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CAN STATES WITHHOLD INFORMATION ABOUT ALLEGED HUMAN RIGHTS ABUSES ON NATIONAL SECURITY GROUNDS? SOME REMARKS ON THE ECtHR JUDGMENTS OF *AL-NASHIRI V. POLAND* AND *HUSAYN (ABU-ZUBAYDAH) V. POLAND*

Abstract:
The judgments delivered by the European Court of Human Rights in Al-Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland highlight the potential tension that may arise between states' broad reliance on national security grounds to withhold disclosure of secret files and compliance with their obligations under the European Convention on Human Rights. The present article examines the above-mentioned judgments, focusing, in particular, on how (and to what extent) the withholding of secret information may infringe on the right to the truth and, as far as proceedings before the European Court of Human Rights are concerned, the state's duty to cooperate with it.

Keywords: European Court of Human Rights, secret files, national security, right to the truth, duty of cooperation

INTRODUCTION

On 24 July 2014, the European Court of Human Rights (ECtHR or the Court) delivered its judgments in the cases of *Al-Nashiri v. Poland*[1] and *Husayn (Abu Zubaydah) v. Poland.*[2]

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[1] ECtHR, *Al-Nashiri v. Poland* (App. No. 28761/11), 24 July 2014, all ECtHR judgments available at: http://www.echr.coe.int.

[2] ECtHR, *Husayn (Abu Zubaydah) v. Poland* (App. No. 7511/13), 24 July 2014. The two judgments became final on 17 February 2015 after a panel of five judges rejected the request of Poland to have the cases reviewed by the Grand Chamber. For a comment on these two judgments *see, inter alia,* L.A. Walin, *Responsibility for Secret Detention and Extraordinary Renditions: The Strasbourg Court Holds Poland to*

The first case concerns the extraordinary rendition[3] of Abd al-Rahim Hussayn Muhammed Al-Nashiri, a Saudi national suspected of being involved in terrorist activities, who was captured in Dubai in October 2002. He was then transferred under CIA custody to the "Salt Pit" prison in Afghanistan and, later on, to secret detention centres (so-called "black sites") in Thailand and Poland. After being transferred and temporarily kept in other secret detention sites outside Poland,[4] Mr. Al-Nashiri was eventually moved to Guantánamo Bay, a United States naval base in Cuba, where, in 2011, the military commission's prosecutors brought charges against him, asking for the death penalty. During his detention, Mr. Al-Nashiri was held *incommunicado* and subjected to the so-called enhanced interrogation techniques, which included waterboarding and mock executions.[5]

The second case before the Court addresses the extraordinary rendition of Zayn Al-Abidin Muhammad Husayn, a stateless Palestinian suspected of being a member of Al'Qaeda, who was seized by Pakistani and U.S. agents from his house in Pakistan on 27 March 2002. For four years, until he was eventually transferred to Guantánamo Bay, he was detained *incommunicado* in secret detention facilities all over the world,[6] including Poland from 5 December 2002 to 22 September 2003.

Account, 3(2) Cyprus Human Rights Law Review 185 (2014); K. Ambos, *The European Court of Human Rights and Extraordinary Renditions: A Commentary on El-Masri vs. Macedonia and Husayn and Al-Nashiri vs. Poland*, 5(1) European Criminal Law Review 107 (2015).

[3] In the aftermath of the terrorist attacks of 9/11, the United States government began a special detention and interrogation programme for suspected terrorists, empowering the Central Intelligence Agency (CIA) with extended competences. As part of this program, suspected terrorists were abducted and transferred to secret detention centres where they were subjected to enhanced interrogation techniques. The ECtHR has provided a specific definition of extraordinary rendition as "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, and where there was a real risk of torture or cruel, inhuman or degrading treatment" (*see*, *inter alia*, *Al-Nashiri*, para. 454). For an overview of the practice of extraordinary renditions and the enhanced interrogations techniques used, see also, *inter alia*, the Executive Summary of the US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, released on 3 April 2014 and declassified on 3 December 2014. To date (April 2016), the rest of the report is still classified. The Executive Summary explicitly refers, *inter alia*, to the use of coercive interrogation techniques against Abu Zubaydah (*ibidem*, p. 5) and against Al-Nashiri (*ibidem*, p. 72). According to CIA cables, for instance, Al-Nashiri was at times placed nude "in standing position, handcuffed and shackled" (*ibidem*). *See also* J. T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6(2) Melbourne Journal of International Law 516 (2005); D. Weissbrodt, A. Bergquist, *Extraordinary Renditions: A Human Rights Analysis*, 19 Harvard Human Rights Journal 123 (2006); S. Borelli, *Extraordinary Rendition, Counter-Terrorism and International Law*, in: B. Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham: 2014, pp. 361-378.

[4] In 2012 Al-Nashiri commenced proceedings before the ECtHR against Romania, where the applicant was allegedly kept *incommunicado* after he was transferred out of Poland in 2003. *See Al-Nashiri v. Romania* (App. No. 33234/12), lodged on 1 June 2012.

[5] The facts of the two cases are well described in: A. Bodnar, I. Pacho, *Domestic Investigations into Participation of Polish Officials in the CIA Extraordinary Renditions Program and the State Responsibility under the European Convention on Human Rights*, 31 Polish Yearbook of International Law 233 (2011).

[6] In respect of the secret detention in Lithuania, Mr. Abu Zubaydah filed a separate application with the Court. *See Husayn (Abu Zubaydah) v. Lithuania* (App. No. 46454/11), lodged on 14 July 2011.

In both cases the Court found that Poland had breached the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) by enabling the detention and torture of the applicants in Polish territory, by failing to conduct effective investigations, and by allowing the transfer of the two detainees outside Poland despite the existence of a real risk of them being tortured and subjected to an unfair trial. More specifically, the Court found that, by means of the above-mentioned conducts/omissions, Poland violated Arts. 3 (prohibition of torture and other inhuman and degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the ECHR. In the *Al-Nashiri* case, the Court also concluded that Poland breached Arts. 2 and 3 of the ECHR, together with Art. 1 of Protocol no. 6 to the same instrument, by allowing the transfer of the applicant, regardless of the foreseeable risk that he could be subjected to the death penalty.

The Court awarded each applicant EUR 100,000 as compensation for non-pecuniary damages. In respect of Al-Nashiri, the Court also ordered Poland to seek assurances from the United States that they would not apply the death penalty.[7]

Several aspects of the two rulings are of particular significance. First of all, as has been correctly underlined, in both decisions the Court took a "bold approach" to human rights violations perpetrated by a third party, namely the United States of America.[8] In concluding that Poland had breached several provisions of the ECHR, the Court relied heavily on the unlawfulness of the CIA's operations, to the point that one might wonder whether the Court considered such unlawfulness to be a prerequisite for its findings in respect to Poland,[9] in apparent contrast to the so-called "Monetary Gold Principle".[10]

Secondly, for the first time the ECtHR openly acknowledged the unfairness of the military trials in Guantánamo, where both applicants are currently detained. The Court expressly found that trials before the military commission in the Cuban naval base do not meet the standards of a fair trial *ex* Art. 6 of the ECHR. As a consequence, according to the Court, Poland had breached the said provision by allowing the transfer of the applicants to Guantánamo even though it was aware that they could have faced a "flagrant denial of justice".[11]

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[7] *Al-Nashiri v. Poland*, para. 589.

[8] M. Scheinin, *The ECtHR Finds the US Guilty of Torture – As an Indispensable Third Party?*, EJIL:Talk! 2014, available at: http://bit.ly/1qDHhvr (accessed 20 April 2016).

[9] *Ibidem*.

[10] According to this principle, enunciated by the International Court of Justice in the case *Monetary gold removed from Rome in 1943 (Italy v. France, UK and USA)* [1954] ICJ Rep. 19, an international court will not adjudicate on a case where the same institution would be required, as a necessary pre-requisite, to decide on the rights or responsibilities of a non-consenting and absent third state. *See also* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (with Commentaries)*, Yearbook of the International Law Commission (2001), Vol. II, part. II, Art. 16. For an analysis of this principle, *see also* A. Nollkaemper, *Issues of Shared Responsibilities before the International Court of Justice,* in: E. Reiter, H. de Waele (eds.), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, Brill, Leiden-Boston: 2008, p. 208.

[11] *Al-Nashiri v. Poland*, para. 568; *Husayn (Abu Zubaydah) v. Poland*, para. 560.

Apart from the above, the two judgments under examination are of particular relevance with respect to another issue, namely the one which will constitute the focus of the present contribution: the ECtHR's stance with regard to the "secrecy" characterising the practice of extraordinary renditions.[12] In particular, the present essay takes into account the "double-fold dimension", under which the issue of secrecy has come into play in the cases at stake: as a breach of the right of the applicants and of the whole society to know the truth (*infra*, section 1); and as a violation of the contracting states' duty to furnish to the ECtHR all necessary facilities for the examination of the case (*infra*, section 2).

1. THE WITHHOLDING OF INFORMATION BASED ON NATIONAL SECURITY GROUNDS AND THE "RIGHT TO THE TRUTH"

1.1. The "national security" argument and the duty to the undertake effective investigations

One of the arguments the applicants relied on in their complaints against Poland was that the Polish authorities did not carry out effective investigations into their alleged torture and ill-treatment, in breach of Art. 3 of the ECHR in its procedural limb.

Pursuant to the well-established case law of the ECtHR, Art. 3 of the ECHR, read in conjunction with Art. 1, requires an effective official investigation any time that an individual alleges to have been the victim of torture or other ill-treatment.[13] Such an investigation should be prompt and thorough, capable of leading to the identification and punishment of those responsible, independent of the executive power and should envisage an effective participation of the victim.[14] If these requirements are disregarded,

[12] For an analysis of the role of "secrecy" in the practice of extraordinary renditions *see, inter alia*, S. Chesterman, *Secrets and Lies: Intelligence Activities and the Rule of Law in Time of Crisis*, 28(3) Michigan Journal of International Law 553 (2007); T. Scovazzi, *La Repubblica riconosce e garantisce i diritti inviolabili della segretezza delle relazioni tra servizi informativi italiani e stranieri?,* 92(4) Rivista di diritto internazionale 959 (2009); S.D. Schwinn, *The State Secret Privilege in the Post 9/11 Era,* 30(2) *Peace Law Review* 778 (2010); F. Fabbrini, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared*, 2(3) Italian Journal of Public Law 255 (2011); J. D. A. Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege,* 63(3) Alabama Law Review 429 (2012); J.D.A. Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, 3(1) National Security Law Brief 1 (2012); S. Horton, *Lords of Secrecy: The National Security Elite and America's Stealth Warfare*, Nation Books, New York: 2015.

[13] *See e.g.* ECtHR, *Assenov and others v. Bulgaria* (App. No. 90/1997/874/1086), 28 October 1998, para. 102; *Labita v. Italy* (26772/95), Grand Chamber, 6 April 2000, para. 131; *Corsacov v. Moldova* (App. No. 18944/02), 4 April 2006, para. 68. On this point *see also, inter alia*, A. Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights*, Council of Europe Publishing, Strasbourg: 2012, p. 48 ff.

[14] *See e.g. Assenov and others v. Bulgaria*, para. 102.

the prohibition of torture and other ill-treatment enshrined in Art. 3 of the ECHR would be ineffective in practice and the State agents involved would be able to operate with impunity.

According to the applicants, in the cases at stake the domestic investigations had, *inter alia*, lacked transparency as almost all relevant material in the case had been classified as secret or top-secret, hindering the victims' vindications of their rights. The applicants argued that such a broad reliance on secrecy had the sole illegitimate aim and scope of granting impunity to the State agents that had cooperated with the CIA.

The Court's assessment on this specific point, which eventually led it to uphold the applicants' arguments, is worth emphasising. The Court indeed acknowledged that investigations may involve national security issues, but according to the Court this should not mean that reliance on confidentiality and secrecy gives investigative authorities full discretion to refuse disclosure of material to the victim(s) or the public.[15] The Court emphasised that:

> (…) even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests.[16]

Interestingly, by implicitly admitting that national security concerns may constitute a legitimate ground to not disclose certain information, and by entrusting States with a margin of discretion in counter-balancing the need to protect national security against the right of the parties to defend their interests, the Court expressly reiterated (and transposed under the procedural limb of Art. 3) its previous findings with respect to Arts. 5(4) and 6[17] of the ECHR in cases involving classified material in the course of criminal proceedings.

The Court's reference to "national security concerns" is thus arguably construed as a key element to be taken into account in establishing what amounts to sufficient "scrutiny" (to use the Court's words) over investigations and proceedings related to allegations of serious human rights violations. Therefore, national security considerations would come into play as part of a balancing exercise in ascertaining what level of scrutiny could be deemed sufficient in a given circumstance.

1.2. The refusal to disclose information and the "right to the truth"

Still, the approach undertaken by the Court with respect to the national security concerns raised by the Respondent party needs also to be reconciled with a second main

[15] *Al-Nashiri v. Poland*, para. 494; *Husayn (Abu Zubaydah) v. Poland*, para. 488.

[16] *Al-Nashiri v. Poland*, para. 494.

[17] *See, inter alia*, ECtHR, *A. and others v. The United Kingdom* (App. No. 3455/05), Grand Chamber, 19 February 2009, paras. 205 ff.

finding of the Court, that is, its express recognition of a "right to the truth" concerning serious human rights abuses.

In the *Al-Nashiri* and *Husayn* judgments, the Court stressed the fact that, in cases involving allegations of serious violations of human rights, both an individual and the society as a whole have a right to know the truth concerning the relevant circumstances surrounding the alleged abuses.[18] If the Court's reference to the right to the truth were to be interpreted extensively (so as to establish a corresponding absolute obligation for contracting states not to rely on secrecy in the course of investigations concerning serious human rights violations), it would be difficult to reconcile such recognition with any "national security" balancing exercise, unless admitting – as the Court seems to do – that the right to the truth only imposes on the contracting states a duty to ensure a *certain degree* of public scrutiny, to be ascertained on a case-by-case basis.

As far as the right to the truth is concerned, the Court reiterated – and further elaborated upon – its previous jurisprudence concerning Art. 3 of the ECHR. In its case law, the Court has repeatedly recognised that, particularly in cases of enforced disappearances, the lack of information concerning the whereabouts and fate of the disappeared amounts to a violation of Art. 3.[19] Only in its judgment in the case of *Association "21 December 1989"* did the Court took a broader approach (motivated by the circumstances at stake, which involved a mass murder) by inferring, more generally, a right to know the truth from Art. 2 of the ECHR. The Court upheld "the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the *right to life*" (emphasis added).[20]

The Court's most "elaborate" recognition of the right to the truth, however, is contained in the 2012 judgment related to another case of extraordinary rendition: *El Masri v. The Former Yugoslav Republic of Macedonia*.[21] On that occasion, the Court found that the summary investigation that had been carried out with respect to the victim's extraordinary rendition was neither effective nor capable of leading to the identification and punishment of those responsible and to the establishment of the truth. As a consequence, as in the cases at stake here, the Court concluded that the respondent State had breached Art. 3

[18] *Al-Nashiri v. Poland*, para. 495; *Husayn (Abu Zubaydah) v. Poland*, para. 489.

[19] One of the leading cases in this respect is the ECtHR case of *Cyprus v. Turkey* (App. No. 25781/94), 10 May 2001, where the Court found that "the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3" (*ibidem*, para. 157).

[20] ECtHR, *Case of Association 21 December 1989 v. Romania* (App. No. 33810/07 and 18817/08), 24 May 2011, para. 144.

[21] ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (App. No. 396306/09), Grand Chamber, 13 December 2012. For comments on this judgment *see, inter alia*, N. Napoletano, *Extraordinary Renditions, tortura, sparizioni forzate e "diritto alla verità": alcune riflessioni sul caso El-Masri*, 7(2) Diritti umani e diritto internazionale 331 (2013) and F. Fabbrini, *The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight against Terrorism*, 14(1) Human Rights Law Review 1 (2013).

of the ECHR in its procedural limb.[22] In reaching such a conclusion, the Court expressly emphasised that the inadequate character of the investigation had had a negative impact on the right of the victim and of the general public to know the truth regarding the relevant circumstances of the case.[23] The Court also stressed that, with regard to the practice of "extraordinary renditions", the concept of "State secrets" had often been invoked to obstruct the search of the truth, granting *de facto* impunity to the State agents involved.[24] Whilst not explicitly stating so, the ECtHR hinted that similar circumstances violated the right of both the victim and the general public to know what had happened.

In the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments, the ECtHR confirmed overall the approach already undertaken in *El-Masri*. Lacking any express recognition of a right to the truth in the ECHR, the Court did not address it as an autonomous self-standing right, but inferred it from the procedural obligations enshrined in Art. 3 of the ECHR. The Court also reiterated the dual dimension – individual and collective – of the right to know the truth, as well as its strict interconnection with the fight against impunity. In this respect, the ECtHR's case law does not depart from, but rather confirms, the emerging recognition of such a "legal paradigm"[25] in international human rights law[26] and jurisprudence.[27]

In particular, the approach upheld by the ECtHR partially follows the stance already taken by the Inter-American Commission on Human Rights and by the Inter-American Court of Human Rights (IACtHR), which have repeatedly inferred such a right, in its dual-fold dimension, from the duty to respect human rights and from the rights to a fair trial and judicial protection, set forth in Arts. 1, 8 and 25 of the American Convention on Human Rights.[28] However, with the sole exception of its judgment in the case *Gomes Lund v. Brazil*,[29] the IACtHR has generally rejected the argument that the

[22] *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 194.

[23] *Ibidem*, para. 191.

[24] *Ibidem*.

[25] This expression is used in Fabbrini, *supra* note 21, p. 19.

[26] The right to the truth is recognised in Art. 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

[27] For more on the right to the truth in international law and jurisprudence, *see, inter alia*, T. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23(4) Michigan Journal of International Law 977 (2001); Y. Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88(862) *International Review of the Red Cross* 245 (2006); V. Newman-Pont, *Falso o Verdadero (El derecho a la verdad es norma imperativa international?),* 14 *Rivista Colombiana de Derecho International* 43 (2009); D. Groome, *The Right to Truth in the Fight against Impunity*, 29(1) Berkeley Journal of International Law 175 (2011). *See also* J.E. Méndez, F.J. Bariffi, *Truth, Right to, International Protection*, in: R. Wolfrum (ed.), *Max Plank Encyclopedia of Public International Law*, online edition (2008), available at: www.mpepil.com (accessed 20 April 2016).

[28] Inter-American Commission on Human Rights, *The Right to Truth in the Americas* (13 August 2013) Doc OEA/Ser.L/V/II.152 No. 2, para. 13.

[29] IACtHR *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219, 24 November 2010, para. 212.

right to the truth constitutes an autonomous right embodied in Arts. 1, 8 and 25 of the American Convention on Human Rights, limiting its reasoning to merely "subsuming" such a right from the above-mentioned legal provisions.[30]

The IACtHR's oscillatory approach towards the autonomous nature of the right to the truth has been recently well illustrated by the concurring opinion of Judge Ferrer Mac-Gregor Poisot (endorsed by Judges Vio Grossi and Ventura Robles) to the 2014 judgment in the case *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia.* While agreeing with the majority's decision in the case, Judge Ferrer Mac-Gregor Poisot took issue with the Court's reiteration of its main approach, i.e. subsuming the right to the truth in Arts. 1, 8 and 25 of the American Convention on Human Rights. Judge Poisot and the two judges who endorsed his opinion stressed the need to recognize the right to the truth as an *autonomous* right under the Inter-American system of human rights protection (thus consolidating the Court's stance in the judgment related to the case *Gomez Lund v. Brazil*).[31] In particular, Judge Ferrer Mac-Gregor Poisot grounded this assertion on the fact that subsuming the right to the truth in other conventional rights would "encourage the distortion of the essence and intrinsic nature of each right" and prevent the clear identification of its content and scope.[32]

Nonetheless, both the IACtHR and the ECtHR have so far distanced themselves from the conclusions reached by the United Nations High Commissioner for Human Rights, according to which the right to know the truth concerning serious violations of human rights constitutes an "inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparation."[33]

It is also noteworthy that, like the ECtHR, the IACtHR has expressly addressed the issue of "secrecy" of information in relation to the right to the truth concerning serious violations of human rights. The IACtHR has indeed repeatedly established that the right to the truth prevents State authorities from relying on official secrecy and confidentiality of information, as well as on reasons of national security or public interest, in order to refuse to supply to the competent judicial or investigative authorities relevant information concerning human rights violations.[34]

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[30] *See e.g.* IACtHR, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 91, 22 February 2002, para. 76; *Case of Trujillo Oroza v. Bolivia*, Series C No. 92, 27 February 2002, para. 114; *Case of Contreras et al. v. El Salvador*, Series C No. 232, 31 August 2011, para. 170.

[31] IACtHR *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, 24 November 2014, Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Introduction (*see also* the endorsements by Judge Eduardo Vio Grossi and Judge Manuel E. Ventura Robles).

[32] *Ibidem*, para. 24.

[33] UNCHR, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights* (8 February 2006), UN Doc E/CN.4/2006/91, para. 55.

[34] IACtHR, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, 25 November 2003, paras. 180-183; *La Cantuta v. Perù*, Series C No. 162, 29 November 2006, para. 111; *Case of Tiu Tojín v. Guatemala*, Series C No. 190, 26 September 2008, para. 77; *Case of Radilla Pacheco v. Mexico*, Series C No. 209, 23 November 2009, paras. 90-92; *Case of Gomes Lund v. Brazil*, para. 202.

The "consolidating attitude" of the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments with respect to the European Court's (as well as to the IACtHR's) previous case law is made evident also by the fact that, contrary to what had happened in *El-Masri*, neither "internal divisions", nor "changes of course" have accompanied the ECtHR's findings in the cases at stake. In *El-Masri,* the explicit embracement of the new paradigm of a right to the truth had given rise to divergences of opinions, as made clear by the two concurring opinions attached to the final ruling. On the one hand, Judges Tulkens, Spielmann, Sicilianos and Keller criticised the lack of a more explicit acknowledgment of the right to the truth in the context of Art. 13 of the ECHR ("right to an effective remedy");[35] while on the other hand, Judges Casadevall and López Guerra noted that "(…) no separate analysis as performed by the Grand Chamber (…) was necessary with respect to the existence of a 'right to the truth' as something different from, or additional to, the requisites already established in such matters by the previous case-law of the Court."[36] In their separate opinions, Judges Casadevall and López Guerra also criticised the Court's recognition of the collective nature of the right to the truth.[37] However, similar divergences as to the nature and content of the right to the truth did not find their way into the judgments under review here, where the ECtHR merely reiterated the conclusions reached in *El-Masri*, situating the right to the truth, in its individual and collective dimension, under the procedural limb of Art. 3 of the ECHR.

That said, in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments the ECtHR, taking into account the circumstances of the cases, appears to have gone partially beyond the "cautious approach" – or, to recall the words of Judges Tulkens, Spielmann, Sicilianos and Keller – the "timid allusion" to the right to the truth it had taken in the *El-Masri* ruling, developing its case law further on this point. First of all, in addressing the issue of truth *vis-à-vis* secrecy, the ECtHR spelled out more clearly the obligations resting on contracting states: to guarantee a certain degree of public scrutiny over investigations concerning allegations of serious violations of human rights, as well as to disclose to the parties to such proceedings as much information as possible about any allegations and evidence. As stated earlier, the Court further stressed that State parties do not enjoy unfettered discretion in establishing what should be deemed to be "sufficient" public scrutiny and, more generally, what should or should not be disclosed to the victims and the public in a given case. To the contrary, at least with respect to the victim's right to know, States should undertake a balancing exercise between the need to protect national security and the rights of the parties to the proceedings to receive information about allegations and evidence, taking into specific account that the more serious is the violation (a point that can raise questions as to what amounts to a "serious" violation of human rights), the stricter the scrutiny which should be ensured.

[35] *El-Masri v. The Former Yugoslav Republic of Macedonia* (Joint Concurring Opinion of Judges Tulken, Spielman, Sicilianos and Keller).

[36] *Ibidem* (Joint Concurring Opinion of Judges Casadvall and López Guerra).

[37] *Ibidem*.

In this respect, as already underlined, the Court seems to have inferred from the right to the truth an obligation of the part of state parties to disclose as much information as possible regarding investigations into serious human rights violations. Whilst national security concerns may limit the amount of information to be disclosed, states cannot unduly rely on secrecy to excessively restrict the public and the victims' access to the material of an investigation.

Furthermore as anticipated in the case of serious violations of human rights, public scrutiny should be particularly intense. Accordingly, whereas states retain a certain margin of appreciation in determining the degree of public scrutiny that should be deemed sufficient in each single case, they do not have full and unfettered discretion to rely on secrecy to avoid oversight over their actions.

Against this background, it seems that the Court relied on the notion of the right to the truth to further substantiate the high "threshold" of public scrutiny and victims' participation in the investigations which should be ensured in any case concerning serious human rights abuses, without excluding in principle that a certain degree of secrecy may nonetheless be maintained when national security concerns so require. That notwithstanding, in the practical application of this principle the Court seems to have *de facto* set a sort of absolute presumption in the sense that confidentiality and secrecy claims in investigations concerning serious human rights abuses would be inconsistent with Art. 3 of the ECHR and the right to the truth encompassed therein. The ECtHR limited itself indeed to a brief examination of the circumstances of the case in order to conclude that the required level of public scrutiny and victims' participation in cases involving serious human rights violations is not ensured when only sparse and vague information has been disclosed.

Strictly interrelated with the above, the ECtHR has made even more stringent the existing link between the need to eradicate impunity and the right of victims and the general public to know the truth about serious violations of human rights. In *Al-Nashiri* and *Husayn (Abu Zubaydah)* the ECtHR has clearly recognised that contracting states do not enjoy absolute discretion to refuse disclosure of relevant material to the public and to the victims. Otherwise, secrecy and confidentiality could easily become a means to grant impunity for serious human rights violations, in contrast with the principle of effective protection of rights inherent in the ECHR.[38] These findings echo the stance taken by the Parliamentary Assembly of the Council of Europe, which has repeatedly stated that information concerning the responsibility of state agents who have committed human rights violations cannot be shielded under the guise of "state secrecy".[39]

[38] According to such a principle, the ECHR is not intended to guarantee rights that are theoretical or illusory, but rights that are practical and effective. *See generally* B. Rainey, E. Wicks, C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th ed.), Oxford University Press, New York: 2014, pp. 73-74.

[39] Council of Europe, Parliamentary Assembly, *Resolution 1675 (2009) on State of Human Rights in Europe: The Need to Eradicate Impunity* (24 June 2009), para. 9(2). *See also Resolution 1838 (2011) on Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Viola-*

On a side note, but along the same line of reasoning related to the close relationship between secrecy and impunity, it is noteworthy that the ECtHR hinted – under the procedural limb of Art. 3 of the ECHR – to an obligation on the part of states to provide for appropriate safeguards, both in law and in practice, against abuses of rights taking place in the context of covert intelligence operations.[40] According to the Court, Art. 3 of the ECHR (as well as Art. 2 of the same legal instrument) should be interpreted not only to encompass the contracting states' obligation to undertake an effective investigation into alleged human rights violations, but also to provide for "appropriate safeguards – both in law and in practice – against intelligence services violating rights granted in the ECHR in the pursuit of their covert operations."[41] The duty of states to establish not only *ex-ante* control and oversight mechanisms, but also a framework capable of ensuring *ex-post facto* accountability for human rights violations committed by intelligence services is inherently in contradiction with any unjustified resort to secrecy and confidentiality meant to hide the truth and grant impunity.

In this respect, the ECtHR has "joined the chorus" of other international and regional bodies, such as the Parliamentary Assembly of the Council of Europe and the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms which, in the context of countering terrorism, have underlined that the blanket resort to secrecy and confidentiality with reference to intelligence activities is contrary to states' human rights obligations and, more specifically, with the duty to undertake effective investigations into allegations of serious violations of human rights.[42]

Finally, the European Court has further specified the content of the right to the truth by stating that, in the case at stake, the fact that the national media had published information related to the investigations officially covered by secrecy and confidentiality could constitute supportive evidence of abusive conduct on the part of state authorities. In this respect, the Court's conclusions seemed to recall – although implicitly – its findings in, *inter alia*, the case *Vereniging Weekblad Bluf! v. Netherlands*.[43] On that occasion, although in a different context (assessment of the national security exception clause under Art. 10 of the ECHR), the Court declared that, when certain information has already been made public and therefore cannot be protected as a state secret anymore, there could be no legitimate interest in protecting such information on the ground of national security.[44]

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tions (6 October 2011), para. 4 and *Resolution 1954 (2013) on National Security and Access to Information* (2 October 2013), para. 6.

[40] For more on the topic (although examined under an alleged breach of Art. 8 of the ECHR), *see also* the recent ECtHR case of *Roman Zakharov v. Russia* (47143/06), Grand Chamber, 4 December 2015.

[41] *Al-Nashiri v. Poland*, para. 498; *Husayn (Abu Zubaydah) v. Poland,* para. 492.

[42] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin (4 February 2009) UN Doc. A/HRC/10/3 para. 58 ff. *See again e.g.* Council of Europe, Parliamentary Assembly, Resolution 1838 (2011), *supra* note 39, paras. 1 and 6.

[43] ECtHR, *Vereniging Weekblad Bluf! v. Netherlands* (App. No. 16616/90), 9 February 1995.

[44] *Ibidem*, paras. 45 and 46.

All in all, in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments the ECtHR seems to have both reiterated and further developed its case law on the right to know the truth about serious violations of human rights. In particular the Court, while reiterating its unwillingness to commit itself to the recognition of the autonomous nature of such a right, seems to have further elaborated on its "content", dictating more clearly states' procedural obligations under the ECHR. In this respect, the ECtHR's hint about the necessary high level of public scrutiny and victims' participation in investigations into serious human rights violations, as well as the possible inconsistency of secrecy and confidentiality claims with the individual and collective right to know the truth, is of particular significance.

However, regardless of these positive developments the Court's reasoning would have benefited from a clearer determination as to the role of national security arguments and the states' margin of appreciation in the context of the procedural limb of Art. 3 of the ECHR. More specifically, whilst the very reference to the right to know the truth in the context of Art. 3 seems to act as a "tool" to set a higher "threshold" of public scrutiny and victims' participation in investigations into serious human rights violations (compared to the approach undertaken by the same Court under Art. 6 of the ECHR), it will be interesting to see whether, in future judgments, the Court will further elaborate on the contours and exact content of any balancing exercise in the framework of Art. 3.

2. SECRET EVIDENCE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE DUTY TO COOPERATE

2.1. The Al-Nashiri and Husayn (Abu Zubaydah) judgments: a reiteration of the extensive reading of Art. 38 of the ECHR

As already stated, in *Al-Nashiri* and *Husayn (Abu Zubaydah)* the issue of "secrecy" of information also came to the attention of the ECtHR in light of the refusal by Polish authorities to comply with the evidentiary request addressed to it by the Court.

The Polish Government justified this lack of compliance by the fact that domestic criminal investigations into the applicants' allegations of human rights abuses were still pending and, therefore, covered by "the secrecy of investigation".[45] As the respondent State, Poland also argued that the refusal to produce the requested evidence was motivated by the fact that the Rules of Court, apart from representing merely "[non-binding] internal acts", do not contain clear indications as to the way in which sensitive documents or classified material are to be protected once produced in Court.[46]

The Court's assessment on this specific point is certainly noteworthy. According to the ECtHR, Art. 38 of the ECHR, by requiring State parties to furnish all necessary facilities for the examination of the case, imposes on State parties the procedural obliga-

[45] *Al-Nashiri v. Poland,* para. 346; *Husayn (Abu Zubaydah) v. Poland*, para. 340.
[46] *Al-Nashiri v. Poland*, para. 348; *Husayn (Abu Zubaydah) v. Poland*, para. 342.

tion to comply with the Court's evidentiary requests in a prompt manner.[47] The Court also found that "the obligations that Contracting States take upon themselves under the Convention (…) include their undertaking to comply with the procedure as set by the Court under the Convention and the Rules of Court."[48]

In light of the obligations flowing from Art. 38 and the Rules of Court,[49] the ECtHR concluded that the respondent state could not refuse to comply with the Court's evidentiary and procedural requests by relying on its domestic law (**i.e.** in the specific case, the norm establishing the "secrecy of investigation"). As correctly noted by the Court, a similar behaviour would indeed violate the general rule enshrined in Art. 27 of the Vienna Convention on the Law of Treaties,[50] pursuant to which provisions of internal law may not be invoked as justification for a failure by a contracting state to abide by its treaty obligations.[51]

It is evident that a similar reasoning could easily be applied even beyond the circumstances of the cases at stake, i.e. to any case where a state's reliance on "secrecy" or "confidentiality", although legitimate under domestic law, would end up breaching international human rights norms.

As to the second main argument invoked by Poland (i.e. the lack of sufficient procedural safeguards), the ECtHR first ruled that even when states justify their failure to produce evidence by putting forward legitimate reasons (such as national security considerations), the Court nonetheless has to satisfy itself that there are reasonable and solid grounds for treating a particular document as secret or confidential.[52] In a situation where the Court is persuaded of to the need to grant confidentiality or secrecy, such an exigency could be accommodated in several ways: by restricting public access (as per Rule 33 of the Rules of Court);[53] by classifying the whole or part of the document contained in the Court's files; or, in an extreme *ratio*, by holding *in-camera* hearings.[54] Finally, the Court declared that the lack of specific or detailed provisions for processing confidential, secret or sensitive information in the Rules of Court does not justify *per se* the state's refusal to disclose such material, considering the existence of a solid practice developed by the Court in processing confidential evidence.[55]

By means of the above reasoning, the ECtHR reiterated its previous case law, in a sense confirming the "consolidating approach" which largely characterises its judgments in *Al-Nashiri* and *Husayn (Abu Zubaydah)*. The Court's conclusions refer, in fact,

[47] *Al-Nashiri v. Poland*, para. 364; *Husayn (Abu Zubaydah) v. Poland*, para. 356.
[48] *Al-Nashiri v. Poland*, para. 371; *Husayn (Abu Zubaydah) v. Poland*, para. 364.
[49] ECtHR, Rules of Court, 1 June 2015.
[50] Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.
[51] *Al-Nashiri v. Poland*, para. 366; *Husayn (Abu Zubaydah) v. Poland*, para. 366.
[52] *Al-Nashiri v. Poland*, para. 365; *Husayn (Abu Zubaydah) v. Poland*, para. 357.
[53] Rule 33(2) expressly provides for classification of documents in the Court's files in the interest of morals, public order, national security considerations or any time that publicity would prejudice the interests of justice.
[54] *Al-Nashiri v. Poland*, para. 365.
[55] *Ibidem*, para. 371. *See also Husayn (Abu Zubaydah) v. Poland*, para. 364.

to the Grand Chamber's ruling in *Janowiec et al v. Russia*,[56] where the respondent state was held responsible under Art. 38 of the ECHR for refusing to produce in Court the internal decision to discontinue the investigation on the *Katyń* massacre.[57] On that occasion, the Russian Federation justified its failure to comply with the Court's evidentiary request by relying, *inter alia*, on the fact that the decision had been legitimately classified as "top secret" at the domestic level and that its disclosure to an international organization would have breached domestic law. As in the judgments under examination, the ECtHR concluded in *Janowiec* that the respondent state could not rely on domestic law to justify its failure to abide by its treaty obligations.[58] Moreover, the Court was not persuaded that the classification of the document had been genuinely driven by national security considerations, especially considering that the executive's assertions that national security was at stake were not subjected to any meaningful oversight before an internal independent body.[59]

Thus, in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments the ECtHR confirmed its previous case law, according to which contracting states cannot refuse to comply with the Court's evidentiary request by merely asserting that a particular disclosure would violate domestic legal provisions on the classification and secrecy of information. The Court itself might decide to accommodate such exigencies, when grounded on solid and reasonable motivations, through special procedural arrangements such as restricted access, classification, or *in-camera* hearings. As has been correctly noted, both in *Janowiec* and in *Al-Nashiri* and *Husayn (Abu Zubaydah)* the ECtHR has *de facto* acknowledged that "granting a blanket right for States to withhold documents from proceedings for national security reasons would jeopardize the very function of the Court."[60]

Moreover, the ECtHR's judgments in *Al-Nashiri* and *Husayn (Abu Zubaydah)* have also reiterated and further elaborated on the Court's stance concerning the use of national security evidence before it. While Rule 33(2) of its rules of procedure merely provides for the possibility of restricting public access to documents in the interests of morals, public order, national security or the administration of justice, the ECtHR has explicitly envisaged further mechanisms, such as the classification of information and *in-camera* proceedings, in order to ensure the proper balance between the need to protect national security interests on one hand, and the right of defence of the victims

[56] For a comment on this ruling *see, inter alia*, Y. Kozheurov, *The Case of Janowiec and Others v. Russia: Relinquishment of Jurisdiction in Favour of the Court of History*, 33 Polish Yearbook of International Law 227 (2013), p. 242.

[57] ECtHR, *Janowiec and others v. Russia* (App. Nos. 55508/07 and 29520/09), Grand Chamber, 21 October 2013. For an overview of the previous relevant case law by the ECtHR, *see also* C. Tripodina, *Articolo 38*, in: S. Bartole, P. De Sena, V. Zagrebelsky (eds.), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, CEDAM, Padova: 2012, pp. 38-39.

[58] *Janowiec and others v. Russia*, para. 211.

[59] *Ibidem,* para. 214.

[60] S. Sanz-Caballero, *How Could it Go So Wrong? Reformatio in Peius before the Grand Chamber of the ECtHR in the Case Janowiec and others v. Russia (or Polish Collective Memory Deceived in Strasbourg)*, 33 Polish Yearbook of International Law 259 (2013), p. 272.

and public scrutiny over investigation, more generally, on the other. The ECtHR has thus confirmed the need for oversight mechanisms over the use of secrecy and classification of information based on national security concerns with respect to domestic investigations and proceedings related to serious human rights violations. Interestingly, however, in the cases before it the Court seemed not to have inferred any conclusions on the merits based on the state's refusal to disclose information.

Finally, the Court's findings appear to be of particular relevance when read together with its conclusions with respect to the right to the truth. It is self-evident indeed that if contracting states can withhold information requested by the Court merely by claiming national security or similar considerations, this could *in practice* further "frustrate" the victim and the public's right to know the circumstances of human rights abuses. The strict interrelation between these two dimensions seems to have been implicitly acknowledged by the ECtHR. In *Al-Nashiri* and *Husayn (Abu Zubaydah)* the Court seems indeed to conclude that Poland's refusal to disclose information to the Court was, in the context of Art. 3 of the ECHR, further evidence of the general lack of public scrutiny and victims' participation in investigations.[61]

2.2. The ECtHR's case law on the duty to cooperate as part of a broader "trend" prohibiting the blanket resort to secrecy

Generally speaking, the ECtHR's case law on art. 38 of the ECHR may be seen as a part of a broader discourse regarding claims of national security and the secrecy of evidence before international and regional courts.[62]

The IACtHR, for instance, has also condemned state authorities' resort to secrecy as grounds to refuse to comply with its orders. In its judgment in the case *Cantoral Benavides v. Peru*, the Court found that the government could not rely on domestic legislation imposing a duty to keep secret the names of judges participating in trials for treason or terrorism in order to evade the Court's order to summon certain witnesses.[63] The Court held that states have a duty to cooperate with it and could not rely on their national legislation to justify their failure to comply.[64] Thus, like the ECtHR the IACtHR relied, although tacitly, on the already-mentioned rule embodied in Art. 27 of the Vienna Convention on the Law of Treaties. The IACtHR also clearly stressed the *ratio* underpinning contracting states' obligation to abide by its evidentiary requests, noting that:

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[61] *Al-Nashiri v. Poland*, para. 496; *see also Husayn (Abu Zubaydah) v. Poland*, para. 490.

[62] For more on the topic, *see, inter alia*, L. Moranchek, *Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY,* 31(2) Yale Journal of International Law 477 (2006).

[63] IACtHR, *Cantoral Benavides v. Peru*, Series C No. 69, 18 August 2008, para. 54. For a general overview of the procedure before the IACtHR *see*, *inter alia*, J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge: 2003.

[64] *Ibidem*. The duty to cooperate with the Court is expressly provided for in Art. 24(1) of its Rules of Procedure.

> [i]n trials dealing with violations of human rights it often happens that the claimant is not in a position to provide evidence, since some, in many cases, cannot be obtained without the cooperation of the State, which exercises control over the means necessary to clarify events that have taken place in their territories.[65]

The wording of the IACtHR on this point mirrors that of the ECtHR, which has repeatedly highlighted the evidentiary "imbalance" inherent in cases related to serious human rights violations.[66]

Furthermore, by agreeing to hear certain witnesses in closed hearings when security considerations are claimed by a state,[67] the IACtHR has *de facto* implicitly recognized *in camera* hearings as a possible procedural mechanism capable of accommodating legitimate security interests in proceedings before it.

Whilst the African Commission and the African Court of Human and Peoples' Rights have not yet dealt explicitly with states' refusal to submit evidence based on secrecy claims, it is likely that they might reach the same conclusions when directly confronted with the issue. The African Commission on Human and Peoples' Rights has indeed held that the African Charter places a duty on the state(s) to cooperate with it.[68] For instance, in its ruling in the case *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, the Commission found that Art. 57 of the Charter[69] "implicitly indicates that the State party (…) against which the allegation of human rights violations is levelled is required to consider them in good faith and *to furnish to the Commission all information at its disposal to enable the latter to come to an equitable decision*."[70]

It is also no surprise that the reasoning followed by the ECtHR in *Al-Nashiri* and *Husayn (Abu Zubaydah)* brings to mind the conclusions reached by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Blaškíc* case, that "to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and 'defeat its essential object and purpose'."[71]

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[65] *Cantoral Benavides v. Peru*, para. 55. *See also e.g.* IACtHR, *Case of Godínez Cruz v. Honduras*, Series C No. 5, 20 January 1989, paras. 141-142; *Gangaram Panday v. Suriname*, Series C No. 16, 21 January 1994, para. 49.

[66] *See e.g.* ECtHR, *Timurtaş v. Turkey* (App. No. 23531/94), 13 June 2000, para. 66.

[67] *See again Case of Godínez Cruz v. Honduras*, para. 35.

[68] R. Murray, *Evidence and Fact-Finding by the African Commission*, in: M. Evans, R. Murray (eds.), *The African Charter on Human and Peoples' Rights. The System in Practice, 1986-2000*, Cambridge University Press, Cambridge: 2011, p. 157.

[69] Art. 57 of the African Charter on Human and Peoples' Rights states: "Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission".

[70] Emphasis added. *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, African Commission on Human and Peoples' Rights, Communication no. 159/96, 11 November 1997, para. 10.

[71] *Prosecutor v. Tihomir Blaškíc* (Appeals Chamber), ICTY-95-14 (29 October 1997), para. 65.

In international adjudication, as well as at the domestic level, the use of national security evidence raises indeed issues as to the proper balance between the right of defence and the need for public scrutiny, on the one hand, and the protection of state secrecy on the other hand. Albeit with some differences, international and regional tribunals have generally accommodated this issue by envisaging *ad hoc* mechanisms (such as, for instance, *in-camera* hearings, *ex parte* proceedings, or restrictions concerning disclosure) in their rules of procedure.[72] In other instances, such in the case of the International Criminal Court, the protection of national security information has been directly addressed in convention provisions.[73]

In addition, even where similar provisions are not in place or case law seems to point towards a general recognition of secrecy privileges, such as in the case of the International Court of Justice,[74] commentators have nonetheless argued that states do not have a blanket privilege to withhold information based on national security concerns.[75]

CONCLUDING REMARKS

The ECtHR's judgments in *Al-Nashiri* and *Husayn (Abu Zubaydah)* have mainly confirmed the recent case law of the Court as regards the use of "secrecy claims" and national security considerations as a justification for withholding relevant evidence

[72] *See e.g.* International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence (Doc. IT/32/Rev 49, 22 May 2013), Rule 53(c); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (amended as per 13 May 2015), Rule 66(c).

[73] Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002), 2187 UNTS 90, Art. 72. For more on this topic *see*, *inter alia*, W. A. Schabas, *National Security Interests and the Rights of the Accused*, in: H. Roggemann, P. Šarčević (eds.), *National Security and International Criminal Justice*, Kluwer Law International, The Hague, London, New York: 2002, pp. 105-113; O. Triffterer, *Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus 'Protection of National Security Information', Article 72 of the Rome Statute*, in: Roggemann & Šarčević (eds.), *ibidem*, pp. 53-82. The legitimate interest that states may have in protecting certain information from public disclosure has also been implicitly recognized by the Memorandum of Understanding concluded between the Office of the Prosecutor of the International Criminal Court and Libya. By this agreement, the two parties "(…) committed to supporting each other's investigations and prosecutions through the exchange of information, subject to *confidentiality and protection obligations*" (emphasized added). *See* Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council on the Situation on Libya, pursuant to UN Security Council Resolution 1970 (2011), 14 November 2013.

[74] ICJ, *Corfu Channel case (UK v. Albania)* (Merits) [1949], ICJ Rep 4, p. 32; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007], ICJ Rep 47, paras. 205-206. For a general overview *see*, *inter alia*, A. Riddell, B. Plant, *Evidence before the International Court of Justice*, British Institute of International and Comparative Law, London: 2009, p. 206 ff. *See also* K.J. Keith, *'Naval Secrets', Public Interest Immunity and Open Justice*, in: K. Bannelier, T. Christakis, S. Heathcote (eds.), *The ICJ and the Evolution of International Law*, Routledge, Abingdon: 2012, pp. 125-146.

[75] *See* A. Zimmerman, C. Tomuschat, K. Oellers-Frahm, C. Tams (eds.), *The Statute of the International Court of Justice. A Commentary*, Oxford University Press, Oxford: 2012, p. 1243.

concerning serious violations of human rights. In fact, although the judgments feature some elements of novelty, especially in regards to the content of the right to the truth, they have eventually reiterated the ECtHR's stance with regard to contracting states' procedural obligations stemming from Arts. 3 and 38 of the ECHR, in accordance with the Grand Chamber's findings in *El-Masri* and *Janowiec*.

Such a "consolidating attitude", while likely to be reiterated in the Court's future judgments in similar cases, may also play a role if considered in a broader context. As previously acknowledged, the ECtHR's findings in *Al-Nashiri* and *Husayn (Abu Zubaydah)* appear to contextually "join" and "strengthen" the general trend towards an emerging recognition of a right to know the truth about serious violations of human rights, as well as towards denying states a blanket right to withhold, for security reasons, documents necessary for an adjudication by international courts and tribunals.

However, some questions still remain open. Whilst as regards secrecy before international and regional courts and tribunals there seems to be a long-standing case-law that has upheld, *inter alia*, alternative methods to general disclosure (first and foremost, *in camera* hearings), more doubts remain as concerns the issue of disclosure *vis-à-vis* secrecy at the domestic level. In particular, one of the main hurdles concerns the role that should be afforded to states' margin of appreciation in establishing the degree of scrutiny that should be ensured with respect to investigations into serious human rights violations, possibly counter-balancing national security concerns and the right of victims and the public to know the circumstances of such abuses. It is certainly true that, especially in cases involving the confidentiality of information based on national security concerns, national authorities are likely to be best placed to strike the above mentioned balance, and international and regional courts have indeed shown deference on several occasions to state authorities in situations involving national security concerns.[76]

However, the margin of appreciation in this regard is not unlimited. States should, in fact, always exercise discretion in good faith, whilst international courts retain ultimate review power over the reasonableness of national decisions.[77] It follows that whatever balance is struck at the domestic level, the limit on the deference to states is that of the reasonableness of the measures undertaken, inferable, for instance, from the establishment of adequate and effective procedural guarantees against abuses.[78]

[76] For a general overview of cases *see, inter alia*, A. Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality*, Oxford University Press, Oxford: 2012, p. 153 ff.

[77] Y. Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* 16(5) European Journal of International Law 907 (2006), p. 910.

[78] *See* ECtHR, *Klass and others v. Germany* (App. No. 5029/1971), 6 September 1978, paras. 49-50.