Varia

The European Court of Human Rights and extraordinary renditions

A commentary of El-Masri vs. Macedonia and Husayn and Al Nashiri vs. Poland

Kai Ambos*

On 13 December 2012 the Grand Chamber of the European Court of Human Rights ('ECtHR') convicted Macedonia of a violation of Art.3, 5, 8 and 13 of the Convention ('ECHR') for assisting in the extraordinary rendition of the German citizen Khaled El-Masri. On 24 July 2014 a Chamber convicted Poland in two similar cases (Husayn and Al Nashiri) for a violation of Art.1, 3, 5, 6, 8, 13 ECHR, giving many more details of the involvement of the respective State in the secret detention, torture and rendition programme of the CIA. This contribution will critically analyse these two ground breaking judgments, first presenting the guiding principles derived from them by the author and then commenting on these principles. It will become clear from this analysis that the more recent Husayn and Al Nashiri judgments could well draw on El-Masri and develop this judgment further in factual and legal terms. With the later judgment in particular, the Court has greatly contributed to the historical record regarding the practice of extraordinary renditions.

I. El-Masri vs. Macedonia[1]

1. Guiding Principles

The following guiding principles may be extracted from the El-Masri judgment:

(1) The practice of so-called 'extraordinary renditions', that is, the extrajudicial transfer of persons from one state to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment, represents a violation of the ECHR, particularly its Art. 5.

* Prof. Dr. Dr. h. c. Kai Ambos is University Professor at the Georg-August-Universität Göttingen and Judge at the Provincial Court Göttingen (Germany), currently delegated to the Appeals Court Braunschweig. Translation by Margaret Hiley and the author.

[1] Eur. Court of Human Rights, Grand Chamber, *Case of El-Masriv. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment 13 December 2012, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (last visited 25 October 2014).

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(2) Through its rendition of the German citizen Khaled El-Masri to the American CIA for transfer to a detention camp controlled by the CIA in Kabul (Afghanistan), Macedonia violated Art. 3, 5, 8 and 13 ECHR.

(3) When calculating the six-month time limit within the meaning of Art. 35(1) ECHR, it is not the date of the final domestic judgment that is key, but the date on which the applicant was informed of the judgment.

(4) Within the context of a rendition, an ECHR member state can be made responsible not only for conduct of its own that violates of the Convention, but also for the violations of the receiving state (in this case, the U. S. A.) that result from this conduct.

(5) If persons in state custody suffer injury or die, there is a strong presumption that the respective state is responsible if it is unable to provide a plausible explanation for these occurrences. However, shifting the burden of proof requires evidence of human rights violations 'beyond reasonable doubt'.

(6) The 'right to the truth' takes on particular significance in cases of arrest and enforced disappearance, not only for the person affected and his or her relatives, but also for the victims of similar crimes and the public in general

2. Commentary

a) The former Yugoslav Republic of Macedonia's conviction by the Grand Chamber[2] of the ECtHR of the violation of Art. 3, 5, 8 and 13 ECHR for the illegal arrest, abduction and maltreatment of the German citizen Khaled El-Masri and the complete failure of domestic legal protection will not come as a surprise to anyone familiar with the U. S. practice of so-called 'extraordinary renditions' – which have been in the public domain[3] since the Marty Report of the Council of Europe[4]– and the specific, largely undisputed circumstances of this case.[5] Thus it is also unsurprising that Macedonia, as the respondent State, has itself opposed the application, mainly on procedural grounds invoking the **so-called six-month rule**.[6] According to this rule, the Court 'may only deal with the matter within a period of six months from the date on which the final decision was taken' (Art. 35(1) ECHR). *In casu*, the 'final decision' within the meaning of this rule was the Macedonian prosecution's rejection[7] on 18 December 2008 of the criminal complaint of the applicant made on 6 October 2008[8] (with the Chamber explicitly recognising the criminal complaint as an effective remedy against violations of Art. 3 ECHR).[9] If the six-month period

[2] The Grand Chamber is made up of 17 judges (Art. 26(1) ECHR) and only takes action in cases of particular significance (Art. 31 ECHR). *In casu* a (small) chamber reliquished the matter in favour of the Grand Chamber (Art. 30 ECHR, cf. El-Masri, supra n. 1, para. 8).

[3] El-Masri, supra n. 1, para. 218.

[4] Cf. El-Masri, supra n. 1, para. 37 (on the Macedonian authorities' response to the applicant's case), 43 ff. (on the U. S. practice of renditions).

[5] El-Masri, supra n. 1, para. 15 ff.

[6] El-Masri, supra n. 1, para. 130 ff.

[7] El-Masri, supra n. 1, para. 143.

[8] El-Masri, supra n. 1, para. 142.

[9] El-Masri, supra n. 1, para. 140.

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were calculated from the date the prosecution delivered its rejection decision (18 December 2008), then El-Masri would have had to file his application with the Court by 18 June 2009; however, he only did so on 20 July 2009.[10] In order to avoid the possible, but truly inequitable result of the inadmissibility of El-Masri's application, the Chamber focused not on the actual date of the rejection decision, but on the time when the applicant was actually informed of this decision; this information only took place – contrary to the Macedonian domestic law (!)[11] – almost two years later (sic!) on 22 November 2010.[12] If this date is taken as the starting point, then the submission of the application on 20 July 2009 was well within the six-month period and accordingly the Chamber was able to determine that El-Masri had not exceeded this time limit.[13]

b) Had the Court followed the formalistic argument put forward by the Macedonian government, it would have deprived itself of the opportunity to subject the **practice of extraordinary renditions** to a fundamental evaluation from a human rights perspective. The Grand Chamber defines this practice – which continues, albeit in a different form, to this day[14] – as 'an extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment'.[15] It sees the practice as a violation of Art. 5 ECHR in particular because of the secret arrest of the person concerned without any legal basis and his/her subsequent transfer to another country.[16] Ultimately this practice amounts to '*enforced disappearance*'[17]

[10] El-Masri, supra n. 1, para. 1.

[11] El-Masri, supra n. 1, para. 147 (according to which internal law stipulates notification within eight days).

[12] El-Masri, supra n. 1, para. 147.

[13] El-Masri, supra n. 1, para. 147.

[14] President Bush declared the closure of the respective 'High-Value Detainees' ('HVD') – high-level terror suspects– programme on 6 September 2006, and since October 2006 all detainees are supposed to be in Guantanamo Bay (Husayn, infra n. 52, para. 69), but the global 'war on terror' cannot really do without this practice, as terror suspects are usually arrested outside US territory. It is thus unsurprising that internet research provides no evidence that this practice has definitely come to an end, only confirming its adaptation to new conditions: 'Obama administration's use of foreign regimes to detain and interrogate terrorism suspects has avoided Bush-style renditions in favour of a different practice known as proxy detention …', cf. http://truth-out.org/news/item/24030-bushs-fourth-term-continues-guantanamo-torture-secret-renditions-indefinite-detention;http://www.motherjones.com/mojo/2013/01/remix-rendition-proxy-detention (both last accessed on 1 August 2014). This also corresponds to the fact that President Obama prohibited the former practice in 2009 at the latest with Executive Orders 13491, 13492 and 13493 (available from http://www.therenditionproject.org.uk/documents/us-white-house.html) as the methods used violated the joint Art. 3 of the Geneva Conventions. Other extraterritorial arrests within the meaning of the aforementioned 'proxy detention' remain unaffected, such as in the case of Abu Anas al-Libi, who was arrested by US officials in Libya in 2012 (http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10367191/Legal-row-over-Libyan-al-Libi-held-on-Guantanamo-at-sea-warship.html; critically http://opiniojuris.org/2013/01/30/u-s-renditions-continuity-change-and-new-trends/).

[15] El-Masri,supra n. 1, para. 221.

[16] El-Masri, supra n. 1, para. 233 ('… unacknowledged detention of an individual is a complete negation of these guarantees … authorities have a duty to account for his or her whereabouts … or take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation …').

[17] El-Masri, supra n. 1, para. 240. – This practice, which became particularly notorious during the dictatorships in Latin America, is extremely difficult to define as a criminal offence. There seems to be agreement that the relevant conduct consists of two acts, namely the (potentially illegal) arrest of a person and the subsequent refusal to provide information on their whereabouts (cf. Art. 7(1)(i) Rome Statute of the International Criminal Court ('ICC Statute'); see also K. Ambos, *Treatise on International Criminal Law. Volume II: The Crimes and Sentencing,* OUP 2014, 108-12).

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which, if committed 'as part of a widespread or systematic attack directed against any civilian population', forms part of the international core crime of crimes against humanity.[18]

The Chamber's establishment of Macedonia's responsibility is problematic insofar as it holds Macedonia responsible not only for its own unlawful actions (arrest and transfer), but also for those of the USA (CIA).[19] Thus, the Chamber establishes a kind of **result liability for the conduct of others**, i. e., a kind of vicarious liability. While this cannot be discussed further here, it merits closer examination particularly in regard to future case law and its relationship to the general law on state responsibility.[20] In any case, in light of the specific violations at hand it is reasonable that the Grand Chamber regards it 'necessary' (Art. 41 ECHR) to award financial compensation in the amount of EUR 60,000 – the applicant had demanded EUR 300,000[21] – as the damage incurred 'cannot be made good by the mere finding of a violation'.[22]

c) Besides this, two aspects in particular merit closer examination, as they have fundamental significance that goes beyond the individual case. On the one hand, the Court is dealing with a question of vast practical importance, that of the **burden of proof** in cases of human rights violations, especially torture within the meaning of Art. 3 ECHR.[23] It assumes that in cases of violations of Art. 2 and 3 ECHR concerning persons in state detention, there is a strong presumption that physical injuries or even death can be attributed to this detention.[24] In such cases, responsibility rests with the responsible authorities of the State in question to provide a satisfactory and convincing explanation for the aforementioned injuries.[25] In doing so, the Court treats statements made by representatives of the State in question with utmost caution, as they are inherently prone to exonerating themselves; on the

[18] Cf. Art. 7(1) ICC Statute and Ambos, supra n. 17, pp. 46 ff.

[19] Cf. in particular El-Masri, supra n. 1, para. 206 (responsibility for maltreatment by the 'special CIA rendition team' during the transfer at Skopje Airport, as it occurred 'in the presence of officials of the respondent State and within its jurisdiction') as well as para. 235, 238 ff. (attribution to Macedonia not only the arrest in its territory, but also the subsequent arrest in Kabul by the CIA as 'enforced disappearance … characterised by an ongoing situation of uncertainty and unaccountability, which extended *through the entire period of his captivity*… 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 …" 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 …'[para. 240, author's italics]).

[20] Cf. Nollkaemper, *The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?* EJIL: *Talk!*, 24 December 2010, who on the one hand criticises the Chamber's 'incoherence and lack of clarity' with regard to the law of state responsibility, but on the other hand welcomes the result of liability for the conduct of others ('fresh approach to the law of responsibility deserves to be taken forward …'); available from: http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ (last accessed 25 October 2014).

[21] El-Masri, supra n. 1, para. 267.

[22] El-Masri, supra n. 1, para. 269.

[23] El-Masri, supra n. 1, para. 152 ff.

[24] El-Masri, supra n. 1, para. 152.

[25] 'The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.' (El-Masri, para. 152).

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other hand, it treats statements that are critical of the State made by such persons as 'a form of admission'.[26] If the respective State does not comply with its obligation to provide an explanation, the Court can correspondingly draw a negative conclusion,[27] that is, assume the state's responsibility for the injuries. The Court explicitly applies these deliberations to the aforementioned practice of enforced disappearance, as here, too, the person in question is (usually) in State detention and the State is thus obliged to provide an explanation.[28]

However, a final **shifting of the burden of proof** requires that the human rights violations in question have been proven 'in the form of concordant inferences'.[29] Thus the applicant has a *burden to produce evidence* to the extent that he or she must, as I have argued elsewhere on the basis of a differentiation between burden of proof and standard of proof,[30] only present the injury (or injuries) in a plausible and convincing manner, and the respondent State then has to refute this presentation, with any doubts counting against it. In the present case, the Court assumes such a shift in burden of proof,[31] considering the injuries claimed by El-Masri to have been presented in a 'sufficiently convincing' manner and '*beyond reasonable doubt*'.[32] As far as the **standard of proof** is concerned, the Court is thus adhering to the required degree of firm conviction. In particular, it is not concerned with approaches that consider a lower degree of suspicion to be enough, for example the view taken by the present author that, at least in regard to accusations of torture, the real and serious risk of the application of torture should in itself be seen as sufficient.[33]

d) On the other hand, the so-called '**right to the truth**' merits closer attention. The Chamber refers to this right in the context of its analysis of Art. 3 ECHR and the insufficient (criminal) investigations undertaken by Macedonia[34] – particularly on the grounds of the statements made by a number of human rights organisations, including the UN High Commissioner for Human Rights.[35] This right has been recognised in a global context as a special right of the victims of severe human rights violations, particularly in regard to the aforementioned enforced disappearance of persons, and thus can be traced back to Art. 32, 33 of the first Additional Protocol of 1977 (AP I) of the four Geneva Conventions (GC)[36] regarding the law of armed

[26] El-Masri, supra n. 1, para. 163.

[27] El-Masri, supra n. 1, para. 152.

[28] El-Masri, supra n. 1, para. 153. See generally on the ECtHR's case law in this respect and in favour of such a shift of the burden of proof H. Keller/C. Heri, 'Enforced Disappearance and the ECtHR', *Journal of International Criminal Justice* ('JICJ') 12 (2014) 735, 738-40.

[29] El-Masri, supra n. 1, para. 153. On the respective circumstantial evidence test see also Keller/Heri, supra n. 28, 741-2.

[30] Ambos, 'The transnational use of torture evidence', *IsrLRev* 42 (2009), 362, at 393-6.

[31] El-Masri, supra n. 1, para. 165. Conc. Keller/Heri, supra n. 28, 742-4.

[32] El-Masri, supra n. 1, para. 167.

[33] Ambos, supra n. 30, 395-6.

[34] El-Masri, supra n. 1, para. 191.

[35] UN High Commissioner for Human Rights, Redress, Amnesty International et al., cf. El-Masri, para. 175 ff.

[36] Art. 32 and 33 are contained in Section 3 on missing and deceased persons of API, with Art. 32 referring to 'the right of families to know the fate of their relatives' and Art. 33 requiring contracting States to 'search for the persons who have been reported missing by an adverse Party'.

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conflict.[37] It can be understood, following the definition given by the Pre-Trial Chamber of the ICC as a victim-focused right to the 'determination of the facts, the identification of the responsible persons and the declaration of their responsibility'.[38] While it has long been recognised in Latin American case law, particularly the human rights case law of the Inter-American Court of Human Rights,[39] it has only recently achieved recognition in international case law through the aforementioned ICC decision[40] and remains something of a wallflower in the European context.[41] It is thus somewhat surprising that it is not only referred to explicitly by the Grand Chamber, but also forms the subject-matter of the controversial 'joint concurring opinions' of two groups of judges annexed to the judgment.

The Grand Chamber[42] first emphasises the great significance of this right not only for the applicant and his family, but also for the victims of similar crimes and for the public in general.[43] It then contrasts the 'right to the truth' with the concept of 'state secrets' – which is repeatedly put forward by States, particularly in the context of the international fight against terrorism and the practice of extraordinary renditions. Indeed, the latter concept 'has often been invoked to obstruct the search for the truth',[44] also, by the U. S. and the Macedonian governments, in the present case. However, the aforementioned joint concurring opinions of two groups of judges, which otherwise wholly concur with the majority opinion, show clearly that the significance of this right is by no means agreed upon among judges. Judges Tulkens, Spielmann, Sicilianos and Keller consider the Chamber to have treated it insufficiently where Art. 3 is concerned, as the right to the truth represents a particularly peremptory norm especially in regard to the secret machinations in the present case and merits a distinct place of its own in the context of the right to an effective remedy (Art. 13 ECHR).[45] By contrast, judges Casadevall and López

[37] For more detail, cf. Ambos, in: Ambos/Large/Wierda (Eds.), *Building a future on peace and justice*, 2009, pp. 34-36.

[38] ICC, *Prosecutor v.Katanga & Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2005, para. 32 fn. 39. On international 'soft law', cf. the anchoring of this right in 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, GA Rs, 60/147, 16 December 2005, No. 22 b) 24.

[39] Cf. for example *Caso Almonacid Arellano y otros vs. Chile*, Sentencia 26.9.2006, para. 148; *Caso de la Masacre de Pueblo Bello vs. Colombia*, Sentencia 31.1.2006, para. 267; *Caso Ximenes López vs. Brasil*, Sentencia 4.7.2006, para. 245; mopst recently *Caso Masacre de Santo Domingo vs. Colombia*, Sentencia 30.11.2012, para. 152, 157; both available from http://www.corteidh.or.cr (last accessed 20 December 2012).

[40] Cf. supra n. 38.

[41] Cf. Sweeny, *The European Court of Human Rights in the Post-Cold War Era*, 2013, p. 70 ff., who notes a 'slow' development within the framework of the Council of Europe (72) and refers to ECtHR case law as 'fairly limited' (73), although there have been several 'robust judgments' (74) on enforced disappearance and incidentally the issue at hand had been access to the secret information of real socialist dictatorships in Eastern Europe (75 ff.).

[42] El-Masri, supra n. 1, para. 191.

[43] For a more restrictive reading of this right however see ECtHR, Grand Chamber, *Janowiec and Others vs. Russia*, Application No. 55508/07 and 29520/09, 21 October 2013, para. 177-8 and passim; for a strongly critical stance see C. Heri, 'Enforced Disappearance and the ECtHR's *ratione temporis* Jurisdiction', JICJ 12 (2014) 751, 765-7 ('stunning lack of sensitivity to the realities of enforced disappearances').

[44] El-Masri, supra n. 1, para. 191.

[45] For these judges, the search for the truth is the real purpose of the obligation to carry out an investigation and the *raison d'être* of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny): 'For society in general, the desire to ascertain the truth plays a part in strengthening confidence in

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Guerra consider the special mention of a right to the truth within the framework of the examination of Art. 3 ECHR 'redundant', as all (criminal) investigations are always concerned with the search for the truth, independently of the significance of the case at hand for the public, for it is the victim who is entitled to this 'right to the truth', not the general public.[46]

However, this latter view is only convincing if the right to the truth is narrowed and equated with the procedural concept of truth as commonly understood in the (reformed) inquisitorial procedure of the European continent.[47] If, by contrast, the right to the truth is understood – in line with the modern human rights and international criminal law discourse – as part of state authorities' comprehensive duty to compensate for past injustices committed,[48] that is, within the context of a comprehensive transitional or post-conflict justice process, then society as a whole indeed has an interest in this kind of historical truth.[49] A completely different issue is of course whether this historical truth can actually be ascertained within the framework of formalised legal (criminal) proceedings, which are, *inter alia*, bound to particular rules and means of evidence. Based on experiences of transitional justice processes so far, the answer to this is probably negative.[50] This is the reason why

public institutions and hence the rule of law. For those concerned – the victims' families and close friends – establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery.' (Joint Concurring Opinion Judges Tulkens et al., para. 6).

[46] Joint Concurring Opinion of Judges Casadevall and López Guerra: 'It seems evident to us that all this required activity [investigations, K. A.] amounts to finding out the truth of the matter, irrespective of the relevance or importance of the particular case for the general public, and therefore a separate analysis of the right to the truth becomes redundant.'

[47] On this 'inquisitorial' concept of truth in this respect cf. *Ambos*, ZStW 115 (2003), 583, 617-8 incl. further references in fn. 258.

[48] In this regard, cf. inter-American case law (supra n. 39) and, as a representative example, the Colombian 'Justice and Peace' Law (Law 975, last amended by Law 1592 of 3 December 2012), which in its (amended) Art. 6 includes among 'victims' rights' the right to truth, justice and comprehensive reparation ('derecho a la verdad, la justicia y la reparación integral'; on this, cf. Ambos et al., *Procedimiento de la Ley de Justicia y Paz [Ley 975 de 2005] y Derecho Penal Internacional.Estudio sobre la facultad de intervención complementaria de la Corte Penal Internacional a la luz del denominado proceso de 'justicia y paz' en Colombia*, Bogotá 2010, p. 116 ff., 136 ff., available from <http://www.department-ambos.uni-goettingen.de/index.php/Forschung/friedensprozess-in-kolumbien-aufgrund-des-gesetzes-975-v-2272005.html>). For an overview of the international debate, see Groome, *Berkeley Journal of International Law* 29 (2011), 175; Wiebelhaus-Brahm, in: Schabas/Bernaz (Eds.), *Routledge Handbook of International Criminal Law*, 2011, p. 369, 370-372; on the legal nature as international customary law, cf. Naqvi, *International Review of the Red Cross* 88 (2006), 245, 254 ff.; on the 'right to justice' within the framework of international criminal proceedings, cf. recently Spiga, JICJ 10 (2012), 1377, 1386 ff.

[49] This is also the understanding of the Inter-American Court and Commission on Human Rights, cf. e. g. Comisión Interamericana de Derechos Humanos, *InformeAnual* 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, p. 205; on this collective dimension, cf. also Procuraduria General de la Nación, *Derecho a la verdad, memoriahistórica y protección de archivos,* 2008, p. 34 ff.

[50] Cf. Pastor, *Revista Jueces para la Democracia*, No. 59 (2007), 95 (106 ff.: with six objections to the establishment of historical truth in criminal proceedings); criticism is also voiced by Koskenniemi, in: Frowein/Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law* 6 (2002), 1-35, 11, available from http://www.mpil.de/shared/data/pdf/pdfmpunyb/ koskenniemi_6.pdf; Schlunck, *ILSA Journal of International and Comparative Law* 4 (1998), 415, 419; Beukelmann, *NJW-Spezial* 2012, 376; Syring, *International Legal Theory* 12 (2006), 143, 150; for a more optimistic view see Gaynor, *JICJ* 10 (2012), 1257 ff. (he recognises the tension between the procedural and historical search for the truth, but emphasises the 'huge potential' of international proceedings 'to help victims and others in the affected region to know the facts' and the 'special responsibility to ensure that their contribution to the collective memory is objective, clear and accessible'). On the ECtHR and transitional justice, cf. Sweeny, supra n. 41, p. 239 ff.

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recourse to other, alternative and interdisciplinary mechanisms, especially so-called truth commissions, is necessary.[51]

II. Husayn and Al Nashiri vs. Poland[52]

1. Guiding Principles

The following guiding principles can be derived from this judgment:

(1) The contracting States of the Convention 'shall furnish all necessary facilities' for the 'effective conduct' of an investigation (Art. 38 ECHR), that is, provide all existing and relevant information without delay and in its entirety. This is to take place in the manner requested by the Court. A contracting State cannot invoke domestic obstacles. Otherwise the State's conduct may be seen as hindering the right to make an individual application according to Art. 34, second sentence ECHR and conclusions against the State may be drawn. Interests of national security are taken account of through criminal procedural safeguards, which are sole responsibility of the Court. For example, documents can be classed as confidential, and the public can be excluded (para. 352-8).

(2) In establishing the facts of the case, the Court employs free evaluation of evidence using the standard of proof 'beyond reasonable doubt'. This standard, which derives from national legal systems, must however be seen in the light of the international law of state responsibility, not of the law of criminal or civil responsibility. Proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The level of persuasion of reliable evidence and in this respect the distribution of the burden of proof are closely linked to the specificity of the facts, the nature of the allegation made and the Convention right referred to (para. 393-4).

(3) In principle, the applicant has to provide the respective evidence (*prima facie case*). However, if the respondent State fails to provide crucial documents or fails to contribute to the investigation in any other way, this can be counted against it. Particularly in dealing with cases of possible violations of the right to life and the prohibition of torture (Art. 2, 3 ECHR), in which the persons involved are frequently in the power of State authorities and these authorities thus possess exclusive knowledge of the factual circumstances, the death or injury of said persons leads to the 'strong presumption' of State responsibility. The burden of proof may

[51] On truth commissions, particularly the relevant criteria of effectiveness, cf. Ambos, supra n. 37, p. 40-47; on effectiveness, also cf. Gibson, *Law and Contemporary Problems* 72 (2009), 123-141; for an overview, cf. Hayner, *Unspeakable Truths – Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. 2011; Wiebelhaus-Braun, in: Bassiouni (Ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice*, Vol. 1, 2010, p. 477 ff.; for a critical stance, see Daly, *International Journal of Transitional Justice* 2 (2008), 23-41.

[52] ECtHR, Chamber, *Husayn (Abu Zubaydah) vs. Poland*, Judg. of 24 July 2014 (application no. 7511/13); *Al Nashiri vs. Poland*, Judg. of 24 July 2014 (application no. 28761/11). The Chamber dealt with both lawsuits at the same time (*Husayn*, para. 6, 29) and reached the same conclusions (see e. g. ibid., para. 15 ff., 36, 86), although Poland was additionally convicted of violating Art. 2, 3 ECHR in conjunction with Art. 1 Protocol No. 6 on the grounds of transfer to the U. S. A. despite the risk of capital punishment – Al Nashiri was accused of capital offences punishable with the death penalty (*Al Nashiri*, para. 570 ff. and Tenor, para. 10).

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then be regarded as resting on the authorities to provide a satisfactory and convincing explanation for the aforementioned occurrences (para. 395-6).

(4) A State party 'shall secure to everyone within their jurisdiction' the rights and freedoms defined in the Convention (Art. 1 ECHR, para. 445). This also applies to persons who are detained and treated in violation of the Convention in the territory of a State party (*in casu* Poland) by the organs (here the CIA) of a foreign power (here the U. S. A.) with the silent consent or tolerance of said State party (ex. para. 401-445, 449). The State in question is thus not only responsible for the actions taken against these persons on its territory (para. 449), but also for their transfer to a third state, provided this is linked to foreseeable violations of their Convention rights (para. 450).

(5) In the case of a so-called 'extraordinary rendition', that is, the extrajudicial transfer from one State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment, a violation of Art. 3 and 5 ECHR in particular comes into consideration, as does a 'flagrant denial of justice' within the meaning of Art. 6 ECHR (para. 451-3). While establishing the risk of a Convention violation implies an assessment of conditions in the receiving State against the standards set out in the Convention, the concern is not the responsibility of this receiving State under international law or the Convention, but only the responsibility of the sending State (para. 454). The Court (freely) evaluates the existence of a risk in the light of all the material placed before it, taking particular account of the situation in the receiving State and the affected person's personal circumstances (para. 455).

(6) The prohibition of torture or other inhuman treatment within the meaning of Art. 3 ECHR has both a procedural and a substantive side to it. In procedural terms, the territorial State within the meaning of Art. 1 ECHR is obliged to conduct effective (speedy, thorough and independent) investigations to identify and punish the parties responsible. Otherwise the prohibition of torture would be ineffective in practice (para. 479-80). With regard to substantive law, the prohibition is valid in absolute terms, including in the fight against terrorism. Here a distinction needs to be drawn between torture and other inhuman or degrading treatment. Objectively, in order to count as torture a treatment has to cause particularly serious and cruel suffering (physical or psychological); subjectively, a particular purpose, including gaining information or inflicting punishment, has to be pursued. Convention States have to take appropriate measures against this. If they neglect to take such measures in the knowledge of or in negligent ignorance of a violation of Art. 3 ECHR, their responsibility is engaged (para. 499-502, 510).

(7) The right to liberty and security (Art. 5 ECHR) serves to protect individuals from the arbitrary deprivation of liberty and thus is of fundamental importance in a democratic society. Reasons for the deprivation of liberty (Art. 5(1) ECHR) must be interpreted narrowly and the possibility of speedy judicial review (Art. 5(3, 4) is particularly important with regard to the (factual) defencelessness of imprisoned persons. The detention of terror suspects must also be measured against Art. 5

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ECHR. The unacknowledged imprisonment of a person thus represents a complete negation of these guarantees and accordingly constitutes a severe violation of Art. 5 ECHR. State authorities must provide information on the whereabouts of imprisoned persons and take effective measures to safeguard against the risk of disappearance, conducting the necessary investigations (para. 521-3).

(8) The right to respect for private and family life (Art. 8 ECHR) is to be interpreted broadly. It protects individuals' right to personal development and to relationships with other human beings and the outer world in general. Private life covers a person's mental and physical integrity, including protection from the deprivation of liberty. The right to a family life includes unimpeded contact with family members and thus prohibits arbitrary state interference (para. 532).

(9) The right to an effective remedy (Art. 13 ECHR) serves to safeguard national legal remedies in cases of Convention violations. The legal remedy in question must be effective; in particular, its exercise must not be hindered by state authorities without due cause. Besides the payment of compensation, an 'effective remedy' includes the right to a thorough and effective investigation leading to the identification and punishment of those responsible and effective access to the investigatory procedure; this goes beyond the investigations arising from Art. 3, 5 ECHR. In regard to Art.3 ECHR, Art. 13 requires 'independent and rigorous scrutiny' of the respective application, regardless of the conduct of the person affected (para. 540-3).

(10) A 'flagrant denial of justice' within the meaning of Art. 6 ECHR exists in cases of severe and overt violations of the principle of fairness, for example convictions *in absentia* with no subsequent review, a complete disregard for the rights of the defence, the lack of a review of the detention by an independent and impartial tribunal, or sentencing by a court composed of members of the armed forces. The admission of evidence gained through torture would also represent a flagrant denial of justice. Such evidence irreparably damages the integrity of the criminal procedure and furthermore is intrinsically unreliable (para. 552-4).

(11) In cases of severe human rights violations, the 'right to the truth' not only belongs to the direct victim and his or her family members, but also to other victims of similar crimes and the general public, which is why investigation results need to be made public to the greatest extent possible (para. 488-9).

(12) The protection of Convention rights requires not only effective investigations, but the democratic supervision of the secret services and appropriate safeguards to prevent violations of the Convention by said secret services, particularly within the context of covert operations (para. 492).

2. Commentary

a) This judgment continues the Grand Chamber's *El-Masri* judgment,[53] but differs from it in its significantly greater length (225 pages). This can be explained by

[53] See however the subsequent judgment of the Grand Chamber in *Janowiec and Others vs. Russia*, supra n. 43, where the GC found to have no temporal jurisdiction with regard to a violation of Art. 2 ECHR by Russia because of 1940 Katyń massacre; crit. Heri, supra n. 43, 751 ff.

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the fact that, when establishing the facts of the case,[54] the Chamber felt obliged to provide a **detailed account** of the background and findings thus far on the **U.S. HVD programme**[55] (the applicant being considered a high-level terror suspect),[56] as a basis for the following evaluation of evidence,[57]since the applicant – who is in Guantanamo Bay – was, unlike *El-Masri*, unavailable as a witness nor was it possible to gain another form of access to him.[58] Incidentally, the Chamber faced the same problem in the parallel *Al Nashiri* case,[59] as he, too, is detained in Guantanamo Bay. The present judgment also represents a continuation of *El-Masri* in that additional, more specific principles can be derived from it. For this reason, the following commentary will restrict itself to a brief explanation of the guiding principles formulated above in regard to the specific case at hand.

b) In regard to a State party's **obligation to cooperate**(cf. guiding principle (1)), the Chamber is well aware of the sensitivity of the information in question and has thus provided assurances of confidentiality in keeping with its rules of procedure (Art. 33(2, 3) Rules of the Court) and many years of practice.[60] However, the Polish government never argued national security interests but only invoked the 'secrecy' of the Polish investigation proceedings and domestic regulations.[61] Ultimately, it was only willing to present an excerpt of the investigation file of the oral proceedings made by the Krakow prosecutor of the appeal for immediate inspection 'in situ, here and now', without leaving the document with the Court.[62] In doing so, Poland was in violation of its obligations of Art. 38 ECHR.[63] Given the procedural guarantees offered by the Chamber and habitual Court practice, there was no justification for the Polish refusal to hand over the relevant information – neither in actual fact nor in connection with any opposing domestic regulations.[64] Poland's refusal hindered the investigation of the Court.[65] This could be judged to count against Poland.[66]

c) Where the **establishment of the facts** of the case (guiding principle (2)) was concerned, the Chamber faced the aforementioned problem that it was not possible

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[54] *Husayn*, supra n. 52, p. 12-135 (para. 41-332).

[55] See supra n. 14.

[56] Husayn, supra n. 52, para. 418 ('It is to be recalled that the applicant was the first High-Value Detainee for whom the EITs were specifically designed by the CIA and on whom they were tested before ever being applied to other captured terrorist suspects as from November 2002 …'), para. 508 ('… first High-Value Detainee … He was reportedly the only one CIA detainee who was continually and systematically subjected to all those aggressive measures applied one by one or in combination.').

[57] Husayn, supra n. 52, p. 13-31, 67-135 (para. 45-79, 207-332).

[58] Husayn, supra n. 52, para. 397.

[59] *Al Nashiri vs.Poland*, supra n. 52.

[60] Husayn, supra n. 52, para. 359-69 (364), also cf. para. 349-50.

[61] Husayn, supra n. 52, para. 361 f.; also cf. para. 19, 25, 27-8, 31, 33, 340 and 343-44.

[62] Husayn, supra n. 52, para. 363; also cf. para. 34.

[63] See generally on the failure of State cooperation in enforced disappearance cases Keller/Heri, supra n. 28, 735, 739, 74, 749.

[64] Husayn, supra n. 52, para. 365-6.

[65] The Court sometimes uses quite harsh words in regard to the Polish authorities; cf. e. g. para. 435 ('…Polish authorities displayed conduct that can be characterised as denial, lack of cooperation with the inquiry bodies and marked reluctance to disclose information of the CIA rendition activities in Poland.'); also cf. below fn. 88.

[66] Husayn, supra n. 52, para. 368.

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to gain access to the applicant. This was aggravated by the Polish government's lack of cooperation, as mentioned above.[67] For the most part, the Chamber thus had to rely on an overall view of the evidence emerging from the international investigation of the CIA practice of the practice of extraordinary renditions (including extraterritorial detention centres and 'enhanced' methods of interrogation),[68] the U. S. documents released,[69] Polish[70] and other public sources[71] and the interrogation of the authors of relevant studies (as expert witnesses)[72] and a witness.[73],[74] On this basis – in conjunction with derivations and presumptions – the Chamber concludes Polish responsibility in regard to Art. 3, 5, 8, 13 and 6 ECHR 'beyond reasonable doubt", drawing on the free evaluation of evidence (on this, see e) below). Here, the *shift in the burden to produce evidence and the burden of proof* affirmed in earlier case law and *El-Masri* works in the applicant's favour.[75] This shift rather exceptionally is already established by the fact that the applicant makes the Convention violations in question sufficiently convincing (*prima facie case*). If he does so successfully, then there is a presumption that he has indeed suffered the injuries cited (*prima facie evidence*).[76] This in itself does not logically result in a shift in the burden to produce evidence and in the burden of proof.[77] However, the Chamber explicitly states that the present case departs from the general rule of *affirmanti incumbit probatio* – according to which the burden of proof rests with the party making a claim or raising an objection.[78] Therefore,

[67] Husayn, supra n. 52, para. 400.

[68] In this regard, the investigations of the Council of Europe ('Marty Inquiry'), the European Parliament ('Fava Inquiry'), the ICRC and the UNO merit particular mention, cf. Husayn, supra n. 52, p. 67 f., 79 ff.

[69] Cf. Husayn, supra n. 52, para. 47 ff. (CIA Report) and para. 76 ff. (US Senate Intelligence Committee).

[70] Cf. part. the information of the Polish border police and air traffic control, Husayn, supra n. 52, p. 110 ff.

[71] Husayn, supra n. 52, p. 68 ff.

[72] Mr. Fava, Senator Marty and his staff, Husayn, supra n. 52, p. 117 ff.

[73] This was the Polish senator Pinior, Husayn, supra n. 52, p. 115 ff., 132 ff.

[74] Husayn, supra n. 52, para. 400.

[75] Cf. supra I. 2. c).

[76] A distinction needs to be made in procedural terms between 'prima facie case' and 'prima facie evidence': The term 'prima facie case', which derives from common law, means that the applicant has presented enough evidence in support of his claim for the jury to come to an independent decision on it. 'Prima facie evidence' by contrast refers to a mitigation of the rules governing the burden of proof. It applies to cases 'in which facts exist that, according to general life experience, indicate a particular cause or that the party concerned is at fault.' (Lüke, *Zivilprozessrecht*, 10th ed. 2011, mn. 279). In Common Law, this legal concept is covered by the term 'res ipsa loquitur'. Despite this distinction, the synonymous usage of 'prima facie case' and 'prima facie evidence' has become established in both German and English literature (as a representative example, cf. *Jauernig/Hess*, Zivilprozessrecht, 30th ed. 2011, § 50 mn. 19; Barceló III, 42 *Cornell ILJ* (2009), 23, 34 ff.). This is actually due to a translation error: In the case of Muschampv. Lancaster and Preston Junction Railway Co. of 1841 (8 M. & W. 421), the judge informed the jury that in his opinion and according to his evaluation of the evidence, they were dealing with a 'prima facie case'. In doing so, he only wanted to communicate that the case could now be decided. However, the court reporters summarised this not with 'Held, by the jury, that the company were liable', but only with 'Held, that [the defendants] were liable for the loss'. This led to the widespread but mistaken assumption that in a 'prima facie case' the sued party's guilt is already presumed ('as a matter of law') and the jury's decision must be reduced to whether or not this presumption can be refuted. On the issue as a whole, cf. Herlitz, *55 Louisiana L. Rev.* (1994), 391 ff.; Kraatz, *Der Einfluss der Erfahrung auf die tatrichterliche Sachverhaltsfeststellung*, 2011, p. 69 ff.

[77] Cf. Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, 2002, p. 389; Lüke, supra n. 76, mn. 281 incl. further references.

[78] Husayn, supra n. 52, para. 396 ('Furthermore, the Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*.'). See generally Schorkopf, *EuR* 2009, 645, 654 incl. further references.

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Poland as the respondent State was obliged to provide a satisfactory and convincing explanation (guiding principle (3)).

d) On this basis, the Court – drawing on many parallels to the *El-Masri* case[79] – reaches the conclusion that the applicant was in a CIA detention centre in Poland from 5 December 2002 to 22 September 2003 and was subjected to the 'standard treatment' of the aforementioned HVD programme, namely the 'enhanced interrogation techniques' (EIT) permitted by the Bush government.[80] *Poland's responsibility* derives from Art. 1 ECHR (guiding principle (4)) and the fact that the Polish government of the time not only was aware of the 'nature and purposes of the CIA's activities on its territory', but also actively cooperated with the CIA's 'rendition, secret detention and interrogation operations'.[81] While there is no indication that Polish authorities were present during interrogations – the detention centres were under exclusive CIA control – the Polish government 'ought to have known' that the detention of terror suspects by the CIA on its territory 'expos[ed] them to a serious risk of treatment contrary to the Convention'.[82] Likewise, the territorial State is liable for foreseeable Convention violations in a third (receiving) State (guiding principle (4)) to which the person in question is transferred in the course of an extraordinary rendition. Here, the Chamber is extending *El-Masri*[83] in seeing this as a violation of Art. 3, 5 and 6 ECHR[84], emphasising and clarifying that its concern is not with the responsibility of the receiving State under the Convention, but only with that of the territorial State that knowingly participates in the transfer (guiding principle (4)). With this it is clear that a non-State party to the Convention (U.S. A.!) cannot be liable,[85] even though the Chamber qualifies the CIA practices as Convention violations.[86]

e) As regards the pertinent Convention rights, all important issues follow from guiding principles (6)-(10), so that the present discussion can be restricted to the

[79] Cf. e. g. Husayn, supra n. 52, para. 409 ('strikingly similar account' of *El-Masri's* transfer to CIA custody), 444 (or knowledge of mistreatment in CIA detention centres).

[80] Husayn, supra n. 52, para. 401-19 (419), esp. para. 418 ('Having regard to the fact that the CIA "legally sanctioned interrogation techniques" encompassed a variety of measures, ranging from "standard" to "enhanced" and that the CIA applied to each and every detainee the same "standard procedures and treatment" … the Court finds it established beyond reasonable doubt that the treatment to which the applicant was subjected in CIA custody in Poland must have included the elements defined in the CIA documents as those routinely used in respect of High-Value Detainees …'); cf. also para. 51-68, 98, 102-105.

[81] Husayn, supra n. 52, para. 420-44, esp. 444 ('… Poland knew of the nature and purposes of the CIA's activities on its territory at the material time … Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory …'); cf. also para. 512 ('…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.').

[82] Husayn, supra n. 52, para. 443-4, esp. 444 ('… Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention …'); cf. also para. 316-7, 324-5.

[83] Cf. supra guiding principles 1 and 4.

[84] In this regard, the Chamber goes further in *Al Nashiri*, supra n. 59, as it presumes a violation of Art. 2, 3 ECHR in conjunction with Art. 1 Protocol No. 6.

[85] In this regard, for a critical view on a possible conflict with the 'indispensable third party' doctrine developed by the ICJ in the *Monetary Gold* case, cf. *Scheinin*, http://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/ (last accessed 1 August 2014).

[86] Cf. e. g. below fn. 91 (interrogation methods as torture).

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application of these principles in the case at hand. Concerning the procedural aspect of Art. 3 ECHR (guiding principle (6)), the Chamber notes that Poland's investigations on the one hand started too late – namely on 11 March 2008, nearly three years after Poland was officially named a country with CIA detention centres (November 2005) – and on the other hand had produced no tangible results by the time the judgment was issued (after more than 6 years).[87] The Chamber thus accuses Poland of a 'lack of will' and 'inordinate delay' in this regard.[88] As a result, Poland failed in its obligation to conduct a speedy, thorough and independent investigation, thus violating the procedural obligation of Art. 3 ECHR.[89] As far as the substantive aspect of Art. 3 ECHR is concerned, the Chamber sees the long-term and systematic mistreatment of the applicant – as the first high-level terror suspect on whom the new interrogation methods were tested[90] – as constituting a violation of the prohibition of torture.[91] Poland carries responsibility for this violation as it (as explained above) knew about these activities and cooperated with them.[92] By participating in the applicant's rendition, Poland also put him at specific risk of further mistreatment in a third state.[93]

For basically the same factual reasons the Chamber sees Poland as responsible for the violations of Art. 5, 8, 13 and 6 ECHR. In regard to Art. 5 ECHR (guiding principle (7)), this follows intrinsically from the practice of extraordinary renditions.[94] Concerning Art. 8 ECHR (guiding principle (8)), the Court stresses that the circumstances of the applicant's detainment can in no way be seen as justified within the meaning of Art. 8(2).[95] It sees a violation of Art. 13 ECHR (guiding principle (9)) in connection with Art. 3, 5 and 8 ECHR in the fact that Poland, as already discussed above, did not carry out an effective investigation.[96] Finally, the Court also considers a flagrant denial of justice within the meaning of Art. 6 ECHR to have taken place (guiding principle (10)),[97] as the applicant has been in custody for over 12 years (since 27 March 2002; now in Guantanamo Bay) without ever having been charged, and the last review of his detention was over 7 years ago (on 27 March 2007).[98] Moreover, there is a danger of his conviction by the U.S. Military Commissions[99], which would amount to a double denial of justice: On the

[87] Husayn, supra n. 52, para. 482-7.

[88] Husayn, supra n. 52, para. 486 ('…perceptible lack of will to investigate at domestic level the allegations that they were denying. … delay must be considered inordinate …'); also cf. supra n. 65.

[89] Husayn, supra n. 52, para. 493.

[90] Also see supra n. 56.

[91] Husayn, supra n. 52, para. 504-11 (511), cf. esp. para. 508 ('…continually and systematically subjected to all those aggressive measures applied one by one or in combination …'), 509 ('….permanent state of anxiety …'), 510 ('…extremely harsh detention regime and permanent emotional and psychological distress caused by the past experience and fear of his future fate …').

[92] Husayn, supra n. 52, para. 512.

[93] Cf. guiding principles 4 and 5 as well as para. 513.

[94] Husayn, supra n. 52, para. 524-26 (526).

[95] Husayn, supra n. 52, para. 533-4.

[96] Husayn, supra n. 52, para. 544-5.

[97] Husayn, supra n. 52, para. 555-61.

[98] Husayn, supra n. 52, para. 559.

[99] On this, cf. K. Ambos/A. Poschadel, 'Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantánamo Bay', *Utrecht Law Rev.* 9 (2013) 109.

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one hand, it can be assumed that such a trial would use evidence gained through torture during his detainment in violation of the Convention;[100] on the other hand, the Commissions do not represent an impartial and independent tribunal within the meaning of the Convention.[101]

f) In regard to the '**right to the truth**' – which has already been discussed in connection with *El-Masri*[102] – and the resulting disclosure obligations (guiding principle (11)), the Chamber states that Poland has failed to meet these obligations.[103] As far as the necessary supervision of the secret services to effectively safeguard Convention rights is concerned (guiding principle (12)), this case raises the question of whether the secret service is supervised sufficiently in the Polish legal system.[104] In light of the 'serious violations of several Convention provisions' and the damage caused to the applicant, which 'cannot be made good by the mere finding of a violation',[105] the Chamber finally regards it 'necessary' to award financial compensation in the amount of EUR 100,000 (Art. 41 ECHR);[106] the applicant had demanded EUR 150,000.[107]

[100] Husayn, supra n. 52, para. 555, 557.
[101] Husayn, supra n. 52, para. 556-7.
[102] Cf. I. guiding principle 6 and 2 d).
[103] Husayn, supra n. 52, para. 490-1.
[104] Husayn, supra n. 52, para. 492.
[105] Husayn, supra n. 52, supra n. 1, para. 566.
[106] Husayn, supra n. 52, supra n. 1, para. 567.
[107] Husayn, supra n. 52, supra n. 1, para. 564.

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