torture. Lord Bingham gave the leading speech on the status of the prohibition of torture in international law, and the consequent duties imposed upon states. In doing so, he also expressly referred to the circumstances in which the English Courts could properly refuse recognition for conduct which represented a serious breach of international law (see ¶¶30-34). Lord Bingham expressed his conclusions in the following terms:

[5] See also *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 at pp.197 to 199.

"[33] *There can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the "common enemies of mankind" (Demjanjuk v Petrovsky 612 F Supp 544 (1985), 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a "right inherent in the concept of civilisation" (Higgs v Minister of National Security [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as "fundamental and universal" (Siderman de Blake v Argentina 965 F 2d 699* (1992), 717) *and the UN Special Rapporteur on Torture (Mr Peter Koojimans) has said that "If ever a phenomenon was outlawed unreservedly and unequivocally it is torture" (Report of the Special Rapporteur on Torture, E/CN.4/1986/15, para 3).*

(3) *The duty of states in relation to torture*

[34] *As appears from the passage just cited, the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture. In Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, paras 29, 117, the House refused recognition to conduct which represented a serious breach of international law. This was, as I respectfully think, a proper response to the requirements of international law. In General Comment 20 (1992) on article 7 of the ICCPR, the UN Human Rights Committee said, in para 8:*

> *"The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."*

Article 41 of the International Law Commission's draft articles on Responsibility of States for internationally wrongful acts (November 2001) requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law. An advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004, General List No 131), para 159 explained the consequences of the breach found in that case:

> *"159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."*

> *There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law. As McNally JA put it in S v Nkomo 1989 (3) ZLR 117, 131*:
>
> > *"It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture."* [...]"

(b) The prohibition includes state instigation, acquiescence and consent to torture, including torture committed by another state

23. The Interveners would emphasise that the prohibition of torture in international law covers not only the physical act of torture itself but also the instigation, acquiescence in or consent to such torture by one or more additional States (or indeed private individuals). This is an important point, having regard to the efforts of the Appellants at ¶¶168, 176 & 227(2) App JT to relegate or downplay the significance of the involvement alleged of British officials in the rendition and torture of the Respondents.

24. A State which instigates, procures or acquiesces in torture is as much a perpetrator, in international law, as the individual or entity which carries out the physical infliction of such torture. This follows form the definition of torture in Article 1(1) of the UNCAT:

> *"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"* (emphasis added).

25. Such instigation, consent or acquiescence on the part of the relevant state can be to the actions of another state. This is in keeping with an orthodox understanding of the international responsibility of states, as encapsulated in Article 16 of the International

Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts:

> '***Article 16. Aid or assistance in the commission of an internationally wrongful act***
>
> *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
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> *(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
> *(b) the act would be internationally wrongful if committed by that State.'*

26. Moreover, under articles 41(1) and (2) of the ILC Articles, states are subject to additional obligations to refrain from cooperation in internationally wrongful acts where those acts amount to a '*serious breach*' that is a '*gross or systemic failure*' by the relevant state to fulfil '*an obligation arising under a peremptory norm of general international law.*'

27. In *El-Masri v Macedonia* (2013) 57 EHRR 25, the ECtHR held Macedonia responsible not only for the actions of its own agents in holding the claimant in a hotel for 23 days, but also for the treatment (amounting to torture) which he suffered at Skopje airport at the hands of the CIA, because the acts took place with the acquiescence or connivance of Macedonian agents, who "actively facilitated" that conduct (see ¶¶205 to 211).

28. Similarly, in *Al-Nashiri v Poland* & *Husayn v Poland* (2015) 60 EHRR 16, another rendition case, the ECtHR held Poland responsible for the actions of the CIA on its territory, having regard to the fact that Poland '*for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring*' (at ¶517 of *Al-Nashiri*, see also ¶513 of *Husayn*). The Court moreover held that, even if Polish officials did not witness or participate in the specific acts of ill treatment and abuse endured by the applicant, Poland was liable for such acts, as it must have been aware of the serious risk of such treatment contrary to article 3 ECHR. Such knowledge was inferred both from Poland's general complicity in the CIA's program on its territory and from a variety of publicly accessible information

on the CIA's rendition program (¶¶418 to 443 & 517 of *Al Nashiri*, ¶¶420 to 445 of *Husayn*).

29. Likewise, in *Gelman v Uruguay*, Judgment of 24 February 2011, IACtHR, Series C No. 221, the Court considered the responsibility of Uruguay for its collaboration with Argentina in the enforced disappearance, alleged torture and ultimate murder of the claimants' pregnant 19 year old daughter-in-law. The case is one of a number of IACtHR cases which relate to "Operation Condor", a campaign co-ordinated between the governments of Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil in the period between 1975 and 1985, with the aim of collectively wiping out political opposition to the regimes in those countries at that time.

30. The victim in *Gelman* was abducted by the Argentine Security forces from her home in Buenos Aires on 24 August 1976 by Argentine and Uruguayan "commandos", and conveyed to a clandestine detention centre elsewhere in the city (¶¶83 and 84). She was then secretly transferred to Montevideo, Uruguay, by the Uruguayan authorities in October 1976. Ms Garcia was held there until after she had given birth, and was then either killed in Uruguay or transferred back to Argentina and killed (¶89).

31. At ¶¶91 to 101 of the IACtHR judgment, the Court found Uruguay responsible for a variety of very serious breaches of the American Convention on Human Rights. It did so having regard to the entirety of the history of Ms Garcia's case and without distinguishing between those acts which had been carried out by the Argentine authorities and those acts which had been carried out by the Uruguayan authorities. At ¶100 the Court held that:

> *"The preparation and execution of the arrest and subsequent disappearance of María Claudia García could not have been perpetrated without the knowledge or higher orders of the military, police, and intelligence headquarters at the time, or without the collaboration, acquiescence, or tolerance, manifested in various actions, carried out in a coordinated or concatenated manner, by members of the security forces and intelligence services (and even diplomats) of the States involved, wherein State agents not only grossly failed in the obligations to prevent and protect against violations of the rights of the alleged victims, enshrined in Articles 1(1) of the American Convention, but also used the official investiture and resources provided by the State to commit the violations."*

32. Moreover, the Court felt able to come to that conclusion without requiring Argentina to be joined as a party to the case. The Court went on at ¶252 to order Uruguay to investigate, identify, prosecute and punish '*those responsible for the enforced disappearance*' of Ms Garcia (the Claimant's daughter-in-law) and her husband, again without distinguishing between those persons involved who were agents of Uruguay and those who were agents of Argentina.

IV. RENDITION, SECRET DETENTION AND ENFORCED DISAPPEARANCE AS A GRAVE VIOLATION OF INTERNATIONAL LAW

33. Just as the instigation, acquiescence or consent of British officials in torture is a violation of a *jus cogens erga omnes* norm, the alleged involvement of such officials in the arbitrary and secret detention of the Respondents, and their enforced disappearances, would likewise (if true) constitute a separate violation of fundamental peremptory norms of international law.

34. The concept of a peremptory norm in general international law more broadly was addressed by Lord Bingham in his speech in *A (No. 2)* at [33]. He set out the concept's definition as a "*norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*" (citing Article 53 of the Vienna Convention on the Law of Treaties (1969)).

(a) Arbitrary Detention is prohibited in all major human rights instruments

35. The prohibition of arbitrary deprivation of liberty is recognised in all major international and regional instruments for the promotion of human rights, including:

35.1. Article 9 of the Universal Declaration of Human Rights;

35.2. Article 9 of the International Covenant on Civil and Political Rights ("**ICCPR**");

35.3. Article 5(1) of the European Convention on Human Rights ("**ECHR**");

35.4. Article 7(1) of the American Convention on Human Rights ("**ACHR**");

35.5. Article 6 of the African Charter of Human and Peoples' Rights; and

35.6. Article 14 of the Arab Charter on Human Rights.

36. The widespread ratification of international treaty law on arbitrary deprivation of liberty, combined with the widespread translation of the prohibition into national laws, evidences a near universal State practice as regards the prohibition, which satisfies the test for a customary rule of international law[6].

(b) The prohibition of arbitrary detention is widely regarded as a fundamental norm of customary international law

37. Many United Nations resolutions confirm the *opinio juris* supporting the customary nature of these rules, in particular:

37.1. Resolutions speaking of the arbitrary detention prohibition with regard to a specific State that at the time was not bound by any treaty prohibition of arbitrary detention[7]; and

37.2. Resolutions of a very general nature on the rules relating to arbitrary detention for all States, without distinction by reference to treaty obligations[8].

38. The fundamental nature of the prohibition of arbitrary detention has also been emphasised by the International Court of Justice, which has previously held that "*wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the United Nations Declaration of Human Rights*" (see *United States Diplomatic and Consular*

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[6] See the recent restatement of the test by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012 p. 99, at p. 122, ¶55;

[7] See for example, Security Council resolutions 392 (1976), 417 (1977) and 473 (1980) on South Africa.

[8] See for example General Assembly Resolution A/RES/62/159, General Assembly 11 March 2008, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/159&Lang=E.

Staff in Tehran (United States of America v. Iran) (the "Tehran Hostages Case")_[1980] ICJ Rep p.3 at ¶¶90-91).

39. The ICJ has more recently emphasised that the prohibition is of an absolute nature (insofar as the deprivation of liberty is found to be arbitrary), and applies *"in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued."*[9] Similarly, the right of anyone deprived of his or her liberty to challenge the legality of their detention before a court is expressed in each of the treaties mentioned above to be non-derogable.

40. The UN Working Group on Arbitrary Detention has consistently maintained that the prohibition of the arbitrary deprivation of liberty forms a part of customary international law, and constitutes a peremptory or *jus cogens* norm[10]. On 14 September 2015 it presented, to the UN Human Rights Council, its Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court. Those principles and guidelines were produced pursuant to UNHRC resolution 20/16 (2012), and its recommendations are drawn from international standards and recognised good practice. The Working Group restates international law, both obligations under UN treaties and in customary international law. They have been adopted by the Working Group following a global consultation with UN member states, international organisations and other bodies. To that end:

40.1. Principle 1 recognises that everyone has the right to be free from arbitrary of unlawful deprivation of liberty and that everyone is guaranteed the right to take proceedings before a court, in order that that court may decide on the arbitrariness or lawfulness of the detention, and obtain without delay appropriate and accessible remedies (see further the authorities cited at footnotes 33, 39 and 40 of the Principles); and

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[9] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 Judgment of 30 November 2010, at ¶77.

[10] See for example its Report to the Human Rights Council dated 24 December 2012 (A/HRC/22/44) at ¶¶37 to 75.

40.2. "Arbitrary" is defined for these purposes as including where **i)** *'it is clearly impossible to invoke any legal basis justifying the deprivation of liberty'* and **ii)** where *'the total or partial non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and in the relevant international instruments is of such gravity as to give the deprivation of liberty an arbitrary character'* (see ¶10 of the Introduction in the Principles).

41. The Basic Principles and Guidelines produced by the Working Group have been strongly endorsed by the International Commission of Jurists in its commentary on those principles[11], which notes the especial importance of such principles *'in the light of some recent State practices, including in the context of unlawful rendition and secret detention programmes'* (p1).

42. The American Law Institute's Restatement of the Law of the Foreign Relations Law of the United States (cited by the House of Lords as an authoritative source of customary international law (see *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 at ¶23)) likewise includes the following relevant passages:

> *"Section 702 Customary International Law of Human Rights*
> *A state violates international law if, as a matter of state policy, it practices, encourages, or condones ....*
>
> *(e) prolonged arbitrary detention...*
>
> *Comment:*
>
> *a. Scope of customary law of human rights. This section includes only those human rights whose status as customary law is generally accepted and whose scope and content are generally agreed. ...*
>
> *h. Prolonged arbitrary detention. Detention is arbitrary if it is not pursuant to law; it may be arbitrary also if it is incompatible with principles of justice or with the dignity of the human person ... arbitrary detention violates customary law if it is prolonged and practised as state policy.*
>
> *REPORTERS' NOTES':*
>
> *6. Prolonged arbitrary detention. Arbitrary detention is cited as a violation of international law in all comprehensive international human rights*

[11] Available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Universal-Commentary-WGAD-PrincGuideArmedConflict-Advocacy-2015-ENG.pdf.

instruments…[see e.g. Universal Declaration of Human Rights Article 9; ICCPR Article 9; ECHR Article 5];

11. Human rights law and jus cogens. Not all human rights norms are jus cogens, but those in clauses (a) to (f) qualify".

(c) Enforced Disappearance / Secret Detention specifically as a grave violation of international law

43. Secret incommunicado detention and/or the enforced disappearance of the individual is regarded as the most egregious violation of the right to liberty, and is the subject of specific provision in international law, further supporting the proposition advanced above.

44. The International Convention for the Protection of All Persons from Enforced Disappearances ("**the Enforced Disappearances Convention**"), A/RES/61/177; 14 IHRR 582 (2007), prohibits enforced disappearances in <u>all</u> circumstances and characterises participation in such disappearances as an international crime (see Articles 1, 2 & 6). The Convention defines an enforced disappearance as "*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State … followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*". It would appear on the pleaded facts that the Respondents were subject to such disappearance for three months and at least until the moment of release of the Second Claimant.

45. The Convention entered into force on 23 December 2010 and has now been signed by 93 countries. Although the United Kingdom has yet to sign the Convention, an official note in the House of Commons Library describes its support for the Convention (see Standard Notes 6119 dated 10 November 2011 pp. 6-7 and 6169 dated 21 December 2011, p.6).

46. "Secret detention", which is defined in similar terms to the concept of enforced disappearance[12], has been expressly characterised as breaching a *jus cogens* norm by the United Nations Human Rights Committee[13], the United Nations Working Group on Arbitrary Detention, the United Nations Working Group on Enforced or Involuntary Disappearances, the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms, and the United Nations Special Rapporteur on Torture[14]. The Enforced Disappearances Convention likewise prohibits secret detention (Article 17(1)).

47. Moreover, the United Nations General Assembly has expressly acknowledged that prolonged incommunicado detention can amount to torture in and of itself (UN General Assembly Resolution 60/148 at ¶11), which would by definition render it contrary to *jus cogens erga omnes* norms.

48. Each of the main international human rights bodies has confirmed that enforced disappearances constitute a violation of multiple human rights:

48.1. In *Kurt v Turkey* (1999) 27 EHRR 373 the ECtHR stated at ¶¶123-124 that:

> *".. the unacknowledged detention of an individual is a complete negation of [the] guarantees [of personal liberty and personal security] and a most grave violation of Article 5* [ECHR] *... Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance";*

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[12] Defined as occurring *"if State authorities acting in their official capacity ... deprive persons of their liberty; where the person is not permitted any contact with the outside world ("incommunicado detention"); and when the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his / her liberty hidden from the outside world .... or refuses to provide or actively conceals information about the facts or whereabouts of the detainee"* (see A/HRC/13/42 at ¶8 p. 11).

[13] See *El-Megreisi v Libyan Arab Jamahiriya* (1994) UN Doc CCCPR/C/50/D/440/1990, *Aber v Algeria* (2007) UN Doc CCCPR/C/90/D/1439/2005 and *Polay Campos v Peru* (1994) UN Doc CCPR/C/61/D/577/1994 and HRC General Comment No. 35, HRC Document CCPR/C/21/Rev.1/Add.11 at ¶¶14 and 67.

[14] see e.g. Office of the High Commissioner for Human Rights CCPR General Comment No. 24 at [8]; Human Rights Council Joint Study on Global Practices in relation to Secret Detention by Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, GE.10-11040 / A/HRC/13/42 at pp. 2, 4, 5 and ¶¶20, 32, 34, 35, 49, 55)

48.2. Similar statements emerge in *Velasquez-Rodriguez v Honduras*, IACtHR Series C No 4 (29 July 1988); *Sarma v Sri Lanka* CCPR/C/78/D/950/2000 (Human Rights Committee)(16 July 2003); *Coronel v Colombia* CCPR/C/76/D/778/1997 (24 October 2002) and *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, 14th Activity Report of the African Commission on Human and People's Rights (2001).

49. The specially egregious nature of enforced disappearances was recognised domestically in the recent High Court decision of *R(Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin), [2015] 3 WLR 503. At ¶209, the Court stated that:

> *'enforced disappearance is a concept recognised in international law which is internationally condemned. It involves detention outside the protection of the law where there is a refusal by the state to acknowledge the detention or disclose the fate of the person who has been detained. Its cruelty and vice lie in the fact that the disappeared person is completely isolated from the outside world and at the mercy of their captors and that the person's family is denied knowledge of what has happened to them.'*

50. The Court went on at ¶¶210 to 225 to review a number of international instruments and the case law of the ECtHR before concluding that, in the particular case of enforced disappearances, there is a positive duty on the state under article 5 ECHR to investigate what has happened to the relevant individuals, wherever *'there is an arguable claim that a person has been taken into state custody and has not been seen since'*.

51. So far as State practice is concerned, the Interveners are unaware of any State advancing a case that prolonged incommunicado detention without access to any judicial process is compatible with international law: on the contrary, the instruments and authorities cited above demonstrate a widespread acceptance that such detention is unlawful in all circumstances.

V. THE POSITIVE OBLIGATION TO PROVIDE AN EFFECTIVE REMEDY

(a) The legal basis of the obligation

52. An essential part of State obligations in respect of international human rights is the obligation not just to refrain from prohibited conduct but also to positively provide individuals with an effective remedy where they claim that their rights have been breached by the State.

53. The right to an effective remedy appears in all of the main international human rights treaties relevant to this context. In particular:

53.1. Article 8 of the Universal Declaration of Human Rights provides that *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"*;

53.2. Article 2(3) of the ICCPR provides that:

> *"Each State Party to the present Covenant undertakes:*
>
> > *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
> > *(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
> > *(c) To ensure that the competent authorities shall enforce such remedies when granted"*;

53.3. Article 13 of the ECHR provides that *"everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"*;

53.4. Article 25 of the ACHR provides for the "right to judicial protection", namely:

> 1. *"Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.*
>
> 2. *The States Parties undertake:*
>
>> 1. *to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;*
>>
>> 2. *to develop the possibilities of judicial remedy; and*
>>
>> 3. *to ensure that the competent authorities shall enforce such remedies when granted."*

53.5. In the specific context of torture, Article 14 of the UNCAT likewise provides that:

> 1. *"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*
>
> 2. *Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."*

53.6. Similarly, Article 24(4) and (5) of the Enforced Disappearances Convention provides that:

> *"4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.*
>
> *5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:*
>
> *(a) Restitution;*
> *(b) Rehabilitation;*
> *(c) Satisfaction, including restoration of dignity and reputation; and*
> *(d) Guarantees of non-repetition."*

54. In support of the general application of the right to an effective remedy, UN General Assembly resolution 60/147 of 16 December 2005 sets out the '*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*'[15]. These principles included:

54.1. a recommendation to States to '*take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general*';

54.2. principles 2(c) and 3(d), which contains general rights to an effective remedy; and

54.3. principle 11, which provides that the remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

54.3.1. Equal and effective access to justice;

54.3.2. Adequate, effective and prompt reparation for harm suffered; and

54.3.3. Access to relevant information concerning violations and reparation mechanisms.

55. The UN Working Group on Arbitrary Detention has itself repeatedly emphasised the importance of providing for an effective remedy for violations of international human rights, the particular role of tortious remedies within that, and the need to avoid the erection of barriers to such remedies in the form of immunities, jurisdictional limitations, procedural hurdles and other barriers[16].

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[15] Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

[16] Opinion No. 50/2014 (United States of America and Cuba) A/HRC/WGAD/2014, Opinion No. 52/2014 (Australia and Papua New Guinea) A/HRC/WGAD/2014.

56. Nothing in the materials above limits the duty to provide such a remedy to cases where the torture occurred on the territory of the relevant member state. The remedy is also owed in respect of acts of torture occurring abroad for which the relevant state is responsible. The Interveners agree with and adopt the eight reasons provided in support of that proposition in the Appendix to the Joint Case of the Respondents.

57. It is likewise well established that for a remedy to be effective, State Parties must ensure that there is adequate access to civil as well as criminal justice. This is implicit in the requirement, in the majority of treaty provisions above, that an effective remedy include fair compensation to the victim of the breach[17]. The same point has also been repeatedly emphasised, in the specific context of torture, by the Committee against Torture in its recent jurisprudence[18]:

> *"9.7...The Committee recalls in this respect that article 14 of the Convention recognizes not only the right to fair and adequate compensation, but also requires States parties to ensure that the victim of an act of torture obtains redress. The redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case. The Committee considers that, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. It considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place."*[19]

(b) The positive obligation to provide an effective remedy is not confined to circumstances in which the factual and legal allegations are admitted

58. On the Appellant's case, the public policy exception to Foreign Act of State is only available where, as a matter of fact and law, it is not contested, or incontestable, that

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[17] See for example, in the ECHR context, K v United Kingdom (2009) 48 EHRR 29 at ¶45 and MAK v United Kingdom (2010) 51 EHRR 14 at ¶¶88 and 89.

[18] Evloev v. Kazakhstan adopted 17 December 2013 CAT/C/51/D/441/2010 Communication No. 441/2010 ¶9.7; Bendib v. Algeria adopted 23 December 2013, CAT/C/51/D/376/2009 Communication No. 376/2009, ¶6.7. See also communication No. 269/2005, Salem v. Tunisia, decision adopted on 7 November 2007, ¶16.8; Gerasimov v. Kazakhstan, adopted 10 July 2012, CAT/C/48/D/433/2010, Communication No. 433/2010, ¶12.8.

[19] Evloev v. Kazakhstan adopted 17 December 2013 CAT/C/51/D/441/2010 Communication No. 441/2010, ¶9.7.

a clear breach of fundamental norms of international law has occurred (see ¶¶147 to 152 and 155 to 165 App JT).

59. There is no basis in international law for limiting the positive obligation to provide an effective remedy to such circumstances. Each of the treaty articles providing for an effective remedy set out above must be interpreted in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. It would be contrary to the ordinary meaning and purpose of each of those articles to interpret them in such a manner.

60. Thus, under the ECHR, for example, an effective remedy is clearly owed in respect of all claims of ECHR violations (*Klass v Germany* (1979-80) 2 EHRR 214 at ¶64). It is only claims which are manifestly ill-founded or unarguable that are outside of the protection of Article 13 ECHR (see *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 at ¶33).

61. Such a limitation would also run contrary to the way in which the burden of proof operates in international law in respect of allegations of torture. Where an allegation of torture has been made and some evidence of this has been submitted, it is generally for the State Party to prove that the torture, inhumane or degrading treatment did not take place. This in part reflects the positive obligation of the State to investigate allegations of torture. In *B.S. v Spain*, Application No 47159/08, Judgment of 24 July 2012, the ECtHR explained at ¶39 that:

> *"where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with one under Article 2, should be capable of leading to the identification and punishment of those responsible (see, regarding Article 2 of the Convention, McCann and Others v. the United Kingdom, 27 September 1995, § 161, Series A no. 324; Kaya v. Turkey, 19 February 1998, § 86, Reports of Judgments and Decisions 1998-I; Yasa v. Turkey, 2 September 1998, § 98, Reports 1998-VI; and Dikme v. Turkey, no. 20869/92, § 101, ECHR 2000-VIII). Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see Assenov and Others v. Bulgaria, 28 October 1998, § 102, Reports 1998-VIII)".*

62. The ECtHR went on at ¶58 to state, in the related context of racially motivated violence, that:

> *"The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence (see, mutatis mutandis, Nachova and Others v. Bulgaria [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII). Lastly, the Court reiterates that the onus is on the Government to produce evidence establishing facts that cast doubt on the victim's account (see Turan Cakir v. Belgium, no. 44256/06, § 54, 10 March 2009, and Sonkaya v. Turkey, no. 11261/03, § 25, 12 February 2008)."* (emphasis added)

63. A similar onus is imposed upon States by the Human Rights Committee when it investigates complaints of torture violating the ICCPR. In the recent decision of *Kitenge v. Democratic Republic of Congo*[20], the HRC stated that:

> *"6.3 The Committee recalls that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party, due weight must be given to the author's allegations."*

64. Likewise, in the *non-refoulement* context, the constant jurisprudence of the Human Rights Committee has been that although the burden of proof lies primarily on the authors of complaints, "[...] *the burden of proof cannot rest alone on the*[m], *especially considering that the authors and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information*" (see, e.g. *Umetaliev v Kyrgyzstan (Communication 1275/2004)* (20 November 2008) at ¶9.5).

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[20] Adopted on 23 April 2014, CCPR/C/110/D/1890/2009, Communication No. 1890/2009.

VI. THE POSITIVE OBLIGATIONS OF STATES ROUTINELY REQUIRE THEM TO CONSIDER AND INVESTIGATE THE CONDUCT OF FOREIGN STATES AND THEIR COMPLIANCE WITH INTERNATIONAL LAW

65. As a matter of international law, there is no basis for circumscribing the right of individuals to an effective remedy against a state for torture and/or rendition simply because the provision of such a remedy will involve considering the lawfulness of foreign State conduct by reference to International law. Such determinations are a routine and necessary part of every State's performance of its obligations in respect of the protection of international human rights.

66. To take one important example, such scrutiny is a necessary element in any claim concerning the *non-refoulement* obligations of States not to extradite or deport individuals to a jurisdiction where their human rights will be infringed. In the present context:

66.1. Article 3 of the UNCAT provides that:

> *"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".*

66.2. Article 16 of the Enforced Disappearances Convention likewise provides that:

> *"1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law."*

67. The Interveners note that there are many examples of English courts scrutinising the practices of foreign States (even on their own territory) by reference to international law in a variety of contexts:

67.1. the case of *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110 provides an important example, from the deportation context, of the willingness and obligation of Courts to scrutinise whether the practices of other States are compliant with human rights and international law. This extended to independently scrutinising whether diplomatic assurances of human rights compliance provided by the receiving State could be relied upon prior to deporting an individual to that State. Whilst rejecting an alleged principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon, Lord Phillips emphasised at ¶¶114 and 115 of his judgment that:

> *"It is obvious that if a state seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subjected to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3.*
>
> *115 That said, there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by state agents is endemic. This comes close to the "Catch 22" proposition that if you need to ask for assurances you cannot rely on them. If a state is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?"*

67.2. the decision of the House of Lords in *A (No. 2)* provides another good example. In order to operate the exclusionary rule identified by the Judicial Committee in that case, the process which was envisaged was (i) the raising of a plausible case that evidence had been obtained by torture by foreign state agents (ii) investigation of that issue by the relevant tribunal (in that case the Special Immigration Appeals Commission but in other related contexts the High Court) (iii) a finding by the tribunal as to whether it had been

established that the evidence had indeed been so obtained and (iv) if so established the exclusion of such evidence, (see Lord Hope at ¶¶118-127);

67.3. numerous other examples of English Courts expressly criticising conduct on the part of foreign states for the purpose of resolving issues arising in English proceedings can also be given from judicial review proceedings (e.g. *R(Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598), jurisdiction disputes raising *forum non conveniens* issues in ordinary civil actions (*Yukos Capital SARLS v OJSC Rosneft Oil Co.* [2012] 2 CLC 549), extradition and deportation proceedings and immigration and asylum claims;

67.4. Beyond those examples, the Interveners note the long list of further examples provided by the Respondents at ¶¶135 and 136 of their Joint Case. As noted above, this practice is entirely reflected in the international practice relating to *non-refoulement* complaints.

VII. NO SUPPORT IN INTERNATIONAL LAW FOR THE FOREIGN ACT OF STATE DOCTRINE ADVANCED BY THE APPELLANTS

68. Having outlined the positive obligations of the UK under international law to provide an effective remedy to victims of torture and rendition, the Interveners would emphasise that, by contrast, the Foreign Act of State doctrine is not itself a concept which receives recognition in customary international law. Its basis and limits are defined by the constitutional competence of the UK Courts[21], not international law.

69. It is a well-established principle of international law that a state may not invoke the provisions of its own municipal law as restricting or justifying the breach of its

[21] See *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359 at ¶42 and *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398 at 421-423. See also the analysis of the US Act of State Doctrine by US Supreme Court Justice Stephen Breyer in "The Court and the World" (2015).

international law obligations[22]. So far as international law is concerned, the *jus cogens erga omnes* obligations outlined above cannot be qualified or overridden by the Foreign Act of State doctrine, which is recognised in certain common law jurisdictions but which does not form part even of ordinary international law.

70. Insofar as the Appellants seek to support the doctrine by reference to "international comity" (App JC ¶122(4)), the Interveners would emphasise that comity is not a norm or principle which sounds in international law: it is by definition an extra-legal concept. Insofar as the Appellants seek, beyond comity, to rely upon the sovereign equality of states, the effect and limits of that principle are defined in this context by the doctrine of state immunity. The principle of sovereign equality provides no basis, in international law, for going beyond the limits of the state immunity doctrine.

71. Insofar as the Appellants seek to rely on the ICJ's *Monetary Gold* principle[23] (at ¶¶40, 131 and 132 App JT) to give the Foreign Act of State doctrine an international law underpinning, such reliance is misconceived. That principle is a rule of admissibility observed by the ICJ as a consequence of the fact that its adjudicative jurisdiction is based on mutual consent (see Article 36 of the ICJ Statute).[24] It has no bearing either upon the international law of state immunity or upon the constitutional competence of the UK Courts to hold their Executive to account. It is clear that this principle does not apply to domestic courts, and it does not say anything on the scope of the rule of state immunity. The Interveners note and agree with the submissions of the Respondents at ¶¶68 to 74 of their Joint Case in this regard.

72. Moreover, the *Monetary Gold* principle is not a rule which is observed by other international courts, in particular those concerned with the enforcement of human rights, whose jurisdiction is not solely consensual, and before whom individuals have standing:

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[22] See the Vienna Convention on the Law of Treaties 1969, Article 27; the ILC Articles on State Responsibility 2001, Article 3; *Exchange of Greek and Turkish Populations* (1925) PCIJ, Series B, No. 10 s. 20), *Alabama Arbitration (Great Britain v US) (1872)* in Moore, 1 International Arbitration 495, 656.

[23] See *Monetary Gold Removed from Rome in 1943 (Preliminary Question)* Judgment, ICJ Reports 1954 p.19; *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections*, Judgment, ICJ Reports 1992, p. 240 and *East Timor (Portugal v Australia)* Judgment, ICJ Reports 1995 p.90.

[24] *Monetary Gold* at p. 32: "*the Court can only exercise jurisdiction over a State with its consent*".

72.1. In each of *El Masri*, *Al-Nashiri* and *Husayn* the ECtHR had no hesitation in both **i)** factually investigating the actions of the CIA and **ii)** in holding that such acts amounted to torture (contrary to Article 3 ECHR) and unlawful detention (contrary to Article 5 ECHR). The ECtHR did so, as a necessary element in the process of holding Macedonia and Poland to account for their complicity, notwithstanding that the US was not a party to any of those cases. The Interveners refer in particular to ¶¶206-211 & 234-239 in *El Masri*, ¶¶404,408-409, 415, 419 & 511 in *Husayn* and ¶¶404,408-409, 415, 419 & 510 in *Al Nashiri*;

72.2. Likewise, the IACtHR, when considering the actions of various Latin American states during Operation Condor, considered itself competent to assess the complicity of one state, by reference to the actions of others, without those other states being parties to the proceedings (see for example *Gelman*, above, concerning the complicity of Uruguay in the actions of Argentinian commandos against the relatives of the claimants);

72.3. The *Monetary Gold* principle accordingly has a bearing only upon cases between States and indeed it originated with such a case.

VIII. RELEVANT INTERNATIONAL JURISPRUDENCE AND PRACTICE ON THE IMPORTANCE OF HOLDING THE EXECUTIVE TO ACCOUNT

(a) International importance of the Rule of Law

73. Insofar as the Appellant's submissions on Foreign Act of State may be reduced to an assertion that the matters at issue in the present proceedings are non-justiciable, in addition to the peremptory (*jus cogens*) norms relied on above, the Interveners would also briefly refer the Court to the importance given in international law to the rule of law and the review of the legality of executive action by the judiciary.

74. The rule of law is a cornerstone of the international legal system (as set out in the Preamble to the United Nations' Universal Declaration on Human Rights (1948): "*whereas it is essential* [...] *that human rights should be protected by the rule of law.*") The

rule of law is likewise prominent in the preamble to the ECHR and in Article 2 of the Treaty on European Union (Consolidated version, OJEU C326, 26.10.2012, pp. 13-390)). It is well-established that a key feature of the rule of law is the capacity of judicial bodies to hold the Executive to account. The *"fact that a legal question also has political aspects"* does not mean that a court (even an international court) *"has no jurisdiction"* (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p.155 at ¶41).

75. Consistent with this approach, it is notable that the Council of Europe's Committee of Ministers (on which the United Kingdom is of course represented) has underscored the obligation of all member states to take steps to provide effective remedies for victims of serious human rights violations. Article XVI of the Committee's Guidelines on eradicating impunity for serious human rights violations, 30 March 2011 requires that *"States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition"*.

(b) Accountability for rendition

76. International practice likewise underscores the imperative of investigating and adjudicating upon human rights violations perpetrated in the course of the CIA's rendition programme and the wider "war on terror".

77. The *El Masri* decision provides a useful compendium of the relevant international standards and expressions of international concern at the practice of extraordinary rendition (see ¶¶98-105, 106-122, 126 & 127)[25] and illustrates the extensive public

[25] See A/HRC/13/42, 19 February 2010, *Joint study on global practices in relation to secret detention in the context of countering terrorism,* undertaken by the Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism; on torture and other cruel, inhuman or degrading treatment or punishment and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc, and also Weisbrodt & Bergquist, *Extraordinary Rendition: A Human Rights analysis*, (2006) 19 Harv. Hum Rts. J.

criticisms of United States authorities that have already been made in this regard. These include:

77.1. Resolutions 1443 and 1463 of the Parliamentary Assembly of the Council of Europe;

77.2. UN General Assembly Resolution 60/148;

77.3. The Statement of the UN High Commissioner for Human Rights on the detention of Taliban and Al Qaeda prisoners at the US Base in Guantanamo Bay, Cuba, 16 January 2002;

77.4. European Commission for Democracy through Law (Venice Commission) Opinion 363/2005;

77.5. The Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism A/HRC/10/3;

77.6. UN Human Rights Council Resolutions 9/11 and 12/12 on the Right to Truth;

77.7. Council of Europe Guidelines on eradicating impunity for serious human rights violations;

77.8. Cases *Agiza v Sweden* (233/2003) UN Doc.CAT/C/34/D/233/2003 (2005) (UN Committee against Torture) and *Alzery v Sweden* UN Doc.CCPR/C/88/D/1416/2005(2006) (UN Human Rights Committee) (on the responsibility of Sweden for the rendition of Egyptian nationals); and

77.9. A number of reports by Amnesty International, the International Red Cross, and other well recognised international NGOs.

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123 for a summary of the principal international instruments breached by the practice of extraordinary rendition.

78. A number of further such reports and inquiries are cited in *Al-Nashiri* at ¶¶213 to 228, 241, 266 to 282 (namely inquiries and resolutions of the European Parliament) and 283 to 286 (Joint Studies and observations of the UN Human Rights Committee). Similar materials are set out in *Husayn* at ¶¶208 et seq.

79. The current United States Administration has itself responded to a UN questionnaire in terms inconsistent with any desire to maintain use of secret detention facilities, or to be involved in the transfer of individuals to second States where they could face torture, (see A/HRC/13/42 at ¶¶160-164]). Similar intentions were made clear in Executive Order 13491, "*Ensuring Lawful Interrogations*", issued by the Obama Administration two days after entering office on 22 January 2009[26]. In particular:

79.1. Section 3(a) of the order reaffirmed that individuals in the custody or control of the United States in Armed Conflicts "*shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment)*";

79.2. Section 3(c) of the order effectively renounced the Bush Administration's stance on the use of torture in interrogations, by providing that "*officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2 22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation -- including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2 22.3, and its predecessor document, Army Field Manual 34-52 issued by the Department of Justice between September 11, 2001, and January 20, 2009*";

79.3. Section 4(a), entitled "CIA Detention", succinctly provides that "*The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future*"; and

[26] http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations

79.4. Section 5 of the order establishes a special interagency task force for the review of "interrogation and transfer policies", with part of its mission stated in section 5(e)(ii) to be *"to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control."*

80. The United States further committed itself to compliance with the UNCAT when it met the UN Committee against torture on the occasion of the Committees' review of the United States in November 2014: see Committee against Torture *Concluding observations on the combined third to fifth periodic reports of the United States of America,* CAT/C/USA/CO/3-5 (2014), page 3:

> *"**Extraterritoriality***
>
> *10. The Committee welcomes the State party's unequivocal commitment to abide by the universal prohibition of torture and ill-treatment everywhere, including at Bagram and Guantanamo Bay detention facilities, as well as the assurances that United States personnel are legally prohibited under international and domestic law from engaging in torture or cruel, inhuman, or degrading treatment or punishment at all times and in all places. The Committee notes that the State party has reviewed its position concerning the extraterritorial application of the Convention and stated that it applies to "certain areas beyond" its sovereign territory, and more specifically to "all places that the State party controls as a governmental authority", noting that it currently exercises such control at "the United States Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft". The Committee also values the statement made by the State party's delegation that the reservation to article 16 of the Convention, whose intended purpose is to ensure that existing United States constitutional standards satisfy the State party's obligations under article 16, "does not introduce any limitation to the geographic applicability of article 16", and that "the obligations in article 16 apply beyond the sovereign territory of the United States to any territory under its jurisdiction" under the terms mentioned above. However, the Committee is dismayed that the State party's reservation to article 16 of the Convention features in various declassified memoranda, which contain legal interpretations of the extraterritorial applicability of United States obligations under the Convention, issued by the Department of Justice Office of Legal Counsel between 2001 and 2009, as part of deeply flawed legal arguments used to advise that interrogation techniques, which amounted to torture, could be authorized and used lawfully....."*

81. Notably, in both *El Masri* and the Polish cases the ECtHR was assisted by the public availability of substantial factual material relating to the rendition programme which had been de-classified and released by the United States Government itself. Such material facilitated both the factual investigations of the Courts and their determination of the legality, under the Convention, of the involvement of Macedonia and Poland in rendition. The Interveners refer, in particular, to:

81.1. A de-classified report of the CIA dated 7 May 2004 entitled "Special Review Counterterrorism Detention and Interrogation Activities September 2001 – October 2003" (*Husayn* ¶¶47 to 59);

81.2. A de-classified memo of the CIA to the Department of Justice Command Centre, containing a background paper on the CIA's combined use of interrogation techniques dated 30 December 2004 (*El Masri* ¶124); and

81.3. The US Senate Review of the CIA's Activities involved in the High Value Detainees Program, begun in March 2009 and concluded at the end of 2012 (*Husayn* ¶¶76 to 78). The findings and conclusions of that report, and a partially redacted 525 page executive summary of the report (which runs to over 6,000 pages), have been de-classified[27]. The UK Government has sought assurances from the Senate Committee that '*ordinary procedures for clearance of UK material will be followed in the event that UK material provided to the Senate Committee were to be disclosed*' (see the letter of the Foreign Secretary to Reprieve dated 14 July 2014)[28].

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[27] http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program

[28] http://www.reprieve.org.uk/wp-content/uploads/2015/04/2014_07_14-PUB-Hague-to-Reprieve-re-SSCI-UK-reps-and-DG.pdf

IX. CONCLUSION

82. For the reasons identified above, the Interveners respectfully invite the Court to dismiss the appeal and to decline the Appellants' invitation to extent common law doctrines beyond the limits of well-established and fundamental principles of international law. To find otherwise would be inconsistent with the clear obligations of the United Kingdom.

1 October 2015

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UKSC 2014/0264

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)
Neutral citation: [2014] EWCA Civ 1394;
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B E T W E E N:

(1) THE RT HON JACK STRAW MP
(2) SIR MARK ALLEN CMG
(3) THE SECRET INTELLIGENCE SERVICE
(4) THE SECURITY SERVICE
(5) THE ATTORNEY GENERAL
(6) THE FOREIGN AND COMMONWEALTH OFFICE
(7) THE HOME OFFICE

Appellants/Appellants

- and -

(1) ABDUL-HAKIM BELHAJ
(2) FATIMA BOUDCHAR

Respondents/Claimants

- and -

(1) UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE
(2) UNITED NATIONS CHAIR-- RAPPORTEUR ON ARBITRARY DETENTION
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