PROOF IN RENDITION CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS[1]

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ABSTRACT

This article examines issues of proof in relation to the three most important rendition cases that have been decided by the European Court of Human Rights (*El-Masri*, *Al-Nashiri* and *Nasr Ghali*). It seeks to illustrate how the Court managed to overcome the very specific difficulties of proof inherent in such cases. When states cooperate extra-legally to capture, imprison and remove suspects to locations for interrogation they do so under 'cover of darkness' and go to considerable lengths to cover their tracks. When challenged before an international tribunal they either refuse to cooperate or simply deny the allegations. The article reveals that the European Court established the facts by relying on its well tested approach to evidentiary issues that has been developed over many years in its extensive case law. The Court did not employ any special rules for these particular types of cases although it relied on an inherent flexibility of approach and appreciation that paid special regards to the context of the cases, the serious implications for the states of the finding of a breach of the ECHR and the inherent difficulties of proof facing the victims of rendition.

Keywords

European Court of Human Rights; international protection of human rights; rendition; burden and standard of proof; rules of evidence; fact-finding.

1. INTRODUCTION

One of the characteristics of the 'rendition' of a suspect extra legally to a place where he/she can be interrogated without the usual restraints is the length the cooperating authorities go to maintain secrecy. The handover takes place away from preying eyes usually at an airport facility at an unusual hour. Efforts are made to avoid customs controls and the completion of documentation that would explain the purpose of the flight, the number of passengers and the point of destination.

When cases are brought before international tribunals such as the European Court of Human Rights (ECtHR) the respondent state will simply deny all knowledge of the alleged events and demand that the applicant prove beyond reasonable doubt that the events took place and that state authorities were implicated. This is a heavy burden for applicants and their counsel. Yet despite the veiled nature of the practice and its almost impenetrable aura of secrecy the ECtHR has managed to find multiple violations of the Convention (ECHR) in a number of cases that have come before it and satisfy itself that the respondent states were involved. This article seeks to explain how this was done and the ECtHR's approach to complex questions of proof that enabled it to be satisfied that the states' international responsibility was engaged.[2]

2. THE ECTHR'S APPROACH TO THE STANDARD AND BURDEN OF PROOF[3]

Neither the European Convention nor the Rules of the ECtHR seek to regulate how evidence is to be assessed by the ECtHR, although the Rules, contain detailed provisions concerning investigatory measures, including fact-finding and the obligations of the parties to participate in them.[4] In general, the ECtHR has been cautious about establishing strict rules concerning the imposition of the burden of proof, preferring a more flexible approach tailored to the circumstances of each case. As a general rule the burden of proof is not borne by one or the other party because the Court examines all the material before it irrespective of its origin and because it may, if necessary, obtain material

of its own motion. Its approach involves the free evaluation of evidence whereby each item of evidence is assessed for its credibility and probative weight without reference to strict rules concerning the admissibility of evidence such as the hearsay or exclusionary rules.

In most cases brought before the ECtHR, the evidence in the case will have been established by the national courts and/or will be the subject of agreement between the parties often having regard to what has been established at national level. It is only when there has been no examination of the issues by the national courts that the ECtHR might take a decision to resort to investigatory measures such as fact-finding. This is entirely a matter for the ECtHR's discretion. Factors that may be relevant to the decision to carry out fact-finding relate to the seriousness of the allegations being made, the existence of factual disputes between the parties that cannot be resolved with reference to elements in the file, the failure of the national authorities to carry out an investigation into the allegations, the existence of a realistic prospect of being able to resolve the factual disputes at issue and any *prima facie* indication that the allegations can actually be substantiated on their merits. The practicability and desirability of an *in situ* investigation are especially relevant factors in cases where the events took place in a war zone on or a long time ago when memories may have faded and witnesses passed away[5].

The ECtHR might also request documents to be submitted by the respondent State on the basis that it alone has knowledge of what has occurred in its detention centres or after taking a person into custody. The State is required under Article 38 of the European Convention to offer all necessary facilities for the examination of an application and a failure to provide such information may lead the ECtHR to draw negative inferences from its behaviour.

When examining cases on the merits the ECtHR uses the standard of proof "beyond reasonable doubt". It has reiterated in its case law that this standard is not to be confused with that applicable in a criminal trial where the guilt and innocence of an accused person is being assessed. The ECtHR is not seeking through its procedure to establish criminal responsibility. Its role is limited to determining whether certain facts have occurred that could amount to a violation of a European Convention right or rights for which the respondent state bears international responsibility. Seen from this perspective the standard is of a less demanding nature that its counterpart in criminal law.[6] A reasonable doubt is considered by the ECtHR to be a doubt for which reasons can be drawn from the facts established and not a doubt raised on the basis of "a mere theoretical possibility or to avoid a disagreeable conclusion".[7]

3. EL-MASRI V THE FORMER YUGOSLAV REPUBLIC OF YUGOSLAVIA

In the ECtHR's leading judgment on rendition–*El Masri v. The Former Yugoslav Republic of Yugoslavia*–it has referred to these evidentiary principles in the following terms,

> In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a

> Contracting State has violated fundamental rights (see Creang v. Romania [GC], no. 29226/03, § 88, 23 February 2012, and the cases cited therein).[8]

The last two sentences of the ECtHR's discussion are especially noteworthy. Here the Court signals that, while it is attentive to the seriousness of a ruling that a Contracting State has violated fundamental rights, the level of persuasion for reaching a particular conclusion and its approach to the distribution of the burden of proof are linked *to the specificity of the facts, the nature of the allegations made and the Convention right at stake.* The Court has recently recalled in *Merabashvili v Georgia* that it is sensitive to specific or potential evidentiary difficulties encountered by a party and may depart from the principle of imposing the burden of proving an allegation on the party that makes it in recognition of these difficulties.[9]

The ECtHR in *El-Masri* also addressed the issue of when the burden of proof will shift to the authorities and when unfavourable inferences can be drawn. It recalled its case law concerning Articles 2 (right to life) and 3 (freedom from torture) of the European Convention to the effect that when the events at 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 deaths occurring during that detention. The burden of proof in such a case may be regarded as resting on the state authorities to provide satisfactory and convincing explanations. In the absence of such explanations the ECtHR can draw inferences which may be unfavourable for the Government.[10]

These considerations also apply in disappearance cases examined under Article 5 (right to liberty) of the European Convention, where, although it has not been proved that a person has been taken into custody, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since.[11]

In the *El -Masri* case most of the evidence was of a circumstantial nature. The only piece of direct evidence consisted of an untested statement by a witness who was Minister of the Interior at the relevant time. In this high pedigree statement, that flatly contradicted the Government's defence, the witness confirmed that *El-Masri* had been arrested on the foot of a valid international arrest warrant issued by the US authorities; that he had been detained incommunicado by agents of the state intelligence service in Skopje; that he was later handed over to the custody of a CIA rendition team at Skopje airport and that he was flown out on a CIA operated aircraft.[12]

Neither the ECtHR nor the national authorities had been given an opportunity to cross examine this witness whose written testimony had been provided late in the day after the termination of the applicant's attempt to obtain a national remedy although the ECtHR considered such testimony of a high-ranking government official against his own state to be 'of particular evidential value' and tantamount to an admission. It is undoubtedly for these reasons that the ECtHR did not attach a primary weight to this statement and used it more to confirm the ample circumstantial evidence that existed in support of the applicant's version of events. Moreover, the ECtHR found that the applicant's account of the events had been specific, detailed and consistent and had remained coherent and steadfast throughout a variety of domestic proceedings and international inquiries. It was therefore considered by the ECtHR to be credible.[13]

The circumstantial evidence adduced in *El-Masri* fell into three categories.[14]

First, the applicant's allegations were supported by a large amount of indirect evidence obtained during various international inquiries (the *Fava* and *Marty* inquiries[15]) and the investigation by the German authorities. Reference was made to flight logs to and from Skopje airport on the day in question; to scientific testing of the applicant's hair follicles confirming that he had spent time in a South Asian country and had been deprived of food for an extended period of time; geological records confirming the applicant's recollection of minor earthquakes during his alleged detention in Afghanistan and sketches that the applicant had drawn of the layout of the Afghan prison which were immediately recognisable by another rendition victim.[16]

Second, a letter from the Skopje Airport authorities confirmed that a Boeing 737 bearing the tail number N313P had arrived at Skopje airport on the relevant day with no passengers and had taken off carrying one passenger. In

addition, a report prepared by a lawyer and investigator for the *Marty* and *Fava* Inquiries (Mr J.G.S.) detailed the factual events between the time the applicant had entered the territory of the respondent State and the moment of his being handed over to the CIA team at the airport.[17]

Third, the ECtHR attached special importance to a wide range of publicly available material disclosing relevant information about the 'rendition programme' run by the US authorities at the time which, although not referring to the applicant's case, shed light on the methods employed in rendition cases like those described by the applicant.[18]

In view of the above-mentioned elements the ECtHR considered that there was *prima facie* evidence in favour of the applicant's version of events and that the burden of proof should shift to the Government. However, the Government failed to provide a satisfactory and convincing explanation of how the events in question occurred or a credible and substantiated rebuttal of the presumption of responsibility for what had taken place. In addition, they had not provided the ECtHR with documents from the applicant's file that had been referenced in the statement by the former Minister of the Interior or sought to contest the expert's report to which reference had been made. In such circumstances the ECtHR drew inferences from the available material and the authorities conduct and concluded that the applicants' allegations were sufficiently convincing and established beyond reasonable doubt.[19]

Lastly, the ECtHR concluded that the Government knew or ought to have known that by handing the applicant over to the CIA for purposes of rendition that there was a real risk of him being subjected to inhuman and degrading treatment. It referred to reports, relevant international and foreign jurisprudence and to media articles and noted that it had already expressed its grave concerns about US interrogation methods in Guantánamo and Bagram in *Al-Moayad v. Germany* (dec.), no. 35865/03, § 66, 20 February 2007. It concluded in para 118 that this material was in the public domain before the applicant's transfer to the US authorities and,

> is capable of proving that there were serious reasons to believe that if the applicant was to be transferred into US custody under the "rendition" programme, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Consequently, it must be concluded that the Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention. The Government failed to dispel any doubts in that regard (see Saadi, cited above, § 129). Material that came to light subsequent to the applicant's transfer confirms the existence of that risk (see paragraphs 103, 108-10, 123, 124, 128 and 129 above).

4. AL-NASHIRI V. POLAND; HUSAYN (ABU ZUBAYDAH) V. POLAND CASES

The Grand Chamber's approach in the *El-Masri* case to the establishment of the facts and the assessment of evidence was followed closely by the ECtHR in the *Al-Nashiri v Poland* and *sayn (Abu Zubaydah) v. Poland* cases.[20] Both applicants had alleged that they were victims of rendition on board the same rendition plane by the CIA to a secret detention site in Poland for the purposes of interrogation.

The ECtHR held a joint fact-finding hearing in Strasbourg on 2 December 2013 prior to the joint public hearing in the cases on 3 December 2013. It heard evidence from Claudio Fava, Senator Dick Marty (respectively authors of the European Parliament's *Fava Report* and the Council of Europe's Parliamentary Assembly *Marty Reports*); Mr J.G.S a lawyer and investigator and Mr Jósef Pinior, a member of the Polish Senate. Third-party submissions had been made by Amnesty International, the International Commission of jurists, the Helsinki Foundation for Human Rights and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms when countering terrorism (Mr Ben Emmerson Q.C.). Mr Emmerson also made submissions during the ECtHR's public hearing.[21]

On 10 July 2012, the Polish government had been requested by the ECtHR to submit a series of documents in its possession concerning a criminal investigation that had been opened in Poland in March 2008 concerning secret CIA prisons in Poland. The Government failed to produce the information and documentary

evidence requested. This failure to furnish the information requested lead the ECtHR to draw inferences against it.

> Given the exceptional difficulties involved in the obtaining of evidence by the Court owing to the high secrecy of the US rendition operations, the limitations on the applicant's contact with the outside world, including his lawyers, and his inability to give any direct account of the events complained of (see also paragraph 397 below), those documents were also important for the examination of his complaints under other provisions of the Convention. The Polish Government have had access to information capable of elucidating the facts as submitted in the application. Their failure to submit information in their possession must, therefore, be seen as hindering the Court's tasks under Article 38 of the Convention. On these grounds, the Court is entitled to draw inferences from the Polish Government's conduct in the present case (see paragraph 360 above and also Shamayev and Others, cited above, §§ 503-504).[22]

The ECtHR also highlighted that the applicant was detained in the US and could not give direct testimony to the ECtHR and was, in fact, forbidden by the US authorities from doing so. As his US lawyer had pointed out, he was gagged from speaking publicly of his own torture in Poland because the US takes the position that disclosure of his experiences of what happened to him would reveal classified sources and methods. That lawyer was also prevented from addressing the issues before the ECtHR for the same reasons. The Court observed,

> [These] circumstances have inevitably had an impact on the applicant's ability to plead his case before this Court. Indeed, in his application the events complained of were to a considerable extent reconstructed from threads of information gleaned from numerous public sources.
>
> The difficulties involved in gathering and producing evidence in the present case caused by the restrictions on the applicant's communication with the outside world and the extreme secrecy surrounding the US rendition operations have been compounded by the Polish Government's failure to cooperate with the Court in its examination of the case.
>
> In consequence, the Court's establishment of the facts is to a great extent based on circumstantial evidence, including a large amount of evidence obtained through the international inquiries, considerably redacted documents released by the CIA, other public sources and evidence from the experts and the witness (see paragraphs 15, 42-43, 49-77 and 213-338 above).[23]

The ECtHR outlined the transfer procedure of "High-Value Detainees" between CIA black sites based on CIA declassified documents. It noted the striking similarity in these respects with the account of the transfer given by *El-Masri* and considered that the following facts had been established beyond reasonable doubt.

> the applicant was photographed both clothed and naked prior to and again after the transfer;
>
> he underwent a rectal examination and was made to wear a diaper and dressed in a tracksuit;
>
> earphones were placed over his ears, through which loud music was sometimes played;
>
> he was blindfolded with at least a cloth tied around the head and black goggles;
>
> he was shackled by his hands and feet, and was transported to the airport by road and loaded onto the plane;
>
> he was transported on the plane either in a reclined sitting position with his hands shackled in front of him or lying flat on the floor of the plane with his hands handcuffed behind his back;
>
> during the journey he was not allowed to go to the toilet and, if necessary, was obliged to urinate or defecate into the diaper.[24]

The ECtHR concluded that there was abundant and coherent circumstantial evidence, which supported the conclusions (1) that Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the

CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory; (2) that, given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, 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.[25]

5. NASR AND GHALI V. ITALY[26]

Nasr–also known as *Abu Omar*–is an Egyptian national and member of the group *Jama'a Al-Islamiya*–an Islamist movement regarded by Egypt as a terrorist organisation. His links to fundamentalist networks had been under investigation by the Milan Public Prosecutor's Office. He was abducted on 17 February 2003 as he walked in a Milan street and was taken to the Aviano airbase operated by United States. He was then flown to Ramstein, a US airbase in Germany, and from there transferred to Cairo. He was secretly detained by Egypt until 19 April 2004. He had been tortured under interrogation. He was eventually released in 2007 and prohibited from leaving Egypt.

What distinguishes this case from *El-Masri* and *Al-Nashiri*–indeed from most rendition cases–is that the Italian judicial authorities had carried out an investigation into his abduction. This led to the identification of 22 US nationals who were suspected of involvement in the abduction. They fled Italy to avoid being detained by the authorities. The Minister of Justice later informed the prosecution authorities that he would not seek their extradition to Italy to stand trial. The investigation also extended to senior members of the Italian Military Intelligence Agency (SSMi) who were suspected of collusion in the abduction. The Italian Constitutional Court later ruled that various documents concerning their involvement could not be used or disclosed due to state secrecy.[27]

On 4 November 2009, the Milan District Court found that the abduction had been planned and carried out by CIA operatives; that the fact that authorisation have been given by very senior CIA officials suggested that the operation had been staged with the knowledge and even the tacit consent of the Italian authorities. The 22 CIA operatives who had been identified were convicted *in absentia* and given prison sentences. Various members of the Italian military intelligence agency (SSMi) were also convicted. These convictions were later quashed by the Court of Cassation on grounds of state secrecy. The Milan district court ordered the US nationals to pay substantial damages to the applicants. These damages were never paid and the Italian authorities have not sought the extradition of the convicted US nationals.[28]

The ECtHR established the facts of the case by following the facts as decided by the national courts. It endorsed the findings by the Italian magistrates that such an operation had been carried out by CIA agents authorised by the US intelligence services and that it could not have taken place without the Italian authorities having been informed and, further, that the existence of an authorisation to abduct *Nasr* given by very senior CIA officials suggested that the Italian authorities were both aware of and indeed complicit in the operation. It further referred to the numerous sources and documents substantiating the reality of extraordinary rendition practised by the CIA and copiously referenced in the *El-Masri* and *Al-Nashiri* judgments.[29]

Lastly the ECtHR held, as in the other two cases, that the Italian authorities ought to have been aware that by facilitating the CIA operation involving the abduction and transfer of the first applicant outside Italy's frontier he would be exposed to a risk of treatment in violation of his rights under the Convention. The establishment of Italy's responsibility did not require an awareness of the specific details of the destination or of the eventual fate of the first applicant.[30]

6. CONCLUSIONS

The analysis of the above-mentioned leading ECtHR rendition judgments prompts the following conclusions.

The cases illustrate the exceptional difficulties facing an international tribunal in determining the facts surrounding a rendition procedure that takes place outside the rule of law and under conditions of programmed secrecy where those who participate make every effort to ensure that their activities take place without witnesses and beyond the public's gaze. The

international tribunal is doubly handicapped by the absence of any national judicial investigation as seen in the cases of *El-Masri* and *Al-Nashiri* and triply so when the respondent State simply denies all involvement. If national proceedings are opened at all they inevitably lead no-where or come up against the unsurpassable hurdle of the state secrets doctrine.

The lengths to which the co-operating and colluding states go to protect secrecy are vividly illustrated by these cases. The State maintains a position of silence throughout the proceedings either denying outright that the events took place at all or that the state authorities had been aware of them or that the incident is imputable to the State. They also fail to co-operate with international inquiries such as those conducted by the European Parliament (*Fava*) and the Parliamentary Assembly of the Council of Europe (*Marty*) and refuse requests for documents and information which it can reasonably be presumed they have in their possession. This has been the default response in the cases of *El-Masri* and *Al-Nashiri.*

As seen in *Al-Nashiri* the applicants were also prevented from giving direct testimony on the wholly self-serving and spurious basis that to do so would harm the interests of national security by providing details of sources and locations. The secrecy of an extraordinary rendition must be preserved at all costs even to the point of ridicule involving a preposterous gagging of the victims themselves.

There is also evidence of a concerted effort by the States to cover their tracks in anticipation of subsequent investigations by disguising the movement of rendition aircraft and by using special security arrangements and special procedures for landings to minimise the chances of the veil secrecy being lifted by eyewitnesses or passers-by or incriminating records.

Yet against this background of intentional concealment the ECtHR has not sought to invent a tailor-made evidentiary tool-kit for the express purpose of resolving these exceptional cases. It has rather relied on an array of evidentiary techniques that have been developed piecemeal in its jurisprudence over the years and emanated from numerous judgments dealing *inter alia* with unlawful killings or disappearances. In *Merabashvili v Georgia* (judgment of 28 November 2017) the Court has recently re-affirmed its preference for adhering to its usual approach to proof rather than having recourse to special rules.[31]

Thus, it has applied its constant case law concerning the standard and burden of proof. It has adopted the factual findings of the national courts where, exceptionally, a national judicial examination of the claims has been carried out (*Nasr* and *Ghali*). It has shifted the burden of proof to the Government when, in the light of a *prima facie* case being made out, the Government has failed to provide plausible substantiated explanations or documents and information in respect of matters uniquely within its knowledge and has drawn negative inferences from these failings. It has also examined in depth the existence of a wide range of circumstantial evidence drawn from a variety of national and international sources that, when considered in their totality, give support to the applicant's allegations and when taken in conjunction with negative inferences that have been drawn from the Government's behaviour enable it to satisfy a demanding standard of proof.

Perhaps the most striking factual element that runs through most of the rendition cases and supports the applicants' veracity concerns the transfer procedures[32] that were followed by CIA agents when transferees were handed over to them for rendition. These well documented procedures, involving *inter alia* mindless anal penetration and diapers, stand out for their bizarre, ritualistic and degrading character and were certainly designed to humiliate and render powerless the transferee. Yet the fact that they were followed in most of these cases–and by their very nature could hardly have been invented–provided good reasons for believing that the applicant who described the procedures in his statements had indeed been the subject of extraordinary rendition by the CIA transfer team.

Lastly, these rendition judgments illustrate the wisdom and practicality of the ECtHR's evidentiary compass, namely that the level of persuasion for reaching conclusions and the ECtHR's approach to the distribution of the burden of proof are not factors that are set in stone but vary in accordance with the specificity of the facts, the nature of the allegations and the Convention rights at stake. It is submitted that such a flexible approach to issues of evidence is entirely appropriate for an international human rights tribunal called on to examine a wide variety of allegations touching on many different types of human rights provisions.

NOTAS

1. This article ensues from an *amicus curiae* brief filed with the African Commission of Human Rights in the case of *Mohammed Abdullah Saleh Al-Asad v the Republic of Djibouti,* No. 383/2010 where rendition is alleged by the applicant.
2. The rendition judgments of the ECtHR *are: El-Masri v. The Former Yugoslav Republic of Macedonia,* no. 39630/09, Grand Chamber Judgment, ECtHR, 13 December 2012 [hereinafter "*El-Masri*"]; *Al-Nashiri v. Poland*, no. 28761/11, Judgment, ECtHR, 24 July 2014 [hereinafter "*Al-Nashiri*"]; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, Judgment, ECtHR, 24 July 2014; *Nasr and Ghali v. Italy*, no. 44883/09, Judgment, ECtHR, 23 February 2015 (available only in French) [hereinafter "*Nasr and Ghali*"]. There are several pending rendition cases – *See e.g.*, *Al-Nashiri v. Romania*, no. 33234/12, Application, ECtHR, 1 June 2012; *Abu Zubaydah v. Lithuania*, no. 46454/11, Application, ECtHR, 27 October 2011. A hearing in these cases was held on 29 June 2016. A third case is pending before the Court (*Al-Hawsawi v Lithuania*). All the judgments of the ECtHR referred to in this text can be accessed from the ECtHR's Hudoc site – https://hudoc.echr.coe.int/eng
3. See generally, the Court's most recent pronouncement on th burden, distribution and standard of proof in *Merabashvili v Georgia*, Grand Chamber judgment of 28 November 2017, ECtHR, paras 309-317; also Harris, O'Boyle, Buckley and Bates, *The Law of the European Convention of Human Rights*, Third Edition, 2014, pp.146-148 (OUP) and O'Boyle and Brady, *Investigatory powers of the European Court of Human Rights* [2013] E.H.R.L.R Issue 4, pp.378-391. The ECtHR's fact-finding practice is set out in Philip Leach, Costas Paraskeva and Gordana Uzelac, *International Human Rights and Fact-Finding – An analysis of the fact- finding missions conducted by the European Commission and Court of Human Rights*, Human Rights and Social Justice Research Institute, London Metropolitan University, February 2009.
4. See, in particular, Rule 44 C para 1 and the Annex to the Rules of Court concerning Investigations.
5. O'Boyle and Brady, *Investigatory powers of the European Court of Human Rights* [2013] E.H.R.L.R Issue 4, pp.378-391, at 380-381.
6. In Mathew v. the Netherlands, no. 24919/03, § 156, Judgment, 15 February 2006, the ECtHR stated as follows: "In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard: as applied by the Court, it has an autonomous meaning. The Court's role, it should be remembered, is to rule not on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof."
7. *v. the United Kingdom*, Judgment, 18 January 1978, ECtHR, para 161, Series A, no. 25 and *Shamayev and others v Georgia and Russia,* Judgment, 12 April 2005, ECtHR, para 338.
8. *El-Masri*, para 151.
9. Judgment, 28 November 2017, ECtHR, para 315.
10. Ibid, para 152.
11. Ibid, para 153.
12. Ibid, paras 161-164.
13. Ibid, para 156.
14. Ibid, paras 157-160.
15. Ibid, paras 47-51 – for a summary of the *Fava Report* and paras 37 and 43- 46 for extracts from the *Marty Reports* of 2006 and 2007.
16. Ibid, para 157.
17. Ibid, para 159.
18. Ibid, paras 98, 103, 106-27, and 160.
19 Ibd, paras 166-167.
20. These are identical judgments. The brief will focus on the *Al-Nashiri v Poland* judgment.
21. *See Al-Nashiri*, paras 7- 15; ECtHR's Press Release of 24 July 2014, *Secret rendition and detention by the CIA in Poland of two men suspected of terrorist acts* – ECtHR 231 (2014).

22. *Al-Nashiri*, para 375.
23. Ibid, paras 399-400.
24. Ibid, para 409. *See*, in this connection, the comparable transfer procedures referenced in the *El-Masri* judgment, at paras 108-110, concerning the Swedish rendition cases – *Agiza v Sweden*, UN Committee against Torture, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005) and *Alzery v Sweden*, UN Human Rights Committee, UN Doc.CCPR/C/88/D/1416/2005 (2006).
25. *Al-Nashiri*, para 442.
26. This judgment of 23 February 2016 exists only in French. The ECtHR has prepared a detailed press release of the judgment available at https://hudoc.echr.coe.int/eng-press.
27. *Nasr and Ghali v Italy*, Press Release.
28 Ibid.
29. *Nasr and Ghali*, paras 233-234.
30. Ibid, para 243.
31. *Merabashvili v Georgia*, Judgment, 28 November 2017, para 310.
32. Given their ritualistic character it is probably more accurate to speak of "a transfer protocol".