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REPORTS

1/2022 | 27 OCTOBER 2022

Expert Witness Statement: A Submission to the Inter-American Court of Human Rights on the AMIA case ('Active Memory Civil Association v. Argentina')

Professor Martin Scheinin, British Academy Global Professor, Bonavero Institute

UNIVERSITY OF OXFORD
FACULTY OF LAW
Bonavero Institute of Human Rights

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AUTHOR'S BIOGRAPHICAL NOTES

Martin Scheinin:

Professor Martin Scheinin is a British Academy Global Professor at the Bonavero Institute of Human Rights, where his research project "Addressing the Digital Realm through the Grammar of Human Rights Law" will run from 2020 – 2024. Before joining the Bonavero Institute, Martin was Professor of International and Human Rights at the European University Institute, a position he had held since 2008. Martin has had extensive experience in international human rights law having served as a member of the UN Human Rights Committee from 1997 to 2004, as UN Special Rapporteur on human rights and counter-terrorism from 2005 to 2011 and as a member of the Scientific Committee for the EU Fundamental Rights Agency since 2018.

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EXECUTIVE SUMMARY

This Bonavero Report consists of an expert witness statement at the Inter-American Court of Human Rights in the *AMIA* case (*Active Memory Civil Association v. Argentina*) that originates from the 18 July 1994 terrorist attack in Buenos Aires against the headquarters of the Israeli-Argentinian Mutual Association. As a result of the terrorist attack that was committed using explosives, 85 people lost their lives and at least 151 other people were injured. Victims and family members of the victims of the attack filed on 16 July 1999 an application before the Inter-American Commission of Human Rights, alleging breaches by the state of Argentina of its obligations to prevent and investigate the attack and to provide remedies to the victims or their families. The Commission issued its report on the merits on 14 July 2020, initating the case before the Inter-American Court of Human Rights.

At the request of the Commission, the Court accepted to receive a written expert witness statement from Martin Scheinin, British Academy Global Professor at the Bonavero Institute. The statement was presented to the Court during its public oral hearings on 13-14 October 2022. The Court's judgment is expected in 2023. The Commission's Report on the admissibility and merits of the case can be found at https://www.oas.org/en/iachr/decisions/court/2021/AR_12.204_EN.pdf.

The relatively brief expert witness statement addresses current standards provided by international human rights law concerning the human rights of victims of terrorism and states' positive obligations to prevent, investigate and remedy acts of terrorism. One important aspect of the case and the expert witness statement concerns accountability and human rights obligations in respect of acts or omissions, including eventual coverups, of a state's intelligence agencies. In these issues, the expert witness statement is expected to be of wider significance beyond the *AMIA* case itself.

INTRODUCTION

1. Pursuant to a request by the Inter-American Commission on Human Rights (hereinafter: the Commission), the Inter-American Court of Human Rights (hereinafter: the Court) has asked me to submit a written expert testimony in the case of Active Memory Civil Association (Victims and Family Members of the Victims of the Terrorist Attack on July 18, 1994 on the Headquarters of the Israeli-Argentinian Mutual Association) vs. Argentina, also known as the "AMIA case".[1] When approving the Commission's request, the Court defined the scope of my expert witness testimony as follows:

Martin Scheinin, professor of International Law and Human Rights, will address the duties that International Human Rights Law imposes to the states regarding the fight against terrorism. In particular, the expert witness will address State obligations to prevent terrorist acts as well as due diligence standards for the investigation and prosecution of said crimes".

2. Concerning my qualifications for the task assigned to me, I provide the following brief information. I graduated as Master of Laws in 1982 from the University of Turku (Finland) and obtained by Doctorate in Laws in 1991 at the University of Helsinki (Finland). Since 1993 I have been a Professor of law, at the University of Helsinki 1993-1998 (constitutional law), at the Åbo Akademi University (Finland) 1998-2008 (constitutional and international law) where I also was Director of the Institute for Human Rights, at the European University Institute (Florence, Italy) 2008-2020 (international law and human rights law), and since August 2020 at the University of Oxford, United Kingdom (as British Academy Global Professor). In 1997-2004 I served eight years as a member of the Human Rights Committee, the treaty body under the International Covenant on Civil and Political Rights, followed by six years (2005-2011) as the first United Nations Special Rapporteur on the promotion and protection of

[1] IACHR, Report No. No. 187/20. Case 12.204. Admissibility and Merits. Active Memory Civil Association. Argentina. July 14, 2020.

human rights and fundamental freedoms while countering terrorism. I have provided expert advice, reports and testimony to a range of international organizations and organs, including this esteemed Court.

3. One important aspect of the current case relates to the clear acknowledgment of state responsibility by the Argentinian state. As recorded in paragraph 35 of the Commission's report on the merits and elaborated in subsequent paragraphs, the Argentinian state has explicitly:

- Recognized its responsibility for the violations of human rights presented by the petitioners, namely the right to life (Article 4 of the American Convention of Human Rights), the right to humane treatment (Article 5 ACHR), the right to a fair trial (Article 8) and the right to judicial protection (Article 25);

- Acknowledged its responsibility for a breach of the prevention duty for not having adopted the appropriate and effective measures to try to prevent the terrorist attack, also explicitly noting that two years before the event another terrorist act had occurred against the embassy of Israel in Argentina; and

- Acknowledged its responsibility because for a cover-up of the facts, because there had been a serious and deliberate failure to carry out the required investigations concerning the terrorist attack of 18 July 1994, this failure amounting to a clear denial of justice.

4. As to the relevance of the acknowledgment of the responsibility of the state, I support the approach expressed by the Commission in paragraph 43 of its report on the merits, that the acknowledgment of responsibility of the Argentinian State has full legal effects.

POSITIVE OBLIGATIONS OF STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW

5. It is well established that international human rights law entails a range of legal obligations for states. The presence of the words 'respect' and 'ensure', for instance both in ICCPR Article 2 and ACHR Article 1, reflects the idea that human rights treaty obligations of states include both negative obligations not to violate human rights and positive obligations to ensure, protect and promote.[2] In the doctrine of human rights law the tripartite typology respect – protect – ensure has become foundational for the understanding of obligations by states. Here, the notion of 'protect' primarily relates to the obligation of the state to see to it that third parties, including private actors, are not allowed to engage in conduct that will impair or nullify the enjoyment of human rights by an individual, while the notion of 'ensure' relates to a wider framework of legislative, budgetary, administrative and other measures that in an orderly society support and secure the effective enjoyment of human rights by all persons, under the direct or indirect responsibility of the state.

6. While the recognition of positive obligations is common ground, different human rights bodies historically developed somewhat different doctrinal frameworks for determining their scope and content. This Court was an early vanguard[3] of an elaborate doctrine on positive obligations, including a due diligence standard,[4] while the Human Rights Committee in its early practice elaborated on the often neglected right to security in Article 9 of the ICCPR,[5] but subsequently has adopted a more general doctrine on positive obligations to exercise due diligence, along the lines established by this Court, to prevent, punish, investigate or redress human rights

[2] Human Rights Committee, General Comment No. 31, see paras. 5-8.

[3] Dinah Shelton and Ariel Gould, Positive and Negative Obligations, pp. 562-583 in Dinah Shelton (ed.), The Oxford Handbook of International Human Rights Law (2013).

[4] Case of *Velásquez Rodríguez v. Honduras* (Merits), IACtHR Series C No. 4 (29 July 1988)

[5] Human Rights Committee, *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985 (12 July 1990).

harms caused by private actors.[6] The European Court of Human Rights, in turn, has distinguished between different forms of positive obligations, including a substantive obligation to safeguard the enjoyment of human rights and procedural obligation to respond to human rights breaches through measures of, inter alia, investigation, trial and punishment.[7] As Dinah Shelton and Ariel Gould explain, although the European Court of Human Rights has adopted a due diligence standard for states' compliance with their positive obligations, it was late in naming it as such.[8]

7. Some judgments by the European Court of Human Rights (ECtHR) that are particularly pertinent in the context of the current case, include *Finogenov and Others v. Russia*,[9] *Tagayeva and Others v. Russia*,[10] *Romeo Castaño v. Belgium,*[11] and *Osman v. the United Kingdom*.[12] In *Finogenov*, the ECtHR established a violation of the right to life (Article 2 ECHR) for inadequate planning and implementation of hostage rescue operation and for failures in investigation into negligence by authorities. Likewise, in *Tagayeva*, a violation of Article 2 was found, this time for a failure to take preventive measures in respect of a known threat of a terrorist attack: insufficient steps were taken, and no warning was issued to the public. A separate violation was found of the Article 2 procedural obligation to investigate. In *Romeo Castaño*, there was a violation of the procedural obligation under Article 2 for a failure to investigate, when Belgian court had refused extradition of a terrorism suspect on inadequate or insufficient reasons. The judgment in *Osman* provides important guidance concerning the qualified conditions where a failure to comply with a positive obligation of prevention amounts to a violation of Article 2: This will be the case when the authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and whether they failed to take measures within the

[6] Human Rights Committee, General Comment No. 31 (footnote 2), para 8.

[7] For a summary, see, Shelton and Gould, op.cit., pp. 569-572.

[8] Idem, pp. 580-581.

[9] Judgment of 20 December 2011 (applications no. 18299/03 and 27311/03).

[10] Judgment of 13 April 2017 (application no. 26562/07 and six others).

[11] Judgment of 9 July 2019 (application no. 8351/17).

[12] Grand Chamber Judgment of 28 October 1998 (application no. 23452/94).

scope of their powers which, judged reasonably, might have been expected to avoid that risk" (§ 116).

8. Shelton and Gould have carefully and on good grounds concluded, "due diligence has emerged as the prevalent standard to measure positive obligations".[13] This conclusion is undoubtedly correct in the context of assessing the obligations of states to prevent, investigate, prosecute and punish acts of terrorism.

OBLIGATIONS OF STATES TO PREVENT ACTS OF TERRORISM IN THE CONTEXT OF THE CURRENT CASE

9. The Court has specifically asked for my assessment of the obligations of a state under international human rights law in respect of the obligation to *prevent* terrorist acts. As has become clear in the preceding section, states do have a positive obligation to take effective measures to prevent acts of terrorism by any third party and the Court's doctrine of due diligence enjoys the status of the applicable standard in international human rights law.

10. In this matter, the Commission's report on the merits of the case is very clear as to the sequence of events that lead to the AMIA attack of 18 July 1994. In particular, the Commission has in a convincing manner documented that prior to the day of the attack there were multiple warning signs that under the applicable due diligence standard should have triggered preventive measures such as warning the general public and in particular any persons using the AMIA building, strengthening the presence and capability of law enforcement authorities and preparing for the evacuation of the AMIA building as well as neighboring buildings for the eventuality that an imminent threat would emerge. The multiple warning signs are documented in paragraphs 109-114 of the Commission's report. Without seeking to be exhaustive, some of the relevant warning signs included:

[13] Shelton and Gould, op.cit., p. 582.

- The occurrence on 17 March 1992 of a terrorist attack against the Israeli Embassy in Buenos Aires that utilized a very specific method of committing a deadly terrorist attack in an urban setting, namely the detonation of explosive material placed in a pickup van (see, paragraph 109 of the Commission's report on the merits);
- A visit by a Brazilian citizen to the Argentinian consulate in Milan, Italy, to report on a suspicious person who appeared to have information concerning the 17 March 1992 attack (paragraph 112); and
- Unexplained and repeated low-level overflight of the AMIA building by a helicopter only hours before the AMIA attack of 18 July 1994 (paragraph 113).

11. The first one of these three warning signs was taken seriously by the Argentinian authorities in the sense that after the attack on the Israeli Embassy, the AMIA building was placed under constant police protection and traffic passing it was subjected to specific restrictions (paragraph 111). That said, these measures of prevention appear to have been allowed over time to descend into a meaningless routine or mere formality that gradually replaced proper vigilance that would conform to the standard of due diligence.[14] Here, I find it particularly important what is reported in paragraph 114 of the Commission's report. To me, *this relapse in vigilance was a clear deviation from the due diligence obligations of the state*.

12. Equally importantly, either there was no preparedness plan in place, or such a plan existed but was not resorted to when the low-flying helicopter was repeatedly seen and heard flying above the AMIA building during the night that preceded the terrorist attack that took place at 9.53 the following morning. To me, the known threat of a terrorist attack that would utilize the same method as the 1992 attack against the Israeli Embassy, which was continuously acted upon through the routine measures reported in paragraph 111, should also have been addressed through a permanent system of detecting any signs of an imminent threat, so as to move to immediate action to protect the potential victims of a targeted terrorist

[14] See, paragraph 128 of the Commission's report on the merits.

attack, as well as the general population. *The absence, or non-observance, of such a preparedness plan* was in my assessment also *a clear deviation from the due diligence obligations* of the state to prevent acts of terrorism.

13. In its report on the merits, the Commission in paragraph 108 relies upon a methodology for assessing the scope of the state's obligation to prevent acts of terrorism, as presented in the first report to the UN Human Rights Council by my immediate successor as the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Ben Emmerson. That methodology, in turn, builds upon the pronouncements by the European Court of Human Rights in the above-mentioned *Osman* case. It is not my intention to disagree either with that Court or with my successor's elaboration of the principles expressed in the *Osman* judgment. That said, I do note that the principles expressed by the European Court in the *Osman* case would necessarily have been developed and expressed in the context of that case which was not a terrorist case but a case of *deadly interpersonal violence between persons who knew each other*, namely a schoolteacher shooting to death the father of one of his teenage students. Due to contextual factors that are not universally present in terrorism cases, both the judgment by the European Court and the methodology presented by Special Rapporteur Emmerson may not fully capture all types of terrorist attacks. In particular, criterion (ii) in the quotation in paragraph 108 from Emmerson's report[15] appears to me as unnecessarily narrow if the intention is to present a general test for the state's prevention obligations in respect of acts of terrorism. As an alternative to Emmerson's formulation of "the existence, at the relevant time, of a real and immediate risk" to a known individual or a category of persons, this item could, in my view, also include *the existence of a known vulnerability to specific methods known to be used in or planned for terrorist attacks.*

14. With this one modification, I take the view that the situation with which the Argentinian authorities were faced with in the early morning hours of 18 July 1994 also meets the Emmerson test for when legal obligations of prevention are

[15] See, UN Document A/HRC/20/14, paragraph 20.

actualized.[16] Using a vehicle carrying a large quantity of explosives in an attack against a targeted building with a link to the Jewish community in Argentina and/or the state of Israel was a *known method* of carrying out a terrorist attack against such targets that had been *acknowledged* as known to the Argentinian authorities by putting in place permanent protective arrangements at the AMIA building – even if those arrangement subsequently had been allowed to relapse into a mere routine.

DUE DILIGENCE STANDARDS CONCERNING THE INVESTIGATION AND PROSECUTION OF TERRORIST CRIMES

15. The Court also requested me to address applicable due diligence standards for the investigation and prosecution of terrorist crimes. In his above-quoted report to the Human Rights Council, Special Rapporteur Emmerson conducted an in-depth analysis of obligations by states in respect of the human rights of victims of terrorism.[17] In my assessment this report competently draws upon the international human rights law doctrine of positive obligations, including concerning the investigation and prosecution of terrorist crimes. The obligation to either prosecute or extradite is foundational for a series of international conventions and protocols against terrorism (see, paragraph 33 of said report). The obligation to investigate acts of terrorism is inherently linked to the state's obligation to prevent such acts (paragraph 34). In human rights law, an obligation to investigate acts of terrorism flows directly from the right to life and other human rights, as a dimension of the state's positive obligations (paragraph 35). Primarily drawing upon the case law by the European Court of Human Rights but reflecting also the established due diligence standard of international human rights law, Emmerson's report presents a set of minimum requirements for what amounts to an effective investigation into acts of terrorism.[18] This itemized account of those minimum requirement is

[16] See, also, paragraph 120 of the Commission's report on the merits.

[17] UN Doc A/HRC/20/14.

[18] See, paragraph 36 for the full list of the minimum requirements and, also, paragraph 67 (c) for a shorter formulation condensed into a recommendation for states.

accurately recapitulated in paragraph 156 of the Commission's report on the merits in the current case.

16. Basing myself on what was stated earlier in this expert witness statement about the doctrine of positive obligations in international human rights law and the standard of due diligence as part of that doctrine, I feel confident in affirming that in my assessment Emmerson's list of minimum requirements for an effective investigation into a terrorist attack represents the current status of international human rights law. Therefore, I am happy to endorse both the itemized list of such requirements in paragraph 36 of Special Rapporteur Ben Emmerson's report and its recapitulation in paragraph 156 of the Commission's report in the current case. To put it on record, I want to include in my witness statement the original list of minimum requirements for investigations into acts of terrorism, as it was presented in paragraph 36 of Emmerson's report (footnotes omitted):

- Once the matter has come to the attention of the authorities, they must act *ex officio* and not wait for a formal complaint lodged by the deceased's next of kin. This applies not only to deaths resulting from a lethal terrorist act, but also to deaths caused by State officials during a counter-terrorist operation, and cases where it is plausibly alleged that public officials have culpably failed in the responsibility to take preventive measures to avert an act of terrorism.
- The investigation should always begin promptly. A timely investigation is more likely to secure reliable evidence. While there may be obstacles delaying progress in an investigation, it must be carried out with reasonable expedition.
- In all cases, once an investigation has been opened, the authorities must ensure that the next-of-kin are kept fully informed of its progress and are provided with an adequate opportunity to participate.
- The investigation must be capable of leading to the identification and punishment of those responsible. The principle of accountability extends to situations in which it is alleged that public officials have caused death or life-

threatening injury through the negligent use of lethal force, or have negligently failed to prevent a terrorist act.

- In cases where State responsibility is at issue the investigative authorities must be wholly independent from those potentially implicated, which implies not only a lack of hierarchical or institutional connection but also a practical independence. Those potentially implicated should have no supervisory role, whether direct or indirect, over those conducting the investigation.
- There must be a sufficient element of public scrutiny of the investigation and its results to secure public accountability. This is essential to maintaining public confidence in the authorities' adherence to the rule of law, and prevents any appearance of collusion in, or tolerance of, unlawful acts or omissions.
- The authorities must have taken reasonable steps to secure and evaluate all potentially relevant evidence. Investigators should commission the necessary forensic and post-mortem reports, providing a complete and objective account of the scientific findings; record all potentially relevant evidential sources; conduct site visits; and identify, question and take comprehensive written statements from all relevant witnesses. Any conclusions must be based on a complete, objective and impartial analysis of the evidence, including an examination of the authorities' own actions.
- In all cases, investigators must be genuinely impartial and must not harbour preconceptions about the matter they are investigating or the identity of those responsible for any fatalities. Nor should they approach the investigation in a way that might promote or protect the interests of any public official who may be at fault. They should be demonstrably free of undue influence.
- If the investigation leads to criminal or other judicial proceedings, there must be a possibility for the effective participation of the next-of-kin.

17. Having concluded that the doctrine and standard concerning effective investigations adopted by the Commission in its report on the merits of the current case is based on a proper understanding of international human rights law, I also

want to commend the Commission for the thorough analysis in section C of the report (paragraphs 141-299), related to the adequacy and effectiveness of investigations by Argentinian authorities in to the terrorist attack of 18 July 1994, as well as into failures and cover-up by some of its authorities. In my assessment, the Commission's analysis is factually and legally well-founded and properly applies the methodology of applicable minimum requirements codified into Special Rapporteur Emmerson's 2012 report and quoted in full in the immediately preceding paragraph. Also here I am pleased to be in a position to endorse the positions expressed by the Commission.

SPECIFICALLY ABOUT STATE OBLIGATIONS IN THE FIELD OF INTELLIGENCE OVERSIGHT AND ACCOUNTABILITY

18. Without any hesitation, I want to state that the issue of state responsibility for the conduct – action or inaction – by its intelligence agencies is very clear. An internationally wrongful act such as a human rights violation – be it in respect of a negative or positive obligation of the state - by personnel or agents of an intelligence agency triggers the responsibility of the state. A corollary of that responsibility is that the victims of the human rights violation enjoy the internationally protected human right to an effective remedy.

19. For state-of-the-art academic writing on the topic, I want to refer to an outstanding doctoral thesis by Sophie Duroy De Suduiraut that I had the pleasure to supervise at the European University Institute and that will soon be published in the form of a monograph by Edward Elgar Publishing. A breach of international law by an intelligence agency may occur as a breach of a primary negative obligation of the state (obligation to respect), or as a breach of a primary positive obligation of the state (obligation to protect), or in the form of aid or assistance under Article 16 of the International Law Commission's Articles on State Responsibility, or as a breach of a secondary obligation of the state in respect of peremptory norms of international law as provided under Article 41 of the Articles on State

Responsibility.[19] An internationally wrongful act "can be committed in a variety of ways, including direct commission, aid or assistance, support, inaction, acquiescence, or willful blindness".[20]

20. A common problem in respect of wrongful acts by intelligence agencies is the lack of accountability. Actions and operations by intelligence agencies are often secret in nature, in many cases for fully legitimate reasons. The degree of that secrecy and its special protections, however, may result in an effective shield against any form of accountability, protecting what is often referred to as 'plausible deniability'[21] and resulting in impunity. As Duroy De Suduiraut, basing herself on earlier work by Iain Cameron, formulates it: "An inadequate domestic legal framework – i.e., the failure to construct and implement satisfactory oversight and review mechanisms and institutions at the national level, thus allowing the exercise of unrestricted intelligence powers – will also engage state responsibility independently of the wrongful acts committed as a result."[22]

21. In my assessment the current case provides an opportunity for the Court to clarify its position in respect of the requirements under the Convention concerning accountability and effective remedies for human rights violations committed or shielded by intelligence agencies. Here, the due diligence standard developed by this Court and subsequently having become established as the applicable standard under international human rights law, is in my view the proper one. The fact that the law of the state may protect the secrecy of actions by its intelligence agencies does not justify the application of a *lower* standard in respect of the responsibility of the state than what is applied in respect of human rights violations resulting from the operation by private actors. Rather, as we are speaking of an agency of the

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[19] Sophie Duroy de Suduiraut, The Regulation of Intelligence Activities under International Law, unpublished PhD Thesis at the European University Institute 2020, p. 231.

[20] Ibid.

[21] See ibid, pp. 26, 38 and 99.

[22] Ibid, p. 99. See, also, Iain Cameron, 'Oversight of Intelligence Agencies: The European Dimension' in Zachary K Goldman and Samuel J Rascoff (eds), Global Intelligence Oversight: Governing Security in the Twenty-First Century (Oxford University Press 2016) 79.

State itself, a *higher* standard should apply, so that the absence of comprehensive and effective accountability mechanisms with the capacity to prevent human rights violations committed or shielded by the state's intelligence agencies should in itself be taken as a basis for attributing the human rights harms in question to the state as human rights violations under its responsibility, due to lack of due diligence in securing proper oversight and accountability of intelligence activities, so that any human rights violations can be prevented, or in the worst case at least effectively investigated, prosecuted and punished.

22. As Duroy De Suduiraut carefully elaborates, simply because the territorial state retains both criminal and human rights jurisdiction over its territory, it is under an obligation to protect persons within its jurisdiction by taking all reasonable measures at its disposal. What, then, is reasonable and sufficient to discharge this obligation will necessarily be context-specific but there must be appropriate action by the state to try to restrain the third party. An obligation to protect also entails adequately investigating and prosecuting third-party violations of human rights under the state's jurisdiction once they have become known to it, as well as providing an effective remedy. Further, even the potential impossibility to prevent terrorist attacks on its territory would not release the state from its positive obligations towards the victims and their relatives. Hence, the state would be under an obligation to carry out a prompt, thorough, independent, and effective investigation and, where appropriate, to proceed to hold those responsible, both the terrorists and any state agents involved in a coverup, to account. Finally, the state would be required under international human rights law to provide an effective remedy to the victims.[23]

23. When serving as United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, one of my annual reports to the Human Rights Council focused on the role of

[23] For the elaboration of and sources for this line of argument, see Duroy De Suduiraut, op.cit., pp. 238-239.

intelligence agencies and their oversight.[24] When considering this report, the Human Rights Council adopted a specific resolution in which it called upon the Special Rapporteur to prepare, working in consultation with States and other relevant stakeholders, a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight.[25] Subsequently, I collaborated with the think-tank Geneva Centre for the Democratic Control of Armed Forces (DCAF)[26] to consult a number of governmental, intergovernmental and civil society actors in the elaboration of a 'Compilation of good practices on legal and institutional frameworks for intelligence services and their oversight' which then was submitted to the Human Rights Council.[27] For purposes of the current case before the Court, I find the following ones of the 35 good practices as particularly instructive concerning applicable, even if still evolving, international standards:

> *Practice 1.* Intelligence services play an important role in protecting national security and upholding the rule of law. Their main purpose is to collect, analyze and disseminate information that assists policymakers and other public entities in taking measures to protect national security. This includes the protection of the population and their human rights.
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> *Practice 6.* Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution that is

[24] UN Document A/HRC/10/3 (4 February 2009).

[25] Human Rights Council Resolution 10/15, paragraph 12 (UN Document A/HRC/RES/10/15).

[26] The current name of the organization is DCAF - Geneva Centre for Security Sector Governance.

[27] Special Rapporteur's report to the UN Human Rights Council, dated on 17 May 2010 and published as UN Document A/HRC/14/46. See, also, DCAF publication International Standards: Compilation of Good Practices for Intelligence Agencies and their Oversight (August 2011), available at https://www.dcaf.ch/sites/default/files/publications/documents/International_Standards_Eng_23-10.pdf. DCAF has produced several subsequent publications on standards for intelligence and oversight**,** see https://www.dcaf.ch/resources?type=publications&id=intelligence

independent of both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services, including their compliance with the law; the effectiveness and efficiency of their activities; their finances; and their administrative practices.

Practice 14. States are internationally responsible for the activities of their intelligence services and their agents, and any private contractors they engage, regardless of where these activities take place and who the victim of internationally wrongful conduct is. Therefore, the executive power takes measures to ensure and exercise overall control of and responsibility for their intelligence services.

Practice 15. Constitutional, statutory and international criminal law applies to members of intelligence services as much as it does to any other public official. Any exceptions allowing intelligence officials to take actions that would normally violate national law are strictly limited and clearly prescribed by law. These exceptions never allow the violation of peremptory norms of international law or of the human rights obligations of the State.

Practice 16. National laws provide for criminal, civil or other sanctions against any member, or individual acting on behalf of an intelligence service, who violates or orders an action that would violate national law or international human rights law. These laws also establish procedures to hold individuals to account for such violations.

ANSWERS TO THE QUESTIONS PRESENTED BY THE VICTIMS TO THE EXPERT WITNESS

24. On 23 September 2022, the Commission transmitted to me a list of questions that representatives of the victims of the AMIA terrorist attacks had submitted to the Court, with a request that I would seek to answer the question in my witness statement. The questions are in part of factual nature, and as to issues of law, I

have addressed some of them already above. Below, I will briefly supplement my above analysis by providing brief responses to each question.

Question 1. Can you share your opinion, in your capacity as former Special Rapporteur, regarding the involvement of intelligence agencies or intelligence agents in judicial enquiries for terrorism offences? In your perspective, should this involvement be subject to some sort of prohibition?

Response: There is a clear danger that intelligence information submitted to an investigation to prepare for a criminal trial will compromise the integrity of the investigation and potentially the trial. There would very often be in place strict rules about secrecy that often would compromise the rights of the defence, the procedural rights of the victims and the ability of the judge to secure a fair trial. I do think that intelligence agencies should not be permitted to submitted anything else than intelligence leads that would assist the investigation, not as evidence but only as hypotheses that could be utilized by the investigator, subject to their professional judgment, in directing their resources in pursuit of actual evidence that could be presented in court.

Question 2. Which are the potential dangers or risks of granting intelligence agencies law enforcement or criminal investigation powers?

Response: In my Special Rapporteur's 2010 report on good practices on legal and institutional frameworks for intelligence services and their oversight, I adopted a restrictive approach to entrusting intelligence agencies with powers of criminal investigation, including those related to arrest and detention.[28] Such powers belong to ordinary police authorities that operate in a transparent manner, are not shielded by rules of heightened secrecy and are subject to civilian command, typically by the Minister of the Interior. Allowing intelligence agencies to exercise criminal investigation powers creates a risk of such agencies becoming 'a state within the state', following their own internal norms rather than general legislation.

[28] See, UN Document A/HRC/14/46, practices 27-30.

Question 3. In your opinion, what is the legal framework that should exist regarding the use of information gathered by intelligence agencies as evidence in a criminal trial? If this sort of information is not admissible or pertinent as trial evidence, could prosecutors still use it for any other purposes? Is there some difference what comes to the investigation of international terrorism offences? How can the accuracy of such information and cross-examination by victims and prosecutors be guaranteed?

Response: Please see my answer to Question 1, calling for the exclusion of intelligence information as evidence for purposes of criminal prosecution or trial. The only acceptable way to rely on such information in a trial would be to call an intelligence agent to testify in person in a trial, subject to cross-examination and other safeguards through which the trial court would be able to assess the reliability and accuracy of the testimony as actual evidence. Most likely, intelligence agencies would not agree to such conditions which to me confirms that they should not be allowed to provide information in any other form. Intelligence agencies may, however, have a role at an earlier stage of a criminal investigation, for which see my response to Question 1, above.

Question 4. Which are the duties and obligations of State officials in charge of criminal investigations (police agents, public prosecutors and judges) regarding the use of information gathered by intelligence agencies in such an investigation? Which is the scope of due diligence in this matter?

Response: It follows from my responses to Questions 1 and 3, that such information should not be relied upon as evidence but merely as hypotheses that may or may not merit investigation in order to obtain actual evidence that could be utilized for purposes of prosecution and trial. Here, the standard of due diligence operates in both directions: Crime investigators have a duty not to ignore or dismiss leads or hypotheses received from intelligence agencies but to allocate appropriate (but not disproportionate) attention to an effort to corroborate the

lead or hypothesis, meeting the standard of due diligence. However, they must also exercise due diligence in safeguarding the rights of the defence and the procedural rights of the victims, so that receiving intelligence information is not allowed to compromise the integrity of the investigation or the fairness of the trial.

Question 5. Can you share examples of good practices regarding the management and preservation of intelligence information that might be useful as evidence in a criminal process as well as for the oversight of intelligence agencies tasked with the duty to prevent acts of terrorism?

Response: As to the first part of the question, I refer to my responses to Questions 1 and 3 which support the conclusion that normally intelligence agencies would not be in the possession of information that qualifies as evidence in a criminal trial. What comes to the second part of the question, I can only provide a generic reference to my Special Rapporteur's report on good practices on legal and institutional frameworks for intelligence services and their oversight, mentioned earlier. The compilation was specifically intended to address the operation and oversight of intelligence agencies in the context of countering terrorism.

Question 6. Which are the general standards and good practices related with *ex post facto* accountability of intelligence activities, especially those related with the duty to prevent terrorism acts and the participation in the investigation of those crimes? Which safeguards or control mechanisms could be regarded as good practices? How should these oversight powers work in the face of laws that restrict the right of access to information or allow the classification of documents or any other intelligence products or activities?

Response: In this expert witness statement I have explained that the functioning of intelligence agencies always falls under the rules of international law concerning the responsibility of the state and that positive human rights law obligations to prevent, investigate, prosecute and punish both acts of terrorism and negligence by agents of the state fully apply in respect of intelligence agencies. My 2010 report as

Special Rapporteur, mentioned earlier, deals comprehensively with good practices concerning accountability and oversight mechanisms. Specifically, as to the right of access to information, I would refer to Practices 23-26 and also 9 and 21 in that report. For instance, Practice 25 emphasizes the importance of an *independent* institution that oversees the use of personal data by intelligence services, with access to all files held by the intelligence services and the power to order the disclosure of information to individuals concerned, as well as the destruction of files or personal information contained therein. As to the general framework of oversight, I would like to refer to Practice 6 that was quoted in full above in paragraph 23 of this statement.

Question 7. Which are the standards regarding the right of access to information that States must guarantee without been able to restrict the access of such information based on national security considerations? Which limitations should be established to the rule of the secrecy of intelligence activities? Is there any difference in matters that involve the investigation of an international terrorism attack?

Response: My response to Question 6, just above, addressed this question. What I may add here is that in my 2010 report, Practice 26 was formulated in a way that makes clear that an individual's access to information held by an intelligence agency may be direct or indirect: even in cases where genuine reasons exist for not allowing direct access, there should be indirect access through a data protection or oversight institution.