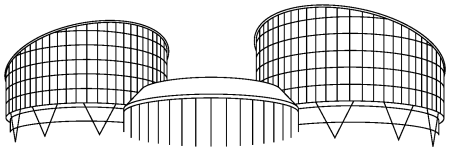

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FOURTH SECTION

CASE OF AL NASHIRI v. POLAND

(Application no. 28761/11)

JUDGMENT

STRASBOURG

24 July 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Al Nashiri v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Krzysztof Wojtyczek, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 2 and 3 December 2013 and 1, 2 and 8 July 2014,

Delivers the following judgment, which was adopted on the last of these dates.

PROCEDURE

A. Written and oral procedure

1. The case originated in an application (no. 28761/11) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Saudi Arabian national of Yemeni descent, Mr Abd Al Rahim Hussayn Muhammad Al Nashiri ("the applicant"), on 6 May 2011.

2. The applicant was represented before the Court by Mr J.A. Goldston, attorney, member of the New York Bar and Executive Director of the Open Society Justice Initiative ("the OSJI"), Mr R. Skilbeck, barrister, member of the England and Wales Bar and Litigation Director of the OSJI, Ms A. Singh, attorney, member of the New York Bar and Senior Legal Officer at the OSJI, and also by Ms N. Hollander, attorney, member of the New Mexico Bar.

The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant alleged violations of various provisions of the Convention, in particular:

(i) Articles 3, 5 and 8 in that Poland had enabled the CIA to detain him at the Stare Kiejkuty detention facility, thereby allowing the CIA to subject him to treatment that had amounted to torture, incommunicado detention and deprivation of any access to, or contact with, his family;

(ii) Articles 2 and 3 of the Convention, Article 1 of Protocol No. 6 to the Convention and also Articles 5 and 6 of the Convention in that Poland had enabled the CIA to transfer him from Poland to other CIA-run detention facilities, despite a real risk of his being subjected to further torture, ill-treatment, incommunicado detention, the imposition of the death penalty and flagrantly unfair trial;

(iii) Articles 3 and 13 of the Convention in that Poland had failed to conduct an effective and thorough investigation into his allegations of serious violations of his rights protected by the Convention during his detention on Polish territory.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 30 November 2011 the Vice-President of the Section gave priority to the application, in accordance with Rule 41.

6. On 10 July 2012 the Chamber that had been constituted to consider the case (Rule 26 § 1) gave notice of the application to the Government.

7. The Government and the applicant each filed written observations on the admissibility and merits of the case. In addition, third-party comments were received from the Helsinki Foundation for Human Rights, the International Commission of Jurists and Amnesty International, as well as from the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counteracting terrorism ("the UN Special Rapporteur").

8. On 22 January 2013 the Chamber decided to invite the parties and the third-party interveners to submit comments on the case in the light of the Grand Chamber's judgment in *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.

9. On 9 July 2013 the Chamber decided that the case would be examined simultaneously with that of *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13).

10. Subsequently, the Chamber, having consulted the parties, decided that a public hearing on the admissibility and merits be held simultaneously in both cases (Rule 63 § 1) and invited the UN Special Rapporteur to take part in the hearing. The hearing date was set for 3 December 2013.

The Chamber also decided, of its own motion, to hear evidence from a witness and from experts (Rule A1 of the Annex to the Rules of Court). The date for a fact-finding hearing was set for 2 December 2013.

11. On 14 October 2013 the Government asked the Court to exclude, under Rule 63 § 2 of the Rules of Court, the press and the public from all oral hearing on the grounds that, in the special circumstances of the cases, the publicity would prejudice the interests of justice.

The applicant, who was asked to submit his comments, opposed the Government's request, stating that they had failed to provide sufficient reasons. He relied on the principle of open justice.

12. Later, in respect of the Government's request for the exclusion of the press and the public from all oral hearing, the Chamber decided that that hearing would be public, pursuant to Rule 63 § 1 of the Rules of Court. It further decided that a separate hearing *in camera* be held on 2 December 2013.

13. In this connection, the President of the Chamber directed that a verbatim record of all the hearings be made under Rule 70 of the Rules of Court and Rule A8 of the Annex to the Rules of Court, and instructed the Registrar accordingly.

14. On 2 December 2013 the Court held a fact-finding hearing and heard evidence from experts and a witness, in accordance with Rule A1 §§ 1 and 5 of the Annex to the Rules of Court. On the same day it subsequently held a hearing *in camera* under Rule 63 § 2 of the Rules of Court and heard the parties' submissions on the evidence taken. Those hearings were held in in the Human Rights Building, Strasbourg.

15. A public hearing took place in the Human Rights Building, Strasbourg, on 3 December 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*:

MR A. NOWAK-FAR,	*Undersecretary of State in the Ministry of Foreign Affairs,*
MS J. CHRZANOWSKA,	*Agent of the Government before the European Court of Human Rights,*
MR J. ŚLIWA,	*Deputy Kraków Prosecutor of Appeal,*
MS A. MĘŻYKOWSKA,	*co-Agent of the Government before the European Court of Human Rights,*
MS K. GÓRSKA-ŁAZARZ,	*Adviser, Ministry of Foreign Affairs*.

(b) *for the applicant Al Nashiri:*

MS A. SINGH,	*Counsel,*
MR M. PIETRZAK,	*Counsel,*
MR R. SKILBECK,	*Counsel,*
MS N. HOLLANDER,	*Counsel.*

(c) *for the applicant Husayn (Abu Zubaydah):*

MR P. HUGHES,	*Counsel,*
MR B. JANKOWSKI,	*Counsel,*
MS H. DUFFY,	*Counsel,*
MR J. MARGULIES,	*Counsel,*
MR C. BLACK,	*Adviser*.

(d) *for the third party in Al Nashiri*:

MR B. EMMERSON,	*UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,*
MS A. KATULU,	*Adviser.*

The Court heard addresses by Mr Nowak-Far, Mr Śliwa, Ms Singh, Mr Pietrzak, Mr Hughes, Mr Jankowski and Mr Emmerson.

16. On 1 February 2014 the Court changed the composition of its Sections (Rule 25 § 1) but this case remained in the former Fourth Section (Rule 52 § 1).

B. The Polish Government's failure to produce information and documentary evidence in the present case and in *Husayn (Abu Zubaydah)*

17. On 10 July 2012, on giving notice of the application to the Government (see paragraph 6 above), the Chamber requested the Government to supply, on a confidentiality basis under Rule 33 § 2 of the Rules of Court, materials showing the grounds on which the applicant had been granted injured person (*pokrzywdzony*) status in the investigation opened on 11 March 2008 (see also paragraphs 131–172 below) and indicating whether the fact of his detention in Poland had been established in that investigation and, if so, on what it was based.

In relation to allegations that there was a document (agreement) on the setting up and running of a secret CIA prison on Polish territory prepared by the Polish authorities, the Chamber, in case that document existed, requested the Government to supply a copy on a confidentiality basis under Rule 33 § 2 of the Rules of Court. It also asked the Government whether that document had been included in the evidence gathered during the investigation.

18. In this connection, the Chamber further decided to impose confidentiality, under Rule 33 § 2 of the Rules of Court and in the interests of national security in a democratic society, on the following documents:

1) any documents that might be produced by the Government in the future relating to the alleged CIA rendition operations in Poland or other States and the alleged participation of Poland or other States in that operation;

2) any documents to be submitted by the Government revealing the scope and course of the investigation conducted in this respect in Poland or identifying persons who had given evidence, had been charged or were otherwise implicated in the investigation; and

3) any classified materials that in the future could be requested by the Court from the Government or would be submitted of their own motion to the Court.

19. The Government were also informed that should they wish to seek specific security measures to ensure the full secrecy of that material, the Court was prepared to have such wish accommodated through appropriate procedural and practical arrangements.

20. On 5 September 2012 the Government filed their observations on the admissibility and merits of the case. In a cover letter attached to their observations they asked the Court to restrict, under Rule 33 § 2 of the Rules of Court, public access to the Government's submissions, as well as to the applicant's observations filed in reply, in the interest of national security in a democratic society and in view of the need to protect the secrecy of the criminal investigation conducted in Poland.

21. The Government also submitted that, since the criminal investigation in Poland was pending, they were not in a position to address in detail the Court's questions or produce documentary evidence requested by the Court. Instead, in the same letter they stated as follows:

> "[The Government] also wish to inform the Court that, to supplement the present position, an additional material will be prepared, by no later than 1 October 2012, by the Appellate Prosecutor's Office in Kraków with regard to the course of the proceedings no. Ap VDs.12/12/S for Judges of the Court examining the present application. However, due to the need to protect the secrecy of the investigation, the material will be classified. As such, it may be made available only to Judges of the Court specified by name, in a manner and at a location that are in conformity with Polish domestic law governing the protection of classified information.
>
> Furthermore, the Government wish to inform the Court that pursuant to Article 156 § 5 of the Code of Criminal Procedure, in the course of a preparatory proceedings case files may in exceptional circumstances be made available to third parties, subject to the approval of the prosecutor. The Government hereby declare their willingness to offer assistance in the scope of preparing and filing the relevant applications to make case files of preparatory proceedings available to the specified Judges of the Court."

22. On 25 September 2012 the President of the Chamber acceded to the Government's request under Rule 33 § 2. However, the Government were reminded that the Chamber had already imposed confidentiality on certain specific documents requested from the Government and that those documents had not been produced. Nor had the Government asked for an extension of the relevant time-limit.

23. In respect of the procedure proposed for the provision of the "additional material" the Government's attention was drawn to the fact that the Court was the master of its procedure and that in processing evidence it was bound by and followed its procedure under the Convention and the Rules of Court, not the procedure of the Contracting States. The Government were also reminded that, in accordance with the Court's case-law, the respondent Government could not rely on domestic legal

impediments to justify a failure to furnish the facilities necessary for the Court's examination of the case. It was also recalled that they had already been informed that the Court was prepared to accommodate their security concerns by means of appropriate security arrangements.

24. By 1 October 2012 the Government had not supplied any "additional material" referred to in their letter of 5 September 2012 (see paragraph 21 above). Nor did they produce the documents initially requested by the Court (see paragraphs 17-18 above).

25. On 31 October 2012 the applicant's representatives asked the Court to reconsider the status of confidential and *ex parte* submissions in the case. First, they objected to the Polish Government's proposal to submit documents to the Court on an *ex parte* basis, submitting that this was not envisaged in the Convention or the Rules of Court.

Second, they drew the Court's attention to the fact that the Government had expressly conceded that they could not provide the documents requested by the Court and that their written observations did not contain any information which was subject to the secrecy of the investigation or which otherwise required confidentiality. On the contrary, their submissions had been limited to information largely in the public domain and legal arguments which should not be withheld from the public.

26. The Government, having been invited by the Court to state their position on whether the confidentiality of the parties' pleadings should be maintained, responded on 29 November 2012. They asked the Court to uphold the restrictions on the public access to the file.

27. In respect of the "additional material" prepared by the Polish prosecution authority, they stated:

> "Finally, the Government would like to address the question of *ex parte* submission which is offered by the Government in their letter of 5 September 2012. The classified document in question was prepared by the Appellate Prosecutor in Kraków in the declared time-limit and this information was passed to the Registrar of the Fourth Section during his visit in Warsaw. Therefore hereby the Government wish to inform that the said material is available to Judges of the Court and the Government wish to kindly ask the Court to specify the name of Judges and appropriate time when they could acquaint themselves with the document.
>
> Simultaneously the Government wish to declare once again their willingness to offer the Court their assistance in preparing and filing the applications for access to the case files of the preparatory proceedings pursuant to Article 156 § 5 of the Code of Criminal Procedure.
>
> The above-mentioned classified document was not created by the Government as such, but by the Appellate Prosecutor's Office in Kraków. Therefore, it is available in the Secret Registry of the Prosecutor General Office, an organ independent of the Government. In order to protect the secrecy of the conducted investigation only the authorized persons can acquaint themselves with the deposited material."

28. On 22 January 2013 the Chamber decided to discontinue the application of Rule 33 § 2 of the Rules of Court and to lift confidentiality in

respect of the observations submitted by the Government and the applicant. The parties were informed that this was without prejudice to any future decision of the Chamber or its President to impose confidentiality on any pleadings or materials that might subsequently be produced in the case where reasons were shown to justify such a decision.

29. On 14 February 2013 the Government renewed their proposal to assist the Court in applying to the Kraków Prosecutor of Appeal for access to the investigation file and other materials – to which they referred to as a "special document" – prepared for the Court by the prosecution authority. They stated that they wished to "declare once again their willingness to offer the Court their assistance in preparing and filing the applications for access to the case file".

In reply, the Court informed the Government that the conditions that they had attached to the Court's access to those documents and the manner they had proposed for the Court to proceed were not in accordance with the Court's Rules and practice. It was recalled that, in the Court's letter of 25 September 2012, the Government's attention had been drawn to the fact that the Court was the master of its procedure and that in processing evidence it was bound by and followed its procedure under the Convention and the Rules of Court, not the procedure of the Contracting States.

The Government were accordingly invited to produce the "special document" prepared by the Kraków Prosecutor of Appeal. It was stressed that, as they were aware, that document was to be included in the Court's file as a material which would be considered to be, and would remain, confidential pursuant to the Chamber's decision of 10 July 2012 to impose confidentiality on, *inter alia*, "any documents to be submitted by the Government revealing the scope and course of the investigation conducted in this respect in Poland or identifying persons who ha[d] given evidence, ha[d] been charged or were otherwise implicated in the investigation". It was once again stressed that the Court was prepared to accommodate the Government's security considerations by means of all appropriate security arrangements.

Lastly, the Government's attention was drawn to the Contracting Parties' duty under Article 38 of the Convention to "furnish all necessary facilities" for the effective conduct of the proceedings before the Court and of the parties' duties to cooperate with the Court, to comply with an order of the Court and to participate effectively in the proceedings, as provided in Rules 44A, 44B and 44C.

30. On 16 September 2013 the Government filed their written observations on the admissibility and merits in *Husayn (Abu Zubaydah*). In those observations, in the section entitled "Means available to the Court to acquaint itself with case files of preparatory proceedings" they again suggested that the Court should apply to the domestic authorities for access to the investigation file. They also offered to ask the prosecution authority

to prepare for the Court a document, to which they referred to as a "comprehensive extract from the non-confidential part of the case files Ap. V Ds. 12/12/S.". The relevant part of their pleading read as follows:

> "[T]he Government would like to indicate that there are means available for the Court to acquaint itself with the case file Ap. V Ds 12/12/S. In the course of domestic preparatory proceedings, case files may be made available, in exceptional circumstances, to third parties, subject to the approval of the prosecutor. The Government wish to declare their willingness to offer the Court their assistance in preparing and filling the applications for access to the case files of the preparatory proceedings pursuant to Article 156 § 5 of the Code of Criminal Procedure. ...
>
> Moreover, the Government would like to inform the Court that, upon its request, they will ask the Appellate Prosecutor's Office in Kraków to draw up a comprehensive extract from the non-confidential part of the case files Ap. V Ds. 12/12/S. Such document will be classified in order to protect the secrecy of the investigation. Consequently, the document could be made available to the Court in the seat of the General Prosecutor's Office in Warsaw or in the Permanent Representation of the Republic of Poland to the Council of Europe in Strasbourg. ..."

31. On 3 October 2013 the Court informed the Government that it had decided to hold an oral hearing in the present case and in the case of *Husayn (Abu Zubaydah)* simultaneously. The Government and the applicants were informed that if they intended to rely on any additional documentary evidence at the hearing, it should be submitted at least three weeks before the hearing or be incorporated verbatim in their oral submissions.

With reference to the Government's observations on "Means available to the Court to acquaint itself with case files of preparatory proceedings" in *Husayn (Abu Zubaydah)*, in particular regarding the conditions that they attached to the Court's access to the documents and information necessary for the examination of the cases, including the non-confidential part of the investigation file, the Government were informed that the Chamber, having considered their submissions, wished to remind them of the Polish State's duties under Article 38 of the Convention (duty to furnish all necessary facilities for the Court's examination of the case) and under Rule 44A (duty to cooperate with the Court). It also wished to remind them of the content of Rule 44B (failure to comply with an order of the Court) and Rule 44C (failure to participate effectively).

In that context, as already observed in the present case in regard to similar restrictions imposed by the Government on the Court's access to evidence, it was recalled that those conditions and the manner proposed for the Court to proceed were not in accordance with the Court's Rules and practice and that in processing evidence the Court was bound by and followed its procedure under the Convention and the Rules of Court, not the procedure of the Contracting States.

The Chamber also decided to remind the Government again that, according to the Court's established case-law, the Contracting States should furnish all necessary facilities to make possible a proper and effective

examination of applications and that they could not rely on domestic impediments to justify a failure to discharge this duty. It was stressed that, in particular, in a case where an application raised issues concerning the effectiveness of the criminal investigation, their duty under Article 38 included the submission of documents from that investigation since the latter were fundamental to the establishment of the facts by the Court.

Accordingly, the Government were invited to produce in respect of both cases, by 30 October 2013, the document referred to in their observations of 16 September 2013 in *Husayn (Abu Zubaydah)* as a "comprehensive extract from the non-confidential part of the case files Ap. V Ds. 12/12/S".

32. The Government failed to submit the document within the time-limit set by the Court. No extension of that time-limit was requested.

33. However, in a letter of 30 October 2013 the Government informed the Court that the extract from the non-confidential part of the investigation file had been prepared "by the date indicated by the Court". They stated that since the document was classified in order to protect the secrecy of the investigation, it would be "made available to the Court pursuant to conditions agreed between the Government and the Court". They added that the same document would be available to the, in their words, "enumerated" representatives of the two applicants.

34. On 5 November 2013 the Court informed the Government that the Chamber wished them to deliver the document in question to the Registrar of the Fourth Section in the Court's premises, either by a person authorised by them or by hand-delivered courier by 12 November 2013 at the latest, that is, the date already fixed by the Chamber for submission by the parties of any additional documentary evidence on which they sought to rely at the oral hearing (see paragraph 31 above). The Government were informed that the said time-limit, given the date set for the hearing and the need to ensure the orderly proceedings before the Court, would not be extended. It was recalled that it was for the Court to make the appropriate internal security arrangements ensuring confidentiality of that document and its availability to the representatives of the two applicants.

Consequently, the Government were invited to produce the document in the manner and within the time-limit specified by the Court.

35. The Government failed to produce the document within the prescribed time-limit. In their letter of 12 November 2013 they stated, among other things, as follows:

> "As it was already mentioned in the previous Government's letters the document prepared by the Appellate Prosecutor's Office in Kraków is classified with the purpose to protect the secrecy of the investigation. The Government offered to produce the document to the Court pursuant to conditions agreed between the Government and the Court. At the same time the Government offered that the same document would be available for the enumerated applicants' plenipotentiaries.

> The Government of Poland are perfectly aware that the Court is the master of the proceeding before it and therefore it is up to the Court to arrange the conditions assuring the confidentiality of submitted documents. However, the general provisions contained in the Court's Rules of procedure do not indicate in any way the manner in which fragile documents produced by the parties, especially states, to the Court are to be protected. This situation is hardly comparable with internal regulations of other international judicial bodies. ...
>
> Therefore the Government cannot accept the assumption taken by the Court that the conditions for submitting by Polish authorities the relevant document have been fulfilled. The Government reiterate their previous offer according to which the said document will be made available to the judges of the Court and enumerated plenipotentiaries of the applicants in the premises of the Permanent Representation of the Republic of Poland to the Council of Europe or in the office of the General Prosecutor in Warsaw. Furthermore, the Government wishing to come up as far as possible with the expectations of the Court wish to declare that they are ready to bring the document in question to the hearing on 2 [December] Monday 2013 which is to be conducted *in camera* in order that the Judges of the Court and enumerated plenipotentiaries of the applicants acquaint themselves with its content."

36. On 2 December 2013, at the close of the fact-finding hearing (see also paragraph 15 above), the representatives of the Government informed the Court that they had brought the document in question by *ad hoc* diplomatic post. They further stated, *inter alia*, that:

> "This is a classified document, which would enable the judges to understand better the details of the investigation. It contains more information about the activities of the Polish prosecutor's office with respect to the cases that are the subject of today's session. Given the Polish regulations concerning classified documents, access to these materials would be possible today for the judges who are involved in the hearing, the interpreters and the Polish representatives of the parties. ...
>
> [We will be handing the document to the Court], except that the document could be reviewed in the course of the hearing and in accordance with our national rules and it would have to be returned and taken back by us because it is a classified document. ...
>
> [We] could find compatibility between [the Court's] rules and our rules, but becoming acquainted with the document must be here *in situ*, here and now. ..."

37. The applicants' representatives, who were asked to comment on the Government's proposal, stated that the limitation of access to only Polish representatives of the two applicants would be extremely onerous in terms of their ability to represent effectively their interests. Moreover, the representatives said that they were not aware of any regulation under Polish law that would justify such prohibition. They added that they needed time to become acquainted with the material and that accepting the Government's proposal would force them to react to a possibly very important document, for submission of which the deadline had long since passed, on an *ad hoc* and immediate basis.

38. At the fact-finding hearing and the hearing *in camera* the counsel for Mr Al Nashiri and Mr Abu Zubaydah confirmed that during the

investigation they had obtained access to the non-confidential part of the case file and, to some extent, to confidential material contained therein.

39. Having deliberated on the Government's proposal, the Chamber:

1) reminded the Government that they had already been given several deadlines for submission of the document;

2) reminded them of the Court's case-law on the cooperation with the Court in order to make the system of individual petition under Article 34 of the Convention effective;

3) reiterated the relevant principles, in particular those regarding the submission of classified documents in the proceedings before the Court, as recently stated in the case of *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 202-206;

4) directed that the Government supply the document in question in a redacted form (for instance, in the manner described in *Janowiec and Others*, § 206) to the Court and the other parties either on the next day (if they were able to do so) or within two weeks thereafter.

40. The Government failed to produce the requested, redacted document.

In their letter of 17 December 2013, they informed the Court that, although they were well aware of the fact that the Court was the master of its proceedings and that it was up to the Court to decide about conditions that would ensure protection of confidentiality of submitted documents, the Rules of Court did not specify the manner in which sensitive documents from the parties, especially the States, were to be protected. There were no specific provisions regulating how classified documents submitted by the States should be handed over, stored and made available.

On this occasion, they submitted that "the document brought to Strasbourg ... had been drafted on the basis of unclassified files and also, in part, on the basis of classified files".

The Government further stated that "the Court [had] refused to make use" of any of the means of becoming acquainted with the document in question suggested by them on the grounds that this was inconsistent with the Court's rules and practice "without indicating the legal basis of its decision and examples of that practice". They considered that, despite their repeated requests, the Court did not show "any understanding for the Polish Government's good will arising from a profound respect for the Convention and the Court".

On the expiry of the time-limit fixed by the Chamber for submission of the document in question, the oral and written procedure in the case was closed.

Following the closure, on 20 March and 25 April 2014 respectively, the Government asked to Court to include in the case file their additional submissions, in particular information concerning the actions recently undertaken in the investigation. However, the President refused those requests since the pleadings were unsolicited and filed outside the time-limit

fixed by the Chamber (Rule 38 § 1 of the Rules of Court and paragraph 6 of the practice direction on written pleadings).

THE FACTS

41. The applicant was born in 1965. He is currently detained in the Internment Facility at the United States Guantánamo Bay Naval Base in Cuba.

I. EVIDENCE BEFORE THE COURT

42. In order to establish the facts of the case the Court based its examination on documentary evidence which had mostly been supplied by the applicant and, to some extent, supplemented by the Government (see paragraphs 131-140 below), the observations of the parties, material available in the public domain (see paragraphs 213-302 below**)** and the testimony of experts and a witness who gave oral evidence before the Court at the fact-finding hearing held on 2 December 2013 (see paragraph 14 above).

In the course of that hearing the Court, with the participation of the parties, took evidence from three expert-witnesses, namely:

(1) Mr Giovanni Claudio Fava, in his capacity as the Rapporteur of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of Prisoners ("the TDIP"), the relevant inquiry also being called "the Fava Inquiry" and so referred to hereinafter (see also paragraphs 266-272 below);

(2) Senator Dick Marty, in his capacity as the Parliamentary Assembly of the Council of Europe's Rapporteur in the inquiry into the allegations of CIA secret detention facilities in the Council of Europe's member States ("the Marty Inquiry"; see also paragraphs 244-265 below);

(3) Mr J.G.S., in his capacity as an advisor to Senator Marty in the Marty Inquiry;

In the course of giving evidence to the Court, Senator Marty and Mr J.G.S. also made a PowerPoint presentation entitled: "Distillation of available documentary evidence, including flight data, in respect of Poland and the cases of *Al Nashiri* and *Abu Zubaydah*".

43. The Court further heard evidence from a witness – Senator Józef Pinior, in connection with his affidavit made in *Husayn (Abu Zubaydah)* and his involvement in the work of the TDIP (see paragraphs 267 and 303 below).

44. The relevant passages from the witnesses' testimony are reproduced below (see paragraphs 304-338 below).

II. BACKGROUND TO THE CASE

A. Terrorist attacks of which the applicant has been suspected

1. USS Cole bombing in 2000

45. On 12 October 2000 a suicide terrorist attack on the United States Navy guided-missile destroyer USS *Cole* took place in Aden, Yemen when the ship stopped in the Aden harbour for refuelling. It was attacked by a small bomb-laden boat. The explosion opened a 40 foot hole in the warship, killing 17 American sailors and injuring 40 other personnel.

The US authorities considered the applicant to have been one of the most senior figures in al'Qaeda and the suspect in this bombing. He has been suspected of masterminding and orchestrating the attack (see also paragraphs 114 and 122 below).

2. MV Limburg bombing

46. On 6 October 2002 a French oil tanker MV *Limburg*, while it was in the Gulf of Aden some miles offshore, was rammed by a small explosives-laden boat which detonated. The tanker caught fire and approximately 90,000 barrels (14,000 m^3) of oil leaked into the Gulf of Aden. One crew member was killed and twelve others injured. The style of the attack resembled the suicide *USS Cole* bombing described above. The US authorities have suspected the applicant of playing a role in the attack (see also paragraph 122 below).

B. The so-called "High-Value Detainees Programme"

47. After 11 September 2001 the US Government began operating a special interrogation and detention programme designed for suspected terrorists. On 17 September 2001 President Bush signed a classified Presidential Finding granting the Central Intelligence Agency ("the CIA") extended competences relating to its covert actions, in particular authority to detain terrorist suspects and to set up secret detention facilities outside the United States, in cooperation with the governments of the countries concerned.

48. On an unspecified later date the CIA established a programme in the Counterterrorist Center to detain and interrogate terrorists at sites abroad. In further documents the American authorities referred to it as "the CTC program" (see also paragraph 51 below) but, subsequently, it was also called "the High-Value Detainees Program" ("the HVD Programme") or the Rendition Detention Interrogation Program ("the RDI Programme"). In the Council of Europe's documents it is also described as "the CIA secret detention programme" or "the extraordinary rendition programme" (see also

paragraphs 244-261 below). For the purposes of the present case, it is referred to as "the HVD Programme".

1. The establishment of the HVD Programme

49. On 24 August 2009 the American authorities released a report prepared by John Helgerson, the CIA Inspector General, in 2004 ("the 2004 CIA Report"). The document, dated 7 May 2004 and entitled "Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003", with appendices A-F, had previously been classified as "top secret". It was considerably redacted; overall, more than one-third of the 109-page document was blackened out.

50. The report, which covers the period from September 2001 to mid-October 2003, begins with a statement that in November 2002 the CIA Deputy Director for Operations ("the DDO") informed the Office of Inspector General ("OIG") that the Agency had established a programme in the Counterterrorist Centre ("CTC") to detain and interrogate terrorists at sites abroad.

51. The background of the HVD Programme was explained in paragraphs 4-5 as follows:

> "4. [REDACTED] the Agency began to detain and interrogate directly a number of suspected terrorists. The capture and initial Agency interrogation of the first high-value detainee, Abu Zubaydah, in March 2002, presented the Agency with a significant dilemma. The Agency was under pressure to do everything possible to prevent additional terrorist attacks. Senior Agency officials believed Abu Zubaydah was withholding information that could not be obtained through then-authorized interrogation techniques. Agency officials believed that a more robust approach was necessary to elicit threat information from Abu Zubaydah and possibly from other senior Al'Qaeda high value detainees.
>
> 5. [REDACTED] The conduct of detention and interrogation activities presented new challenges for CIA. These included determining where detention and interrogation facilities could be securely located and operated, and identifying and preparing qualified personnel to manage and carry out detention and interrogation activities. With the knowledge that Al'Qaeda personnel had been trained in the use of resistance techniques, another challenge was to identify interrogation techniques that Agency personnel could lawfully use to overcome the resistance. In this context, CTC, with the assistance of the Office of Technical Service (OTS), proposed certain more coercive physical techniques to use on Abu Zubaydah. All of these considerations took place against the backdrop of pre-September 11, 2001 CIA avoidance of interrogations and repeated US policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community."

52. As further explained in the 2004 CIA Report, "terrorist targets" and detainees referred to therein were generally categorised as "high value" or "medium value". This distinction was based on the quality of intelligence that they were believed likely to be able to provide about current terrorist threats against the United States. "Medium-Value Detainees" were

individuals believed to have lesser direct knowledge of terrorist threats but to have information of intelligence value. "High-Value Detainees" (also called "HVD") were given the highest priority for capture, detention and interrogation. In some CIA documents they are also referred to as "High-Value Targets" ("HVT").

The applicant fell into this category.

2. Enhanced Interrogation Techniques

53. According to the 2004 CIA Report, in August 2002 the US Department of Justice had provided the CIA with a legal opinion determining that 10 specific "Enhanced Interrogation Techniques" ("EITs"), as applied to suspected terrorists, would not violate the prohibition of torture. This document provided "the foundation for the policy and administrative decisions that guided the CTC Program".

54. The EITs are described in paragraph 36 of the 2004 CIA Report as follows:

> " [1.] The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
>
> [2.] During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
>
> [3.] The facial hold is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.
>
> [4.] With the facial or insult slap, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
>
> [5.] In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
>
> [6.] Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.
>
> [7.] During wall standing, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
>
> [8.] The application of stress positions may include having the detainee sit on file floor with his legs extended straight out in front of him with his anus raised above his head or kneeling on the floor while leaning back at a 45 degree angle.
>
> [9.] Sleep deprivation will not exceed 11 days at a time.
>
> [10.] The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water

onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation."

55. Appendix F to the 2004 CIA Report (Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations of 4 September 2003) refers to "legally sanctioned interrogation techniques".

It states, among other things, that "captured terrorists turned over to the CIA for interrogation may be subjected to a wide range of legally sanctioned techniques. ... These are designed to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence".

The techniques included, in ascending degree of intensity:

1) Standard measures (that is, without physical or substantial psychological pressure): shaving; stripping; diapering (generally for periods not greater than 72 hours); hooding; isolation; white noise or loud music (at a decibel level that will not damage hearing); continuous light or darkness; uncomfortably cool environment; restricted diet, including reduced caloric intake (sufficient to maintain general health); shackling in upright, sitting, or horizontal position; water dousing; sleep deprivation (up to 72 hours).

2) Enhanced measures (with physical or psychological pressure beyond the above): attention grasp; facial hold; insult (facial) slap; abdominal slap; prolonged diapering; sleep deprivation (over 72 hours); stress positions: on knees body slanted forward or backward or leaning with forehead on wall; walling; cramped confinement (confinement boxes) and waterboarding.

56. Appendix C to the 2004 CIA Report (Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency of 1 August 2002) was prepared by Jay S. Baybee, Assistant Attorney General in connection with the application of the EITs to Abu Zubaydah, the first high-ranking Al'Qaeda prisoner who was to be subjected to those interrogation methods. This document, a classified analysis of specific interrogation techniques proposed for use in the interrogation of Abu Zubaydah, was declassified in 2009.

It concludes that, given that "there is no specific intent to inflict severe mental pain or suffering ..." the application "of these methods separately or a course of conduct" would not violate the prohibition of torture as defined in section 2340 of title 18 of the United States Code.

57. The US Department of Justice Office of Professional Responsibility Report: "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" ("the 2009 DOJ Report") was released by the US authorities in a considerably redacted form in 2010. The report is 260 pages long but all the parts that seem to refer to locations of CIA "black sites" or names of interrogators are blackened. It states, among other things, as follows:

> "The issue how to approach interrogations reportedly came to a head after the capture of a senior al'Qaeda leader, Abu Zubaydah, during a raid in Faisalabad, Pakistan, in late March 2002. Abu Zubaydah was transported to a 'black site', a secret CIA prison facility [REDACTED] where he was treated for gunshot wounds he suffered during his capture. ..."

58. According to the 2009 DOJ Report, the CIA psychologists eventually proposed twelve EITs to be used in the interrogation of Mr Abu Zubaydah: attention grasp, walling, facial hold, facial or insult slap, cramped confinement, insects, wall-standing, stress positions, sleep deprivation, use of diapers, waterboard – the name of the twelfth EITs was redacted.

59. The 2004 CIA Report states that, subsequently, the CIA Office of General Counsel ("OGC") continued to consult with the US Department of Justice in order to expand the use of EITs beyond the interrogation of Abu Zubaydah.

According to the report, "this resulted in the production of an undated and unsigned document entitled "Legal principles Applicable to CIA Detention and Interrogation of Captured Al'Qaeda Personnel". Certain parts of that document are rendered in the 2004 CIA report. In particular, the report cites the following passages:

> "...the [Torture] Convention permits the use of [cruel, inhuman, or degrading treatment] in exigent circumstances, such as a national emergency or war. ...the interrogation of Al'Qaeda members does not violate the Fifth and Fourteenth Amendments because those provisions do not apply extraterritorially, nor does it violate the Eighth Amendment because it only applies to persons upon whom criminal sanctions have been imposed ...
>
> The use of the following techniques and of comparable, approved techniques does not violate any Federal statute or other law, where the CIA interrogators do not specifically intend to cause the detainee to undergo severe physical or mental pain or suffering (i.e., they act with the good faith belief that their conduct will not cause such pain or suffering): isolation, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainees), deprivation of reading material, loud music or white noise (at a decibel level calculated to avoid damage to the detainees' hearing), the attention grasp, walling, the facial hold, the facial slap (insult slap), the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation, the use of diapers, the use of harmless insects, and the water board."

The report, in paragraph 44, states that according to OGC this analysis embodied the US Department of Justice agreement that the reasoning of the classified OLC opinion of 1 August 2002 extended beyond the interrogation of Abu Zubaydah and the conditions specified in that opinion.

60. As established in paragraph 51 of the report, in November 2002 CTCinitiated training courses for CIA agents involved in interrogations. On 28 January 2003 formal "Guidelines on Confinement Conditions for CIA Detainees" and "Guidelines on Interrogations Conducted Pursuant to [REDACTED]" were approved (paragraph 50).

61. The application of the EITs to other terrorist suspects in CIA custody, including Mr Al Nashiri, began in November 2002.

3. Standard procedures and treatment of "High Value Detainees" in CIA custody (combined use of interrogation techniques)

62. On 30 December 2004 the CIA prepared a background paper on the CIA's combined interrogation techniques ("the 2004 CIA Background Paper"), addressed to D. Levin, the US Acting Assistant Attorney General. The document, originally classified as "top secret" was released on 24 August 2009 in a heavily redacted version. It explains standard authorised procedures and treatment to which High-Value Detainees – the HVD – in CIA custody were routinely subjected from their capture through their rendition and reception at a CIA "black site" to the interrogation. It "focuses on the topic of combined use of interrogation techniques, [the purpose of which] is to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner ... Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence HVD behaviour, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence ... The interrogation process could be broken into three separate phases: Initial conditions, transition to interrogation and interrogation" (see also *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 124, ECHR 2012).

63. The first section of the 2004 CIA Background Paper, entitled "Initial Capture", was devoted to the process of capture, rendition and reception at the "black site". It states that "regardless of their previous environment and experiences, once a HVD is turned over to CIA a predictable set of events occur". The capture is designated to "contribute to the physical and psychological condition of the HVD prior to the start of interrogation".

64. The said "predictable set of events" following the capture started from rendition, which was described as follows:

> "a. The HVD is flown to a Black Site. A medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. [REDACTED] There is no interaction with the HVD during this rendition movement except for periodic, discreet assessments by the on-board medical officer
>
> b. Upon arrival at the destination airfield, the HVD is moved to the Black Site under the same conditions and using appropriate security procedures."

65. The description of the next "event" – the reception at the black site – reads as follows:

> "The HVD is subjected to administrative procedures and medical assessment upon arrival at the Black Site. [REDACTED] the HVD finds himself in the complete control of Americans; [REDACTED] the procedures he is subjected to are precise,

quiet, and almost clinical; and no one is mistreating him. While each HVD is different, the rendition and reception process generally creates significant apprehension in the HVD because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of US custody. Reception procedures include:

a. The HVD's head and face are shaved.

b. A series of photographs are taken of the HVD while nude to document the physical condition of the HVD upon arrival.

c. A Medical Officer interviews the HVD and a medical evaluation is conducted to assess the physical condition of the HVD. The medical officer also determines if there are any contra indications to the use of interrogation techniques.

d. A psychologist interviews the HVD to assess his mental state. The psychologist also determines if there are any contra indications to the use of interrogation techniques."

66. The second section, entitled "Transitioning to Interrogation - The Initial Interview", deals with the stage before the application of EITs. It reads:

"Interrogators use the Initial Interview to assess the initial resistance posture of the HVD and to determine – in a relatively benign environment – if the HVD intends to willingly participate with CIA interrogators. The standard on participation is set very high during the Initial Interview. The HVD would have to willingly provide information on actionable threats and location information on High-Value Targets at large not lower level information for interrogators to continue with the neutral approach. [REDACTED] to HQS. Once approved, the interrogation process begins provided the required medical and psychological assessments contain no contra indications to interrogation."

67. The third section, "Interrogation", which is largely redacted, describes the standard combined application of interrogation techniques defined as 1) "existing detention conditions", 2) "conditioning techniques", 3) "corrective techniques" and 4) "coercive techniques".

1) The part dealing with the "existing detention conditions" reads:

"Detention conditions are not interrogation techniques, but they have an impact on the detainee undergoing interrogation. Specifically, the HVD will be exposed to white noise/loud sounds (not to exceed 79 decibels) and constant light during portions of the interrogation process. These conditions provide additional operational security: white noise/loud sounds mask conversations of staff members and deny the HVD any auditory clues about his surroundings and deter and disrupt the HVD's potential efforts to communicate with other detainees. Constant light provides an improved environment for Black Site security, medical, psychological, and interrogator staff to monitor the HVD."

2) The "conditioning techniques" are related as follows:

"The HVD is typically reduced to a baseline, dependent state using the three interrogation techniques discussed below in combination. Establishing this baseline state is important to demonstrate to the HVD that he has no control over basic human needs. The baseline state also creates in the detainee a mindset in which he learns to perceive and value his personal welfare, comfort, and immediate needs more than the

information he is protecting. The use of these conditioning techniques do not generally bring immediate results; rather, it is the cumulative effect of these techniques, used over time and in combination with other interrogation techniques and intelligence exploitation methods, which achieve interrogation objectives. These conditioning techniques require little to no physical interaction between the detainee and the interrogator. The specific conditioning interrogation techniques are

a. Nudity. The HVD's clothes are taken and he remains nude until the interrogators provide clothes to him.

b. Sleep Deprivation. The HVD is placed in the vertical shackling position to begin sleep deprivation. Other shackling procedures may be used during interrogations. The detainee is diapered for sanitary purposes; although the diaper is not used at all times.

c. Dietary manipulation. The HVD is fed Ensure Plus or other food at regular intervals. The HVD receives a target of 1500 calories per day per OMS guidelines."

3) The "corrective techniques", which were applied in combination with the "conditioning techniques", are defined as those requiring "physical interaction between the interrogator and detainee" and "used principally to correct, startle, or to achieve another enabling objective with the detainee". They are described as follows:

"These techniques – the insult slap, abdominal slap, facial hold, and attention grasp – are not used simultaneously but are often used interchangeably during an individual interrogation session. These techniques generally are used while the detainee is subjected to the conditioning techniques outlined above (nudity, sleep deprivation, and dietary manipulation). Examples of application include:

a. The insult slap often is the first physical technique used with an HVD once an interrogation begins. As noted, the HVD may already be nude, in sleep deprivation, and subject to dietary manipulation, even though the detainee will likely feel little effect from these techniques early in the interrogation. The insult slap is used sparingly but periodically throughout the interrogation process when the interrogator needs to immediately correct the detainee or provide a consequence to a detainee's response or non-response. The interrogator will continually assess the effectiveness of the insult slap and continue to employ it so long as it has the desired effect on the detainee. Because of the physical dynamics of the various techniques, the insult slap can be used in combination with water dousing or kneeling stress positions. Other combinations are possible but may not be practical.

b. Abdominal Slap. The abdominal slap is similar to the insult slap in application and desired result. It provides the variation necessary to keep a high level of unpredictability in the interrogation process. The abdominal slap will be used sparingly and periodically throughout the interrogation process when the interrogator wants to immediately correct the detainee [REDACTED], and the interrogator will continually assess its effectiveness. Because of the physical dynamics of the various techniques, the abdominal slap can be used in combination with water dousing, stress positions, and wall standing. Other combinations are possible but may not be practical,

c. Facial Hold. The facial hold is a corrective technique and is used sparingly throughout interrogation. The facial hold is not painful and is used to correct the detainee in a way that demonstrates the interrogator's control over the HVD [REDACTED]. Because of the physical, dynamics of the various techniques, the

facial hold can be used in combination with water dousing, stress positions, and wall standing. Other combinations are possible but may not be practical.

d. Attention Grasp .It may be used several times in the same interrogation. This technique is usually applied [REDACTED] grasp the HVD and pull him into close proximity of the interrogator (face to face). Because of the physical dynamics of the various techniques, the attention grasp can be used in combination with water dousing or kneeling stress positions. Other combinations are possible but may not be practical."

4) The "coercive techniques", defined as those placing a detainee "in more physical and psychological stress and therefore considered more effective tools in persuading a resistant HVD to participate with CIA interrogators", are described as follows:

"These techniques – walling, water dousing, stress positions, wall standing, and cramped confinement – are typically not used in combination, although some combined use is possible. For example, an HVD in stress positions or wall standing can be water doused at the same time. Other combinations of these techniques may be used while the detainee is being subjected to the conditioning techniques discussed above (nudity, sleep deprivation, and dietary manipulation). Examples of coercive techniques include:

a. Walling. Walling is one of the most effective interrogation techniques because it wears down the HVD physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the HVD knows he is about to be walled again. [REDACTED] interrogator [REDACTED]. An HVD may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question. During an interrogation session that is designed to be intense, an HVD will be walled multiple times in the session. Because of the physical dynamics of walling, it is impractical to use it simultaneously with other corrective or coercive techniques.

b. Water Dousing. The frequency and duration of water dousing applications are based on water temperature and other safety considerations as established by OMS guidelines. It is an effective interrogation technique and may be used frequently within those guidelines. The physical dynamics of water dousing are such that it can be used in combination with other corrective and coercive techniques. As noted above, an HVD in stress positions or wall standing can be water doused. Likewise, it is possible to use the insult slap or abdominal slap with an HVD during water dousing.

c. Stress Positions. The frequency and duration of use of the stress positions are based on the interrogator's assessment of their continued effectiveness during interrogation. These techniques are usually self-limiting in that temporary muscle fatigue usually leads to the HVD being unable to maintain the stress position after a period of time. Stress positions requiring the HVD to be in contact with the wall can be used in combination with water dousing and abdominal slap. Stress positions requiring the HVD to kneel can be used in combination with water dousing, insult slap, abdominal slap, facial hold, and attention grasp.

d. Wall Standing. The frequency and duration of wall standing are based on the interrogator's assessment of its continued effectiveness during interrogation. Wall standing is usually self-limiting in that temporary muscle fatigue usually leads to the HVD being unable to maintain the position after a period of time. Because of the physical dynamics of the various techniques, wall standing can be used in

combination with water dousing and abdominal slap. While other combinations are possible, they may not be practical.

e. Cramped Confinement. Current OMS guidance on the duration of cramped confinement limits confinement in the large box to no more than 8 hours at a time for no more than 18 hours a day, and confinement in the small box to 2 hours. [REDACTED] Because of the unique aspects of cramped confinement, it cannot be used in combination with other corrective or coercive techniques."

68. The subsequent section of the 2004 CIA Background Paper, entitled "Interrogation – A Day-to-Day Look" sets out a – considerably redacted – "prototypical interrogation" practised routinely at the CIA black site "with an emphasis on the application of interrogation techniques, in combination and separately".

It reads as follows:

"1) [REDACTED]

2) Session One

a. The HVD is brought into the interrogation room, and under the direction of the interrogators, stripped of his clothes, and placed into shackles.

b. The HVD is placed standing with his back to the walling wall. The HVD remains hooded.

c. Interrogators approach the HVD, place the walling collar over his head and around his neck, and stand in front of the HVD. [REDACTED].

d. The interrogators remove the HVD's hood and [REDACTED] explain the HVD's situation to him, tell him that the interrogators will do what it takes to get important information, and that he can improve his conditions immediately by participating with the interrogators. The insult slap is normally used as soon as the HVD does or says anything inconsistent with the interrogators' instructions.

e. [REDACTED] If appropriate, an insult slap or abdominal slap will follow.

f. The interrogators will likely use walling once it becomes clear that the HVD is lying, withholding information, or using other resistance techniques.

g. The sequence may continue for several more iterations as the interrogators continue to measure the HVD's resistance posture and apply a negative consequence to the HVD's resistance efforts.

h. The interrogators, assisted by security officers (for security purposes), will place the HVD in the center of the interrogation room in the vertical shackling position and diaper the HVD to begin sleep deprivation. The HVD will be provided with Ensure Plus - (liquid dietary supplement) - to begin dietary manipulation. The HVD remains nude. White noise (not to exceed 79db) is used in the interrogation room. The first interrogation session terminates at this point.

i. [REDACTED]

j. This first interrogation session may last from 30 minutes to several hours based on the interrogators' assessment of the HVD's resistance posture. [REDACTED] The three Conditioning Techniques were used to bring the HDV to a baseline, dependent state conducive to meeting interrogation objectives in a timely manner. [REDACTED].

3) Session Two.

a. The time period between Session One and Session Two could be as brief as one hour or more than 24 hours [REDACTED] In addition, the medical and psychological personnel observing the interrogations must advise that there are no contra indications to another interrogation session.

b. [REDACTED]

c. Like the first session, interrogators approach the HVD, place the walling collar over his head and around his neck, and stand in front of the HVD. [REDACTED].

d. [REDACTED] Should the HVD not respond appropriately to the first questions, the interrogators will respond with an insult slap or abdominal slap to set the stage for further questioning.

e. [REDACTED] The interrogators will likely use walling once interrogators determine the HVD is intent on maintaining his resistance posture.

f. The sequence [REDACTED] may continue for multiple iterations as the interrogators continue to measure the HVD's resistance posture.

g. To increase the pressure on the HVD, [REDACTED] water douse the HVD for several minutes. [REDACTED].

h. The interrogators, assisted by security officers, will place the HVD back into the vertical shackling position to resume sleep deprivation. Dietary manipulation also continues, and the HVD remains nude. White noise (not to exceed 79db) is used in the interrogation room. The interrogation session terminates at this point,

i. As noted above, the duration of this session may last from 30 minutes to several hours based on the interrogators' assessment of the HVD's resistance posture. In this example of the second session, the following techniques were used: sleep deprivation, nudity, dietary manipulation, walling, water dousing, attention grasp, insult slap, and abdominal slap. The three Conditioning Techniques were used to keep the HVD at a baseline, dependent state and to weaken his resolve and will to resist. In combination with these three techniques, other Corrective and Coercive Techniques were used throughout the interrogation session based on interrogation objectives and the interrogators' assessment of the HVD's resistance posture.

4) Session Three

a. [REDACTED] In addition, the medical and psychological personnel observing the interrogations must find no contra indications to continued interrogation.

b. The HVD remains in sleep deprivation, dietary manipulation and is nude.[REDACTED].

c. Like the earlier sessions, the HVD begins the session standing against the walling wall with the walling collar around his neck.

d. If the HVD is still maintaining a resistance posture, interrogators will continue to use walling and water dousing. All of the Corrective Techniques, (insult slap, abdominal slap, facial hold, attention grasp) may be used several times during this session based on the responses and actions of the HVD. Stress positions and wall standing will be integrated into interrogations. [REDACTED]. Intense questioning and walling would be repeated multiple times.[REDACTED].

Interrogators will often use one technique to support another. As an example, interrogators would tell an HVD in a stress position that he (HVD) is going back to

the walling wall (for walling) if he fails to hold the stress position until told otherwise by the HVD. This places additional stress on the HVD who typically will try to hold the stress position for as long as possible to avoid the walling wall. [REDACTED] interrogators will remind the HVD that he is responsible for this treatment and can stop it at any time by cooperating with the interrogators.

e. The interrogators, assisted by security officers, will place the HVD back into the vertical shackling position to resume sleep deprivation. Dietary manipulation also continues, and the HVD remains nude. White noise (not to exceed 79db) is used in the interrogation room. The interrogation session terminates at this point.

In this example of the third session, the following techniques were used: sleep deprivation, nudity, dietary manipulation, walling, water dousing, attention grasp, insult slap, abdominal slap, stress positions, and wall standing.

5) Continuing Sessions.

[REDACTED] Interrogation techniques assessed as being the most effective will be emphasized while techniques with little assessed effectiveness will be minimized.

a. [REDACTED]

b. The use of cramped confinement may be introduced if interrogators assess that it will have the appropriate effect on the HVD.

c. [REDACTED]

d. Sleep deprivation may continue to the 70 to 120 hour range, or possibly beyond for the hardest resisters, but in no case exceed the 180-hour time limit. Sleep deprivation will end sooner if the medical or psychologist observer finds contra indications to continued sleep deprivation.

e. [REDACTED].

f. [REDACTED]

g. The interrogators' objective is to transition the HVD to a point where he is participating in a predictable, reliable, and sustainable manner. Interrogation techniques may still be applied as required, but become less frequent. [REDACTED]

This transition period lasts from several days to several weeks based on the HVDs responses and actions.

h. The entire interrogation process outlined above, including-transition, may last for thirty days. [REDACTED] On average, the actual use of interrogation technique can vary upwards to fifteen days based on the resilience of the HVD [REDACTED]. If the interrogation team anticipates the potential need to use interrogation techniques beyond the 30-day approval period, it will submit a new interrogation plan to HQS [CIA headquarters] for evaluation and approval."

4. Conditions of detention at CIA detention facilities

69. From 2003 to 2006 the conditions of detention at CIA detention facilities abroad were governed by the Guidelines on Confinement Conditions for CIA Detainees, signed by the CIA Director, George Tenet, on 28 January 2003.

According to the guidelines, at least the following "six standard conditions of confinement" were in use in 2003:

(i) blindfolds or hooding designed to disorient the detainee and keep him from learning his location or the layout of the detention facility;

(ii) removal of hair upon arrival at the detention facility such that the head and facial hair of each detainee is shaved with an electric shaver, while the detainee is shackled to a chair;

(iii) incommunicado, solitary confinement;

(iv) continuous noise up to 79dB, played at all times, and maintained in the range of 56-58 dB in detainees' cells and 68-72 dB in the walkways;

(v) continuous light such that 'each cell was lit by two 17-watt T-8 fluorescent tube light bulbs, which illuminate the cell to about the same brightness as an office;

(vi) use of leg shackles in all aspects of detainee management and movement.

70. The Memorandum for John A. Rizzo, Acting General Counsel at the CIA, entitled "Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Facilities, dated 31 August 2006, which was released on 24 August 2009 in a heavily redacted form, referred to conditions in which High-Value Detainees were held as follows:

> "... the CIA detainees are in constantly illuminated cells, substantially cut off from human contact, and under 24-hour-a-day surveillance. We also recognize that many of the detainees have been in the program for several years and thus that we cannot evaluate these conditions as if they have occurred only for a passing moment ... .
>
> Nevertheless, we recognize that the isolation experienced by the CIA detainees may impose a psychological toll. In some cases, solitary confinement may continue for years and may alter the detainee's ability to interact with others. ..."

5. Closure of the HVD Programme

71. On 6 September 2006 President Bush delivered a speech announcing the closure of the HVD Programme. According to information disseminated publicly by the US authorities, no persons were held by the CIA as of October 2006 and the detainees concerned were transferred to the custody of the US military authorities in the US Naval Base in Guantànamo Bay.

C. Role of Jeppesen Company

72. Jeppesen Dataplan is a subsidiary of Boeing based in San Jose, California. According to the company's website, it is an international flight operations service provider that coordinates everything from landing fees to hotel reservations for commercial and military clients.

73. In the light of reports on rendition flights (see paragraphs 258, 287-291 and 316 below), a unit of the company Jeppesen International Trip Planning Service (JITPS) provided logistical support to the CIA for the renditions of persons suspected of terrorism.

74. In 2007, the American Civil Liberties Union ("the ACLU") filed a federal lawsuit against Jeppesen Dataplan, Inc. on behalf of three extraordinary rendition victims with the District Court for the Northern District of California. Later, two other persons joined the lawsuit as plaintiffs. The suit charged that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly disappear these five men to torture, detention and interrogation.

In February 2008 the District Court dismissed the case on the basis of "state secret privilege". In April 2009 the 9th Circuit Court of Appeals reversed the first-instance decision and remitted the case. In September 2010, on the US Government's appeal, an 11-judge panel of the 9th Circuit Court of Appeals reversed the decision of April 2009. In May 2011 the US Supreme Court refused the ACLU's request to hear the lawsuit.

D. Military Commissions

1. Military Order of 13 November 2001

75. On 13 November 2001 President Bush issued the Military Order of November 13, 2001 on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. It was published in the Federal Register on 16 November 2001.

The relevant parts of the order read as follows:

> "Sec. 2. *Definition and Policy*.
>
> (a) The term 'individual subject to this order' shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaeda;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.
>
> (b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.
>
> (c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is

under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense. ..."

Sec. 3 *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be –

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; ...

Sec.4 *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

2. Military Commission Order no. 1

76. On 21 March 2002 D. Rumsfeld, the US Secretary of Defense at the relevant time, issued the Military Commission Order No. 1 (effective immediately) on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism.

The relevant parts of the order read as follows:

"2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee (Appointing Authority') may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the members and the alternate member or members of each Commission. ...

(2) Number of Members

Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. ...

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ('Military Officer), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. ...

6. CONDUCT OF THE TRIAL

...

B. Duties of the Commission during Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte*, *in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

...

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the Military Order and this Order, including to safeguard 'Protected Information', which includes:

(i) information classified or classifiable pursuant to reference (d);

(ii) information protected by law or rule from unauthorized disclosure;

(iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;

(iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as

practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct

(i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel;

(ii) the substitution of a portion or summary of the information for such Protected Information; or

(iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove.

The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel.

...

H. Post-Trial Procedures

...

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

...

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either

(a) forward the case to the Secretary of Defense with a recommendation as to disposition, or

(b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and frim conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision."

3. The 2006 Military Commissions Act and the 2009 Military Commissions Act

77. On 29 June 2006 the Supreme Court ruled in *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006), that the military commission "lacked the power to proceed" and that the scheme violated the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions. Consequently, the Military Commission order was replaced by the Military Commissions Act of 2006 ("the MCA 2006"), signed into law by President Bush on 17 October 2006.

On 28 October 2009 President Obama signed into law the Military Commissions Act of 2009 ("the MCA 2009").

On 27 April 2010 the Department of Defense released new rules governing the military commission proceedings.

The rules include some improvements of the procedure but they still continue, as did the rules applicable in 2001-2009, to permit the introduction of coerced statements under certain circumstances if "use of such evidence would otherwise be consistent with the interests of justice".

E. Review of the CIA's activities involved in the HVD Programme in 2001-2009 by the US Senate

78. In March 2009 the US Senate Intelligence Committee initiated a review of the CIA's activities involved in the HVD Programme, in particular the secret detention at foreign black sites and the use of the EITs.

The Committee's report, entitled "Study of the Central Intelligence Agency's Detention and Interrogation" was finished towards the end of 2012. The report describes the CIA's Detention and Interrogation Program between September 2001 and January 2009. It reviewed operations at

overseas CIA clandestine detention facilities, the use of the EITs and conditions of the more than 100 individuals detained by CIA during that period.

79. On 13 December 2012, Senator Dianne Feinstein, chairman of the Intelligence Committee gave a statement, which, in so far as relevant, reads as follows:

> "The committee's report is more than 6,000 pages long. It is a comprehensive review of the CIA's detention program that includes details of each detainee in CIA custody, the conditions under which they were detained, how they were interrogated, the intelligence they actually provided and the accuracy – or inaccuracy – of CIA descriptions about the program to the White House, Department of Justice, Congress and others. With this vote, the committee also approved the report's list of 20 findings and conclusions.
>
> The report is based on a documentary review of more than 6 million pages of CIA and other records, extensively citing those documents to support its findings. There are more than 35,000 footnotes in the report. I believe it to be one of the most significant oversight efforts in the history of the United States Senate, and by far the most important oversight activity ever conducted by this committee.
>
> Following the committee's vote today, I will provide the report to President Obama and key executive branch officials for their review and comment. The report will remain classified and is not being released in whole or in part at this time. The committee will make those decisions after receiving the executive branch comments.
>
> The report uncovers startling details about the CIA detention and interrogation program and raises critical questions about intelligence operations and oversight. I look forward to working with the president and his national security team, including the Director of National Intelligence and Acting Director of the Central Intelligence Agency, to address these important issues, with the top priority being the safety and security of our nation. ...
>
> I strongly believe that the creation of long-term, clandestine 'black sites' and the use of so-called 'enhanced-interrogation techniques' were terrible mistakes. The majority of the Committee agrees. ..."

80. On 3 April 2014 the Intelligence Committee decided to declassify the report's executive summary and 20 findings and conclusions. In this connection, Senator Dianne Feinstein issued a statement which reads, in so far as relevant, as follows:

> "The Senate Intelligence Committee this afternoon voted to declassify the 480-page executive summary as well as 20 findings and conclusions of the majority's five-year study of the CIA Detention and Interrogation Program, which involved more than 100 detainees.
>
> The purpose of this review was to uncover the facts behind this secret program, and the results were shocking. The report exposes brutality that stands in stark contrast to our values as a nation. It chronicles a stain on our history that must never again be allowed to happen. ...
>
> The report also points to major problems with CIA's management of this program and its interactions with the White House, other parts of the executive branch and

> Congress. This is also deeply troubling and shows why oversight of intelligence agencies in a democratic nation is so important. ...
>
> The full 6,200-page full report has been updated and will be held for declassification at a later time."

81. The report was later sent to the CIA for the declassification review. The declassification procedure is still pending.

III. THE PARTICULAR CIRCUMSTANCES OF THE CASE

82. The facts of the case may be summarised as follows.

A. The applicant's capture, transfer to the CIA's custody and initial detention (from the end of October to 4 December 2002)

83. At the end of October 2002 the applicant was captured in Dubai, in the United Arab Emirates. By November 2002, he was transferred to the custody of the CIA. This fact is mentioned in paragraph 7 of the 2004 CIA Report:

> "7. [REDACTED] By November 2002, the Agency had Abu Zubaydah and another high-value detainee, Abd Al-Rahim Al Nashiri, in custody [REDACTED] and the Office of Medical Services (OMS) provided medical care to detainees."

84. Subsequently, US agents took him to a secret CIA prison in Afghanistan known as the "Salt Pit". During his detention, the interrogators subjected him to prolonged stress standing positions, during which his wrists were shackled to a bar or hook in the ceiling above the head for at least two days.

85. After a brief stay at the "Salt Pit", US agents took him to another secret CIA prison in Bangkok, Thailand, code-named "Cat's Eye" (often written as one word "Catseye" in CIA documents), where he remained until 4 December 2002. Mr Abu Zubaydah was detained in the same facility throughout the relevant time (see *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, judgment of 24 July 2014, §§ 86 and 89). At this site, the interrogations of both applicants were videotaped.

86. According to the 2004 CIA Report, at that black site the CIA subjected the applicant to the EITs (see also paragraphs 53–61 above) from 15 November 2002 until 4 December 2002.

In the chapter "Detention and Interrogation Operations at [NAME REDACTED]", which is in most part redacted, paragraphs 74-76 read:

> " 74. [REDACTED] psycholgist/interrogators [REDACTED] led each interrogation of Abu Zubaydah and Al-Nashiri where EITs were used. The psychologist/interrogators conferred with [REDACTED] team members before each interrogation session. Psychological evaluations were performed by [REDACTED] psychologists.

75. [REDACTED IN WHOLE]

76. [REDACTED] 15 November 2002. The interrogation of Al-Nashiri proceeded after [REDACTED] the necessary Headquarters authorisation. [REDACTED].

Psychologist/interrogators began Al-Nashiri's interrogation using EITs immediately upon his arrival. Al-Nashiri provided lead information on other terrorists during his first day of interrogation.

On the twelfth day of interrogation [REDACTED] psychologist/interrogators administered two applications of the waterboard to Al-Nashiri during two separate sessions. Enhanced interrogation of Al-Nashiri continued through 4 December 2002."

87. Paragraph 224 of the 2004 CIA Report relates the same facts and also the fact that after those waterboard sessions Al Nashiri was moved from the "Cat's Eye" black site to another site:

"224. With respect to Al-Nashiri [REDACTED] reported two waterboard sessions in November 2002, after which psychologist/interrogators determined that Al-Nashiri was compliant.

However, after being moved [REDACTED] Al-Nashiri was thought to be withholding information. Al-Nashiri subsequently received additional EITs, but not the waterboard.

The Agency then determined Al-Nashiri to be 'compliant'. Because of the litany of techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why Al-Nashiri became more willing to provide information. However, following the use of EITs, he provided information about his most current operational planning and [REDACTED] as opposed to the historical information he provided before the use of EITs."

88. The same facts are related in the 2009 DOJ Report, which also states that Mr Al Nashiri and Mr Abu Zubaydah had been moved together to another CIA detention facility. The relevant passage reads as follows:

"On November 15, 2002, a second prisoner, Abd Al-rahim Al-Nashiri was brought to [REDACTED] facility. [REDACTED] psychologist/interrogators immediately began using EITs, and Al Nashiri reportedly provided lead information about other terrorists during the first day of interrogation. On the twelfth day, the psychologist/interrogators applied the waterboard on two occasions, without achieving any results. Other EITs continued to be used, and the subject eventually became compliant.

[REDACTED] 2002, both Al Nashiri and Abu Zubaydah were moved to another CIA black site, [REDACTED] ..."

89. According to a Vaughn Index released by the CIA to the ACLU, on 3 December 2002 a cable was sent to a CIA site from the CIA Headquarters entitled "Closing of facility and destruction of classified information". The cable text itself, released in a redacted form, instructed the CIA station to create an inventory of videotapes of interrogation sessions with Mr Al Nashiri and Mr Abu Zubaydah. Another cable, sent on 9 December 2002, recorded that the inventory had been carried out:

> "On 3 Dec[ember] [20]02, [redacted] conducted an inventory of all videotapes and other related materials created at [REDACTED] during the interrogations of al Qaeda detainees Abu Zubaydah and al Nashiri."

90. In the total list of cables from "FIELD" [CIA station] to "HQTRS" (the CIA headquarters) relating to Mr Al Nashiri's and Mr Abu Zubaydah's interrogation at the Cat's Eye site, no cables were sent after 4 December 2002. It transpires from the declassified CIA documents that that site was closed on that date.

B. Transfer to Poland and detention in the "black site" in Stare Kiejkuty (from 4/5 December 2002 to 6 June 2003)

1. Transfer (4-5 December 2002)

91. The applicant submitted that he had been transferred to Poland under the HVD Programme on 5 December 2002.

On 4 December 2002 a CIA contracted aircraft, a Gulfstream jet (capacity for 12 passengers) registered as N63MU with the US Federal Aviation Authority and operated by First Flight Management/Airborne Inc., flew the applicant and Mr Abu Zubaydah from Thailand to the Szymany military airbase in Poland.

The flight flew from Bangkok *via* Dubai and landed in Szymany, Poland, on 5 December 2002 at 14:56. It departed from there on the same day at 15:43. The flight was disguised under multiple layers of secrecy characterising flights that the CIA chartered to transport persons under the HVD Programme (see also paragraphs 258-260, 316 and 318 below).

92. The collation of data from multiple sources, including flight plan messages released by Euro Control, invoices, and responses to information disclosure requests made on behalf of the applicant and/or Mr Abu Zubaydah (see also paragraphs 287–291 below), confirmed that between 3 and 6 December 2002, the N63MU had travelled the following routes:

Take-off	Destination	Date of flights
Elmira, New York (KELM)	Washington, DC (KIAD)	3 Dec 2002
Washington, DC (KIAD)	Anchorage, Alaska (PANC)	3 Dec 2002
Anchorage, Alaska (PANC)	Osaka, Japan (RJBB)	3 Dec 2002
Osaka, Japan (RJBB)	Bangkok, Thailand (VTBD)	4 Dec 2002
Bangkok,Thailand (VTBD)	Dubai,UAE (OMDB/OMDM)	4 Dec 2002
Dubai,UAE (OMDB/OMDM)	Szymany, Poland (EPSY)	5 Dec 2002
Szymany, Poland (EPSY)	Warsaw, Poland (EPWA)	5 Dec 2002
Warsaw, Poland (EPWA)	London Luton, UK (EGGW)	6 Dec 2002
London Luton, UK (EGGW)	Washington, DC (KIAD)	6 Dec 2002
Washington, DC(KIAD)	Elmira,New York KELM	6 Dec 2002

93. A letter dated 23 July 2010 from the Polish Border Guard to the Helsinki Foundation for Human Rights confirms that the airplane N63MU landed at Szymany airport on 5 December 2002 with eight passengers and four crew and departed from there on the same day with no passengers and four crew (see also paragraph 292 below).

94. A 2007 Council of Europe report ("the 2007 Marty report" – see also paragraphs 258 and 316 below) drawn up by Senator Marty in the Marty Inquiry identifies N63MU as a "rendition plane" that arrived in Szymany from Dubai at 14:56 on 5 December 2002.

95. The routine procedure applied on arrival of the CIA aircraft in Szymany airport was described by one of the witnesses heard in the course of the Fava Inquiry, a certain Ms M.P. who was at that time the Szymany airport manager (see paragraphs 293–302 below). It was also described in the Fava Report (see paragraph 271 below) and the 2007 Marty Report (see paragraph 260 below).

96. In accordance with that routine procedure, the applicant and Mr Abu Zubaydah were apparently taken to a van provided by the Polish authorities and driven to the Polish intelligence's training base in Stare Kiejkuty, which is located close to the Szczytno airport (see also paragraphs 260, 266-271, 294-302 below).

97. No official records of the Polish Border Guard disclosed Mr Al Nashiri's and Mr Abu Zubaydah's presence on Polish territory (see also paragraph 328 below).

2. Detention and ill-treatment (5 December 2002- 6 June 2003)

98. During his detention the applicant was deprived of any contact with his family and the outside world and subjected to various forms of ill-treatment.

99. The 2004 CIA Report, in the section covering the period from December 2002 to September 2003, in paragraphs 90-98, refers to the following events that took place in December 2002 and January 2003:

> "Specific Unauthorized or Undocumented Techniques
>
> ...
>
> Handgun and Power Drill
>
> 91. [REDACTED] interrogation team members, whose purpose was to interrogate-Al-Nashiri and debrief Abu Zubaydah initially staffed [REDACTED]. The interrogation team continued EITs on Al-Nashiri for two weeks in December 2002 [REDACTED] they assessed him to be 'compliant'. Subsequently, CTE officers at Headquarters [REDACTED] sent a [REDACTED] senior operations officer (the debriefer) [REDACTED] to debrief and assess Al-Nashiri.
>
> 92. [REDACTED] The debriefer assessed AI-Nashiri as withholding information, at which point [REDACTED] reinstated [REDACTED] hooding, and handcuffing. Sometime between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing

information. After discussing this plan with [REDACTED] the debriefer entered the cell where Al-Nashiri sat shackled and racked [racking is a mechanical procedure used with firearms to chamber a bullet or simulate a bullet being chambered] the handgun once or twice close to Al-Nashiri's head. On what was probably the same day debriefer used a power drill to frighten Al-Nashiri. [REDACTED] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill.

93. The [REDACTED] and debriefer did not request authorization or report the use of these unauthorized techniques to Headquarters. However, in January 2003, newly arrived TDY officers [REDACTED] who had learned of these incidents reported them to Headquarters. OIG investigated and referred its findings to the Criminal Division of DoJ. On 11 September 2003, DoJ declined to prosecute and turned these matters over to CIA for disposition. These incidents are the subject of a separate OIG Report of Investigation.

Threats

94. [REDACTED] During another incident [REDACTED] the same Headquarters debriefer, according to a [REDACTED] who was present, threatened Al-Nashiri by saying that if he did not talk, 'We could get your mother here' and, 'We can bring your family in here'. The [REDACTED] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [REDACTED] intelligence officer based on his Arabic dialect and that Al-Nashiri was in [REDACTED] custody because it was widely believed in Middle East circles that [REDACTED] interrogation technique involves sexually abusing female relatives in front of the detainee. The debriefer denied threatening AI-Nashiri through his family. The debriefer also said he did not explain who he was or where he was from when talking with Al-Nashiri. The debriefer said he never said he was [REDACTED] intelligence officer but let AI-Nashiri draw his own conclusions.

...

Smoke

96. [REDACTED] An Agency [REDACTED] interrogator admitted that, in December 2002, he and another [REDACTED] smoked cigars and blew smoke in Al-Nashiri's face during an interrogation. The interrogator claimed they did this to 'cover the stench' in the room and to help keep the interrogators alert late at night. This interrogator said he would not do this again based on 'perceived criticism'. Another Agency interrogator admitted that he also smoked cigars during two sessions with Al-Nashiri to mask the stench in the room. He claimed he did not deliberately force smoke into Al-Nashiri's face.

Stress Positions

97. [REDACTED] OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed AI-Nashiri backward while he was in this stress position. On another occasion [REDACTED] said he had to intercede after [REDACTED] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [REDACTED] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

Stiff Brush and Shackles

98. [REDACTED] interrogator reported that he witnessed other techniques used on Al-Nashiri that the interrogator knew were not specifically approved by DoJ. These included the use of a stiff brush that was intended to induce pain on Al-Nashiri and standing on Al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [REDACTED] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. A CTC manager who had heard of the incident attributed the abrasions on Al-Nashiri's ankles to an Agency officer accidentally stepping on Al-Nashiri's shackles while repositioning him into a stress position."

100. Those events are also related in the 2009 DOJ Report which states that after "both Al Nashiri and Abu Zubaydah were moved to another CIA black site", Al Nashiri was subjected to the following treatment:

"While EITs were being administered, several unauthorised techniques were also used on Al-Nashiri. Sometime around the end of December [REDACTED] debriefer tried to frighten Al-Nashiri by cocking an unloaded pistol next to the prisoner's head while he was shackled in a sitting position in his cell. On what may have been the same day, Al-Nashiri was forced to stand naked and hooded in his cell while the debriefer operated a power drill, creating the impression that he was about to use it to harm Al- Nashiri.

On another occasion in December 2002 [REDACTED] debriefer [REDACTED] told Al-Nashiri that, if he did not talk, his mother and family would be brought to the facility. According to the CIA OIG report, there is a widespread perception in the Middle East that [REDACTED] intelligence services torture prisoners by sexually abusing female family members in their presence.

On other occasions, the CIA debriefer blew cigar smoke in Al-Nashiri's face, manhandled him while he was tied in stress positions, and stood on his shackles to induce pain."

101. The applicant gave a description of ill treatment to which he was subjected in CIA custody to representatives of the International Committee of the Red Cross ("the ICRC"). From 6 and 11 October and from 4 to 14 December 2006 the ICRC interviewed 14 High-Value Detainees, including the applicant, in Guantánamo. On this basis, the ICRC drafted its Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody of February 2007 ("the 2007 ICRC Report"; for a further rendition of the relevant passages from that report see paragraphs 281–282 below).

The applicant's account of ill-treatment in his "third place of detention" – which, in his submission, was Poland – as recorded by the ICRC reads, in so far as relevant, as follows:

"1.3.2. PROLONGED STRESS STANDING

Ten of the fourteen alleged that they were subjected to prolonged stress standing positions, during which their wrists were shackled to a bar or hook in the ceiling above the head for periods ranging from two or three days continuously, and for up to two or three months intermittently. All those detainees who reported being held in this position were allegedly kept naked throughout the use of this form of ill-treatment.

For example, ... Al Nashiri [alleged that he was shackled in this position] for at least two days in Afghanistan and again for several days in his third place of detention.

...1.3.10. THREATS

Nine of the fourteen alleged that they had been subjected to threats of ill-treatment. Seven of these cases took the form of a verbal threat, including of ill-treatment in the form of 'water boarding', electric shocks, infection with HIV, sodomy of the detainee and the arrest and rape of his family, torture, being brought close to death, and ofan interrogation process to which 'no rules applied'.

... Mr Al Nashiri alleged that, in his third place of detention, he was threatened with sodomy, and with the arrest and rape of his family.

102. The fourteen High-Value Detainees, including Mr Al Nashiri, gave the ICRC the following common description of their detention at the CIA black sites:

« 1.2. CONTINUOUS SOLITARY CONFINEMENT AND INCOMMUNICADO DETENTION

Throughout the entire period during which they were held in the CIA detention program – which ranged from sixteen months up to almost four and a half years and which, for eleven of the fourteen was over three years – the detainees were kept in continuous solitary confinement and incommunicado detention. They had no knowledge of where they were being held, no contact with persons other than their interrogators or guards. Even their guards were usually masked and, other than the absolute minimum, did not communicate in any way with the detainees. None had any real – let alone regular – contact with other persons detained, other than occasionally for the purposes of inquiry when they were confronted with another detainee. None had any contact with legal representation. The fourteen had no access to news from the outside world, apart from in the later stages of their detention when some of them occasionally received printouts of sports news from the internet and one reported receiving newspapers.

None of the fourteen had any contact with their families, either in written form or through family visits or telephone calls. They were therefore unable to inform their families of their fate. ...

In addition, the detainees were denied access to an independent third party. ...

1.3. OTHER METHODS OF ILL-TREATMENT

... [T]he fourteen were subjected to an extremely harsh detention regime, characterised by ill-treatment. The initial period of interrogation, lasting from a few days up to several months was the harshest, where compliance was secured by the infliction of various forms of physical and psychological ill-treatment. This appeared to be followed by a reward based interrogation approach with gradually improving conditions of detention, albeit reinforced by the threat of returning to former methods."

C. Transfer from Poland on 6 June 2003

103. On 6 June 2003, according to the applicant, he was secretly transferred from the Szymany airbase in Poland to Rabat, Morocco, on a rendition plane with a tail number N379P.

The aircraft, a Gulfstream V, also known as the "Guantánamo Express" was described in the working document no. 8 attached to the Fava Report (PE 380.984v02-00) as "one of the most notorious prisoner transport aircraft used by the CIA". It can transport up to 18 passengers, but it is usually configured for 8 passengers.

104. The fact of N379P's landing at and departure from the Szymany airport is mentioned in the letter of 23 July 2010 from the Polish Border Guard to the Helsinki Foundation for Human Rights (see also paragraph 292 below):

> "N379P, June 6, 2003
>
> Arrival/passengers: 1, crew: 2; Departure/passengers: 0, crew: 2"

105. The 2007 Marty Report identified the N379P as a "rendition plane" that flew from Kabul and landed in Szymany airport the previous day, i.e., on 5 June 2003 (see paragraph 258 below).

106. The flight data contained in the 2007 Marty Report was subsequently analysed by the Center for Human Rights and Global Justice ("the CHRGJ"), which, in its report released on 9 March 2010 ("the CHRGJ Report"), confirmed that N379P's movements over 3-7 June 2003 "conform[ed] to the most typical attributes of a CIA rendition circuit". The data collected and examined in the CHRGJ Report shows that a Gulfstream V aircraft, registered with the US Federal Aviation Administration as N379P, embarked from Dulles Airport, Washington D.C. on Tuesday 3 June at 23:33 GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries including Germany, Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal back to Dulles Airport on 7 June 2003 (for further details see also paragraph 291 below).

D. The applicant's further transfers during CIA custody (from 6 June 2003 to 6 September 2006)

107. According to the applicant, after his transfer out of Poland, he was detained in Rabat, Morocco, until 22 September 2003, when he was flown to the US Naval Base in Guantánamo Bay.

108. On 27 March 2004 the CIA flew the applicant from Guantánamo Bay back to Rabat.

109. On an unknown date he was moved to the CIA secret detention facility in Bucharest, Romania (allegedly named "Bright Light") and remained there until he had been finally transferred to Guantánamo Bay – presumably at the latest by 6 September 2006. More detailed information on his alleged detention in Romania is provided in his application lodged against Romania, no. 33234/12 (see the "Statement of facts" available on the Court's website www.echr.coe.int.).

E. The applicant's detention in Guantánamo Bay and his trial before the Military Commission (from 6 September 2006 to present)

110. On 6 September 2006 President Bush publicly acknowledged that 14 "high-value detainees", including the applicant, had been transferred from the HVD Programme run by the CIA to the custody of the Department of Defense in the Guantánamo Bay Internment Facility (see also paragraph 71 above).

111. Presumably since 6 September 2006 at the latest, the applicant has been detained in the US Naval Base in Guantánamo Bay. By that time, he had been held in undisclosed detention for nearly 4 years.

1. Hearing before the Combatant Status Review Tribunal

112. On 14 March 2007 the applicant was heard by the Combatant Status Review Tribunal, which purported to review all the information related to the question whether he met the criteria to be designated as an "enemy combatant" (i.e. an individual who was part of or supporting Taliban or Al'Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including one who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces). The hearing was closed to the public. The applicant was not afforded legal counsel at this hearing. A "personal representative" was appointed for him, but this person did not act as counsel and the applicant's statements to this representative were not privileged. He did not have access to any classified evidence that was introduced against him. Nor did he have the right to confront any of the accusations that were introduced at this hearing.

113. According to a partially redacted transcript of that hearing, the applicant stated that he "[had been] tortured into confession and once he [had] made a confession his captors [had been] happy and they [had] stopped torturing him. He also stated that he had made up stories during the torture in order to get it to stop and that "[f]rom the time I [had been] arrested five years ago, they [had] been torturing me. It [had] happened during interviews. One time they [had] tortured me one way and another time they [had] tortured me in a different way". The applicant's reply to the President of the Tribunal's request to describe the methods that were used, is largely redacted from the transcript of the hearing. The unredacted portion however states that: "before I was arrested I used to be able to run about ten kilometres. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body". He also stated that "they used to drown me in water. So I used to say yes, yes." Further details relating to his own description of his treatment are redacted from the transcript.

2. Trial before the military commission

114. On 30 June 2008, the US Government brought charges against the applicant for trial before a military commission, including those relating to the bombing of the USS Cole on 12 October 2000.

115. On 2 October 2008, counsel for the applicant filed a petition for a writ of *habeas corpus* on his behalf in a federal district court of the District of Columbia. That petition is apparently still pending to date with no decision.

116. On 19 December 2008, the Convening Authority authorised the Government to seek the death penalty at his military commission.

117. Immediately after the referral of charges, the defence filed a motion with the military commission contesting the Government's method of transporting the applicant to legal proceedings in Guantánamo Bay on the grounds that it was harmful to his health and violated his right to free and unhindered access to his counsel.

118. Shortly after this motion was filed, the applicant's arraignment – which signified the start of his trial before a military commission – was set for 9 February 2009.

119. On 22 January 2009 President Obama issued an Executive Order requiring that all commission proceedings be halted pending the Administration's review of all detentions at Guantánamo Bay. In response to this order, the Government requested a 120-day postponement for the 9 February 2009 arraignment.

120. On 25 January, 2009 the military judge assigned to the applicant's military commission denied the Government's request for postponement of the trial. Moreover, the military judge ordered that a hearing on the defence motion regarding the applicant's transportation be held immediately after the arraignment. In response to this order, the defence filed a notice that it intended to introduce evidence of how he was treated while in CIA custody.

Hours after this notice was filed, on 5 February 2009, the US Government officially withdrew charges from the military commission, thus removing the applicant's case from the military judge's jurisdiction.

121. In March 2011 President Obama announced that he would be lifting a 2-year freeze on new military trials for detainees at the US Naval Base in Guantánamo Bay.

122. On 20 April 2011 United States military commission prosecutors brought capital charges against the applicant relating to his alleged role in the attack on the USS *Cole* in 2000 and the attack on the French civilian oil tanker MV *Limburg* in the Gulf of Aden in 2002. The charges against him included terrorism, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hazarding a vessel, using treachery or perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy to commit terrorism and murder in violation of the law of war, destruction of property in violation of

the law of war and attempted destruction of property in violation of the law of war. The applicant was designated for trial by military commission despite the fact that the United States Government had previously indicted two of his alleged co-conspirators in the USS *Cole* bombing – Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso – in the US federal court. The relevant indictment, filed on 15 May 2003 while the applicant was secretly held in CIA custody in Poland, identified him as an unindicted co-conspirator in the USS *Cole* bombing.

123. The military commission prosecutors announced that the capital charges against the applicant would be forwarded for independent review to Bruce MacDonald, the "convening authority" for the military commissions, for decision whether to reject the charges or to refer some, all or none of them for trial before the military commission.

124. On 27 April 2011 Mr MacDonald informed the US military defence counsel for the applicant that he would accept written submissions against the death penalty until 30 June 2011.

125. The military commission hearing in the applicant's case began on 17 January 2012. The first two days of the trial were devoted mostly to pre-trial motions.

126. On 22 November 2013 the applicant's representative produced a psychological evaluation of the applicant by US government psychiatrists, which had been conducted at the request of the U.S. government. It states that Mr Al Nashiri suffers from Post-Traumatic Stress Syndrome.

127. The proceedings against the applicant before the military commission are pending. The date for the applicant's trial before the military commission is now fixed for 2 September 2014.

F. Parliamentary inquiry in Poland

1. Parliamentary inquiry in Poland

128. In November-December 2005 a brief parliamentary inquiry into allegations that a secret CIA detention site existed in the country was carried out in Poland. The inquiry was conducted by the Parliamentary Committee for Special Services (*Komisja do Spraw Służb Specjanych*) behind closed doors and none of its findings have been made public. The only public statement that the Polish Government made was at a press conference when they announced that the inquiry had not turned up anything "untoward".

2. Views regarding the inquiry expressed by international organisations

(a) Council of Europe

129. The 2006 Marty Report (see also paragraph 244 below), referring to that inquiry stated: "this exercise was insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations".

The 2011 Marty Report, in paragraph 40, also referred to the Polish parliamentary inquiry, stating, among other things that "the [parliamentary] commission responsible for oversight of the intelligence services ... held a one-day meeting on 21 December 2005 to discuss the allegations of secret CIA prisons in Poland" and that "the only public indication given by the commission was that there ha[d] not been any CIA prisons in Poland".

(b) European Parliament

130. Similar concerns were expressed in the Fava Report, which stated that "the Polish government investigated the allegations in internal, secret inquiry (see also paragraph 264 below) and the EU Parliament's in paragraph 169 of its resolution adopted following the report "regretted that no special inquiry ha[d] been established and that the Polish Parliament ha[d] conducted no independent investigation" (see paragraph 270 below).

G. Criminal investigation in Poland

131. Given that the Polish Government disclosed only limited information of the investigation (see also paragraphs 17–40 above), the following description constitutes the Court's reconstruction of its conduct based on various pieces of information supplied by the Government, the applicant in the present case and the applicant in the case of *Husayn (Abu Zubaydah)* and also on some materials available in the public domain – which have not been contested, negated or corrected by either party. Certain parts of the parties' accounts overlap but neither party contested the account given by its opponent.

Accordingly, there has been no disagreement as to the circumstances of the case as stated below.

1. Information supplied by the Polish Government in their written and oral submissions made in the present case and in the case of Husayn (Abu Zubaydah) v. Poland

132. On 11 March 2008 the Warsaw Regional Prosecutor (*Prokurator Okręgowy*) opened an investigation against persons unknown (*śledztwo w sprawie*) concerning secret CIA prisons in Poland.

133. On 11 July 2008 the investigation was taken over by the State Prosecutor (*Prokurator Krajowy*) and referred to the 10th Department of the Bureau for Organised Crime and Corruption.

134. On 1 April 2009, as the Government stated, "due to organisational changes", the case was transmitted to the Warsaw Prosecutor of Appeal (*Prokurator Apelacyjny*) and was then conducted by the 5th Department for Organised Crime and Corruption of the Warsaw Prosecutor of Appeal's Office until 26 January 2012.

On 26 January 2012, by virtue of the Prosecutor General's decision, the case was transferred to the Kraków Prosecutor of Appeal (see also paragraph 159 below).

135. Referring to the scope of the investigation, the Government stated that "the subject matter ... covers, among others, alleged commission of offences under Article 231 § 1 of the Criminal Code and other, relating to alleged abuse of powers by public officials, acting to the detriment of the public interest, in connection with the alleged use of secret detention centres located in the territory of Poland by the Central Intelligence Agency to transport and illegally detain persons suspected of terrorism".

Subsequently, in their observations in *Abu Zubaydah*, they stated the following:

> "The scope of the conducted investigation as to persons in light of the alleged offences reported during different periods covers three persons: Abd Al-Rahim Husein Muhamed Abdu Al-Nashiri, Zayn Al-Abidin Muhammad Husein and a certain W.M.S.M.A."

136. In the course of the investigation evidence from 62 persons has been heard. The case file comprises 43 volumes. Procedural steps taken in the investigation included "checking information contained in Dick Marty's reports drafted for the Council of Europe in 2006-2007 and in the report of the European Parliament concerning possible detention in the territory of Poland of persons suspected of terrorism, as well as the use against them of illegal methods of interrogation".

The Government added that the actions taken by the prosecution "concerned procedural verification of the circumstances of the landings, while omitting border and customs control in the Szymany airport used by the [CIA]".

Border Guard and Customs Service officers, the staff of the Szymany airport, air traffic controllers, one member of the European Parliament's Commission that had carried out an inquiry into the circumstances surrounding the CIA operations in Poland at the relevant time were heard as witnesses. The PANSA provided materials concerning aircraft landings in the Szymany airport.

137. According to the Government, "due to the complex legal nature of the proceedings, opinion of experts on public international law has been sought in order to provide answers to questions concerning international law

regulating the establishment and running of detention centres for persons suspected of terrorism and the status of such persons".

138. The Polish authorities addressed four requests for legal assistance to the US authorities under the Mutual Legal Assistance in Criminal Matters Agreement ("the MLAT") signed by the United States and Poland.

The first request for information concerning the landing of US aircraft in the Szymany airport, dated 18 March 2009, was declined by the US Department of Justice on 7 October 2009 (see also paragraph 149 below).

The second request, dated 9 March 2011, concerned, according to the Government's description, "the need to perform acts with the participation of two persons who have the status of injured persons and whose representatives declared their participation in the preparatory proceedings". As of 5 September 2012 (the date on which the Government filed their observations in *Al Nashiri*) there had been no answer to the request (see also paragraph 153 below).

The most recent two requests were sent in May 2013 and, as the Government submitted, concerned handing over documents, providing information and questioning witnesses.

The former requests, despite reminders of 25 July and 11 October 2012 and 30 January 2013, have not been answered. Another reminder was sent by the Office of the Prosecutor General on 28 May 2013.

139. The Polish authorities also requested the ICRC for information but their request was denied, as the Government state, "on the grounds of the ICRC's procedure". The US lawyers for Mr Al Nashiri and for the second injured party were heard but gave fragmentary depositions, invoking the principle of client-lawyer confidentiality.

As regards further actions taken in the course of the investigation, the Government submitted, among other things, the following:

> "Lawyers for the potential injured persons submitted multiple motions as to evidence in the case. These are being systematically examined in the course of the investigation, some were dismissed because the circumstances raised in them were considered proven in line with the statements made by the applicants. Actions covered by other motions are successively implemented. ... Several of these motions can be only implemented through international legal assistance, which involves drafting additional motions in that regard. ...
>
> At the current stage of the proceedings, persons conducting the investigation have limited possibilities of finding new witnesses (although there are some exceptions). They are now involved in additional hearings of persons who have already been questioned as witnesses. These additional hearings are intended either to provide further details or to extend the scope of the hearing. On witness in this cases is Senator Józef Pinior. ... the questioning was intended to obtain evidence which he publicly declared to have about the events under investigation. But the hearing proved ineffective. When asked about this directly, the senator invoked his right under [section] 21 of the Act on the exercise of the mandate of deputy and senator dated 9 May 1996 (*ustawa z dnia 9 maja 1996 r. o wykonywaniu mandatu posła i senatora*).

and refused to disclose the name of the person who provided him with such information."

140. The Government added that actions had been taken to determine whether expert opinions could be obtained in at least three areas of expert knowledge. The nature and the area could not be disclosed at this stage. Also, translations of documents and reports in English were provided.

2. Facts supplied by the applicant in the present case and supplemented by the facts related in the case of Abu Zubaydah v. Poland and certain materials available in the public domain

141. The investigation concerning secret CIA prisons in Poland started on 11 March 2008.

142. On 9 April 2009, in response to a request for information by the Helsinki Foundation for Human Rights, the Head of the Bureau for Organised Crime and Corruption in the State Prosecutor's Office (*Biuro ds. Przestępczości Zorganizowanej i Korupcji Prokuratuy Krajowej*) stated that:

"...in reference to the Resolution of the European Parliament regarding the investigation into the alleged use of European countries by the Central Intelligence Agency of the United States to transport and illegally detained prisoners, the 5th Department for Organized Crime and Corruption of the Warsaw Prosecutor of Appeal is conducting the investigation in the case AP V DS. 37/09 regarding the abuse of power by State officials, namely the offence defined in Article 231 § 1 of the Criminal Code.

The proceedings were commenced on March 11, 2008 by the Warsaw [Regional Prosecutor].

In the course of the investigation there are conducted open and classified procedural activities.

Within open activities, landings of American aircrafts in Szymany airport were confirmed. The information quoted in your letter, sourced by the web site, does not correspond with the exact wording of the prosecutor. The prosecutor possesses information over the report of the International Red Cross.

The interest of the Helsinki Foundation for Human Rights of the case is obvious. Nevertheless the presentation of prosecutor's intentions, due to the fact that a wide range of procedural activities is classified, is not possible,

Taking into consideration the above, it is not possible to indicate the precise date of the termination of the investigation."

143. On an unspecified date in 2009, responding to a questionnaire from the UN experts working on the 2010 UN Joint Study (see also paragraphs 283-285 below), the Polish authorities stated the following:

"On 11 March 2008, the [Regional] Prosecutor's Office in Warsaw instituted proceedings on the alleged existence of so-called secret CIA detention facilities in Poland as well as the illegal transport and detention of persons suspected of terrorism. On 1 April 2009, as result of the reorganization of the Public Prosecutor's Office, the

> investigation was referred to the Warsaw [Prosecutor of Appeal]. In the course of investigation, the prosecutors gathered evidence, which is considered classified or secret. In order to secure the proper course of proceedings, the prosecutors who conduct the investigation are bound by the confidentiality of the case. In this connection, it is impossible to present any information regarding the findings of the investigation. Once the proceedings are completed and its results and findings are made public the Government of Poland will present and submit all necessary or requested information to any international body."

144. On 21 September 2010 the Polish lawyer for Mr Al Nashiri filed an application with the Warsaw Regional Prosecutor, asking for an investigation into his detention and treatment in Poland to be opened.

145. The application included numerous evidentiary motions, requesting that the investigating prosecutors hear evidence from the applicant and a number of other witnesses, including former General Directors of the CIA G. Tenet, J. Mc Laughlin, P. Goss and M. Hayden, certain pilots and commanders involved in the rendition flights to Poland, members of the ICRC team, Senator Dick Marty and other authors of the Marty Reports and a number of Polish politicians and military officials, for instance, General H. Tacik, Executive Commander of the Armed Forces in 2004-2007, former Prime Minister L. Miller, former president of Poland A. Kwaśniewski and former Head of the Intelligence Agency Z. Siemiątkowski. The applicant's lawyer also requested the prosecution to admit documentary evidence and ask the relevant authorities to disclose the identities and locations of persons who needed to be heard in the investigation.

146. The lawyer also asked that the applicant be informed about all actions undertaken as part of the investigation and be admitted to participate in them.

147. On 22 September 2010, Mr J. Mierzewski, the investigating prosecutor from the 5th Department of Organised Crime and Corruption of the Warsaw Prosecutor of Appeal's Office, informed the applicant's lawyer that there was no need to conduct a separate investigation into the circumstances surrounding the applicant's detention and treatment as those matters would be dealt with in the investigation initiated on 11 March 2008.

148. In October 2010, the prosecutor granted injured party (*pokrzywdzony*) status to the applicant.

149. In a letter of 15 December 2010, replying to the Helsinki Foundation for Human Rights' request for information, the prosecution authorities revealed that on 18 March 2009 the Warsaw Prosecutor of Appeal had submitted a legal assistance request to the US judicial authorities regarding the investigation. On 7 October 2009 the US Department of Justice informed the Polish authorities that under Article 3(1)(c) of the MLAT, the request had been refused and American authorities considered the case closed (see also paragraph 138 above). The Prosecutor did not publicly disclose the content of the mutual assistance request due to "State secrecy".

150. In a letter of 4 February 2011 addressed to the Helsinki Foundation for Human Rights the prosecutor provided information about certain procedural actions undertaken in the course of the investigation. According to the letter, steps undertaken by the prosecutors were related to the verification of the landings without clearance by the CIA planes between 2002 and 2003 at the Szymany airport. Evidence from Border Guard and Customs Service officers had been heard, as well as from employees of the Szymany airport, flight controllers and a member of the European Parliament's Commission that carried out an inquiry into the circumstances under investigation (see also paragraph 136 above).

151. Apparently on 17 February 2011 the Warsaw Deputy Prosecutor of Appeal, Mr R. Majewski, and the investigating prosecutor, Mr J. Mierzewski, ordered that evidence from three experts on public international law on the issues relevant for the investigation be obtained (see also paragraph 137 above). The contents of the order, questions and answers from the experts were not made public but were leaked to the press and published by *Gazeta Wyborcza* daily on 30 May 2011. There was no subsequent disclaimer from the prosecution.

The text of the prosecutors' order as reproduced by *Gazeta Wyborcza* read, in so far as relevant, as follows:

> "... Order on obtaining a report – appointing an expert in the case concerning abuse of power by State officials, i.e. the offence defined in Article 231 and others [of the Criminal Code].
>
> Robert Majewski, Warsaw Deputy Prosecutor of Appeal, and Jerzy Mierzewski, the prosecutor of the Warsaw Prosecutor of Appeal's Office, decided to appoint a team of experts on the public international law, i.e. ... in order to establish whether [text of ten questions reproduced below]."

The questions and corresponding answers, as published in *Gazeta Wyborcza*, read as follows:

> "1. Are there any provisions of public international lawregulating the setting up and functioning of facilities for holding persons suspected of terrorist activity? If so, which of them are binding on Poland?
>
> *Answer*: Terrorism is a criminal offence and is prosecuted on the basis of legal provisions of a given State.
>
> 2. Are there any provisions of public international law permitting a facility for holding persons suspected of terrorist activity to be excluded from jurisdiction of the State on whose territory such a facility has been set up? If so, which of them are binding on Poland?
>
> *Answer:* There are no such provisions. The setting up of such a facility would amount to a breach of the Constitution and an offence against sovereignty of the R[epublic of] P[oland].
>
> 3. In the light of international public law, what is the legal status of an arrested person suspected of terrorist activity?

Answer: This is regulated by criminal law of a given country unless [a person] is a prisoner of war.

4. What influence on the legal status of an arrested person suspected of terrorist activity does have the fact that the arresting authority considers that the person belongs to the organisation described as Al-Khaida?

Answer: It does not have any importance. Membership in Al-Khaida is not separately regulated by any provisions of criminal law.

5. In the light of the provisions of international public law, what importance for the legal status of an arrested person suspected of terrorist activity does have the fact that the person has been arrested outside the territory which is occupied, seized or on which an armed conflict takes place?

Answer: Such arrest can be qualified as unlawful abduction.

6. Can a person suspected of terrorist activity, arrested outside the territory of the Republic of Poland and subsequently held in a facility in Poland, be characterised as a person referred to in Article 123 § 1-4 of the Criminal Code [in general, persons protected by the 1949 Geneva Conventions: members of armed forces who have laid down their arms, wounded, sick, shipwrecked, medical personnel, priests, prisoners of war or civilians from the territory occupied, seized or on which an armed conflict takes place or other persons protected by international law during an armed conflict]?

Answer: Such a qualification is justified.

7. Is the holding of a person suspected of terrorist activity, in respect of whom no charges were laid and no detention order has been issued under Polish law, in breach of public international law in terms of deprivation of liberty or the right to an independent and impartial court or limitations on his defence rights in criminal proceedings?

Answer: Yes and it should be prosecuted.

8. In the light of international public law, can the methods of interrogation and treatment of detainees suspected of terrorist activity as described in the CIA documents supplied by the injured parties be considered torture, cruel or inhuman treatment of these persons?

Answer: Yes. Torture is prohibited both under international conventions and the laws of specific States.

9. Are the regulations issued by the USA authorities in respect of persons considered to be engaged in terrorist activity and their application in practice in conformity with the provisions of international humanitarian law ratified by Poland?

Answer: No. These regulations are often incompatible with international law and human rights.

10. If possible, [the experts are asked] to make an assessment of compatibility of regulations concerning combating terrorism issued by the USA authorities after 11 September 2011 with the provisions of public international law relating to the legal status, treatment, methods of interrogation and procedural guarantees of persons. "

152. On 25 February 2011 the applicant's lawyer filed, through the Warsaw Prosecutor of Appeal, a complaint with the Warsaw Regional Court (*Sąd Okręgowy*) under the Law of 17 June 2004 on complaints about the breach of the right to a trial within a reasonable time *(Ustawa o skardze na*

naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki) ("the 2004 Act"). The applicant asked the court to find that the length of the investigation had been excessive, order the investigating prosecutor to take actions to counteract the delay and to mitigate the consequences of the delay that had already occurred. He also asked the court to award him an appropriate sum in compensation.

The complaint was referred for examination to the Białystok Regional Court.

On 20 April 2011 the court dismissed it, holding that the length of the investigation was not excessive. It stressed, in particular, complexity of the case.

153. According to press reports, on 9 March 2011 the prosecution submitted the second legal assistance request to the US Department of Justice, sought under the MLAT. Although the prosecutors have never officially disclosed its content, it is reported that they asked, *inter alia*, for evidence to be heard from the applicant. There has apparently been no answer by the US authorities to this request (see also paragraph 138 above).

154. On an unspecified date in mid-May 2011 the investigating prosecutor J. Mierzewski was disqualified from dealing with the case.

155. Later, the press reported that the disqualified investigating prosecutor had intended to ask the present President of Poland to release the former President of Poland, Mr A. Kwaśniewski, from his secrecy obligations in order to have him questioned in connection with the alleged operation of the CIA "black site" in Poland.

156. The applicant and Mr Abu Zubaydah submitted that in September 2011, the President of Poland, Mr B. Komorowski, had refused to relieve the former President of Poland A. Kwaśniewski from his secrecy duty for the purposes of providing information to the prosecutors.

157. On an unspecified date, presumably in the second half of 2011, the First President of the Supreme Court gave a decision exempting a number of State officials from maintaining the secrecy of classified materials in connection with the investigation into secret CIA prisons in Poland and ordering the Intelligence Agency (*Agencja Wywiadu*) to disclose classified materials to the prosecution. This decision was apparently given in a review procedure (see also paragraph 204 below), after the Head of the Intelligence Agency refused the investigating prosecutor's request to that effect.

158. According to press reports, on an unspecified date, presumably on 10 January 2012, the Warsaw Prosecutor of Appeal charged Mr Z. Siemiątkowski, the Head of the Intelligence Agency in 2002-2004, during the Democratic Left Alliance (*Sojusz Lewicy Demokratycznej*) Government, with abuse of power (Article 231 of the Criminal Code – see also paragraph 178 below) and with violation of international law by "unlawful detention" and "imposition of corporal punishment" on prisoners of war. Information about the charges leaked to the press towards the end of

March 2012 and was widely disseminated in Polish and international media. It was suggested that the charges were eventually brought mostly because of the fact that the Intelligence Agency had been obliged – pursuant to the First President of the Supreme Court's decision – to supply certain classified materials relating to their cooperation with the CIA in the first stage of the "war on terror" (see also paragraph 205 below).

There has been no official statement from the prosecution regarding the charges. The supposed suspect, however, gave interviews to the press and stated that he had refused to give evidence before the prosecutor and was going to rely on his right to silence throughout the entire proceedings, also at the judicial stage. He invoked national-security grounds.

159. After the investigation was transferred to the Kraków Prosecutor of Appeal on 26 January 2012, the Prosecutor General (see also paragraph 133 above), relying on the secrecy of the investigation, refused to give reasons for the decision to transfer the case.

160. As regards other persons possibly involved, since the end of March 2012 there have been repeated reports in the media that evidence disclosed to the prosecution by the Intelligence Agency may justify the initiation of the proceedings against Mr L. Miller, the Prime Minister in 2001-2004, before the Court of State (*Trybunał Stanu)* for violating the Constitution. The President of Poland at the material time, Mr A. Kwaśniewski, has also been mentioned in that context. Both of them have given interviews to media and denied the existence of any CIA prisons in Poland.

161. In its 2012 Periodic Report on the Implementation of the Provisions of the Convention against Torture, Poland has referred to the scope of the investigation in the following way:

> "An investigation on the circumstances defined in the question was conducted by the Appellate Prosecution Authority in Warsaw (ref. No. Ap V Ds. 37/09) and concerns suspicions of public officials exceeding their authorities to the detriment of public interest, i.e. an offence under Art. 231 § 1 [of the Criminal Code]``````````. ... Because of the fact that the proceedings are confidential, any more extensive account of the results of the investigation, its scope, detailed progress and methodology is impossible. At the current stage of development, the conclusion of investigation cannot be predicted, even roughly."

162. On 29 February 2012 the Helsinki Foundation for Human Rights asked the Kraków Prosecutor of Appeal for information about the conduct of the investigation.

The prosecutor replied on 4 April 2012. The letter read, in so far as relevant, as follows:

> "1. The investigating prosecutor in the case concerning the suspicion that there were CIA prisons in Poland is Ms K.P.
>
> 2. The case is registered under no. Ap V Ds. 12/12/S.
>
> 3. The case concerns an offence defined in Article 231 §1 of the Criminal Code and in other provisions.

4. The investigation has been prolonged until 11 August 2012.

5. In the course of the investigation evidence has been taken from 62 persons.

6. After 18 March 2009 the authorities of the United States have been asked to supply appropriate information within the framework of [mutual] legal assistance.

7. To date, the case file comprises twenty volumes.

8. Access to classified material is strictly controlled and all persons having access to the materials are listed in the documentation. As a matter of principle, the investigating prosecutors and prosecutors supervising the conduct of the investigation have access to the file.

9. In the course of the investigation, expert evidence has been obtained from experts in public international law.

I should also inform you that I am not able to give you a broader answer because the material collected in the case is classified "top secret".

Information of the contents of the order appointing the experts in public international law, cited in your letter, is not an official position of the prosecution and, in consequence, we cannot give you more detailed information in reply to your questions. I would add that the prosecution has initiated appropriate proceedings concerning the illegal disclosure of information about the pending investigation. I would also add that information contained in this letter has not been supplied under [the law on public access to information]. According to the established case-law [of the Supreme Administrative Court], this law does not apply to pending investigations. However, respecting the citizens' right to information about activities of public authorities, I provide you with the above information ..."

163. On 28 July 2012 the spokesman for the prosecution informed the press that the investigation into the matter of the CIA secret prisons in Poland had been extended by a further six months, that is until 11 February 2013. This was the eighth extension since the beginning of the investigation on 11 March 2008.

164. On 21 September 2012 the Helsinki Foundation for Human Rights requested the National Council of Prosecution (*Krajowa Rada Prokuratury*) to examine a possible breach of the principle of independence of prosecutors in relation to the transfer of the investigation to the Kraków Prosecutor of Appeal on 26 January 2012 (see paragraphs 133 and 159 above).

165. On 10 January 2013 the National Council of Prosecution found that there were no grounds to conclude that the transfer occurred in violation of the principle of independence of prosecutors. The relevant decision stated, among other things, that:

"The National Council of Prosecution did not find grounds supporting the argument that the transfer of the investigation occurred in violation of the [principle of the] independence of prosecutors as guaranteed by law. The decisions to change the prosecutors in charge of the criminal proceedings and the decision to hand over the case to the Prosecutor of Appeal for further investigation are well-grounded in the applicable provisions of law – a point which must be unequivocally emphasised. ...

> At this point, it should be noted that the National Council of Prosecution has not received any signals from prosecutors conducting this investigation suggesting that their independence has been violated."

166. On 1 February 2013 it was reported in the Polish media that the prosecutor had applied for a further extension. The investigation was then extended by the Prosecutor General until 11 June 2013.

167. On 7 February 2013 *Gazeta Wyborcza* published extracts from an interview given by L. Miller, the Prime Minister of Poland in 2001-2004, to the radio station *TOK FM*, who said:

> "I refused to give evidence in the case concerning the so-called 'CIA prisons' because I do not have confidence in the prosecution's impenetrability. Cancer has been eating the prosecution away for years. There are leaks all the time. I was convinced that whatever I would say there, would in a moment be in newspapers. In addition, the scope of questions which were the object of the interrogation went considerably beyond the problem of the so-called 'CIA prisons'. And I am a man responsible enough and will not talk to anyone about various intelligence operations."

168. On 10 June 2013 the spokesman for the Kraków Prosecutor of Appeal informed the media that the investigation had been extended by the Prosecutor General until mid-October 2013.

169. The authorities did not disclose the terms of reference or the precise scope of the investigation. Until June 2013 the investigation has been extended nine times.

170. The investigating prosecutor ruled on evidentiary motions filed by Polish counsel who represents the applicant in the pending criminal investigation, but refused most of the counsel's requests to interview witnesses.

The Polish counsel has also received access to the non-classified part of the investigation file and on one occasion to classified material relating to the investigation. However, the precise scope of the investigation remains unclear. No formal charges have been officially announced to date, and there is no indication as to when the investigation is likely to be completed.

171. In October or November 2013, the Prosecutor General extended the investigation until 11 February 2014. This was the eleventh extension granted to the investigating prosecutor during the proceedings.

172. As on the date of the adoption of the judgment, the proceedings were still pending.

3. Views regarding the investigation expressed by international organisations

(a) United Nations

(i) The 2010 UN Joint Study

173. The 2010 UN Joint Study, in its paragraph 118, recorded its "concern . . . about the lack of transparency into the investigation"

observing that "[a]fter 18 months, still nothing is known about the exact scope of the investigation". The UN experts added that they "expect that any such investigation would not be limited to the question of whether Polish officials had created an 'extraterritorial zone' in Poland, but also whether officials were aware that 'enhanced interrogation techniques' were applied there (see also paragraphs 283-285 below).

(ii) The UN Human Rights Committee

174. The conduct of the investigation was also examined by the UN Human Rights Committee. In its concluding observations on reports on Poland dated 27 October 2010, the UN Human Rights Committee "note[d] with concern that the investigation conducted by the Fifth Department for Organised Crime and Corruption of Warsaw Prosecutor of Appeal [wa]s not yet concluded" (see also paragraph 286 below).

(iii) The UN Committee against Torture

175. The UN Committee against Torture considered the combined fifth and sixth periodic reports of Poland (CAT/C/POL/5-6) at its 1174th and 1177th meetings, held on 30 and 31 October 2013. It adopted its concluding observations on the reports at its 1202nd meeting (CAT/C/SR. 1202) held on 19 November 2013.

The relevant part of the document, entitled "Rendition and secret detention programme, reads as follows:

> "10. The Committee is concerned about the lengthy delays in the investigation process on the alleged complicity of the State party in the Central Intelligence Agency rendition and secret detention programmes between 2001 and 2008, which allegedly involved torture and ill treatment of persons suspected of involvement in terrorism related crimes. It is also concerned about the secrecy surrounding the investigation and failure to ensure accountability in these cases (arts.2, 3, 12 and 13).
>
> The Committee urges the State party to complete the investigation into allegations of its involvement in the Central Intelligence Agency rendition and secret detention programmes between 2001 and 2008 within reasonable time and ensure accountability of the persons involved in the alleged crimes of torture and ill treatment. It also recommends that the State party inform the public and ensure transparency into the progress of its investigation process as well as cooperate in full with the European Court of Human Rights on the Central Intelligence Agency rendition and secret detention cases against Poland."

(b) Amnesty International

176. In June 2013 Amnesty International published its report entitled "Unlock the Truth: Poland's involvement in CIA secret detention" which, in its conclusions, states, *inter alia*, the following:

> "Poland has been in the spotlight since 2005, long accused of hosting a secret detention facility operated by the CIA where suspects were held and tortured between 2002 and 2005. As this report has documented, a stream of credible reports by the

media, intergovernmental, and non-governmental organizations – coupled with official data from Polish governmental agencies – leaves little room for doubt that Poland is implicated.

The lawyers of both of the named victims – Abd al-Rahim al-Nashiri and Abu Zubaydah – maintain that the information now available is enough to trigger prosecutions, but the on-going Polish criminal investigation, shrouded in secrecy, drags on. Since its inception in 2008, the investigation has been plagued by sudden personnel changes, an unexplained shift from Warsaw to Kraków, and complaints by al-Nashiri's and Abu Zubaydah's representatives that prosecutors have frustrated their attempts to participate fully in the Polish proceedings. Other potential victims, such as Walid bin Attash, may be waiting in the wings, searching as well for justice in Poland.

Yet accusations abound of delay in the investigation as a deliberate tactic as a result of political influence on the process. Attempts to get answers from the Polish authorities are met with cryptic acknowledgements that 'something happened' in Poland; or denials of knowledge of or wrong-doing in relation to the operations; or . . . with silence. ..."

IV. RELEVANT DOMESTIC LAW

A. Criminal Code

1. Territorial jurisdiction

177. Article 5 of the Criminal Code (*Kodeks karny*), reads as follows:

"Polish criminal law shall apply to a perpetrator who has committed a criminal act on the territory of the Republic of Poland, as well as on board any Polish aircraft or vessel, unless otherwise provided for by an international agreement to which the Republic of Poland is a party."

2. Offence of abuse of power

178. Article 231 § 1 of the Criminal Code, which defines the offence of abuse of power, reads as follows:

"A public official who, overstepping his powers or not fulfilling his duties, acts to the detriment of the public or private interests shall be liable to a sentence of imprisonment up to three years."

3. Statute of limitation

179. Article 101 § 1 of the Criminal Code sets out rules for statute of limitation on punishment for criminal offences. It reads, in so far as relevant:

"Punishment for an offence shall be subject to limitation if, from the time of commission of the offence, the [following] period has expired:

1) 30 years – if an act constitutes a serious offence (*zbrodnia*) of homicide;

2) 20 years – if an act constitutes another serious offence;

2a) 15 years – if an act constitutes an offence making the offender liable to a sentence of imprisonment exceeding 5 years;

3) 10 years – if an act constitutes an offence making the offender liable to a sentence of imprisonment exceeding 3 years;

4) 5 years – in respect of other offences.

..."

180. Pursuant to Article 102, if during the limitation-periods referred to in the above provision, an investigation against a person has been opened, punishment for offences specified in § 1 (1-3) shall be subject to limitation after the expiry of 10 years and for other offences after the expiry of 5 years after the end of the relevant periods.

181. Article 105 lays down exclusion rules in respect of particularly serious crimes, including crimes under international law, homicide and certain forms of ill–treatment committed by a public official, which are not subject to any time-bar. It reads, in so far as relevant, as follows:

"1. Articles 101, [102] and ... shall not apply to crimes against peace, [crimes against] humanity and war crimes.

2. Articles 101, [102] and ... shall not apply to intentional offences of homicide, grievous bodily harm, grievous damage to health or deprivation of liberty with particular torment committed by a public official in connection with performing his duties."

4. Protection of secrecy of investigation (offence of disseminating information of criminal investigation)

182. Article 241 § 1 reads as follows:

"A person who disseminates to the public information [deriving from] a criminal investigation before that information has been disclosed in judicial proceedings shall be liable to a fine, restrictions on his liberty or a sentence of imprisonment up to two years."

B. Code of Criminal Procedure

1. Prosecution of offences

183. Pursuant to Article 17 § 1 (6) of the Code of Criminal Procedure (*Kodeks postępowania karnego*), prosecution shall be time-barred if the statutory period of limitation for punishment has expired. This provision reads:

"[Criminal] proceedings shall not be instituted and, if instituted, shall be discontinued, if:

...

6) the statutory period of limitation on punishment has expired."

184. Article 303 imposes on the authorities a duty to open an investigation of their own motion if there is a justified suspicion (*uzasadnione podejrzenie*) that an offence has been committed. It reads:

> "If there is a justified suspicion that an offence has been committed, a decision to initiate an investigation shall be issued [by the authorities] of [their] own motion or upon a notification of offence. [That] decision shall specify an act subject to the proceedings and its legal characterisation."

185. An offence shall be prosecuted by the authorities of their own motion. Exceptions from this rule concern only a few offences which cannot be prosecuted without a prior request (*wniosek*) from a victim (e.g. rape) or specific authority (e.g. certain military offences) and offences that can only be prosecuted by means of private prosecution (*oskarżenie prywatne)* (e.g. minor assault or defamation).

186. Article 10 § 1 of the Code reads:

> "In respect of offences prosecuted of their own motion, the authorities responsible for prosecution of offences are obliged to institute and carry out an investigation and the prosecutor [is obliged] to file and maintain an indictment."

187. Pursuant to Article 304, every person, authority or institution that has become aware that an offence prosecuted of the authorities' own motion has been committed has a civic duty (*obowiązek społeczny*) to notify the prosecutor or the police.

2. Classified materials

188. Article 156 § 4 of the Code, which entered into force on 2 January 2011, provides:

> "If there is a risk of disclosing information classified as 'secret' or 'top secret', inspecting a case file, making copies or photocopying shall take place under conditions determined by the president of the court or the court. Certified copies or photocopies shall not be issued unless otherwise provided by law."

189. Article 156 § 5, which concerns access to a case file during an investigation, reads:

> "Unless otherwise provided by law, in the course of an investigation the parties, the defence counsel, and the legal representatives shall be given access to the case file, be able to make copies or photocopies and to obtain payable certified copies only with permission from the investigating prosecutor.
>
> In exceptional cases, in the course of an investigation access to the case file can be given to third persons with the prosecutor's permission."

C. Laws on classified information and related ordinance

1. The laws on classified information

(a) Situation until 2 January 2011 – "the 1999 Act"

190. The law of 22 January 1999 on protection of classified information (*Ustawa o ochronie informacji niejawnych*) ("the 1999 Act") was in force until 2 January 2011. On that date it was repealed, following the entry into force of the law of 5 August 2010 on protection of classified information ("the 2010 Act").

Section 2 (1) of the 1999 Act defined a state secret as follows:

> "A State secret is information included in the list setting out categories of information, constituting appendix no. 1, whose unauthorised disclosure may cause a considerable threat to the fundamental interests of the Republic of Poland concerning public order, defence, security and international or economic relations of the State."

191. Pursuant to section 23(1)-(2) of the 1999 Act, classified information could be rated "top secret" (*ściśle tajne*), "secret" (*tajne*), "confidential" (*poufne*) or "restricted" (*zastrzeżone*).

Appendix no. 1 to the 1999 Act listed 29 categories of information that could be classified as "top secret". These included "classified information exchanged by the Republic of Poland with the North Atlantic Treaty Organisation, European Union, West European Union and other international organisations and States, rated "top secret" or equivalent, if so required under international agreements – on the basis of the reciprocity principle".

192. Section 50 of the 1999 Act obliged all the authorities that created, processed, transmitted and stored documents containing classified information rated as "confidential" or constituting a State secret, to set up secret registries.

193. Section 52 (2) of the 1999 Act provided, in so far as relevant:

> "Documents marked 'top secret' and 'secret' can be released from the secret registry only if the recipient can secure the conditions for protection of those documents from unauthorised disclosure. In case of doubts regarding the securing of conditions for protection, the document can be made available only in the secret registry."

(b) Situation as from 2 January 2011 – "the 2010 Act"

194. Pursuant to its section 1(1), the 2010 Act sets out principles for "the protection of information whose unauthorised disclosure, also in the course of its preparation and regardless of its form and the manner of its communication, hereinafter referred to as 'classified information', would or could cause damage to the Republic of Poland or would be to the detriment of its interests".

Section 1(2) (1) states that the law applies to public authorities, in particular to Parliament, the President of the Republic of Poland, the public

administration, the self-government authorities and its subordinate units, the courts and tribunals (*trybunały*), the State audit authorities and "the authorities responsible for the protection of law".

195. The 2010 Act no longer refers to such notions as "State secret" or "official secret" (*tajemnica służbowa)* but instead uses a more general term "classified information" (*informacje niejawne*), accorded four levels of protection depending on the importance of the classified material. Section 5 of the 2010 Act maintains the previous levels of classification, namely "top secret", "secret", "confidential" and "restricted".

Classified information should be rated "top secret" if its unauthorised disclosure would cause an exceptionally grave damage to the Republic of Poland and "secret" if such a disclosure would cause a grave damage to its interests.

2. The 2012 Ordinance

196. The Ordinance of the Minister of Justice of 20 February 2012 on the handling of transcripts of questioning and other documents or items covered by the duty to maintain secrecy of classified information or the duty of secrecy related to the exercise of a profession or function (*Rozporządzenie Ministra Sprawiedliwości z dnia 20 lutego 2013 r. w sprawie sposobu postępowania z protokołami przesłuchań i innymi dokumentami lub przedmiotami, na które rozciąga się obowiązek zachowania tajemnicy informacji niejawnych albo zachowania tajemnicy związanej z wykonywaniem zawodu lub funkcji*) ("the 2012 Ordinance") entered into force on 13 March 2012.

197. Paragraph 4.2 of the 2012 Ordinance provides that the court, or at the investigation stage, the prosecutor shall classify a case file or particular volumes of it as "top secret", "secret", "confidential" or "restricted" if the file includes circumstances covered by the duty of secrecy of information classified as a State secret, an official secret or a secret related to the exercise of a profession or function. The case file, other documents or items classified as "top secret", "secret" or "confidential" are to be deposited in the court's or the prosecution's secret registry.

Paragraph 6.1 of the 2012 Ordinance provides that classified files, documents or items shall be made available to parties, counsel and representatives only on the basis of an order issued by the court or its president, or, at the investigation stage, by the prosecutor.

In accordance with paragraph 6.2, an order referred to in the preceding provision, should indicate the person authorised to inspect the classified documents, case file or items and specify the scope, manner and place of the inspection. If the person concerned asks for the creation of a bound set of documents (*trwale oprawiony zbiór dokumentów*) for the purposes of taking notes, such a bound set of documents shall be made and classified appropriately.

In accordance with paragraph 6.3, a bound set of documents for taking notes shall be created for each person concerned separately. It shall be deposited and made available only in the court's or the prosecution's secret registry.

D. Law on intelligence agencies

198. The law of 24 May 2002 on the Internal Security Agency and the Intelligence Agency (*ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu*) ("the 2002 Act"), adopted as a measure reforming the former structures of the secret services, set up two civilian intelligence agencies.

The Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego* – also called *"ABW"* in Polish) is responsible for the protection of the State's internal security and the State's constitutional order (section 1).

The Intelligence Agency (also called *"AW"* in Polish) is responsible for "the external protection of the State" (section 2). This includes foreign intelligence.

According to section 3 of the 2002 Act, the heads of both agencies are subordinate to the Prime Minister. Their activities are subject to Parliament's oversight – through the Parliamentary Commission for Special Services (*Sejmowa Komisja do Spraw Służb Specjalnych*).

199. The tasks of the Intelligence Agency are enumerated in section 6(1). They include, among other things, the following:

> 1) obtaining, analysing, processing and transmitting to the relevant authorities information that may have a vital importance for security and international position of the Republic of Poland and its economic and defence potential;
>
> 2) identifying and counteracting external threats to the security, defence, independence and territorial integrity of the Republic of Poland;
>
> ...
>
> 5) identifying international terrorism, extremism and international organised-crime groups;
>
> ...
>
> 7) identifying and analysing threats occurring in regions of tensions, conflicts and international crisis which have an impact on the State's security and taking actions aimed at eliminating those threats;
>
> ...
>
> 9) taking other actions specified in other laws and international agreements."

200. Section 6(3) stipulates that the Intelligence Agency's activities in the territory of Poland may be conducted exclusively in connection with their activities abroad.

201. Section 7 states, in so far as relevant, as follows:

"1. The Prime Minister determines the directions for the agencies' actions by means of guidelines.

...

3. The heads of the agencies, each within his competence, shall submit, by 31 January, a annual report on the agency's activities for the previous calendar year."

202. Section 8 provides:

"1. In order to accomplish the agencies' tasks, the heads of the agencies, each within his competence, may cooperate with the relevant authorities and services of other States.

2. Cooperation referred to in section 1 may be sought after obtaining the Prime Minister's consent."

203. Chapter 2 of the 2002 Act deals with the Cabinet Committee for Special Services (*Kolegium do Spraw Służb Specjalnych*) – a consultative-advisory body chaired by the Prime Minister.

Pursuant to section 11, the Committee exercises its competence in respect of "programming, supervising and coordinating" activities of special services, namely the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Agency (*Służba Kontrwywiadu Wojskowego*), the Military Intelligence Agency (*Służba Wywiadu Wojskowego*) and the Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*), as well as activities undertaken in view of State security by the police, the Border Guard, the Military Police, the Prison Service, the Office for the Government Protection, the Customs, military information services and the tax authorities.

The Committee comprises the Prime Minister, Secretary to the Committee, the Minister for the Interior, the Minister for Foreign Affairs, the Minister for Defence, the Minister for the Treasury and the Head of the National Security Bureau (*Biuro Bezpieczeństwa Narodowego*) from the President of Poland's Chancellery. The Heads of the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Agency, the Military Intelligence Agency, the Central Anti-Corruption Bureau and the President of the Parliamentary Committee for Special Services attend the Committee's meetings (section 12(2)-(3)).

204. Under section 18(1), the Heads of the Internal Security Agency and the Intelligence Agency, each within his competence, have a duty "to supply promptly" the President of the Republic of Poland and the Prime Minister with any information that may have a vital importance for Poland's security and its international position.

205. The Head of the Intelligence Agency may allow officers or staff members to supply classified information to a specific person or institution (section 39). He has full discretion in granting or refusing the disclosure of classified information. Only if so ordered by the First President of the

Supreme Court in the review procedure under section 39(6) is he obliged to disclose classified information. This exception, however, is limited to proceedings for crimes against peace, crimes against humanity and war crimes referred to in Article 105 § 1 of the Criminal Code (see paragraph 181 above) and serious fatal offences.

Section 39(6) reads, in so far as relevant, as follows:

> "If, despite a request from a court or prosecutor made in connection with criminal proceedings for an offence defined in Article 105 § 1 of the Criminal Code or serious offence against human life or an offence against life and health causing death, [the head of the Intelligence Agency] has refused to exempt an officer or staff member ... from his duty to maintain secrecy of materials classified 'secret' or 'top secret' or refused to disclose materials ... classified 'secret or 'top secret', he shall submit the materials requested and [his] explanation to the First President of the Supreme Court.
>
> If the First President of the Supreme Court finds that granting the court's or the prosecutor's request is necessary for the proper course of the proceedings, the head of ... the Intelligence Agency is obliged to issue an exemption from secrecy or to disclose materials covered by secrecy."

V. RELEVANT INTERNATIONAL LAW

A. Vienna Convention on the Law of Treaties

206. Articles 26 and 27 of the Vienna Convention on the Law of Treaties (23 May 1969), to which Poland is a party, provide as follows:

Article 26
"*Pacta sunt servanda*"

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Article 27
Internal law and observance of treaties

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ..."

B. International Law Commission, 2001 Articles on Responsibility of States for Internationally Wrongful Acts

207. The relevant parts of the Articles ("the ILC Articles"), adopted on 3 August 2001 (*Yearbook of the International Law Commission*, 2001, vol. II), read as follows:

Article 7
Excess of authority or contravention of instructions

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

..."

Article 14
Extension in time of the breach of an international obligation

"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

Article 15
Breach consisting of a composite act

"1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

Article 16
Aid or assistance in the commission of an internationally wrongful act

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State."

C. International Covenant on Civil and Political Rights

208. Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), to which Poland is a party, reads as follows:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

D. The United Nations Torture Convention

209. One hundred and forty-nine States are parties to the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"), including all Member States of the Council of Europe. Article 1 of the Convention defines torture as:

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

210. Article 1(2) provides that it is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. Article 2 requires States to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Article 4 requires each State Party to ensure that all acts of torture are offences under its criminal law.

Article 3 provides:

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

211. Article 12 provides that each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 15 requires that each State ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

E. UN General Assembly Resolution 60/147

212. The UN General Assembly's Resolution 60/147 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations

of International Humanitarian Law, adopted on 16 December 2005, reads, in so far as relevant, as follows:

> "24. ... victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations".

VI. SELECTED PUBLIC SOURCES CONCERNING GENERAL KNOWLEDGE OF THE HVD PROGRAMME AND HIGHLIGHTING CONCERNS AS TO HUMAN RIGHTS VIOLATIONS ALLEGEDLY OCCURRING IN US-RUN DETENTION FACILITIES IN THE AFTERMATH OF 11 SEPTEMBER 2001

213. The applicant, Mr Abu Zubaydah and third-party interveners submitted a considerable number of reports and opinions of international governmental and non-governmental organisations, as well as articles and reports published in media, which raised concerns about alleged rendition, secret detentions and ill-treatment in US-run detention facilities in Guantánamo and Afghanistan. A summary of most relevant sources is given below.

A. United Nations Organisation

1. Statement of the UN High Commissioner for Human Rights on detention of Taliban and Al-Qaeda prisoners at the US Base in Guantánamo Bay, Cuba, 16 January 2002

214. The UN High Commissioner for Human Rights stated as follows:

> "All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention."

2. Statement of the International Rehabilitation Council for Torture

215. In February 2003 the UN Commission on Human Rights received reports from non-governmental organisations concerning ill-treatment of US detainees. The International Rehabilitation Council for Torture ("the IRCT") submitted a statement in which it expressed its concern over the United States' reported use of "stress and duress" methods of interrogation, as well as the contraventions of *refoulement* provisions in Article 3 of the

Convention Against Torture. The IRCT report criticised the failure of governments to speak out clearly to condemn torture; and emphasised the importance of redress for victims. The Commission on Human Rights communicated this document to the United Nations General Assembly on 8 August 2003.

3. UN Working Group on Arbitrary Detention, Opinion No. 29/2006, Mr Ibn al-Shaykh al-Libi and 25 other persons v. United States of America, UN Doc. A/HRC/4/40/Add.1 at 103 (2006)

216. The UN Working Group found that the detention of the persons concerned, held in facilities run by the United States secret services or transferred, often by secretly run flights, to detention centres in countries with which the United States authorities cooperated in their fight against international terrorism, fell outside all national and international legal regimes pertaining to the safeguards against arbitrary detention. In addition, it found that the secrecy surrounding the detention and inter-State transfer of suspected terrorists could expose the persons affected to torture, forced disappearance and extrajudicial killing.

B. Other international organisations

1. Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002

217. In this memorandum, Amnesty International expressed its concerns that the US Government had transferred and held people in conditions that might amount to cruel, inhuman or degrading treatment and that violated other minimum standards relating to detention, and had refused to grant people in its custody access to legal counsel and to the courts in order to challenge the lawfulness of their detention.

2. Human Rights Watch, "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees", Vol. 14, No. 4 (G), August 2002

218. This report included the following passage:

> "... the fight against terrorism launched by the United States after September 11 did not include a vigorous affirmation of those freedoms. Instead, the country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights ... Most of those directly affected have been non-U.S. citizens ... the Department of Justice has subjected them to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence."

3. Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects", 26 December 2002

219. This report referred to the *Washington Post*'s article: "U.S. Decries Abuse but Defends Interrogations" which described "how persons held in the CIA interrogation centre at Bagram air base in Afghanistan were being subject to "stress and duress" techniques, including "standing or kneeling for hours" and being "held in awkward, painful positions".

It further stated:

> "The Convention against Torture, which the United States has ratified, specifically prohibits torture and mistreatment, as well as sending detainees to countries where such practices are likely to occur."

4. International Helsinki Federation for Human Rights, "Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11", Report, April 2003

220. The relevant passage of this report read as follows:

> "Many 'special interest' detainees have been held in solitary confinement or housed with convicted prisoners, with restrictions on communications with family, friends and lawyers, and have had inadequate access to facilities for exercise and for religious observance, including facilities to comply with dietary requirements. Some told human rights groups they were denied medical treatment and beaten by guards and inmates."

5. Amnesty International Report 2003 – United States of America, 28 May 2003

221. This report discussed the transfer of detainees to Guantánamo, Cuba in 2002, the conditions of their transfer ("prisoners were handcuffed, shackled, made to wear mittens, surgical masks and ear muffs, and were effectively blindfolded by the use of taped-over ski goggles") and the conditions of detention ("they were held without charge or trial or access to courts, lawyers or relatives"). It further stated:

"A number of suspected members of *al-Qaeda* reported to have been taken into US custody continued to be held in undisclosed locations. The US government failed to provide clarification on the whereabouts and legal status of those detained, or to provide them with their rights under international law, including the right to inform their families of their place of detention and the right of access to outside representatives. An unknown number of detainees originally in US custody were allegedly transferred to third countries, a situation which raised concern that the suspects might face torture during interrogation."

6. Amnesty International, "Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay", 29 May 2003

222. Amnesty International reported on the transfer of six Algerian men, by Bosnian Federation police, from Sarajevo Prison into US custody in Camp X-Ray, located in Guantánamo Bay, Cuba. It expressed its concerns that they had been arbitrarily detained in violation of their rights under the International Covenant on Civil and Political Rights. It also referred to the decision of the Human Rights Chamber of Bosnia and Herzegovina in which the latter had found that the transfer had been in violation of Article 5 of the Convention, Article 1 of Protocol No. 7 and Article 1 of Protocol No. 6.

7. Amnesty International, "United States of America, The threat of a bad example: Undermining international standards as 'war on terror' detentions continue", 18 August 2003

223. The relevant passage of this report read as follows:

"Detainees have been held incommunicado in US bases in Afghanistan. Allegations of ill-treatment have emerged. Others have been held incommunicado in US custody in undisclosed locations elsewhere in the world, and the US has also instigated or involved itself in 'irregular renditions', US parlance for informal transfers of detainees between the USA and other countries which bypass extradition or other human rights protections."

8. Amnesty International, "Incommunicado detention/Fear of ill-treatment", 20 August 2003

224. The relevant passage of this report read as follows:

"Amnesty International is concerned that the detention of suspects in undisclosed locations without access to legal representation or to family members and the 'rendering' of suspects between countries without any formal human rights protections is in violation of the right to a fair trial, places them at risk of ill-treatment and undermines the rule of law."

9. International Committee of the Red Cross, United States: ICRC President urges progress on detention-related issues, news release 04/03, 16 January 2004

225. The ICRC expressed its position as follows:

> "Beyond Guantánamo, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. Mr Kellenberger echoed previous official requests from the ICRC for information on these detainees and for eventual access to them, as an important humanitarian priority and as a logical continuation of the organization's current detention work in Guantánamo and Afghanistan."

10. Human Rights Watch - Statement on US Secret Detention Facilities of 6 November 2005

226. On 6 November 2005 the Human Rights Watch issued a "Statement on US Secret Detention Facilities in Europe" ("the 2005 HRW Statement"), which indicated Poland's complicity in the CIA rendition programme. It was given 2 days after the *Washington Post* had published material revealing information of secret detention facilities designated for suspected terrorists run by the CIA outside the US, including "Eastern European countries" (see also paragraph 228 below).

227. The statement read, in so far as relevant, as follows:

> "Human Rights Watch has conducted independent research on the existence of secret detention locations that corroborates the Washington Post's allegations that there were detention facilities in Eastern Europe.
>
> Specifically, we have collected information that CIA airplanes travelling from Afghanistan in 2003 and 2004 made direct flights to remote airfields in Poland and Romania. Human Rights Watch has viewed flight records showing that a Boeing 737, registration number N313P – a plane that the CIA used to move several prisoners to and from Europe, Afghanistan, and the Middle East in 2003 and 2004 – landed in Poland and Romania on direct flights from Afghanistan on two occasions in 2003 and 2004. Human Rights Watch has independently confirmed several parts of the flight records, and supplemented the records with independent research.
>
> According to the records, the N313P plane flew from Kabul to northeastern Poland on September 22, 2003, specifically, to Szymany airport, near the Polish town of Szczytno, in Warmia-Mazuria province. Human Rights Watch has obtained information that several detainees who had been held secretly in Afghanistan in 2003 were transferred out of the country in September and October 2003. The Polish intelligence service maintains a large training facility and grounds near the Szymany airport. ...
>
> On Friday, the Associated Press quoted Szymany airport officials in Poland confirming that a Boeing passenger plane landed at the airport at around midnight on the night of September 22, 2003. The officials stated that the plane spent an hour on the ground and took aboard five passengers with U.S. passports. ...
>
> Further investigation is needed to determine the possible involvement of Poland and Romania in the extremely serious activities described in the Washington Post article. Arbitrary incommunicado detention is illegal under international law. It often acts as a

foundation for torture and mistreatment of detainees. U.S. government officials, speaking anonymously to journalists in the past, have admitted that some secretly held detainees have been subjected to torture and other mistreatment, including waterboarding (immersing or smothering a detainee with water until he believes he is about to drown). Countries that allow secret detention programs to operate on their territory are complicit in the human rights abuses committed against detainees.

Human Rights Watch knows the names of 23 high-level suspects being held secretly by U.S. personnel at undisclosed locations. An unknown number of other detainees may be held at the request of the U.S. government in locations in the Middle East and Asia. U.S. intelligence officials, speaking anonymously to journalists, have stated that approximately 100 persons are being held in secret detention abroad by the United States.

Human Rights Watch emphasizes that there is no doubt that secret detention facilities operated by the United States exist. The Bush Administration has cited, in speeches and in public documents, arrests of several terrorist suspects now held in unknown locations. Some of the detainees cited by the administration include: Abu Zubaydah, a Palestinian arrested in Pakistan in March 2002; ... Abd al-Rahim al-Nashiri (also known as Abu Bilal al-Makki), arrested in United Arab Emirates in November 2002 ....

Human Rights Watch urges the United Nations and relevant European Union bodies to launch investigations to determine which countries have been or are being used by the United States for transiting and detaining incommunicado prisoners. The U.S. Congress should also convene hearings on the allegations and demand that the Bush administration account for secret detainees, explain the legal basis for their continued detention, and make arrangements to screen detainees to determine their legal status under domestic and international law. We welcome the decision by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe to examine the existence of U.S.-run detention centers in Council of Europe member states. We also urge the European Union, including the EU Counter-Terrorism Coordinator, to further investigate allegations and publish its findings."

11. Human Rights Watch – List of Ghost Prisoners Possibly in CIA Custody of 30 November 2005

228. On 30 November the Human Rights Watch published a "List of Ghost Prisoners Possibly in CIA Custody" ("the 2005 HRW List"), which included the applicant. The document reads, in so far as relevant, as follows:

"The following is a list of persons believed to be in U.S. custody as 'ghost detainees' – detainees who are not given any legal rights or access to counsel, and who are likely not reported to or seen by the International Committee of the Red Cross. The list is compiled from media reports, public statements by government officials, and from other information obtained by Human Rights Watch. Human Rights Watch does not consider this list to be complete: there are likely other "ghost detainees" held by the United States.

Under international law, enforced disappearances occur when persons are deprived of their liberty, and the detaining authority refuses to disclose their fate or whereabouts, or refuses to acknowledge their detention, which places the detainees outside the protection of the law. International treaties ratified by the United States prohibit incommunicado detention of persons in secret locations.

Many of the detainees listed below are suspected of involvement in serious crimes, including the September 11, 2001 attacks; the 1998 U.S. Embassy bombings in Kenya and Tanzania; and the 2002 bombing at two nightclubs in Bali, Indonesia. ... Yet none on this list has been arraigned or criminally charged, and government officials, speaking anonymously to journalists, have suggested that some detainees have been tortured or seriously mistreated in custody.

The current location of these prisoners is unknown.

List, as of December 1, 2005:

...

4. Abu Zubaydah (also known as Zain al-Abidin Muhammad Husain). Reportedly arrested in March 2002, Faisalabad, Pakistan. Palestinian (born in Saudi Arabia), suspected senior al-Qaeda operational planner. Listed as captured in 'George W. Bush: Record of Achievement. Waging and Winning the War on Terror', available on the White House website. Previously listed as 'disappeared' by Human Rights Watch.

...

9. Abd al-Rahim al-Nashiri (or Abdulrahim Mohammad Abda al-Nasheri, aka Abu Bilal al-Makki or Mullah Ahmad Belal). Reportedly arrested in November 2002, United Arab Emirates. Saudi or Yemeni, suspected al-Qaeda chief of operations in the Persian Gulf, and suspected planner of the USS *Cole* bombing, and attack on the French oil tanker, Limburg. Listed in 'George W. Bush: Record of Achievement, Waging and Winning the War on Terror', available on the White House website. Previously listed as 'disappeared' by Human Rights Watch.

C. Parliamentary Assembly of the Council of Europe Resolution no. 1340 (2003) on rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay, 26 June 2003

229. The above resolution ("the 2003 PACE Resolution") read, in so far as relevant, as follows:

"1. The Parliamentary Assembly:

i. notes that some time after the cessation of international armed conflict in Afghanistan, more than 600 combatants and non-combatants, including citizens from member states of the Council of Europe, may still be held in United States' military custody – some in the Afghan conflict area, others having been transported to the American facility in Guantánamo Bay (Cuba) and elsewhere, and that more individuals have been arrested in other jurisdictions and taken to these facilities; ....

2. The Assembly is deeply concerned at the conditions of detention of these persons, which it considers unacceptable as such, and it also believes that as their status is undefined, their detention is consequently unlawful.

3. The United States refuses to treat captured persons as prisoners of war; instead it designates them as "unlawful combatants" – a definition that is not contemplated by international law.

4. The United States also refuses to authorise the status of individual prisoners to be determined by a competent tribunal as provided for in Geneva Convention (III) relative to the Treatment of Prisoners of War, which renders their continued detention arbitrary.

5. The United States has failed to exercise its responsibility with regard to international law to inform those prisoners of their right to contact their own consular representatives or to allow detainees the right to legal counsel.

6. Whatever protection may be offered by domestic law, the Assembly reminds the Government of the United States that it is responsible under international law for the well-being of prisoners in its custody.

7. The Assembly restates its constant opposition to the death penalty, a threat faced by those prisoners in or outside the United States.

8. The Assembly expresses its disapproval that those held in detention may be subject to trial by a military commission, thus receiving a different standard of justice than United States nationals, which amounts to a serious violation of the right to receive a fair trial and to an act of discrimination contrary to the United Nations International Covenant on Civil and Political Rights.

9. In view of the above, the Assembly strongly urges the United States to:

i. bring conditions of detention into conformity with internationally recognised legal standards, for instance by giving access to the International Committee of the Red Cross (ICRC) and by following its recommendations;

ii. recognise that under Article 4 of the Third Geneva Convention members of the armed forces of a party to an international conflict, as well as members of militias or volunteer corps forming part of such armed forces, are entitled to be granted prisoner of war status;

iii. allow the status of individual detainees to be determined on a case-by-case basis, by a competent tribunal operating through due legal procedures, as envisaged under Article 5 of the Third Geneva Convention, and to release non-combatants who are not charged with crimes immediately.

10. The Assembly urges the United States to permit representatives of states which have nationals detained in Afghanistan and in Guantánamo Bay, accompanied by independent observers, to have access to sites of detention and unimpeded communication with detainees. ...

13. The Assembly further regrets that the United States is maintaining its contradictory position, claiming on the one hand that Guantánamo Bay is fully within US jurisdiction, but on the other, that it is outside the protection of the American Constitution. In the event of the United States' failure to take remedial actions before the next part-session, or to ameliorate conditions of detention, the Assembly reserves the right to issue appropriate recommendations."

D. Media reports and articles

1. International media

230. On 2 April 2002 ABC News reported:

"US officials have been discussing whether Zubaydah should be sent to countries, including Egypt or Jordan, where much more aggressive interrogation techniques are permitted. But such a move would directly raise a question of torture ... Officials have also discussed sending Zubaydah to Guantànamo Bay or to a military ship at sea. Sources say it's imperative to keep him isolated from other detainees as part of psychological warfare, and even more aggressive tools may be used."

231. Two Associated Press reports of 2 April 2002 stated:

> "Zubaydah is in US custody, but it's unclear whether he remains in Pakistan, is among 20 al Qaeda suspects to be sent to the US naval station at Guantànamo Bay, Cuba, or will be transported to a separate location."

and:

> "US officials would not say where he was being held. But they did say he was not expected in the United States any time soon. He could eventually be held in Afghanistan, aboard a Navy ship, at the US base in Guantànamo Bay, Cuba, or transferred to a third country."

232. On 26 December 2002 the *Washington Post* published a detailed article entitled "Stress and Duress Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities". The article referred explicitly to the practice of rendition and summarised the situation as follows:

> "a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation; in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred. ...
>
> 'If you don't violate someone's human rights some of the time; you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists."

The article also noted that

> "there were a number of secret detention centers overseas where US due process does not apply ... where the CIA undertakes or manages the interrogation of suspected terrorists ... off-limits to outsiders and often even to other government agencies. In addition to Bagram and Diego Garcia, the CIA has other detention centres overseas and often uses the facilities of foreign intelligence services".

The *Washington Post* also gave details on the rendition process:

> "The takedown teams often 'package' prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape."

The article received worldwide exposure. In the first weeks of 2003 it was, among other things, the subject of an editorial in the *Economist* and a statement by the World Organisation against Torture.

233. On 2 November 2005 the *Washington Post* reported that the United States had used secret detention facilities in Eastern Europe and elsewhere to hold illegally persons suspected of terrorism. The article, entitled "CIA Holds Terror Suspects in Secret Prisons" cited sources from the US Government, notably the CIA, but no specific locations in Eastern Europe were identified. It was written by Dana Priest, an American journalist. She referred to countries involved as "Eastern-European countries".

It read, in so far as relevant, as follows:

> "The CIA has been hiding and interrogating some of its most important al Qaeda captives at a Soviet-era compound in Eastern Europe, according to U.S. and foreign officials familiar with the arrangement.

The secret facility is part of a covert prison system set up by the CIA nearly four years ago that at various times has included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe, as well as a small center at the Guantánamo Bay prison in Cuba, according to current and former intelligence officials and diplomats from three continents.

The hidden global internment network is a central element in the CIA's unconventional war on terrorism. It depends on the cooperation of foreign intelligence services, and on keeping even basic information about the system secret from the public, foreign officials and nearly all members of Congress charged with overseeing the CIA's covert actions.

The existence and locations of the facilities – referred to as 'black sites' in classified White House, CIA, Justice Department and congressional documents – are known to only a handful of officials in the United States and, usually, only to the president and a few top intelligence officers in each host country.

...

Although the CIA will not acknowledge details of its system, intelligence officials defend the agency's approach, arguing that the successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantánamo Bay.

The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.

...

It is illegal for the government to hold prisoners in such isolation in secret prisons in the United States, which is why the CIA placed them overseas, according to several former and current intelligence officials and other U.S. government officials. Legal experts and intelligence officials said that the CIA's internment practices also would be considered illegal under the laws of several host countries, where detainees have rights to have a lawyer or to mount a defense against allegations of wrongdoing.

Host countries have signed the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as has the United States. Yet CIA interrogators in the overseas sites are permitted to use the CIA's approved "Enhanced Interrogation Techniques," some of which are prohibited by the U.N. convention and by U.S. military law. They include tactics such as 'waterboarding', in which a prisoner is made to believe he or she is drowning.

...

The contours of the CIA's detention program have emerged in bits and pieces over the past two years. Parliaments in Canada, Italy, France, Sweden and the Netherlands have opened inquiries into alleged CIA operations that secretly captured their citizens or legal residents and transferred them to the agency's prisons.

More than 100 suspected terrorists have been sent by the CIA into the covert system, according to current and former U.S. intelligence officials and foreign sources. This figure, a rough estimate based on information from sources who said their knowledge of the numbers was incomplete, does not include prisoners picked up in Iraq.

> The detainees break down roughly into two classes, the sources said.
>
> About 30 are considered major terrorism suspects and have been held under the highest level of secrecy at black sites financed by the CIA and managed by agency personnel, including those in Eastern Europe and elsewhere, according to current and former intelligence officers and two other U.S. government officials. Two locations in this category – in Thailand and on the grounds of the military prison at Guantánamo Bay – were closed in 2003 and 2004, respectively.
>
> A second tier – which these sources believe includes more than 70 detainees – is a group considered less important, with less direct involvement in terrorism and having limited intelligence value. These prisoners, some of whom were originally taken to black sites, are delivered to intelligence services in Egypt, Jordan, Morocco, Afghanistan and other countries, a process sometimes known as "rendition." While the first-tier black sites are run by CIA officers, the jails in these countries are operated by the host nations, with CIA financial assistance and, sometimes, direction.
>
> ...
>
> The top 30 al Qaeda prisoners exist in complete isolation from the outside world. Kept in dark, sometimes underground cells, they have no recognized legal rights, and no one outside the CIA is allowed to talk with or even see them, or to otherwise verify their well-being, said current and former and U.S. and foreign government and intelligence officials.
>
> ...
>
> The Eastern European countries that the CIA has persuaded to hide al Qaeda captives are democracies that have embraced the rule of law and individual rights after decades of Soviet domination. Each has been trying to cleanse its intelligence services of operatives who have worked on behalf of others – mainly Russia and organized crime.
>
> ...
>
> By mid-2002, the CIA had worked out secret black-site deals with two countries, including Thailand and one Eastern European nation, current and former officials said. An estimated $100 million was tucked inside the classified annex of the first supplemental Afghanistan appropriation. ..."

234. On 5 December 2005, *ABC News* published a report, listing the names of twelve top Al Qaeda suspects held in Poland, including the applicant and Mr Abu Zubaydah. This report was available on the Internet for only a very short time; it was withdrawn from ABC's webpage shortly thereafter following the intervention of lawyers on behalf of the network's owners.

2. Polish media

235. On 12 January 2002 a daily *Rzeczpospolita* discussed an Amnesty International report about 20 Guantànamo prisoners being given intoxicants, handcuffed, shaved and hooded and reported that then the US Defense Secretary Donald Rumsfeld had said that Guantànamo detainees would not be treated as prisoners of war, because they were illegal fighters who did not have rights.

236. On 25 January 2002 the same newspaper reported that the US Government had refused to allow the Human Rights Watch to visit the detention centre in Guantànamo Bay and that the detainees had not had lawyers or access to legal representation.

237. On 15 January 2003 *Rzeczpospolita* referred to and discussed a Human Rights Watch report documenting human rights abuses in the course of the Bush administration's counter-terrorism operations. In May 2003, the newspaper reported on criticism by the Amnesty International of the US practice of detaining hundreds of Afghans suspected of Al'Qaeda membership at its base in Guantànamo. According to the report, they remained in a "legal black hole", held without charge, without access to lawyers, and without the status of prisoner.

238. On 17 July 2003 a daily *Gazeta Wyborcza* reported the deplorable living conditions of detainees held at Guantànamo Bay, stating that the majority of the 680 prisoners were kept in 2.4 x 2m cages, in which the temperature often reached 38 degrees. Detainees had the right to a 30 minute walk only three times a week – the youngest detainees were under 16 and the eldest well over 70.

239. On 6 August 2003 *Rzeczpospolita* reported on the detention of two UK detainees among the 680 held indefinitely at Guantànamo, and the consequent public outrage in the UK. It emphasised that this practice of detention was a clear human rights violation and that the situation was viewed by the world as further proof that, when it came to the war on terror, America would not hesitate to brush away human rights and other legalities as insignificant.

3. Interview with Mr A. Kwaśniewski, former President of Poland

240. On 30 April 2012 *Gazeta Wyborcza* published an interview with Mr Aleksander Kwaśniewski, President of Poland in 2000-2005. Mr Kwaśniewski, in response to questions concerning the alleged CIA prison in Poland, said, among other things:

> "Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest. After attacks on the World Trade Center we considered it necessary on account of exceptional circumstances. Subsequent, post-11 September attacks, confirmed us in this [decision]. In attacks in New York, London and Madrid Polish nationals were also killed. This was our duty, and cooperation of the Government and the President was exemplary. ...
>
> It was not us who arrested the terrorists, it was not us who interrogated them. We assumed that our allies respect the law. If something was not in accordance with the law, this is the Americans' responsibility and they should be accountable. ...
>
> The decision to cooperate with the CIA carried a risk that the Americans would use inadmissible methods. But if a CIA agent brutally treated a prisoner in the Warsaw Mariott Hotel, would you charge the management of that hotel for the actions of that agent? We did not have knowledge of any torture."

VII. INTERNATIONAL INQUIRIES RELATING TO CIA SECRET DETENTIONS AND RENDITIONS OF SUSPECTED TERRORISTS IN EUROPE, INCLUDING POLAND

A. Council of Europe

1. Procedure under Article 52 of the Convention

241. On 21 November 2005, the Secretary General of the Council of Europe, Mr Terry Davis, acting under Article 52 of the Convention and in connection with reports of European collusion in secret rendition flights, sent a questionnaire to the States Parties to the Convention, including Poland.

The States were asked to explain how their internal law ensured the effective implementation of the Convention on four issues: 1) adequate controls over acts by foreign agents in their jurisdiction; 2) adequate safeguards to prevent, as regards any person in their jurisdiction, unacknowledged deprivation of liberty, including transport, with or without the involvement of foreign agents; 3) adequate responses (including effective investigations) to any alleged infringements of ECHR rights, notably in the context of deprivation of liberty, resulting from conduct of foreign agents; 4) whether since 1 January 2002 any public official had been involved, by action or omission, in such deprivation of liberty or transport of detainees; whether any official investigation was under way or had been completed.

242. The Polish Government replied on 10 March 2006. The letter was signed by Mr W. Waszczykowski, the Undersecretary of State. It read, in so far as relevant, as follows:

> "... The findings of the Polish Government's internal enquiry into the alleged existence in Poland of secret detention centers and related over flights fully deny the allegations in the debate. ...
>
> According to my knowledge based on the above mentioned findings of the enquiry, the official Polish statements should be understood in a sense that it has not been in that matter any facts in Poland in contravention of the internal laws, or international treaties and conventions, to which our State is a party. ...
>
> We stated in our letter of February, 17th: '*With reference to the responsibility for the commitment of an offence it should be noted that under Article 5 of the Penal Code, the Polish judicial organs have jurisdiction with respect to any prohibited act committed within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which Poland is a party stipulates otherwise*.' It means that any person, including members of Polish and foreign agencies, is under the same jurisdiction of Polish Penal Code, without any differentiation.
>
> We can clarify it farther in a following way: the activities of foreign agencies on Polish territory could be either to the detriment of Poland's interests or in cooperation with our services. In the first case, we quoted an Article 130 of the Polish Penal Code,

prohibiting and punishing the activities of foreign intelligence agencies to the detriment of the Republic of Poland. In the second case, we informed that general 'civil supervision (of Poland's intelligence), both by Parliament and Government,... also controls the Polish Foreign Intelligence Agency in matters relating to its cooperation with partner secret services of other States.

It is necessary to add that, according to the Polish Ministry of Justice' opinion, no one international agreement to which Poland is a party could exclude members of civil foreign agency from the above described principle and practice of Polish jurisdiction.

Exemptions in that regard in favor of the foreign states, envisaged in the NATO – SOFA Agreement, are applicable only to members of the armed forces or of their civilian staff, and only in specified cases, assuring the adequate law enforcement."

243. On 1 March 2006 the Secretary General released his report on the use of his powers under Article 52 of the Convention (SG/Inf (2006) 5) of 28 February 2006 based on the official replies from the member states.

2. Parliamentary Assembly's inquiry – the Marty Inquiry

244. On 1 November 2005 the Parliamentary Assembly of the Council of Europe launched an investigation into allegations of secret detention facilities being run by the CIA in many member states, for which Swiss Senator Dick Marty was appointed rapporteur.

245. On 15 December 2005 the Parliamentary Assembly requested an opinion from the Venice Commission on the legality of secret detention in the light of the member states' international legal obligations, particularly under the European Convention on Human Rights.

(a) The 2006 Marty Report

246. On 7 June 2006 Senator Marty presented to the Parliamentary Assembly his first report prepared in the framework of the investigation launched on 1 November 2005 (see paragraph 244 above), revealing what he called a global "spider's web" of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe member states, including Poland. The document, as published by the Parliamentary Assembly, is entitled "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states" (Doc. 10957) and commonly referred to as "the 2006 Marty Report".

247. Chapter 2.6.3 of the 2006 Marty Report refers to Poland. It states, in so far as relevant, as follows:

"63. Poland was likewise singled out as a country which had harboured secret detention centres.

64. On the basis of information obtained from different sources we were able to determine that persons suspected of being high level terrorists were transferred out of a secret CIA detention facility in Kabul, Afghanistan in late September and October 2003. During this period, my official database shows that the only arrival of CIA-linked aircraft from Kabul in Europe was at the Polish airport of Szymany. The flights

in question, carried out by the well-known rendition plane' N313P, bear all the hallmarks of a rendition circuit.

...

67. Szymany is described by the Chairman of the Polish delegation to PACE as a 'former Defence Ministry airfield', located near the rural town of Szczytno in the North of the country. It is close to a large facility used by the Polish intelligence services, known as the Stare Kiejkuty base. Both the airport and the nearby base were depicted on satellite images I obtained in January 2006."

248. The attitude of the Polish authorities displayed during the inquiry was described in the following way:

68. It is noteworthy that the Polish authorities have been unable, despite repeated requests, to provide me with information from their own national aviation records to confirm any CIA-connected flights into Poland. In his letter of 9 May 2006, my colleague Karol Karski, the Chairman of the Polish delegation to PACE, explained:

'I addressed the Polish authorities competent in gathering the air traffic data, related to these aircraft numbers... I was informed that several numbers from your list were still not found in our flight logs' records. Being not aware about the source of your information connecting these flight numbers with Polish airspace, I am not able, [nor are] the Polish air traffic control authorities, to comment on the fact of missing them in our records.'

69. Mr. Karski also made the following statement, which reflects the position of the Polish Government on the question of CIA renditions:

'According to the information I have been provided with, none of the questioned flights was recorded in the traffic controlled by our competent authorities – in connection with Szymany or any other Polish airport.'

70. The absence of flight records from a country such as Poland is unusual. A host of neighbouring countries, including Romania, Bulgaria and the Czech Republic have had no such problems in retrieving official data for the period since 2001. Indeed, the submissions of these countries, along with my data from Eurocontrol, confirm numerous flights into and out of Polish airports by the CIA-linked planes that are the subject of this report.

71. In this light, Poland cannot be considered to be outside the rendition circuits simply because it has failed to furnish information corroborating our data from other sources. I have thus presented in my graphic the suspected rendition circuit involving Szymany airport, in which the landing at Szymany is placed in the category of "detainee drop-off" points."

249. In Chapter 8.2 concerning parliamentary investigations undertaken in certain member states, the report refers to Poland under the title "Poland: a parliamentary inquiry, carried out in secret":

"252. A parliamentary inquiry into the allegations that a 'secret prison' exists in the country has been conducted behind closed doors in Poland. Promises made beforehand notwithstanding, its work has never been made public, except at a press conference announcing that the inquiry had not found anything untoward. In my opinion, this exercise was insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations."

250. Chapter 11 contains conclusions. It states, *inter alia*, the following:

> "280. Our analysis of the CIA rendition' programme has revealed a network that resembles a 'spider's web' spun across the globe. The analysis is based on official information provided by national and international air traffic control authorities, as well as other information including from sources inside intelligence agencies, in particular the American ....
>
> 282. In two European countries only (Romania and Poland), there are two other landing points that remain to be explained. Whilst these do not fall into any of the categories described above, several indications lead us to believe that they are likely to form part of the 'rendition circuits'. These landings therefore do not form part of the 98% of CIA flights that are used solely for logistical purposes, but rather belong to the 2% of flights that concern us the most. These corroborated facts strengthen the presumption – already based on other elements – that these landings are detainee drop-off points that are near to secret detention centres."
>
> ...
>
> 287. Whilst hard evidence, at least according to the strict meaning of the word, is still not forthcoming, a number of coherent and converging elements indicate that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe. I do not set myself up to act as a criminal court, because this would require evidence beyond reasonable doubt. My assessment rather reflects a conviction based upon careful examination of balance of probabilities, as well as upon logical deductions from clearly established facts. It is not intended to pronounce that the authorities of these countries are "guilty" for having tolerated secret detention sites, but rather it is to hold them 'responsible' for failing to comply with the positive obligation to diligently investigate any serious allegation of fundamental rights violations. ..."

(b) The 2007 Marty Report

251. On 11 June 2007 the Parliamentary Assembly adopted the second report prepared by Senator Marty ("the 2007 Marty Report") (Doc. 11302.rev.), revealing that high value detainees had been held in Romania and in Poland in secret CIA detention centres during the period from 2002 to 2005.

According to the report, in Poland the centre was located at the Stare Kiejkuty intelligence training base.

The report relied, *inter alia*, on the cross-referenced testimonies of over 30 serving and former members of intelligence services in the US and Europe, and on a new analysis of computer "data strings" from the international flight planning system.

252. The introductory remarks referring to the establishment of facts and evidence gathered read, in so far as relevant, as follows:

> "7. There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania. These two countries were already named in connection with secret detentions by Human Rights Watch in November 2005. At the explicit request of the American government, the Washington Post simply referred generically to 'eastern European democracies', although it was aware of the countries actually concerned. It should be

noted that ABC did also name Poland and Romania in an item on its website, but their names were removed very quickly in circumstances which were explained in our previous report. We have also had clear and detailed confirmation from our own sources, in both the American intelligence services and the countries concerned, that the two countries did host secret detention centres under a special CIA programme established by the American administration in the aftermath of 11 September 2001 to "kill, capture and detain" terrorist suspects deemed to be of 'high value'. Our findings are further corroborated by flight data of which Poland, in particular, claims to be unaware and which we have been able to verify using various other documentary sources.

8. The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter. The local authorities were not supposed to be aware of the exact number or the identities of the prisoners who passed through the facilities – this was information they did not 'need to know.' While it is likely that very few people in the countries concerned, including in the governments themselves, knew of the existence of the centres, we have sufficient grounds to declare that the highest state authorities were aware of the CIA's illegal activities on their territories.

...

10. In most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies. We believe that the framework for such assistance was developed around NATO authorisations agreed on 4 October 2001, some of which are public and some of which remain secret. According to several concurring sources, these authorisations served as a platform for bilateral agreements, which – of course – also remain secret. ..."

12. Without investigative powers or the necessary resources, our investigations were based solely on astute use of existing materials – for instance, the analysis of thousands of international flight records – and a network of sources established in numerous countries. With very modest means, we had to do real "intelligence" work. We were able to establish contacts with people who had worked or still worked for the relevant authorities, in particular intelligence agencies. We have never based our conclusions on single statements and we have only used information that is confirmed by other, totally independent sources. Where possible we have cross-checked our information both in the European countries concerned and on the other side of the Atlantic or through objective documents or data. Clearly, our individual sources were only willing to talk to us on the condition of absolute anonymity. At the start of our investigations, the Committee on Legal Affairs and Human Rights authorised us to guarantee our contacts strict confidentiality where necessary. ... The individuals concerned are not prepared at present to testify in public, but some of them may be in the future if the circumstances were to change. ..."

253. In paragraph 30 of the report it is stressed that "the HVD programme ha[d] depended on extraordinary authorisations – unprecedented in nature and scope – at both national and international levels. In paragraph 75, it was added that:

"75. The need for unprecedented permissions, according to our sources, arose directly from the CIA's resolve to lay greater emphasis on the paramilitary activities of its Counterterrorism Center in the pursuit of high-value targets, or HVTs. The US Government therefore had to seek means of forging intergovernmental partnerships

with well-developed military components, rather than simply relying upon the existing liaison networks through which CIA agents had been working for decades.

...

83. Based upon my investigations, confirmed by multiple sources in the governmental and intelligence sectors of several countries, I consider that I can assert that the means to cater to the CIA's key operational needs on a multilateral level were developed under the framework of the North Atlantic Treaty Organisation (NATO).

...."

254. In paragraphs 112-122 the 2007 Marty Report referred to bilateral agreements between the US and certain countries to host "black sites" for high value detainees. This part of the document read, in so far as relevant, as follows:

"112. Despite the importance of the multilateral NATO framework in creating the broad authorisation for US counter-terrorism operations, it is important to emphasise that the key arrangements for CIA clandestine operations in Europe were secured on a bilateral level.

...

115. The bilaterals at the top of this range are classified, highly guarded mandates for 'deep' forms of cooperation that afford – for example – 'infrastructure', 'material support and / or 'operational security' to the CIA's covert programmes. This high-end category has been described to us as the intelligence sector equivalent of 'host nation' defence agreements – whereby one country is conducting operations it perceives as being vital to its own national security on another country's territory.

116. The classified 'host nation' arrangements made to accommodate CIA 'black sites' in Council of Europe member states fall into the last of these categories.

255. The sources and findings in respect of bilateral agreements concerning Poland read as follows:

117. The CIA brokered 'operating agreements' with the Governments of Poland and Romania to hold its High-Value Detainees (HVDs) in secret detention facilities on their respective territories. Poland and Romania agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference.

118. We have not seen the text of any specific agreement that refers to the holding of High-Value Detainees in Poland or Romania. Indeed it is practically impossible to lay eyes on the classified documents in question or read the precise agreed language because of the rigours of the security-of-information regime, itself kept secret, by which these materials are protected.

119. However, we have spoken about the High-Value Detainee programme with multiple well-placed sources in the governments and intelligence services of several countries, including the United States, Poland and Romania. Several of these persons occupied positions of direct involvement in and/ or influence over the negotiations that led to these bilateral arrangements being agreed upon. Several of them have knowledge at different levels of the operations of the HVD programme in Europe.

120. These persons spoke to us upon strict assurances of confidentiality, extended to them under the terms of the special authorisation I received from my Committee

last year. For this reason, in the interests of protecting my sources and preserving the integrity of my investigations, I will not divulge individual names. Yet I can state unambiguously that their testimonies - insofar as they corroborate and validate one another – count as credible, plausible and authoritative.

...

126. The United States negotiated its agreement with Poland to detain CIA High-Value Detainees on Polish territory in 2002 and early 2003. We have established that the first HVDs were transferred to Poland in the first half of 2003. In accordance with the operational arrangements described below, Poland housed what the CIA's Counterterrorism Centre considered its 'most sensitive HVDs', a category which included several of the men whose transfer to Guantánamo Bay was announced by President Bush on 6 September 2006."

256. Paragraphs 167-179 describe the cooperation between the US and Polish State authorities, including the intelligence services, the military authorities, the Border Guard, the Customs Office and the Polish Air Navigation Services. The relevant passages read as follows:

"167. Since the May 2002 'quasi-reform' of its secret services, Poland has had two civilian intelligence agencies the Internal Security Agency (*Agencja Bezpieczeństwa Wewnetrznego, or ABW*); and the ... Intelligence Agency (*Agencja Wywiadu, or AW*) Neither of these services was considered a viable choice as a CIA partner for the sensitive operations of the HVD programme m Poland, precisely because they are 'subject to civil supervision, both by Parliament and Government'. ...

168. According to our sources, the CIA determined that the bilateral arrangements for operation of its HVD programme had to remain absolutely outside of the mechanisms of civilian oversight. For this reason the CIA's chosen partner intelligence agency in Poland was the Military Information Services (*Wojskowe Służby Informacyjne, or WSI*), whose officials are part of the Polish Armed Forces and enjoy 'military status in defence agreements under the NATO framework. The WSI was able to maintain far higher levels of secrecy than the two civilian agencies due to its recurring ability to emerge 'virtually unscathed' from post-Communism reform processes designed at achieving democratic oversight. ....

170. From our interviews with current and former Polish military intelligence officials, we have established that the WSI's role in the HVD programme comprised two levels of co-operation. On the first level, military intelligence officers provided extraordinary levels of physical security by setting up temporary or permanent military-style 'buffer zones' around the CIA's detainee transfer and interrogation activities. This approach was deployed most notably to protect the CIA's movements to and from, as well as its activities within, the military training base at Stare Kiejkuty. Classified documents, the existence of which was made known to our team describe how WSI agents performed these security role under the guise of a Polish Army Unit (*Jednostka Wojskowa*) denoted by the code JW-2669, which was the formal occupant of the Stare Kiejkuty facility.

171. On the second level, the WSI's assistance depended to a large extent on its covert penetration of other state and parastatal institutions through its collaboration with undercover 'functionaries' in their ranks. Our sources have indicated to us that WSI collaborators were present within institutions including the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*), where they assisted m disguising the existence and exact movements of incoming CIA flights; the Polish

Border Guard (*Straż Graniczna*), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (*Główny Urząd Celny*), where they resolved irregularities in the non-payment of fees related to CIA operations Thus the military intelligence partnership brought with it influence throughout a society-wide undercover community, none of which was checked by the conventional civilian oversight mechanisms."

257. Paragraphs 174-179 contain conclusions as to who were the Polish State officials responsible for authorising Poland's role in the CIA's HVD programme. They read, in their relevant part:

"174. During several months of investigations, our team has held discussions with various Polish sources, including civilian and military intelligence operatives, representatives of state or municipal authorities, and high-ranking officials who hold first-hand knowledge of the operations of the HVD programme in Poland. Based upon these discussions, which have come to the same conclusions, my inquiry allows me to state that some individual high office-holders knew about and authorised Poland's role in the CIA's operation of secret detention facilities for High-Value Detainees on Polish territory, from 2002 to 2005. The following persons could therefore be held accountable for these activities: the President of the Republic of Poland, Aleksander KWAŚNIEWSKI, the Chief of the National Security Bureau (also Secretary of National Security Committee), Marek SIWIEC, the Minister of National Defence (Ministerial oversight of Military Intelligence), Jerzy SZMAJDZINSKI, and the Head of Military Intelligence, Marek DUKACZEWSKI.

175. In my analysis the hierarchy for control of the Polish Military Information Services, or WSI, was chronically lacking in formal oversight and independent monitoring. As a result the structure described here from 2002 to 2005 depended to a great extent on close relationships of trust and professional familiarity, both among the Polish principals and between the Poles and their American counterparts. Several of our sources characterised the bonds between these four individuals as being a combination of loyal personal allegiance ('we all serve one another') and strong common notions of national duty ('... but first we serve the Republic of Poland').

176. There was complete consensus on the part of our key senior sources that President KWAŚNIEWSKI was the foremost national authority on the HVD programme. One military intelligence source told us: '*Listen, Poland agreed from the top down... From the President - yes... to provide the CIA all it needed*.' Asked whether the Prime Minister and his Cabinet were briefed on the HVD programme, our source said: '*Even the ABW [Internal Security Agency] and AW [Foreign Intelligence Agency] do not have access to all of our classified materials. Forget the Prime Minister, it operated directly under the President'*.

177. Our investigations have revealed that the state office from which much of the strength of this Polish accountability structure derived was the National Security Bureau (*Biuro Bezpieczeństwa Narodowego*, or BBN), located in the Chancellery of President Kwasniewski. Our sources confirmed to us that the bilateral operational arrangements for the HVD programme in Poland were 'negotiated on the part of the President's office by the National Security Bureau [BBN]'.

178. Marek Dukaczewski, an outstanding military intelligence officer ultimately promoted to the rank of General, served the BBN in the Chancellery of his close friend Aleksander Kwasniewski for the first five years of the latter's Presidency, from 1996 to 2001. Mr Dukaczewski worked directly alongside Marek Siwiec during this period, whilst Mr Siwiec was a Secretary of State in the Presidential Chancellery and then became Chief of the BBN. Jerzy Szmajdzinski was appointed Minister of National Defence for Mr Kwasniewski's second term, in October 2001. Shortly afterwards, Mr Dukaczewski was nominated Head of the Military Information Services, the WSI, starting in December 2001.

179. Besides this accountability structure, which remained in place from the immediate aftermath of the 11 September 2001 attacks throughout Poland's involvement in the CIA's covert HVD programme, probably no other Polish official had knowledge of it. Indeed, the 'highest level of classification' at national and intergovernmental levels, understood to match NATO's 'Cosmic Top Secret' category, still attaches to the information pertaining to operations in Poland. ..."

258. In paragraphs 180-196 the 2007 Marty Report describes "The anatomy of CIA secret transfers and detention in Poland". Those paragraphs read, in so far as relevant, as follows:

"180. Notwithstanding the approach of the Polish authorities towards this inquiry, our team was able to uncover new documentary evidence from two separate Polish sources showing actual landings in Poland by aircraft associated with the CIA.

181. These sources corroborate one another and provide the first verifiable records of a number of landings of 'rendition planes' significant enough to prove that CIA detainees were being transferred into Poland I can now confirm that at least ten flights by at least four different aircraft serviced the CIA's secret detention programme in Poland between 2002 and 2005. At least six of them arrived directly from Kabul, Afghanistan during precisely the period in which our sources have told us that High-Value Detainees (HVDs) were being transferred to Poland. Each of these flights landed at the same airport I named m my 2006 report as a detainee drop-off point Szymany.

182. The most significant of these flights, including the aircraft identifier number, the airport of departure (ADEP), as well as the time and date of arrival into Szymany, are the following

I. N63MU from DUBAI, arrived in SZYMANY at 14h56 on 5 December 2002

...

V. N379P from KABUL, arrived in SZYMANY at 01 h00O on 5 June 2003

...

VII N313P from KABUL, arrived in SZYMANY at 21 h00 on 22 September 2003"

...

185. The aviation services provider customarily used by the CIA, Jeppesen International Trip Planning, filed multiple 'dummy' flight plans for many of these flights The 'dummy' plans filed by Jeppesen – specifically, for the N379P aircraft – often featured an airport of departure (ADEP) and/or an airport of destination (ADES) that the aircraft never actually intended to visit. If Poland was mentioned at all in these plans, it was usually only by mention of Warsaw as an alternate, or back-up airport, on a route involving Prague or Budapest, for example Thus the eventual flight paths for N379P registered in Eurocontrol's records were inaccurate and often

incoherent, bearing little relation to the actual routes flown and almost never mentioning the name of the Polish airport where the aircraft actually landed – Szymany.

186. The Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*), commonly known as PANSA, also played a crucial role in this systematic cover-up PANSA's Air Traffic Control in Warsaw navigated all of these flights through Polish airspace, exercising control over the aircraft through each of its flight phases right up to the last phase, when control was handed over to the authority supervising the airfield at Szymany, immediately before the aircraft's landing PANSA navigated the aircraft m the majority of these cases without a legitimate and complete flight plan having been filed for the route flown.

...

190. The analysis of 'data strings' has also enabled me to confirm further intricate details of the 'anatomy' of these CIA clandestine operations For example, each of these flights was operated under a 'special status' or STS designation. The aircraft were thereby exempted from adhering to the normal rules of air traffic flow management (ATFM), and did not, for example, have to wait at airports for approved departure slots. Since such exemptions are only granted when specifically authorised by the relevant national authority, they provide further evidence of Polish complicity in the operations. The clearest proof of Poland's knowledge and authorisation of such landings is demonstrated by the following two-line message, contained in several 'data strings" for flights of N379P in 2003:

'STS/ATFM EXEMPT APPROVED

POLAND LANDING APPROVED'

..."

259. In conclusion of this section, reference is made to the attitude displayed by the Polish authorities to the Marty inquiry:

"192. In concluding this section it is only fitting that I should note here, with considerable regret that the cover-up of CIA flights into Szymany seems to have carried over into the approach adopted by the Polish authorities towards my inquiry on the specific question of national aviation records. In over eighteen months of correspondence, Poland has failed to furnish my inquiry with any data from its own records confirming CIA-connected flights into its airspace or airports. The excuses from the Polish authorities for having failed to do so unfortunately do not seem to be credible."

260. Paragraph 197 explains in a more detailed manner the procedure for receiving High-Value Detainees into CIA detention in Poland:

"197. Our enquiry regarding Poland included talks with Polish airport employees, civil servants, security guards, Border Guards and military intelligence officials who hold first-hand knowledge of one or more of the undeclared flights into Szymany Their testimonies are crucial in establishing what happened in the time after these ClA-associated aircraft landed at Szymany The following account is a compilation of testimonies from our confidential sources about these events.

...

- Each of these landings was preceded, usually less than 12 hours in advance, by a telephone call to Szymany Airport from the Warsaw HQ of the Border Guards (*Straż*

Graniczna), or a military intelligence official, informing the Director Mr Jerzy Kos of an arriving 'American aircraft'.

- The airport manager, who assumed the flights were coming from the United States, was instructed to adhere to strict protocols to prepare for the flights, including cleaning the runways of all other aircraft and vehicles; and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees

- The perimeter and grounds of the airport were secured by military officers and Border Guards, the latter of whom were registered on a roll-call document that lists names of those present on more than five dates between 2002 and 2005

- American officials from the nearby Stare Kiejkuty intelligence training base assumed 'control' on the dates in question, arriving in several passenger vans m advance of the landing; '*everything Americans'*, said one Polish source present for several landings, '*even the drivers [of the vans*] *were Americans*'

- A 'landing team' comprising American officials waited at the edge of the runway, in two or three vans with their engines often running; the aircraft touched down in Szymany and taxied to a halt at the far end of the runway, several hundred metres (and out of visible range) from the four-storey terminal control tower.

- The vans drove out to the far end of the runway and parked at close proximity to the aircraft; officials from within the vans were said to have boarded the aircraft 'every time', although it is not clear whether any then stayed on board

- All the officers charged with 'processing' the passengers on these aircraft were Americans; no Polish eye-witness has yet come forward to state whether or not any detainees disembarked the aircraft upon any of these landings – indeed, it may be that no Polish eye-witness to such an event exists.

- However, asked where the HVDs actually entered Poland, one of our sources in Polish military intelligence confirmed that '*it was on the runway of Szczytno-Szymany*'; another said '*they come on planes and they entered at this airport'*.

- Documentation, in Polish, attests to persons having been 'picked up' [verbal translation] at Szczytno-Szymany in conjunction with at least two aircraft landings in 2003; the documentation also refers to the dispatch of vehicles to the airport from the military unit stationed at the Stare Kiejkuty facility.

- Having spent only a short time next to the aircraft after each landing, the vans then drove back past the side of the terminal building, without stopping, before leaving airport premises through the front security gate; the vans put their 'headlights up to full level' and airport officials say they '*turned our eyes away*'.

- The vans then drove less than two kilometres along a simple tarmac road, lined by thick pine forest on both sides, through an area which was entirely out of bounds to private or commercial vehicles during these procedures, having been cordoned off for 'military operations'; at the end of the tarmac road, the vans travelled north-east beyond Szczytno for approximately 15 to 20 minutes before joining an unpaved access road next to a lake.

- At the end of this access road they reached an entrance of the Stare Kiejkuty intelligence training base, where multiple sources have confirmed to me that the CIA held High-Value Detainees (HVDs) in Poland."

261. Referring further to the level of involvement of the Polish authorities, the report, in paragraphs 198-199 stated the following:

> "198. The stringent limitations on information about what happened to detainees 'dropped-off' at Szymany are perhaps the best example of the 'need-to-know' principle of secrecy in practice. Polish officials were not involved in the interrogations or transfers of HVDs, nor did they have personal contact. In explaining his understanding of HVD treatment or conditions in detention, one Polish source said: *'I have no understanding of detainee treatment. We were not 'treating' the detainees. Those were the responsibilities of the Americans.'*
>
> 199. We were told that senior Polish military intelligence officials who visited Stare Kiejkuty were ordered to 'limit rotation and operational demands on Polish officers to make the HVD programme work'. Beyond this fleeting insight, however, neither Polish nor American sources who discussed the HVD programme with us would agree to speak about the exact 'operational details' of secret detentions at Stare Kiejkuty, nor would they confirm how long it was operated for, which other facilities were used as part of the same programme in Poland, nor how and when exactly the detainees left the country."

(c) The 2011 Marty Report

262. On 16 September 2011 the Parliamentary Assembly of the Council of Europe adopted the third report prepared by Senator Marty, entitled "Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations" ("the 2011 Marty Report"), which describes the effects of, and progress in, national inquiries into CIA secret detention facilities in some of the Council of Europe's member states.

263. The summary of the report reads:

> "Secret services and intelligence agencies must be held accountable for human rights violations such as torture, abduction or renditions and not shielded from scrutiny by unjustified resort to the doctrine of 'state secrets', according to the Committee on Legal Affairs and Human Rights.
>
> The committee evaluates judicial or parliamentary inquiries launched after two major Assembly reports five years ago named European governments which had hosted CIA secret prisons or colluded in rendition and torture (including Poland, Romania, Lithuania, Germany, Italy, the United Kingdom and the former Yugoslav Republic of Macedonia).
>
> Prosecutors in Lithuania, Poland, Portugal and Spain are urged to persevere in seeking to establish the truth and authorities in the United States are called on to co-operate with them. The committee considers that it is possible to put in place judicial and parliamentary procedures which protect 'legitimate' state secrets, while still holding state agents accountable for murder, torture, abduction or other human rights violations."

264. Conclusions, in the section concerning "Assessment of the situation and the efforts being made", read, in so far as relevant:

> "Numerous European governments seem to have accepted the doctrine of the previous US Administration: terrorism is a phenomenon that cannot be dealt with by the judiciary and, to the extent that one claims to be at war, the Geneva Conventions are not or only very partially applicable. Worse: security must have precedence over

freedom, as if the two concepts were irreconcilable. It is obvious that over the last years, also due to the overdramatisation of the 'war against terrorism', the balance between the different powers of state has shifted in favour of the executive, to the detriment of parliament and of the judiciary. Parliaments are not without blame for this situation. Numerous parliamentarians seem to give priority, all too often, to governmental and party-political solidarity rather than to their duty to assume their responsibility of critical scrutiny. Democracy, as we know, is based on a complex and delicate balance which must be protected carefully. I believe that it is precisely up to the parliamentarians who belong to this Assembly to be particularly vigilant on this point and to be at the forefront to defend the fundamental principles of the separation of powers and of 'checks and balances'. The systematic and arbitrary invocation of the state secrecy privilege, in particular for the purpose of ensuring the impunity of public officials, is a dangerous movement against which parliamentarians must be the first to react."

265. Paragraphs 9-13 relate to Poland. Their relevant parts read:

"9. In Poland judicial proceedings which looked quite promising have so far failed to produce any results, also because of the American authorities' refusal to provide the requested judicial assistance. The first request in March 2009 was rejected in October 2009. The American authorities have not yet given a decision on the second request, lodged on 22 March 2011. One interesting development came when Abd al Rahim al-Nashiri and Abu Zubaydah (who are currently being held at Guantánamo Bay) were granted victim status. But the prosecutorial enquiry started only in March 2008, almost three years after credible allegations of secret detentions in Poland first emerged.

10. The Polish Helsinki Foundation, in tandem with the Open Society Justice Initiative, has succeeded in obtaining and publishing some important information, including data collected by the Polish Air Navigation Services Agency (PANSA) on suspicious movements of aircraft belonging to CIA shell companies, information which the Polish authorities officially refused to disclose to us and to the European Parliament during our inquiries in 2006/2007. These data, along with those made available to the Helsinki Foundation by the Polish Border Guard, provide definite proof that seven CIA-associated aircraft landed at Szymany airport between 5 December 2002 and 22 September 2003.

11. The Polish Helsinki Foundation noted a positive change of attitude on the part of the prosecuting authorities, reporting that they have released more information of late and that their second request to the United States for judicial assistance shows how seriously they are taking the case. In a recent development, prosecutor Jerzy Mierzewski was removed from the file and replaced by the recently appointed deputy appellate prosecutor Waldemar Tyl. Adam Bodnar, of the Polish Helsinki Foundation, criticised this decision as 'irrational' and expressed his fear that sooner or later the Polish investigation would be discontinued, as had happened in Lithuania, for which there was 'no objective reason'. The new prosecutor in charge of the case, Mr Tyl, called the worries 'groundless. Time will tell.

12. The Polish prosecuting authorities have not yet secured the desired co-operation from the American authorities or even an opportunity to hear Mr al-Nashiri himself as a witness. But the data collected by the Polish Helsinki Foundation and the victims' lawyers should be sufficient to confirm the presence at the Stare Kiejkuty site of half a dozen detainees and to identify the head of the 'black site' and at least one other person alleged to have committed acts which are described as 'unauthorised and undocumented' in the Report by the CIA Inspector General [the 2004 CIA Report]

and which seem to correspond to the definition of torture in Article 3 of the European Convention on Human Rights (ETS No. 5, 'the Convention') as interpreted by the European Court of Human Rights ('the Court') in the case of *Ireland v. United Kingdom*. The Polish prosecuting authorities therefore have a duty, under the Court's case law, to investigate these acts and prosecute those responsible, especially as one of them, a private contract worker, is not even covered by any form of immunity. ..."

B. European Parliament

1. The Fava Inquiry

266. On 18 January 2006 the European Parliament set up a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners – "the TDIP" and appointed Mr Giovanni Claudio Fava as rapporteur with a mandate to investigate the alleged existence of CIA prisons in Europe (see also paragraph 42 above). The Fava inquiry held 130 meetings and sent delegations to the former Yugoslav Republic of Macedonia, the United States, Germany, the United Kingdom, Romania, Poland and Portugal. The TDIP also heard witnesses (see also paragraphs 267 and 293-302 below) and collected voluminous documentary evidence concerning the CIA flights in Europe.

It identified at least 1,245 flights operated by the CIA in European airspace between the end of 2001 and 2005.

267. The TDIP delegation comprising 13 members, including 3 members elected in respect of Poland, namely Ms B. Kudrycka, Mr J. Pinior and Mr M. Piotrowski, visited Warsaw from 8 November 2006 to 10 November 2006.

The delegation asked to meet twenty persons but eleven of them, including the current Minister for Defence, the current Minister for Foreign Affairs, the current Deputy Prime Minister, the former Minister for Defence, the current Chairman of the Parliamentary Committee for Special Services, the former Head of the Internal Security Agency, the former Chief of the Border Guards Unit responsible for controls at the Szymany airport and the current Minister Coordinator of Special Services declined to meet the delegation. However, the latter was represented by Mr Pasionek, the Undersecretary of State in the Chancellery of the Prime Minister. The former Head of the Intelligence Agency (*Agencja Wywiadu*), Mr Z. Siemiątkowski, also appeared before the delegation. As regards persons not connected with the State authorities, the delegation interviewed Mr M.A. Nowicki, the President of the Helsinki Foundation for Human Rights in Poland, Mr J. Jurczenko, the former director of the Szymany airport, Mr J. Kos, the former Chairman of the Board of the Szymany airport and 4 journalists.

268. As regards Poland, the Fava Report noted, in paragraph 178,105 that in the light of the available circumstantial evidence it was not possible to "acknowledge or deny that secret detention centres were based in Poland". However, it further noted that seven of the fourteen detainees transferred from a secret detention facility to Guantánamo in September 2006 coincide with those mentioned in a report by ABS News published in December 2005 (see § 177 of the resolution cited in paragraph 275 below) listing the identities of twelve of Al'Qaeda suspects held in Poland.

In respect of the Polish Parliament inquiry, the report concluded that it had not been conducted independently and that the statements given to the Committee delegation were contradictory and compromised by confusion about flight logs.

269. Working document no. 9 on certain countries analysed during the work of the Temporary Committee (PE 382.420v02-00) produced together with the Fava Report in a section concerning Poland and allegations of the existence of a CIA detention facility on its territory, stated the following:

> "A) ALLEGED EXISTENCE OF DETENTION CENTRE
>
> Persons suspected of being terrorists were transferred by the CIA from Afghanistan to Poland, most probably using the small airport at Szymany.
>
> At least one CIA secret prison was supposed to be operating in Poland, most probably from 2002 until autumn 2005, when it was shut down following media reports of its existence. The prison location was possibly a former Soviet air base, an intelligence facility or the airport itself. Around 10 high ranking al Qaeda members would have been held in this prison and subjected to the harshest interrogation techniques. The detention of prisoners was both illegal and secret.

As regards the parliamentary inquiry conducted in Poland (see also paragraphs 128–130 above) it reads, in so far as relevant:

> B) NATIONAL OFFICIAL INQUIRIES
>
> Polish government investigated the allegations in internal, secret enquiry. The government refused to present methodology of the enquiry to the Temporary Committee. The conclusion of the investigation without any background was made public, stating that the allegation is entirely not true.
>
> ...
>
> In December 2005, Roman Giertych, chairman (to May 2006) of the Special Services Committee of the Sejm initially considered setting-up a special inquiry committee regarding the allegations. This proposal received opposition, among the others, from Zbigniew Wassermann (Minister Coordinator of Special Services). No such special inquiry committee was set-up but on 21 December 2005 the Committee held an *in camera* sitting with minister Zbigniew Wassermann and two heads of intelligence services Zbigniew Nowak (*Agencja Wywiadu*) and Witold Marczuk (*Agencja Bezpieczeństwa Wewnętrznego*). In fact, this was the only Parliament activity that dealt with the accusations and the Committee released no documentation or final statement in this regard. Unofficial statements by Committee members indicate that heads of special services proved in a comprehensive manner that no CIA prisons had existed in Poland."

Referring to the alleged involvement of the Polish authorities in the CIA secret detentions, the document, states:

"C) ROLE OR ATTITUDE OF POLISH BODIES

To date, and since publication of the first news about alleged existence of the CIA prison and illegal transportation of prisoners, Poland has constantly denied any illegal involvement in any aspect of the accusation. The Polish authorities repeated their position by letter to Terry Davis, Secretary General of the Council of Europe: *'The findings of the Polish Government's internal enquiry into the alleged existence in Poland of secret detention centres and related over flights fully deny the allegations in the debate*.'

On December 7, 2005, Aleksander Kwaśniewski, former President of Poland, rejected any allegation of the existence of secret CIA prisons in Poland. He made conflicting statements, namely that any decision taken by Polish authorities of this nature would have been brought to his attention and then that sometimes the secret services do not inform politicians of top secret operations. Subsequent denials have been made by Polish prime ministers and ministers of foreign affairs following each new allegation involving Poland.

Zbigniew Siemiątkowski, former Head of the Internal Security Agency (ABW) stated, in December 2005 and repeated that services under his authority - Polish civilian intelligence - were not engaged in any secret detention or illegal transportation of prisoners. Mr Siemiątkowski stated that Polish and American intelligence services have been cooperating very intensively, especially after 9/11. Mr Siemiątkowski stressed that any CIA activity in Poland must have prior agreement from Polish authorities and that Polish authorities had full knowledge of CIA activities in Poland. Consequently, he excluded the possibility of any CIA activity being in connection with the illegal detention or transportation of prisoners. He learnt about the alleged illegal CIA flights from press reports in November 2005."

270. As regards the conduct displayed by the Polish authorities during the inquiry, the document states:

"Cooperation of official authorities with the Temporary Committee's delegation was regrettably poor. The delegation was not able to meet any Parliamentary representatives. The government was reluctant to offer full cooperation to the TDIP investigation and to receive our delegation at an appropriate political level.

There was confusion about flight registers of CIA planes transferring through Poland. Polish authorities failed to present these logs directly to the Council of Europe as well as to journalists investigating the allegations. Different managers and former managers of the Szymany airport reported contradictory statements about existence of flight logs and eventually in November 2006 the Temporary Committee was provided by the airport owner with partial summary about CIA flights. The most complete logs of the flights were provided by Eurocontrol."

271. The document also identified certain flights landing in Poland, which were associated with the CIA operations:

"D) FLIGHTS

Total Flights Number since 2001: 11

Principal airports: Szymany; Warzawa; Kraków.

Suspicious destinations and origins: Kabul, Afghanistan; Rabat, Morocco (Guantánamo, after a stopover in Rabat)

Stopovers of planes transited through Poland and used in other occasion or extraordinary renditions:

N379 used for the extraordinary renditions of Al Rawi and El Banna; Benyam Mohammed; Kassim Britel [and the expulsion of Agiza and El-Zari]: 6 stopovers in Poland.

N313P used for the extraordinary renditions of El-Masri and Benyamin Mohamed: 1 stopover in Poland."

Referring to the "extensive exchange of views with few managers of the Szymany airport and journalist investigating events, which took place in the airport" the document stated that the following information had been gathered:

"• in 2002, two Gulfstream jets, in 2003, four Gulfstream jets and on 22 September 2003, one Boeing 737 with civilian registration numbers transferred through the airport. These planes were treated as military planes and have not been a subject to customs clearance. The military character of the flight was determined by the Border Guards and the relevant procedure was followed by the airport staff;

• Orders were given directly by the Border Guards about the arrivals of the aircraft referred to, emphasising that the airport authorities should not approach the aircraft and that military staff and services alone were to handle those aircraft and only to complete the technical arrangements after the landing;

• Landing fees of the planes were paid in cash and overpriced - between EUR 2000 and EUR 4000;

• One or two vehicles would wait for the arrival of Gulfstream aircraft. The vehicles had military registration numbers starting with "H", which are associated with the intelligence training base in nearby Stare Kiejkuty. In one case a medical emergency vehicle, belonging to either the police academy or the military base, was involved. One airport staff member reported once following the vehicles and seeing them heading towards the intelligence training centre at Stare Kiejkuty;

• According to the Border Guards the Boeing crew of 7 people was joined at Szymany airport by 5 passengers, who declared themselves as businessmen. All 12 people (crew and passengers) where American citizens."

272. The Fava Report was approved by the European Parliament with 382 votes in favour, 256 against with 74 abstentions on 14 February 2007.

2. The 2007 European Parliament Resolution

273. On 14 February 2007, following the examination of the Fava Report, the European Parliament adopted the Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/22009INI) ("the 2007 EP Resolution"). Its general part, it reads, in so far as relevant, as follows:

"*The European Parliament*,

...

J. whereas on 6 September 2006, US President George W. Bush confirmed that the Central Intelligence Agency (CIA) was operating a secret detention programme outside the United States,

K. whereas President George W. Bush said that the vital information derived from the extraordinary rendition and secret detention programme had been shared with other countries and that the programme would continue, which raises the strong possibility that some European countries may have received, knowingly or unknowingly, information obtained under torture,

L. whereas the Temporary Committee has obtained, from a confidential source, records of the informal transatlantic meeting of European Union (EU) and North Atlantic Treaty Organisation (NATO) foreign ministers, including US Secretary of State Condoleezza Rice, of 7 December 2005, confirming that Member States had knowledge of the programme of extraordinary rendition, while all official interlocutors of the Temporary Committee provided inaccurate information on this matter, ..."

274. The passages regarding the EU member states reads:

9. Deplores the fact that the governments of European countries did not feel the need to ask the US Government for clarifications regarding the existence of secret prisons outside US territory;

...

13. Denounces the lack of cooperation of many Member States, and of the Council of the European Union towards the Temporary Committee; stresses that the behaviour of Member States, and in particular the Council and its Presidencies, has fallen far below the standard that Parliament is entitled to expect;

...

39. Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the condoning and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries;

...

43. Regrets that European countries have been relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees, and recalls their positive obligations arising out of the case law of the European Court of Human Rights, as reiterated by the European Commission for Democracy through Law (Venice Commission);

44. Is concerned, in particular, that the blanket overflight and stopover clearances granted to CIA-operated aircraft may have been based, inter alia, on the NATO agreement on the implementation of Article 5 of the North Atlantic Treaty, adopted on 4 October 2001;

...

48. Confirms, in view of the additional information received during the second part of the proceedings of the Temporary Committee, that it is unlikely that certain European governments were unaware of the extraordinary rendition activities taking place in their territory;"

275. In respect of Poland, the resolution states:

"POLAND

[The European Parliament]

167. Deplores the glaring lack of cooperation by the Polish Government with the Temporary Committee, in particular when receiving the Temporary Committee delegation at an inappropriate level; deeply regrets that all those representatives of the Polish Government and Parliament who were invited to do so, declined to meet the Temporary Committee;

168. Believes that this attitude reflects an overall rejection on the part of the Polish Government of the Temporary Committee and its objective to examine allegations and establish facts;

169. Regrets that no special inquiry committee has been established and that the Polish Parliament has conducted no independent investigation;

170. Recalls that on 21 December 2005, the Special Services Committee held a private meeting with the Minister Coordinator of Special Services and the heads of both intelligence services; emphasises that the meeting was conducted speedily and in secret, in the absence of any hearing or testimony and subject to no scrutiny; stresses that such an investigation cannot be defined as independent and regrets that the committee released no documentation, save for a single final statement in this regard;

171. Notes the 11 stopovers made by CIA-operated aircraft at Polish airports and expresses serious concern about the purpose of those flights which came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Poland of aircraft that have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri and Binyam Mohammed and for the expulsion of Ahmed Agiza and Mohammed El Zar;

172. Regrets that following the hearings carried out by the Temporary Committee delegation in Poland, there was confusion and contradictory statements were made about the flight plans for those CIA flights, which were first said not to have been retained, then said probably to have been archived at the airport, and finally claimed to have been sent by the Polish Government to the Council of Europe; acknowledges that in November 2006, the Szymany Airport's management provided the Temporary Committee with partial information on flight plans;

...

177. Acknowledges that shortly thereafter and in accordance with President George W. Bush's statements on 6 September 2006, a list of the 14 detainees who had been transferred from a secret detention facility to Guantánamo was published; notes that

7 of the 14 detainees had been referred to in a report by ABC News, which was published 9 months previously on 5 December 2005 but withdrawn shortly thereafter from ABC's webpage, listing the names of twelve top Al Qaeda suspects held in Poland;

178. Encourages the Polish Parliament to establish a proper inquiry committee, independent of the government and capable of carrying out serious and thorough investigations;

179. Regrets that Polish human rights NGOs and investigative journalists have faced a lack of cooperation from the government and refusals to divulge information;

180. Takes note of the statements made by the highest representatives of the Polish authorities that no secret detention centres were based in Poland; considers, however, that in the light of the above circumstantial evidence, it is not possible to acknowledge or deny that secret detention centres were based in Poland;

181. Notes with concern that the official reply of 10 March 2006 from Under-Secretary of State Witold Waszczykowski to the Secretary-General of the Council of Europe, Terry Davis, indicates the existence of secret cooperation agreements, initialled by the two countries' secret services themselves, which exclude the activities of foreign secret services from the jurisdiction of Polish judicial bodies."

3. The 2011 European Parliament Resolution

276. On 9 June 2011 the European Parliament adopted its resolution on Guantánamo: imminent death penalty decision (doc. B70375/2011) relating to Mr Al Nashiri.

The European Parliament, while recognising that the applicant was accused of serious crimes, expressed its deep concern that the US authorities in his case had violated international law "for the last 9 years". It called on the US Convening Authority not to apply the death penalty on him, "on the grounds that the military commission trials do not meet the standards internationally required for the application of the death sentence".

The European Parliament further appealed to "the particular responsibility of the Polish and Romanian Governments to make thoroughly inquiries into all indications relating to secret prisons and cases of extraordinary rendition on Polish soil and to insist with the US Government that the death penalty should on no account be applied to Mr Al Nashiri".

4. The Flautre Report and the 2012 European Parliament Resolution

277. On 11 September 2012 the European Union Parliament adopted a report prepared by Hélène Flautre within the Committee on Civil Liberties, Justice and Home Affairs ("the Flautre Report") highlighting new evidence of secret detention centres and extraordinary renditions by the CIA in European Union member states. The report, which came 5 years after the Fava Inquiry (see paragraphs 266–272 above), highlighted new abuses - notably in Romania, Poland and Lithuania, but also in the United Kingdom and other countries – and made recommendations to ensure proper

accountability. The report included the Committee on Foreign Affairs' opinion and recommendations.

Following the examination of the Report the European Union Parliament adopted, on 11 September 2012, the Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)) ("the 2012 EP Resolution").

278. Paragraph 13 of the 2012 EP Resolution, which refers to the criminal investigation in Poland, reads:

> *"[The European Parliament,]*
>
> "13. Encourages Poland to persevere in its ongoing criminal investigation into secret detention, but deplores the lack of official communication on the scope, conduct and state of play of the investigation; calls on the Polish authorities to conduct a rigorous inquiry with due transparency, allowing for the effective participation of victims and their lawyers;"

279. Paragraph 45, which concerns the applicant, reads:

> "45. Is particularly concerned by the procedure conducted by a US military commission in respect of Abd al-Rahim al-Nashiri, who could be sentenced to death if convicted; calls on the US authorities to rule out the possibility of imposing the death penalty on Mr al-Nashiri and reiterates its long-standing opposition to the death penalty in all cases and under all circumstances; notes that Mr al-Nashiri's case has been before the European Court of Human Rights since 6 May 2011; calls on the authorities of any country in which Mr al-Nashiri was held to use all available means to ensure that he is not subjected to the death penalty; urges the VP/HR to raise the case of Mr al-Nashiri with the US as a matter of priority, in application of the EU Guidelines on the Death Penalty;"

5. The 2013 European Parliament Resolution

280. Having regard to the lack of response to the recommendations made by the European Union Parliament the 2012 EP Resolution on the part of the European Commission, on 10 October 2013 the EU Parliament adopted the Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP) ("the 2013 EP Resolution").

Paragraph 6, which concerns Poland, reads:

> *"*[*The European Parliament*,]
>
> 6. Asks Poland to continue its investigation on a basis of greater transparency, in particular by offering evidence of concrete actions taken, allowing victims' representatives to meaningfully represent their clients by giving them their rightful access to all relevant classified material, and acting on the material that has been collected; calls on the Polish authorities to prosecute any implicated state actor; urges the Polish General Prosecutor, as a matter of urgency, to review the application of Walid Bin Attash and come to a decision; calls on Poland to cooperate in full with the ECtHR regarding the cases of Al Nashiri v Poland and Abu Zubaydah v Poland;"

C. The 2007 ICRC Report

281. The ICRC made its first written interventions to the US authorities in 2002, requesting information on the whereabouts of persons allegedly held under US authority in the context of the fight against terrorism (see also paragraph 101 above). It prepared two reports on undisclosed detention on 18 November 2004 and 18 April 2006. These reports still remain classified.

After President Bush publicly confirmed that 14 terrorist suspects – High-Value Detainees, including the applicant, detained under the CIA detention programme had been transferred to the military authorities in the US Guantánamo Bay Naval Base (see also paragraph 71 above), the ICRC was granted access to those detainees and interviewed them in private from 6 to 11 October and from 4 to 14 December 2006 (see also paragraphs 101-102 above). On this basis, its report of February 2007 – the 2007 ICRC Report – was drafted, concerning the CIA rendition programme, including arrest and transfers, incommunicado detention and other conditions and treatment. The aim of the report, as stated therein, was to provide a description of the treatment and material conditions of detention of the fourteen detainees concerned during the period they had been held in the CIA programme.

The 2007 ICRC report was (and formally remains) classified as "strictly confidential" but it was leaked to the public domain. It was published by the New York Review of Books on 6 April 2009 and further disseminated *via* various websites, including the ACLU's site (www.aclu.org).

282. The rendition programme as applied to the detainees was, in so far as relevant, related as follows:

> " 1. MAIN ELEMENTS OF THE CIA DETENTION PROGRAM
>
> ... The fourteen, who are identified individually below, described being subjected, in particular during the early stages of their detention, lasting from some days up to several months, to a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information. This regime began soon after arrest, and included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or m combination, in addition to the deprivation of other basic material requirements.
>
> ...
>
> 2. ARREST AND TRANSFER
>
> ... The fourteen were arrested in four different countries [Thailand, Pakistan, Somali and the United Arab Emirates]. In each case, they were reportedly arrested by the national police or security forces of the country in which they were arrested.
>
> In some cases US agents were present at the time of arrest. All fourteen were detained in the country of arrest for periods ranging from a few days up to one month

before their first transfer to a third country ...(reportedly Afghanistan, see below) and from there on to other countries. Interrogation in the country of arrest was conducted by US agents in nearly all cases. In two cases, however, detainees reported having been interrogated by the national authorities, either alone or jointly with US agents:...Hussein Abdul Nashiri was allegedly interrogated for the first month after arrest by Dubai agents.

During their subsequent detention, outlined below, detainees sometimes reported the presence of non-US personnel (believed to be personnel of the country in which they were held), even though the overall control of the facility appeared to remain under the control of the US authorities.

Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in several different countries. The number of locations reported by the detainees varied, however ranged from three to ten locations prior to their arrival in Guantánamo in September 2006.

The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort.

In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment described below.

The ICRC was informed by the US authorities that the practice of transfers was linked specifically to issues that included national security and logistics, as opposed to being an integral part of the program, for example to maintain compliance. However, in practice, these transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned. As their detention was specifically designed to cut off contact with the outside world and emphasise a feeling of disorientation and isolation, some of the time periods referred to in the report are approximate estimates made by the detainees concerned. For the same reasons, the

detainees were usually unaware of their exact location beyond the first place of detention in the country of arrest and the second country of detention, which was identified by all fourteen as being Afghanistan. This report will not enter into conjecture by referring to possible countries or locations of places of detention beyond the first and second countries of detention, which are named, and will refer, where necessary, to subsequent places of detention by their position in the sequence for the detainee concerned (e.g.. third place of detention, fourth place of detention). The ICRC is confident that the concerned authorities will be able to identify from their records which place of detention is being referred to and the relevant period of detention.

...

1.2. CONTINUOUS SOLITARY CONFINEMENT AND INCOMMUNICADO DETENTION

[the relevant passages are rendered in paragraph 102 above]

1.3. OTHER METHODS OF ILL-TREATMENT

...

The methods of ill-treatment alleged to have been used include the following:

• Suffocation by water poured over a cloth placed over the nose and mouth, alleged by three of the fourteen.

• Prolonged stress standing position, naked, held with the arms extended and chained above the head, as alleged by ten of the fourteen, for periods from two or three days continuously, and for up to two or three months intermittently, during which period toilet access was sometimes denied resulting in allegations from four detainees that they had to defecate and urinate over themselves.

• Beatings by use of a collar held around the detainees' neck and used to forcefully bang the head and body against the wall, alleged by six of the fourteen.

• Beating and kicking, including slapping, punching, kicking to the body and face, alleged by nine of the fourteen.

• Confinement in a box to severely restrict movement alleged in the case of one detainee.

• Prolonged nudity alleged by eleven of the fourteen during detention, interrogation and ill-treatment; this enforced nudity lasted for periods ranging from several weeks to several months.

• Sleep deprivation was alleged by eleven of the fourteen through days of interrogation, through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music. One detainee was kept sitting on a chair for prolonged periods of time.

• Exposure to cold temperature was alleged by most of the fourteen, especially via cold cells and interrogation rooms, and for seven of them, by the use of cold water poured over the body or, as alleged by three of the detainees, held around the body by means of a plastic sheet to create an immersion bath with just the head out of the water.

• Prolonged shackling of hands and/or feet was alleged by many of the fourteen.

• Threats of ill-treatment to the detainee and/or his family, alleged by nine of the fourteen.

• Forced shaving of the head and beard, alleged by two of the fourteen.

• Deprivation/restricted provision of solid food from 3 days to i month after arrest, alleged by eight of the fourteen.

In addition, the fourteen were subjected for longer periods to a deprivation of access to open air, exercise, appropriate hygiene facilities and basic items in relation to interrogation, and restricted access to the Koran linked with interrogation.

...

For the purposes of clarity in this report, each method of ill-treatment mentioned below has been detailed separately. However, each specific method was in fact applied in combination with other methods, either simultaneously, or in succession. Not all of these methods were used on all detainees, except in one case, namely that of Mr Abu Zubaydah, against whom all of the methods outlined below were allegedly used.

1.3.1. SUFFOCATION BY WATER

Three of the fourteen alleged that they were repeatedly subjected to suffocation by water. They were: Mr Abu Zubaydah, Mr Khaled Shaik Mohammed and Mr Al Nashiri.

In each case, the person to be suffocated was strapped to a tilting bed and a cloth was placed over the face, covering the nose and mouth. Water was then poured continuously onto the cloth, saturating it and blocking off any air so that the person could not breathe. This form of suffocation induced a feeling of panic and the acute impression that the person was about to die. In at least one case, this was accompanied by incontinence of the urine. At a point chosen by the interrogator the cloth was removed and the bed was rotated into a head-up and vertical position so that the person was left hanging by the straps used to secure him to the bed. The procedure was repeated at least twice, if not more often, during a single interrogation session. Moreover, this repetitive suffocation was inflicted on the detainees during subsequent sessions. The above procedure is the so-called ‘water boarding’ technique.

...

1.3.2. PROLONGED STRESS STANDING

[the relevant passages are rendered in paragraph 101 above]

...

1.3.10. THREATS

[the relevant passages are rendered in paragraph 101 above]

...

1.4. FURTHER ELEMENTS OF THE DETENTION REGIME

The conditions of detention under which the fourteen were held, particularly during the earlier period of their detention, formed an integral part of the interrogation process as well as an integral part of the overall treatment to which they were subjected as part of the CIA detention program. This report has already drawn attention to certain aspects associated with basic conditions of detention, which were clearly manipulated in order to exert pressure on the detainees concerned.

In particular, the use of continuous solitary confinement and incommunicado detention, lack of contact with family members and third parties, prolonged nudity,

deprivation/restricted provision of solid food and prolonged shackling have already been described above.

The situation was further exacerbated by the following aspects of the detention regime:

- Deprivation of access to the open air
- Deprivation of exercise
- Deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation
- Restricted access to the Koran linked with interrogation.

These aspects cannot be considered individually, but must be understood as forming part of the whole picture. As such, they also form part of the ill-treatment to which the fourteen were subjected.

...

Basic materials such as toothbrushes, toothpaste, soap, towels, toilet paper, clothes, underwear, blankets and mattress were not provided at all during the initial detention period, in some instances lasting several months. The timing of initial provision and continued supply of all these items was allegedly linked with compliance and cooperation on the part of the detainee. Even after being provided, these basic items allegedly were sometimes removed in order to apply pressure for purposes of interrogation.

In the early phase of interrogation, from a few days to several weeks, access to shower was totally denied and toilet, as mentioned above, was either provided in the form of a bucket or not provided at all—in which case those detainees shackled in the prolonged stress standing position had to urinate and defecate on themselves and remain standing in their own bodily fluids for periods of several days (see Section 1.3.2. Prolonged Stress Standing).

D. United Nations Organisation

1. The 2010 UN Joint Study

283. On 19 February 2010 the Human Rights Council of United Nations Organisation released the "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" – "the 2010 UN Joint Study" (A/HRC/1342).

284. In relation to Poland, the report (in paragraphs 114-118) stated, among other things, the following:

"114. In Poland, eight high-value detainees, ... were allegedly held between 2003 and 2005 in the village of Stare Kiejkuty. ... The Polish press subsequently claimed that the authorities of Poland – during the term of office of President Aleksander Kwasniewski and Prime Minister Leszek Miller – had assigned a team of 'around a dozen' intelligence officers to cooperate with the United States on Polish soil, thereby putting them under exclusive American control and had permitted American 'special purpose planes' to land on the territory of Poland. The existence of the facility has

always been denied by the Government of Poland and press reports have indicated that it is unclear what Polish authorities knew about the facility.

115. While denying that any terrorists had been detained in Poland, Zbigniew Siemiątkowski, the head of the Polish Intelligence Agency in the period 2002-2004, confirmed the landing of CIA flights. Earlier, the Marty report had included information from civil aviation records revealing how CIA-operated planes used for detainee transfers landed at Szymany airport, near the town of Szczytno, in Warmia-Mazuria province in north-eastem Poland ... between 2003 and 2005. Marty also explained how flights to Poland were disguised by using fake flight plans.

116. In research conducted for the present study, complex aeronautical data, including 'data strings' retrieved and analysed, have added further to this picture of flights disguised using fake flight plans and also front companies. For example, a flight from Bangkok to Szymany, Poland, on 5 December 2002 (stopping at Dubai) was identified, though it was disguised under multiple layers of secrecy, including charter and sub-contracting arrangements that would avoid there being any discernible 'fingerprints' of a United States Government operation, as well as the filing of 'dummy' flight plans. The experts were made aware of the role of the CIA chief aviation contractor through sources in the United States. The modus operandi was to charter private aircraft from among a wide variety of companies across the United States, on short-term leases to match the specific needs of the CIA Air Branch. Through retrieval and analysis of aeronautical data, including data strings, it is possible to connect the aircraft N63MU with three named American corporations, each of which provided cover in a different set of aviation records for the operation of December 2002. ... Nowhere in the aviation records generated by this aircraft is there any explicit recognition that it carried out a mission associated with the CIA. Research for the present study also made clear that the aviation services provider Universal Trip Support Services filed multiple dummy flight plans for the N63MU in the period from 3 to 6 December 2002. In a report, the CIA Inspector General discussed the interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri. Two United States sources with knowledge of the high-value detainees programme informed the experts that a passage revealing that 'enhanced interrogation of al-Nashiri continued through 4 December 2002" and another, partially redacted, which stated that: 'However, after being moved, al-Nashiri was thought to have been withholding information;', indicate that it was at this time that he was rendered to Poland. The passages are partially redacted because they explicitly state the facts of al-Nashiri's rendition – details which remain classified as 'Top Secret'.

...

118. ...While the experts appreciate the fact that an investigation has been opened into the existence of places of secret detention in Poland, they are concerned about the lack of transparency into the investigation. After 18 months, still nothing is known about the exact scope of the investigation.

The experts expect that any such investigation would not be limited to the question of whether Polish officials had created an 'extraterritorial zone' in Poland, but also whether officials were aware that 'enhanced interrogation techniques' were applied there."

285. The 2010 UN Joint Study's conclusions and recommendations read, in so far as relevant, as follows:

"A. Conclusions

282. International law clearly prohibits secret detention, which violates a number ofhuman rights and humanitarian law norms that may not be derogated from under any circumstances. If secret detention constitutes enforced disappearances and is widely or systematically practiced, it may even amount to a crime against humanity. However, in spite of these unequivocal norms, secret detention continues to be used in the name of countering terrorism around the world. The evidence gathered by the four experts for the present study clearly shows that many States, referring to concerns relating to national security – often perceived or presented as unprecedented emergencies or threats - resort to secret detention.

283. Resorting to secret detention effectively means taking detainees outside the legal framework and rendering the safeguards contained in international instruments, most importantly *habeas corpus*, meaningless. The most disturbing consequence of secret detention is, as many of the experts' interlocutors pointed out, the complete arbitrariness of the situation, together with the uncertainty about the duration of the secret detention and the feeling that there is no way the individual can regain control of his or her life. ...

B. Recommendations

292. On the basis of the above conclusions, the experts put forward the recommendations set out below ...:

(a) Secret detention should be explicitly prohibited, along with all other forms of unofficial detention. Detention records should be kept, including in times of armed conflict as required by the Geneva Conventions, including with regard to the number of detainees, their nationality and the legal basis on which they are being held, whether as prisoners of war or civilian internees. Internal inspections and independent mechanisms should have timely access to all places where persons are deprived of their liberty for monitoring purposes at all times. In times of armed conflict, the location of all detention facilities should be disclosed to the International Committee of the Red Cross; ...

(d) Any action by intelligence services should be governed by law, which in turn should be in conformity with international norms. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. Such mechanisms should have access to any information, including sensitive information. They should be mandated to undertake reviews and investigate upon their initiative, and to make reports public:

(e) Institutions strictly independent of those that have been allegedly involved in secret detention should investigate promptly any allegations of secret detention and 'extraordinary rendition'. Those individuals who are found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated;

(f) The status of all pending investigations into allegations of ill-treatment and torture of detainees and detainee deaths in custody must be made public. No evidence or information that has been obtained by torture or cruel, inhuman and degrading treatment may be used in any proceedings;

(g) Transfers or the facilitation of transfers from one State to the custody of authorities of another State must be carried out under judicial supervision and in line with international standards. The principle of non-refoulement of persons to countries where they would be at risk of torture or other inhuman, cruel or degrading treatment must be honoured;

(h) Victims of secret detention should be provided with judicial remedies and reparation in accordance with relevant international norms. These international standards recognize the right of victims to adequate, effective and prompt reparation, which should be proportionate to the gravity of the violations and the harm suffered. As families of disappeared persons have been recognized as victims under international law, they should also benefit from rehabilitation and compensation; ...

(k) Under international human rights law, States have the obligation to provide witness protection. Doing so is indeed a precondition for effectively combating secret detention."

2. The 2010 UN Human Rights Committee Observations

286. The UN Human Rights Committee, in its Concluding Observations on the sixth periodic report of the Republic of Poland of 27 October 2010 – "the 2010 UN Human Rights Committee Observations" stated, among other things, the following:

"15. The Committee is concerned that a secret detention centre reportedly existed at Stare Kiejkuty, a military base located near Szymany airport, and that renditions of suspects allegedly took place to and from that airport between 2003 and 2005. It notes with concern that the investigation conducted by the Fifth Department for Organized Crime and Corruption of the Appellate Prosecution Authority in Warsaw is not yet concluded ...

The State party should initiate a prompt, thorough, independent and effective inquiry, with full investigative powers to require the attendance of persons and the production of documents, to investigate allegations of the involvement of Polish officials in renditions and secret detentions, and to hold those found guilty accountable, including through the criminal justice system. It should make the findings of the investigation public."

E. The CHRGJ Report

287. On 9 March 2010 the CHRGJ disclosed its report entitled "Data string analysis submitted as evidence of Polish involvement in US Extraordinary Rendition and secret detention program" – the CHRGJ Report (see also paragraph 106 above). It analysed in detail data strings relating to flight N379P on which, according to the applicant, he was transferred by the CIA from Polish territory to Morocco on 6 June 2003 (see also paragraph 103 above) and also flight N313 on which, as stated in Mr Abu Zubaydah's application, Mr Abu Zubaydah was taken from Poland on 22 September 2003 (see *Husayn (Abu Zubaydah)*, cited above, §§ 108-113 and 281).

288. In relation to data strings in general the report stated:

"In combination with corroborating information such as detainee accounts, eye-witness testimony, documentary evidence, and other sources, the data string analysis can also provide insight into – but not conclusively determine – the time frame within which secret detention facilities were operational and the possible location of secret detention facilities. When combined with other evidence, data string analysis can also suggest where a particular detainee was held during a particular time and identify what flight a particular detainee was on when being transported to, from, or between detention facilities. The data string analysis does not, however, conclusively show the purpose of the underlying flights. While data string analysis may suggest that a particular flight was likely used in a rendition, it cannot reveal whether that flight was transporting CIA personnel, resupplying CIA outposts, transporting prisoners, or something else.

Additionally, data string analysis alone cannot provide information regarding which specific detainees were on which flights, nor can it conclusively pinpoint the exact locations of detention facilities. ..."

289. It further explained that:

"In this submission, CHRGJ includes information pertaining to two different flight circuits believed to represent CIA 'rendition circuits' – one taking place from June 3 -7, 2003 and the other September 20-23, 2003. These flight circuits include landings in and overflights through Polish territory.

The data string communications demonstrate that the Polish Government granted licenses and overflight permissions to facilitate these CIA rendition : flights. The data string analysis also reveals conclusively that Jeppesen International Trip Planning (hereinafter 'Jeppesen') provided the key travel planning services for these two flight circuits."

290. The introductory remarks ended with the following conclusion:

"In sum, examination of the data strings pertaining to the two flight circuits discussed below in conjunction with information available on the public record supports the finding that the United States used Poland as a transit point for several clandestine flights during 2003, that Polish authorities were aware of the clandestine nature of these flights, and that they facilitated them nonetheless, in contravention of international aviation regulations. The data string analysis may also corroborate detainee accounts that they were held in Poland as well as other evidence of the existence of a U.S. secret detention facility on Polish territory."

291. An analysis of the data strings concerning flight N379P, also known as "Guantánamo Express" (see paragraphs 105–106 above), read, in so far as relevant, as follows:

"Flight records drawn from the database compiled by Council of Europe ('CoE) Rapporteur Dick Marty show that a Gulfstream V aircraft, registered with the U.S. Federal Aviation Administration as N379P, embarked from Dulles Airport in Washington, D.C. on Tuesday June 3, 2003 at 23h33m GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries. These six countries, in the order in which the aircraft landed there, were: Germany, Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal to the United States and landed back at Dulles Airport in Washington, D.C. on Saturday June 7, 2003.

...

I. Who planned the flights, through what medium and in collaboration with whom

To a great extent, CHRGJ's analysis reveals that these flights conformed to the most typical attributes of a CIA rendition circuit. First, the familiar travel service provider, responsible for the overall itinerary, route and technical provisions for the aircraft, was Jeppesen. Jeppesen filed a total of eight messages via the AFTN [Aeronautical Fixed Telecommunications Network or the Société Internationale Télécommunique Aéronautique Network- "SITA"] to the movements of N379P in the period from June 3-7, 2003, including seven separate flight plans and one cancellation.

Second, the aircraft travelled the entire circuit under various forms of exemption and special status, which indicate that the flights were planned and executed with the full collaboration of the United States Government and the 'host' states through which the aircraft travelled. In departing from and landing in the United States, N379P's flight plans were filed with the annotation, Department of State Support'. For all other component routes of this circuit (i.e. those routes that did not involve a departure from or a landing in the United States), N379P's flight plans were designated 'STS/ ATFM EXEMPT APPROVED' or 'STS/STATE'. As indicated above, such special status exemptions in their invocation alone demonstrate collaborative planning on the part of the states whose territory or airspace is being traversed, because they are only granted when specifically authorized by the national authority whose territory is being used.

In each instance that Jeppesen invoked a special status designation for the aircraft N379P, the IFPS [Initial Flight Plan Processing] operator responded by formally recognizing the designation – first, through inclusion of the relevant portions of the flight plan in copies to other authorities via the AFTN, and second, through acceptance of the flight plans in question.

II. To whom and to what extent information about these flights was communicated through the Aeronautical Fixed Telecommunications Network or the Société Internationale Télécommunique Aéronautique Network

All of the communications CHRGJ has found relating to the flight circuit of N379P in this period were exchanged over the AFTN network. Using this medium, the IFPS operator notified multiple national aviation authorities responsible for the component routes planned by Jeppesen for this circuit, by sending a copy of the respective flight plan(s).

The information filed in relation to the Kabul, Afghanistan to Poland component route of the circuit is an example of the systematic disguise of CIA flights into Poland, involving both American and Polish collaborators, as uncovered by CoE Rapporteur Marty in his 2007 report. Rapporteur Marty concluded that several flights, including N379P's flight into Poland on June 5, 2003, landed at Szymany Airport in northern Poland notwithstanding the filing of flight plans that indicated the landing was to be in Warsaw. The fact that Szymany was the actual destination has been corroborated by documentation released by PANSA to HFHR in response to a Freedom of Information request filed under the Statute on Access to Public Information. This newly released documentation confirms that PANSA navigated N379P into Szymany on June 5, 2003 despite all relevant flight plans having named Warsaw as the airport of destination. This indicates that Jeppesen filed "dummy" flight plans for the Poland portion of the June circuit, designed to obscure the fact that the plane actually went to Szymany. The fact that PANSA accepted Jeppesen's flight plan naming Warsaw, yet nevertheless navigated the plane to Szymany, demonstrates that once N379P arrived in Polish airspace, Polish authorities did not require it to comply with international aviation

regulations by filing a correct flight plan naming Szymany as the plane's actual point of destination and subsequent departure. PANSA officials therefore collaborated with Jeppesen (and, by extension, with Jeppesen's client, the CIA) by accepting the task of navigating this disguised flight into Szymany without adhering to international flight planning regulations.

CHRGJ's analysis of the data strings reveals that the actual destination of the flight did not feature in any single communication between Jeppesen, PANSA, and the operators of the IFPS. Instead, at 04h59m32s GMT on June 5, 2003, Jeppesen filed a flight plan for the 'dummy' route from Kabul to Warsaw, which was accepted at 04h59m37s GMT by the IFPS operator and copied to the Polish Area Control Centre.

Later the same day, the IFPS operator twice copied the Kabul-Warsaw flight plan to additional Polish authorities, including the Warsaw-based navigation agency and the Air Traffic Control Tower at Warsaw Airport. The 'dummy' flight plan was disseminated to other national aviation authorities, who were therefore also misled about the plane's actual destination.

According to CHRGJ's analysis, no entity on the AFTN network received notice of the actual destination of the aircraft N379P upon its departure from Kabul. Hence N379P touched down secretly in Szymany not – Warsaw – at 0lh00m local time on June 5, 2003, and stayed on the runway for over two hours while the rest of the aviation monitoring community, including Eurocontrol, mistakenly had recorded a stopover in Warsaw.

In normal circumstances, there would have had to exist a record of an in-flight change of plan for the aircraft to land at Szymany, or a new filing of an onward flight plan from Szymany; but, due to the invocation of 'ATFM EXEMPT APPROVED' special status, N379P was not required to adhere to these carefully conceived air traffic management protocols.

The cover-up then continued with the filing of the flight plan for the next route of the circuit, this time with a false airport of departure in Poland. At 05h00m37s GMT, just one minute after the IFPS operator had accepted the Kabul-Warsaw 'dummy' plan – and over seventeen hours before the aircraft's scheduled landing in Poland – Jeppesen filed a flight plan for N379P to fly from Warsaw to Rabat, Morocco. Once again, the message was copied only to the Polish Area Control Centre before being accepted by the IFPS operator.

At 17h04m42s GMT on June 5, 2003, Jeppesen cancelled its first Warsaw-Rabat plan; but six seconds later, 17h04m48s GMT Jeppesen filed a second, apparently identical plan. Both of these 'dummy' flight plans were subsequently circulated to multiple other national aviation authorities, who were therefore also misled as to N379P's actual point of departure in Poland.

III. What permissions were granted for the flights, by whom and in what form

National aviation authorities routinely grant permits for flights to use their airspace or land in their territory, generally upon the specific request of the flight planner. In this case, Jeppesen was granted such routine permits by multiple national authorities. For the route from Kabul, Afghanistan to Szymany, Poland – for which Jeppesen had declared Warsaw as its airport of destination in its flight plan – Jeppesen invoked overflight permits from four countries, as well as a landing permit for its declared destination. These permits appeared in the data strings and were accepted by die IFPS operator in the following abbreviated form: 'WARSAW PMT NDW 7113 113/03'. The data strings indicate that the request for permission to land in Poland was specific to the Warsaw Airport. CHRGJ's analysis of the data strings and the PANSA

documents obtained by HFHR reveal that Polish officials knowingly issued a permit for Warsaw, despite the fact that they knew that the aircraft was actually going to land in Szymany."

VIII. OTHER DOCUMENTARY EVIDENCE BEFORE THE COURT

A. Polish Border Guard's letter of 23 July 2010

292. In a letter dated 23 July 2010 the Polish Border Guard, in response to a request for information from the Helsinki Foundation for Human Rights, confirmed the landing of certain aircraft between 5 December 2002 and 22 September 2003. The letter, in so far as relevant, read as follows:

"In relation to the letter ref/1614/2010/ABJIP and dated July 5, 2010, the letter ref 1345/2010/AB/IP and dated May 31, 2010, as well as the letter of the [Border] Guard ref ZG-2582/WliBD/lO and dated June 16, 2010 concerning the making available of information by the [Border] Guard detailing the borders clearance of the airplanes with registration numbers N63MU, N379P, N313P and N8213G at Szymany airport in 2002 and 2005 after having obtained a statement from the Public Prosecutor's Office assenting to the making available of the clearance information, I kindly inform that on the basis of archival documentation the [Border] Guard can confirm the clearance of the following airplanes for take-off and landing:

N63MU, December 5, 2002.

Arrival/ passengers:8, crew:4; Departure/ passengers: 0, crew: 4

N379P, February 8, 2003

Arrival/ passengers: 7, crew: 4; Departure/ passengers: 4, crew: 4

N379P, March 7, 2003

Arrival/ passengers: 2, crew: 2; Departure/ passengers:0, crew: 2

N379P, March 25, 2003

Arrival/ passengers: 1, crew:2; Departure/ passengers: 0, crew:2

N379P, June 6,2003

Arrival/passengers: 1, crew: 2; Departure/ passengers:0, crew:2

N379P, July 30, 2003

Arrival/passengers: 1, crew: 3; Departure/passengers: 0, crew: 3

N313P, September 22, 2003

Arrival/ passengers: 0, crew: 7; Departure/ passengers: 5, crew: 7

We do not possess information that can confirm the border clearance of the airplane with registration number N8213G. ..."

B. TDIP transcript of "Exchange of views with [M.P.], former director of Szczytno/Szymany airport in Poland"

293. Ms M.P. was employed in the Szymany airport from 2001 to 2005. From 2001 to January 2003 she was a manager of the technical unit and dealt with technical issues relating to the airport, including maintenance of the runways and other airport equipment. In 2003 she was put in charge of all matters relating to the airport and became agent for the managing director.

294. On 23 November 2006 Ms M.P. appeared before the TDIP members, including Mr Fava and Senator Pinior, in Brussels. The transcript of her statements given in response to questions from the TDIP members (doc. PE 384.322v01-00) read, in so far as relevant, as follows:

> " ... regarding the flights, we termed them special flights, as none of the procedures followed in the case of other aircraft, such as civil aircraft, were complied with.
>
> As to the landings, we were under the impression that they involved changeover of intelligence personnel. The airport manager received information concerning these flights directly from Border Guard Headquarters, and the army was informed about the landings at the same time. Two staff from the army unit at Lipowiec were on duty at the Szymany airport at the time. Events unfolded as follows. Border Guard Headquarters telephoned me about the planned landing and at the same time, I received the same information from one of the staff on duty at the airport.
>
> Turning to arrangements for these landings, normal practice was for the Border Guard and the Customs Service to be informed of civil aircraft landings. When these particular aircraft landed, however, the Customs Service was not informed, at the request of the Border Guard, who said they would make all the arrangements themselves.
>
> Prior to the landings two high-ranking Border Guard officers would always appear, a captain or someone of higher rank. The Customs Service was not present, as I mentioned earlier. It was always two Border Guard officers.
>
> After they landed, these aircraft generally parked at the end of the runway, so that the airport workers could not really see what was going on. The Border Guard would always drive up to the aircraft and return a few minutes later. Vehicles bearing the Kiejkuty army unit's registration would then drive up to the aircraft. It was not possible to tell if anyone did or did not leave the aircraft and enter these vehicles, as this could not be observed from the airport office which is located about halfway along the runway.
>
> An ambulance was in attendance at one of these landings, but nobody knew why that was there either. The ambulance travelled behind the vehicles with tinted windows. ...
>
> ... T]hey were vehicles bearing Polish army plates with the Kiejkuty army unit's registration. They all began with the letter 'h'. These vehicles often move around Szczytno. They probably belonged to special units of the Polish army. ...
>
> It was not possible for anyone to see what was happening around the aircraft because the aircraft always parked in such a way that the entrance doors faced towards

the wood, so nothing could be seen. No airport workers drove up to the aircraft, only the Border Guard.

It was not even possible to see what was happening from the top of the control tower."

In response to the question whether the coaches that came alongside the plane then left the airport directly, without undergoing any checks, she said:

"... Yes, they drove away without being subjected to any controls. It was not possible, however, to establish if any passengers were being transported in or out. Nobody checked these aircraft; standard procedures were not complied with.

Szymany airport is also an emergency Border Guard airport, so the Border Guard determined the procedures to be followed when such aircraft landed."

295. In response to the question how many Gulfstream jets had landed in the airport, whether the landing of Boeing 737 that had come from Afghanistan on 22 September was the only time when such a large aircraft had landed and whether other Boeings 737 had landed in Szymany, she said:

"As far as I know, that is to say, as far as I recall, I think six landings of aircraft of this type must have taken place, two in 2002 and four in 2003.

As regards the Boeing 737 that landed in September 2003, I do not have any information about it. I do not have any information either on the individuals who embarked or disembarked from it. I only found out about this landing from the duty staff at the airport.

No phone call was received form the Border Guard. The information came directly from the army, as there was also the issue of refuelling the aircraft to consider, because the Szymany airport does not have the facilities to refuel such a large aircraft. There are no suitable steps at Szymany either, which was another difficulty. So this landing was indeed dealt with by the army directly."

In response to a further question concerning the landing of Boeing 737 on 22 September 2003, she stated:

"I can say that the Boeing 737 certainly did land in September 2003. I witnessed it myself. As the person responsible for the airport I had certain misgivings, because it is a very large aircraft and the Szymany fire brigade was not suitably equipped. Should an accident have taken place, we would have been severely reprimanded for having accepted such an aircraft despite lacking the relevant technical equipment."

In response to a question concerning the Boeing 737's flight record, she said:

"All information pertaining to landings was always entered in the aircraft movement logbook kept at the airport in the charge of the duty staff. The control tower staff present at the time were in possession of the same information. They were Air Traffic Control staff. It is therefore impossible for there not to have been any information on the landing of this plane at Szymany."

She also added:

> "As far as passengers are concerned, having listened to the previous speaker, I have just remembered that some passengers did indeed board this aircraft. Yes, that was the case. 1 am sorry I did not mention it earlier, but I had forgotten."

In response to the question how the passengers who got off the plane processed subsequently, whether any record was made of their names and whether they entered the airport building, she said:

> "Only the Border Guard went up to this aircraft, as happened in all the other cases. I am unable to reply to the question as to whether the passengers were checked. I suspect they were not. I do not know, I do not suspect anything. I cannot voice suspicions, I can only state the facts. The Border Guard drove right up to the aircraft and those passengers were taken away straight from the aircraft. They did not come on to airport premises; they did not enter the terminal."

296. In response to the question as to how long did the aircraft stay in Szymany, she stated:

> "These aircraft spent a very short time on the airport tarmac. They would land, the Border Guard would go up to them, then the Guard would drive away, and the vans or minivans with tinted windows would drive up, drive away again and the aircraft would leave That is what happened in the case of the Boeing 737, too.
>
> I agree with the previous speaker that there were many reasons why such an aircraft should not have landed at Szymany. In particular, the airport does not have the facilities to deal with an aircraft of that size. In my view, there must have been some very pressing reasons for the landing"

297. In response to the question as to what kind of ideas or speculations about the flights the people working in the airport had had, she said:

> "With regard to the reaction to these aircraft landing at the airport, it certainly was a major event. Our comments were along the lines of 'here come the spies'. We presumed that this was simply a changeover of intelligence staff. These landings were lucrative for the airport in another respect. The aircraft concerned paid much more per landing than civil aircraft. They actually paid several times more, so it really was a good deal for a struggling airport like Szymany."

298. In response to the questions about when an ambulance had appeared at the airport and the circumstances in which this had happened, she said:

> "An ambulance only attended at one such landing, and it definitely was not present when the Boeing 737 landed.
>
> Nobody was taken away from that aircraft by ambulance. It happened that I had just finished work and was driving behind those vehicles with tinted windows and behind the ambulance. The ambulance did not turn towards the hospital. It seemed to me that it drove towards the Police Officers' Training Centre in Szczytno. It is my impression that the ambulance belonged there. ...
>
> In response to the questions posed, I am very sorry, but I am unable to state exactly which day that ambulance attended. I cannot remember. It certainly was not present when the Boeing 737 landed. It must have been there at one of the landings

Gulfstream aircraft landings. As to where the ambulance came from, it definitely was not a health service one; it was a military ambulance from the unit at Lipowiec or from the Higher Police Training Unit at Szczytno. We could not ascertain if anyone was carried in that ambulance. It was impossible to tell. Discussing it amongst ourselves, we concluded that it must be an ambulance from the Szczytno Police Officers' Training Centre."

299. In response to the questions whether the procedure applied in respect to the aircraft was in compliance with the legal provisions and whether the Border Guard could deal with customs procedures in Poland, she said:

"With regard to the question as to whether these aircraft were handled in compliance with the current legal provisions, I am not familiar with the provisions applying to the armed services, so I am unable to comment. They certainly were not handled according to the provisions relating to civil aviation and civil airports, because no customs procedures were undertaken. It should be said, however, that the Border services, namely Border Guard Headquarters, asked to handle arrangements for these aircraft itself. ...

The Border Guard certainly cannot deal with customs procedures; however, we were unable to protest in our capacity as airport managers because it was an emergency Border Guard airport."

300. In response to the question whether the airport had received a prior warning of the landings, she said:

"... [T]the airport management and the person in charge were informed of these landings one or two days in advance by Border Guard Headquarters. The one exception was the landing of the Boeing 737. I learnt about that from a member of the Armed Forces who was on duty at the airport and who worked half-time for the airport whilst also being employed in the military unit at Lipowiec. On that occasion I received no information about the landing from the Border Guard."

She then added:

"Szymany airport is a civilian airport, but it is also an emergency Border Guard airport. We could not refuse to allow that aircraft to land.

For instance, in winter the snow is not cleared from the airport because there are very few movements and it is so expensive to maintain the airport. ... Any aircraft intending to land at Szymany would divert to other airports.

I shall go back to that landing, which took place in the winter, I think in February of 2002, when the weather conditions were dreadful. No snow had been cleared from the airport for six weeks, and we were required to prepare the runway. At the time, I was manager of the technical unit, and Mr Jurczenko was the airport director. He informed me that the runway had to be prepared for landing, because if the aircraft concerned did not land, 'heads would roll'. I am not aware of the source of his information. So it was not a case of being able to refuse because we were not prepared to accept that aircraft, as the runway was not in a fit state. It was not possible."

301. In response to the question whether, when the planes landed and the coaches arrived, there were any Polish military beside the aircraft, she stated:

> "The Polish army was never present on these occasions. Border Guard officials were the only ones present, but they would arrive before the vans. The Border Guard would drive up first, then it would leave and the vehicles from Kiejkuty would drive up."

302. In relation to payment for the airport operations and landing fees, Ms M.P. stated:

> "Every time such a landing took place, someone would arrive the next day with a lot of money in cash. It was either a Pole or a person who spoke Polish very well. This person would provide the name of the company to whom the invoice was to be made out, and the invoice was always paid in cash, regardless of the sum involved. ...
>
> Cash payments were unusual. Payments were generally made using credit cards, as is the case in the rest of the developed world. The fact that these landing fees were settled in cash was an exception to the rule.
>
> The fees varied considerably, ranging from 7 000 to 15 000 Polish zloty. We included an additional amount relating to so-called 'non-standard handling' on these invoices. It was the fee for our provision of non-standard servicing of the operation. At the time, we were free to set our own fees on the spot....
>
> [T]he idea arose after the first landing of a Gulfstream aircraft, when we had not been prepared to receive it. There was a lot of snow and mud on the runway, and theoretically we should not have agreed to allow the aircraft to land. We were then informed that the customer would pay us for clearing the snow off the runway. Such an arrangement is unheard of in civil aviation, because runway maintenance costs are included in the landing fees. On that occasion we were paid some 7 000 Polish zloty and began to think that we could continue in this vein and make as much as we possibly could."

C. Senator Pinior's affidavit submitted to the Court in the case of *Husayn (Abu Zubaydah)*

303. The applicant in *Husayn (Abu Zubaydah)* supplied the following affidavit made by Senator Pinior:

> "Affidavit of Józef Pinior to the European Court of Human Rights
>
> Abu Zubaydah v Poland
>
> Background
>
> 1. My name is Józef Pinior. I was born on 9 March 1955.1 have an MA degree from the Faculty of Law at the Wrocław University and postgraduate degrees in Ethics and Religious Studies from both the University of Wrocław and the Centre for Social Studies at the Institute of Philosophy and Sociology of the Polish Academy of Sciences.
>
> 2. During the communist regime in Poland, I was an active member of the political opposition. I was a founder and one of the chairmen of the Lower Silesian region of the independent, self-governing trade union NSZZ Solidamość. In 1984 and 1988 I was described by Amnesty International as a prisoner of conscience. Following to

the political transformation in Poland, I pursued an academic career. In 2004, I was elected to the European Parliament. As a Member of the European Parliament I was a member of the Group of European Socialists,

3. During my term in the European Parliament I was a vice-chairman of the Subcommittee on Human Rights, a member of the Committee on Regional Development and a member of the Delegation for relations with the United States.

4. In 2006-2008 I was a member of the European Parliament's 'Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners" (TDIP), working alongside rapporteur Giovanni Claudio Fava.

5. In 2011 I was elected to the Polish higher chamber of Parliament, the Senate. I am a senator of the Group of Civic Platform (*Platforma Obywatelska*), and a member of two commissions - the Commission of Human Rights, Rule of Law and Petitions, and the Commission on European Union issues.

Confirmation of Statements concerning CIA detention in Poland

6. With this affidavit I confirm to the Honorable Court the accuracy of certain statements that have been reported publicly concerning my knowledge of the CIA's secret prison in Poland. My knowledge of the programme initially stemmed from my involvement in the TDIP in 2006-8. Subsequent to that involvement, many people, both officials and people living in the vicinity of Stare Kiejkuty, have over time come to me to discuss various elements of this case. The information referred to below derives from information obtained, in these various contexts, from credible sources.

7. I can confirm that in the course of my research into this case, I was informed, by an authoritative source, of a document drawn up under the auspices of the government of Leszek Miller for the purpose of regulating the existence of the CIA prison in Poland.

In this document there are precise regulations concerning the foundation of the CIA secret prison in Stare Kiejkuty. Among other details, the document proposed a protocol for action in the event of a prisoner's death.

8. In 2006, this document was found by the then-Coordinator of the Secret Service in Poland, Minister Zbigniew Wasserman. He handed it in to the then Minister of Justice, Zbigniew Ziobro. I have been informed of a transcript of the meeting during which this document was handed over, in the presence of other politicians from the then ruling party, *Prawo i Sprawiedliwość.*

9. Furthermore, according to my information, among the other documents that are in the possession of the Prosecutor's Office, there is a receipt for a cage which was made for the Intelligence Centre in Stare Kiejkuty. The receipt dates back to the period when the CIA prisoners were detained in Stare Kiejkuty. My assumption is that this cage was intended to hold prisoners.

10. I have also been informed that Polish officials made many different notes concerning various aspects of the CIA prison existence in Stare Kiejkuty. These notes were intended to prove that any actions of the Polish officers were based on their supervisors' orders. I understand that these written notes are also among documents gathered by the Prosecutor's Office.

11. I understand that the Prosecutor's investigation has also gathered information indicative of practical logistical support and servicing of the prison site: specifically documents record food being provided to the site, and US officials dumping Polish

sausages outside the fence of the villa on the military base and a memo written by a Polish official asking the Americans not to do this.

12. From the information that has been provided to me, as illustrated above, it would appear that considerable information is available to the prosecutors office indicating the close involvement of the Polish authorities, in various ways, in the establishment and operation of the Stare Kiejkuty secret prison on Polish soil.

Signed	Date	Witness
[Mr Pinior's signature]	26 March 2013	[Signature illegible]"

IX. EXTRACTS FROM TESTIMONIES OF EXPERTS AND WITNESS HEARD BY THE COURT

304. On 2 December 2013 the Court heard evidence from Mr Fava, Senator Marty and Mr J.G.S. as experts and Senator Pinior as a witness (see also paragraphs 42-44 above). The extracts from their testimonies as reproduced below were taken from the verbatim record of the fact finding hearing. They are presented in the order in which the evidence was taken.

A. Mr Fava

305. In 2006 and 2007 Mr Fava was the Rapporteur of the TDIP in the framework of the inquiry initiated by the European Parliament (EP) into the allegations concerning the existence of the CIA secret detention facilities in Europe. In this connection, he prepared the Report of the TDIP, the so-called "Fava Report", on whose basis the 2007 EP Resolution was adopted (see paragraphs 266-272 above).

At present, Mr Fava is a member of the Chamber of Deputies of the Italian Parliament and Vice-Chair of the "Inquiry into the Mafia" Commission.

Mr Fava responded to a number of questions from the Court and the parties.

306. In response to questions concerning records of the informal transatlantic meeting of European Union and North Atlantic Treaty Organisation foreign ministers, including Condoleezza Rice, of 7 December 2005, "confirming that Member State had knowledge of the programme of extraordinary rendition", as referred to in paragraph "L" of the 2007 EP Resolution (see paragraph 273 above), he stated, among other things, as follows.

As regards the checking of the credibility of the confidential source from which the document – "the debriefing" – had been received:

"Yes, the reliability was checked, it was a confidential source coming from the offices of the European Union, in particular from the Commission. In Washington, when we received the debriefing of the [Washington] meeting, we checked that the latter did indeed correspond to the real content of the meeting and that same opinion

was shared by the Chair of the Temporary Committee and in fact this document was acquired as one of the fundamental papers of the final report which I proposed and that the Temporary Committee has approved and that the Parliament subsequently approved."

As regards the nature of the document:

"[A] debriefing. Some meetings, when there is a request – in that case the request had been put forward by the American Department of State – are not minuted; however, in any case a document which incorporates with sufficient details the course of the discussion is drawn up, even if this is not then formally published in the records of the meeting. In this case it was asked not to minute [the meeting], but it was asked to write this document, following the practice, and it is this document, the debriefing, that has been then provided to us."

As regards the topic of the transatlantic meeting:

"Extraordinary renditions. The American Secretary of State, Condoleezza Rice, met the ministers and the topic of discussion was what had been discussed in those months by the general public in America and Europe – I believe our Temporary Committee had already been set up – it was a particularly burning issue and there was the concern on the part of several Governments about the consequences that these extrajudicial activities in the fight against terrorism, using extraordinary renditions as a practice, could create problems to the various Governments in respect of the public opinion and in respect of the parliamentary inquiries, some of which had already been undertaken at the time. Therefore, some Governments were asking whether what was known corresponded to the truth and whether all this was not contrary to the international conventions, beginning from the Geneva Convention onwards.

In that case, the reply – from the debriefing we received – from Madame Rice, was that that operational choice to counteract terrorism was necessary because the atypical nature of the conflict, with a subject that was not a state but a group of terrorists prevented the use in full of the international conventions which up till then had served mainly to regulate traditional conflicts. This is the thesis which also the legal counsellor of Condoleezza Rice put to us in Washington when we had a hearing and it was explained to us that they felt that they could not apply the Geneva Convention and that they thought that the extraordinary renditions were therefore a necessary and useful practice even for European Governments, because they placed European countries, European Governments [and] the European Community in a position to defend themselves from the threat of terrorism.

I also remember – of course we are talking about events of seven years ago – that from the said debriefing there emerged quite an animated discussion among the European Governments[:] between those who felt that these practices should be censored for obvious reasons linked to international law, and other Governments which felt on the contrary that they should be supported. ..."

As regards the content of the document:

"[T]his document indicated precisely the interventions with the names of the ministers of member states of the European Union. That document was a fairly clear picture of how the discussion had proceeded, it was not just a summary of the various topics dealt with but the document actually recalled who said what. In fact, let's say, the discussion heated up also because of the different positions taken, [which positions] are reproduced quite faithfully in this document. Which member States had felt the need to raise doubts and objections to the practice of extraordinary renditions

and which member States had felt on the contrary the need to support the thesis of Madame Rice. ...

I do not remember whether there was the intervention of a Polish Government representative in the debriefing. ...

The discussion started because a few weeks before the fact had been divulged by the American press, I think it was an article of the Washington Post which was then taken up by ABC, ABC television, saying that there were secret places of detention in Europe. Extraordinary renditions were a fairly widespread practice in 2002 and 2003 and that in Europe there were at least two places of secret detention. Afterwards President Bush, in a statement, confirmed that there had been some detainees, members of Al Qaeda, who had been transferred to Guantánamo after having gone through some places of detention under the CIA's control, thereby somehow justifying and confirming what had been said by the American journalists at the time.

The meeting with Condoleezza Rice and the European ministers, as far as I remember, took place immediately after these revelations of the American press and indeed this was one of the reasons why our Temporary Committee was set up."

In response to the question whether Poland was mentioned at the meeting:

"I do not remember, I think that those detention places [in Poland and Romania] had not been specifically mentioned, however it is clear that the issue that had heathen up the discussion consisted in the fact that this news had been disclosed. And Condoleezza Rice had, in a certain sense, how can one say, tried to comfort her colleagues of the European Union, explaining that these practices served in any case in the fight against terrorism and had been put at the disposal of the European countries as well. The discussion was in general not aiming to verify specific episodes but had a more global and structural trend. As to whether or not it was appropriate to use these extrajudicial techniques, you had on the one hand some Governments' concern and then on the other hand the insistence of Condoleezza Rice who, in any case, said that "*We all know about these techniques*". It was somehow an attempt to share, so that the American Government would not be the only Government to carry the weight of the accusations originating from the international public opinion and from many NGOs dealing with human rights."

307. In response to a question whether, on the basis of evidence mentioned in paragraph 169 of the Fava Report and, subsequently, in paragraph 171 of the 2007 EP Resolution, that there were "11 stopovers made by CIA-operated aircraft in Polish airports" (see paragraph 275 above) could it be said that Poland had, or should have had, knowledge of the rendition programme in 2002-2005, Mr Fava said:

"[O]n the basis of that and other information, we felt yes. One information concerned the stopovers of certain aircraft which had been used on a regular basis by the CIA for extraordinary renditions. We had obtained their flight logs from EuroControl and they corresponded to the transferring of certain detainees during events that had been confirmed also in the course of judicial proceedings. Here I am thinking of a German citizen who had been abducted in Macedonia, El-Masri, and then brought to Afghanistan.

Comparing the flight logs of these aircraft which were used, as I said, on a regular basis by the CIA, we had found that there had been a number of stopovers at the

airport of Szymany in northeast Poland. On the occasion of our mission to Poland and of some hearings held in Brussels, we could verify that, in certain cases, the time and procedure [of these stopovers] were rather unusual. In particular, there had been a hearing held in Brussels on 23rd November 2006, a few weeks after our mission to Poland, with the former director of the airport of Szymany, who gave us some information which we thought was very significant with regard to the completely unusual procedures with which the stopovers of these aircraft coming from airports which were part of the network of extraordinary renditions were accepted."

308. As regards the Polish Government's cooperation with the TDIP (see also paragraphs 269 and 275 above), Mr Fava stated:

"The Polish Government cooperated very little with the Temporary Committee. We went to Poland on the occasion of one of our 14 missions carried out in the different countries which were implicated. Finally we were forced to say, and to write in our final report, that cooperation on the part of Poland was very inadequate. Almost all the representatives of the Government we asked to meet declined to meet us. We were permitted to meet only the former chief of the intelligence services, the former manager of the airport, the manager of the airport currently in charge and some journalists and the Undersecretary of State at the Chancellery of the Prime Minister. So I was saying, yes we met the former chairman of the airport Jerzy Kos, the former head of intelligence services Siemiątkowski, the Undersecretary of State Pasionek, whereas all the other ministers we had requested to meet refused to meet us, unlike in other countries, where cooperation was always offered, in many cases in order to deny all responsibility."

In response to the question whether he had the impression that there had been attempts to conceal information, Mr Fava said:

"Yes, definitely. There was no trace of these flight logs. It was not known what had happened to them. The airport said that they had been sent to Warsaw and in Warsaw they said they did not know in which files they had been placed and the few people who represented Polish institutions, whom we managed to speak to, were very vague. It was only later, after considerable insistence, that we received confirmation from Jarosław Jurczenko, who had been director of the Szymany airport, of the stopovers of some flights and of some registration numbers of planes that we have provided. And cross-checking this list with other data which we already had enabled us to establish, to confirm that some planes of the CIA in that period of 2002-2003 had landed a number of times at this airport."

309. With regard to the statement in paragraph 178 of the report that "in the light of the above circumstantial evidence it is not possible to acknowledge that secret detention centres were based in Poland" and to the reference in working document no. 9 to "detention centres in Poland" (see also paragraphs 268-269 and 275 above), he stated:

"The report had to take on data which was certain and verified, and we did not have, as one would say, a smoking gun, in the sense that we had not been able to verify that there was a detention structure. After all, in any case [the structure] would long since have been dismantled. In the attached documents we decided to indicate in any case all the strong circumstantial elements on the basis of which we came to the conclusion that this centre of detention had existed. On the one hand we had quite a firm position on the part of the Polish Government, with whom we had spoken, which had denied any, so to say, complicity with this practice. On the other hand we had a series of

testimonies which indicated to us that between the airport of Szymany and the military base, which had been placed at the disposal of the Polish secret services and of the CIA, there was, so to say, a traffic of persons not subject to any control and moreover coming from flights which were perfectly integrated in the rendition's circuit[. W]hich is to say that we never had the direct, physical, material evidence, but we did have a very strong concern that this centre of detention had existed. And we held that this strong concern, which could not be proven in absolute terms in the report, should in any case be indicated in the alarming terms we used in the annexed documents."

310. In relation to the verification of the credibility of the TDIP sources Mr Fava stated:

"This Temporary Committee had the privilege of accessing direct sources, the victims of extraordinary renditions. I cannot quite remember the number, but at least a dozen people, captured, detained, tortured and finally released have cooperated with us. And the sensation which we gleaned from this was that they were a small minority and they were privileged in that they had the citizenship, the nationality of a Western or a European country. But our impression was that in respect of many of them, without a Western passport, and therefore without the attention of public opinion [there was] no report before the judicial authorities and no judicial investigation. About many of them we could not know anything. Our direct sources of information were the victims.

Another fundamental source was the possibility to reconstruct, in a detailed fashion, airport by airport, stopover by stopover, moment by moment, the flight paths of these aircraft used by the CIA, and we also obtained some considerable cooperation from some Governments, not all Governments, but some."

He further added:

"Although this was done with great diplomacy, the then former director of the security services, Mr Siemiątkowski, confirmed to us that at that airport, CIA officials often landed; he told us that in the framework of the cooperation with the CIA they had close relations with the director at the time, Tenet, of the CIA, but it was not up to them to check all the movements of the American intelligence service officials in that base, but he told us that they did come and that there were frequent relations of cooperation, he explained this to us, let's say, from an operational cooperation perspective, consisting in sharing certain practices and objectives. Naturally, he did not tell us that the reason behind the presence of the CIA officials in Poland was to use a detention centre for the objectives which we have surmised. He referred to cooperation between intelligence authorities."

B. Presentation by Senator Marty and Mr J.G.S. "Distillation of available evidence, including flight data, in respect of Poland and the cases of *Al Nashiri* and *Abu Zubaydah*"

311. The oral presentation was recorded in its entirety and is included in the verbatim record of the fact-finding hearing. The passages cited below are taken from the verbatim record.

312. The aim of the presentation was explained as follows:

> "[T]he intention of this presentation is not to reveal anything new but rather to offer a distillation of the available data in a manner which might allow the construction of a coherent chronology; in particular, a chronology that situates the two applicants in today's proceedings in the territory of the Republic of Poland in the material period between 5 December 2002 and 22 September 2003 ..."

This was followed by the presentation of a map showing a network of various locations:

> "On the map are situated several important locations in the context of the so-called war on terror led by the United States administration of President George W. Bush. In each of these locations a detainee held under the auspices of the American war on terror was either picked up, captured, held, transferred and in some cases interrogated and subjected to ill-treatment. In the course of our two-year inquiry we were able to categorise these locations into four separate sets.
>
> The first set was stopover points. ... The second category was staging points. ... Our third category was pickup points. ...
>
> And finally of most importance to today's proceedings, the fourth category depicted detainee transfer or drop-off points. These were destinations of CIA rendition aircraft, places to which detainees were brought for the purpose of being detained secretly, interrogated and often ill-treated at the hands of CIA interrogation teams. Again, the material interest of our inquiry was to establish in particular which of these locations were situated in Council of Europe member states and as you will see from the map, in addition to Romania which is depicted here by Timisoara and Bucharest, the focus of today's proceedings is the northernmost circle Szymany in North-eastern Poland."

313. The experts gave the following general explanation:

> "It is important to begin by understanding that there were two principle categories of detention as they were described in the report: counter-terrorism detention and interrogation activities, which were undertaken by the CIA, in particular its counter-terrorism centre in the material period between September 2001 and October 2003. The date of October 2003 is used here because the period of review encompassed by the CIA Inspector General concluded in October 2003 [in this judgment this document is referred to as "the 2004 CIA Report"; see also paragraphs 49-52 above]. ... These sites were specialised or as the report described them, customised facilities for the detention of high value detainees. ... These facilities were operated exclusively by the Central Intelligence Agency through specialist teams of its counter-terrorism centre.
>
> We shall focus for the purpose of today's proceedings on the first category since it is our finding that the detention facility in Poland was an HVD facility customised for exclusive purposes of the CIA."

314. The presentation was further devoted to explaining the chain of events starting from the detention of the applicant and Mr Zubaydah detention in the "Cat's Eye" black site in Bangkok in November 2002, through their rendition to Poland on 5 December 2002 to their transfer from Poland on 6 June and 22 September 2003 respectively (see also paragraphs 83–106 above and *Husayn (Abu Zubaydah)*, cited above, §§ 86-117).

For the purposes of the presentation the "Cat's Eye" was referred to also as "black site no. 1" and the detention facility in Poland, code-named "Quartz" also as "black site no. 2".

315. As regards the black site no. 1:

> "The first facility, which I am referring to as black site number 1, was the only facility at which interrogations were videotaped. I mention this because the CIA has undertaken several protracted inquiries into the practice and the outcomes of videotaping of interrogations. It is now an established judicial fact in the United States that between April and December of 2002 the CIA compiled 92 video tapes of the interrogations of the two applicants in today's proceedings, Abu Zubaydah and Abd Al-Rahim Al Nashiri. This specific detail is important because in many of the documents released by the CIA the practice of videotaping is a reference point for the location at which other operations and activities took place. As I stated, videotaping was discontinued in December of 2002 and, therefore, in all of the declassified documents with which we have engaged any reference to videotaping indicates black site number 1.
>
> Our finding was that it was located in Bangkok, Thailand and that its classified code-name was "Cat's Eye", which was often written as one word "CATSEYE" in CIA documents. I have given one example here, there are numerous examples in the redactions where part of the word CATSEYE is in fact visible and the word CATSEYE is in fact used also to describe the videotapes, hence the expression "the CATSEYE videotapes".
>
> The documentation in its entirety confirms that both applicants in today's proceedings were detained, simultaneously, were interrogated and indeed subjected to enhanced interrogation techniques and videotaped in the process of being interrogated in Thailand. One example is this excerpt from a declassified cable from 9 December 2002 which refers by name to both of today's applicants as in Al Abhadim Muhammad Abu Zubaydah and Abd Al-Rahim Al Nashiri, both of whom were interrogated and a videotaped record of their interrogations forms in Thailand. ...It is our finding that this inventory was in fact a form of closing inventory of the site in Thailand – a point to which I shall return in a few moments.
>
> It is important that in Thailand Abu Zubaydah in particular was subjected to repetitive and indeed excessive use of the technique known as waterboarding and this was described by the CIA itself as the most traumatic of enhanced interrogation techniques. Mr Zubaydah was subjected to that technique a minimum of 83 times in Thailand. It was also confirmed in the CIA's reporting that the second applicant, Mr Al Nashiri, was also subjected to 2 sessions of waterboarding in Thailand, again documented in the Inspector General's report, although it has been stated that these two sessions did not achieve any results. It is unclear as to what that reference actually means in the scheme of ill treatment.
>
> We focus on the interrogation cycle of Mr Al Nashiri because it includes important date references for the subsequent onward transfer of both detainees. Mr Al-Nahiri's interrogation which commenced upon his arrival in Thailand on 15 November 2002, and lasted for 19 days, is expressly described in the CIA Inspector General's report as having continued through, meaning up until, 4 December 2002.
>
> This point represents a cut-off, an interruption in the interrogation schedule of Mr Al Nashiri, a principle which had not previously been known before the declassification of this report, that interrogations were routinely interrupted or cut-off in one location in order, according to the report, to be resumed in a different location.

So our investigation looked at what was the reason for this particular cut-off point on 4 December 2002 and it is contained in the same report ... that although Al Nashiri had been deemed compliant at a certain point in November 2002, he was then subsequently moved, to use the word here, and thereafter was thought to be withholding information.

Again this is representative of disruption or an interruption in the interrogation schedule to which Mr Al Nashiri was subjected in Thailand. The conclusion which we were able to draw from our investigations and which was then confirmed by the declassification of a further document, is in fact that this move was a physical transfer by means of HVD rendition out of the black site in Thailand to another CIA black site. The document in question here is from the United States Department of Justice. It is a report prepared by the Office of Professional Responsibility which analysed ethical or professional responsibility in authorising enhanced interrogation techniques [in this judgment referred to as the 2009 DOJ report; see aso paragraph ... above]. It was written in July of 2009 and declassified approximately one year later in 2010. And in this excerpt you can see in the penultimate line the explicit statement that, at a redacted date in 2002, both Al Nashiri and Abu Zubaydah were moved to another CIA black site, hence confirming that the reason for the disruption in Al Nashiri's interrogation schedule on 4 December was that he was moved along with Mr Zubaydah to another CIA black site. .... So at that point black site number one closed on 4 December 2002 ...

It follows that the closure of the CATSEYE base according to our findings led to the opening on 5 December 2002 of the QUARTZ base in Poland. ..."

316. As regards the transfer to the black site no. 2 :

"Al Nashiri and Abu Zubaydah were moved out of Thailand on or immediately after December 4, 2002. They were moved to another CIA black site and as the CIA Inspector General's report concluded, this was not the war zone facility in Afghanistan but rather "another foreign site" at which he was subsequently detained and interrogated. ...

I wish first of all to address an element of our 2007 report which discusses the methodology by which the CIA kept its operations into, inside and out of Poland, secret. This is a process which we have referred to as dummy flight planning ... And this is a process which entails not only the use of private companies contracted by the CIA, notably Jeppesen Dataplan as mentioned in the Statement of Facts, but also entails collaboration and active participation of Polish authorities, notably personnel in the air navigation services PANSA, whose responsibility first and foremost is to preserve the safety of Polish airspace but who are also responsible vis-à-vis international institutions for filing clear and accurate information regarding the paths of flights. In at least four of the six instances in which detainees were brought into Poland, including on 5 December 2002, flight plans were disguised, false flight plans were filed and Polish air navigation services navigated the aircraft into Szymany airfield in Poland without a valid flight plan in violation of international air traffic rules, hence their knowledge of there being a clandestine operation on the dates in question. ...

Hence we come to a document generated by the CIA's private contractor in respect of the flight out of Bangkok on 4 December 2002. This document is entitled "trip sheet report" and it is described as a Government trip on a Government contract. You have in your Statement of Facts, honourable judges, a description of the multiple layers of secrecy employed in disguising this flight of December 2002 into Poland. One layer was the use of a First Flight Management, which was a leaser of private

aircraft owned by other companies in the United States. Here the trip sheet describes a flight from Osaka, Japan to Bangkok, which was indeed flown, and an onward flight from Bangkok to Dubai which again was flown. The third route on this trip sheet is a false flight plan from Dubai to Vienna, Austria, which was not flown and which was intended merely to instigate the methodology of disguised flight planning just described. We were able, based on our documentary records, not least obtained from Szymany airport in Poland, to demonstrate that in fact this aircraft N63MU, which had departed from Bangkok on 4 December 2002 and was flying under contract of the United States Government, had landed at 14:56 hours GMT on 5 December at Szymany airport. Indeed we obtained the original handwritten record of landing. It was one of only two flights that landed at Szymany airfield in the month of December 2002. Based upon those records and our analysis of complex aeronautical data known as data strings, we were able to piece together the full flight logs related to the circuit of this aircraft between 3 and 6 December 2002."

317. As regards the black site no. 2:

"The second of the facilities ... was the location at which the most significant and specific abuse under investigation by the office of the Inspector General had occurred. Again, this is very important for the purposes of today's proceedings because that most significant abuse or, as the report described it, "use of unauthorised techniques" concerned one of today's applicants, Abd Al-Rahim Al Nashiri and involved the use of unauthorised techniques including implements – a handgun and a power drill – in order to precipitate mock execution of the detainee. The Inspector General went on to describe in exhaustive detail the use of up to five unauthorised techniques on this individual and although the location was not stated explicitly in the redacted version of the report, a very clear timeframe and the specificity of this activity allows references to Al Nashiri's mistreatment to be associated directly with this second site. It is significant because that site was located near Szymany, Poland, and used the classified code-name "Quartz". It is addressed in paragraphs 80 to 100 of the Inspector General's report in its redacted form. ...

QUARTZ became the facility to which the CIA brought its highest value detainees for each HVD interrogation in the period and, in particular, from December 2002 until September 2003. ...

Abu Zubaydah, who is described by the CIA as the first HVD, was arrested in Faisalabad, Pakistan on 28 March 2002. This was his capture/transfer to the CIA and was initially held as described in Thailand at the first black site. His transfer to Poland on 5 December 2002 on N63MU flight, the one just documented, confirmed notably by the fact of Al Nashiri's confirmed presence on this flight and the US Department of Justice's confirmation that the two men were transferred together on the same day in December 2002. Mr Zubaydah was held in secret CIA detention in Poland for 292 days from 5 December 2002 until 22 September 2003. He was described as having been compliant, upon the point of his transfer to Poland and he was undergoing a process known as debriefing which is interviewing provision of intelligence and information rather than being subjected to enhanced interrogation techniques of the more aggressive or harsh nature described in the CIA documents. So it is not known what techniques were applied to Mr Zubaydah inside Poland. Indeed if his case is described in the CIA Inspector General's report, it has been redacted out and we have been unable to confirm that.

With regard to the second applicant Mr Al-Nahiri however, there is far more extensive documentation regarding the treatment to which he was subjected inside of Poland. His arrest had taken place in October 2002 in Dubai in the Emirates and he

was initially held in Dubai, Afghanistan and Thailand before being transferred to Poland on the same flight as Mr Zubaydah. His detention in Poland comprised 184 days, until 6 June 2003, and it is Mr Al Nashiri who was subjected to unauthorised techniques as described by the CIA Inspector General, including those most significant abuses which the Inspector General purported to have found in the whole CIA programme. I shall try to describe some of these abuses.

Firstly, there is an incident which is described as being "mock execution". This incident occurred in late December and 1 January 2003 and it is described in the report as the "handgun and power drill incident". ... A debriefer sent to Poland on detachment from CIA CTC headquarters used a semi-automatic handgun as a prop to frighten Al Nashiri into disclosing information. He furthermore racked the handgun once or twice close to Al Nashiri's head whilst Al Nashiri sat shackled and the same debriefer used a power drill to frighten Al Nashiri, revving the drill while the detainee stood naked and hooded. These quotes are all directly taken from the CIA Inspector General's own report and the time period, 28 December 2002 until 1 January 2003, corresponds precisely with Mr Al Nashiri's detention in Poland. Furthermore, the detainee was subjected to at least three further unauthorised techniques. These included interrogators blowing smoke in Al Nashiri's face during interrogation sessions, using a stiff brush to bath Al Nashiri in a manner that was intended to induce pain and standing on Al Nashiri's shackles, resulting in cuts and bruises. The report also recounted that on several occasions Al Nashiri was reported be lifted off the floor by his arms while his arms were bound behind his back with a belt. The account of Al Nashiri's mistreatment in Poland is recounted in authoritative terms in the CIA report ..."

318. As regards the "final rendition circuit" through Poland, executed by a Boeing 737 airplane registered as N313P with the US Federal Aviation Authority on 22 September 2003 the experts said:

"One flight circuit however is of particular significance and this is the final part of our presentation in which we would like to discuss how the detention operations in Poland were brought to an end.

In September 2003 the CIA rendition and detention programme underwent another overhaul analogous to the one which had taken place in December 2002 when Mr Nashiri and Mr Zubaydah were transferred from Thailand to Poland. On this occasion, the CIA executed a rendition circuit which entailed visiting no fewer than five secret detention sites at which CIA detainees were held. These included, in sequence, Szymany in Poland, Bucharest in Romania, Rabat in Morocco and Guantánamo Bay, a secret CIA compartment of Guantánamo Bay, having initially commenced in Kabul, Afghanistan. On this particular flight route, it has been found that all of the detainees who remained in Poland at that date were transferred out of Poland and deposited into the successive detention facilities at the onward destinations: Bucharest, Rabat and Guantánamo. Among those persons was one of the applicants today, Mr Zubaydah, who was taken on that date from Poland to Guantánamo Bay. This particular flight circuit was again disguised by dummy flight planning although significantly not in respect of Poland. It was the sole official declaration of Szymany as a destination in the course of all the CIA's flights into Poland. The reason therefor being that no detainee was being dropped off in Szymany on the night of 22 September and the methodology of disguising flight planning pertained primarily to those renditions which dropped a detainee off at the destination. Since this visit to Szymany was comprised solely of a pick-up of the remaining detainees, the CIA declared Szymany as a destination, openly, and instead disguised

its onward destinations of Bucharest and Rabat, hence demonstrating that the methodology of disguised flight planning continued for the second European site in Bucharest, Romania and indeed for other detention sites situated elsewhere in the world.

This circuit can be demonstrated graphically, flying via stopover in Prague to Tashkent, Kabul, then to Szymany where as I mentioned the base was closed and the detainees taken out to onward destinations in Bucharest, Rabat and Guantánamo Bay. In order to place the closure of QUARTZ base into documentary terms, I once again refer to the CIA Inspector General's report which addresses all of the afore-mentioned abuses including those of Mr Al Nashiri in the context of a section, paragraphs 80 to 100 of the report, prefaced by this introduction: from December 2002 until its closure on 22 September 2003. The chronology accompanying the report also confirms that the last significant event in the period of review of the Inspector General occurred in this month, September 2003. It is, we found, the closure of the second black site which formed the focus of the Inspector General's inquiries. And once again, to demonstrate that these operations including the detentions of the two applicants in today's proceedings were situated within a much larger, indeed global system of rendition flights, detentions and interrogations that the CIA undertook for at least four and a half years."

C. Senator Marty

319. Senator Dick Marty was a member of the Parliamentary Assembly of the Council of Europe (PACE) from 1998 until the beginning of 2012. He chaired the Legal Affairs and Human Rights Committee and, subsequently, the Monitoring Committee.

At the end of 2005 he was appointed the Rapporteur in the investigation into the allegations of secret detentions and illegal transfers of detainees involving Council of Europe member States launched by the PACE (see also paragraphs 244-261 above).

320. In response to the questions from the court and the parties, Senator Marty stated, among other things, as follows.

With reference to findings in paragraphs 112-122 of the 2007 Marty Report (see paragraphs 254-259) and in response to questions about the existence of an operational bilateral agreement brokered by the CIA with Poland to hold its High-Value Detainees in secret detention facilities, he stated, among other things:

"In order to understand the attitude of the governments, which was very reluctant, and Poland was absolutely no exception, practically all governments that had links with the secret detention centres or with "extraordinary rendition" not only did not cooperate but did everything they could in order to stifle the truth, to create obstacles in the search for the truth. ...

Poland did not respond to the questionnaire that I sent out via the delegations to all the governments; no answer was received from Poland. And, as is described in my report, the Head of the Polish delegation, Mr Karski if I am not mistaken, had several times promised to provide information, which in reality was never forthcoming, except to say that there was nothing to report.

That attitude on the part of the governments can be explained, not justified of course but explained, if we look at what occurred in Brussels at the beginning of October 2001. I believe that this is the absolutely key element that explains the whole of the subsequent attitude of the governments.

This operation was organised within the framework of NATO. The United States, and that is official, requested the application of Article 5 of the North Atlantic Treaty. Article 5 provides that if a member of the Alliance is attacked militarily from the outside the other members of the Alliance are bound to lend assistance. The principle was adopted unanimously, indeed it was extended to include not only members of the Alliance but also candidates for membership and a certain number of States that are part of the NATO Partnership for Peace. The application of Article 5 was discussed in a secret session immediately afterwards in Brussels, and during that secret session it was decided, *inter alia*, that the CIA would be in charge, sole charge, of the operations and that if requested, the member countries would provide cooperation, as a general rule through the military secret services; not the civilian services because, generally speaking, the military secret services are far less closely monitored, in so far as there is any monitoring, than the civilian secret services. Next, and this is important and explains quite a number of things, the United States demanded total immunity for the American agents; this too is unlawful under the legislation of the member States. Furthermore, the whole of this operation was subject to the highest secrecy code obtaining under NATO rules: this is the famous "need to know" principle. And lastly, the United States would conclude secret bilateral agreements with the States as required. It is that agreement, I am now convinced, which explains the attitude subsequently adopted by all the governments, and not just by Poland."

321. As regards the names of the Polish officials listed in paragraph 174 of the 2007 Marty Report (see also paragraph 257 above), Senator Marty stated:

"[W]hy did we provide names, it is true that we gave four names. I thought long and hard before doing this, and the reason I did it was because the sources that provided us with these names were of such value, they were so authoritative and there was so much concurring evidence of the involvement of these persons that it appeared to us necessary to provide their names, considering also that we were continually being told that we were simply making allegations in a vacuum, without evidence, and so on. Of course my work, our work, was not aimed at undertaking a judicial investigation or making findings of guilt. The aim of the Parliamentary Assembly, the aim of the Council of Europe, was through this report to trigger the process of establishing the truth in each country."

322. As regards the knowledge of the Polish authorities, Senator Marty said, among other things:

"[I]t should be said that those with responsibility in Poland who were aware of the secret detention centres were not aware of the details of what was going on inside them. Everything that went on inside was under the exclusive responsibility of the CIA. No other persons were allowed inside that area. Poland was responsible for ensuring the security of the area and collaborated, as we saw earlier on, in concealing the flights of the American planes, the CIA planes, which they did on the basis of what had been agreed. The individuals who revealed the identity of these four persons were not aware of the identity of the persons detained in Poland. These are different sources, not the same ones."

He further added:

> "It was a general rule, and not only in Szymany, that everything to do with the treatment of the detainees fell exclusively under the responsibility of the CIA and that there were no local staff within the facilities where these people were held. That was the general rule, which applied everywhere. That was also established when in October 2001, within NATO, it was stated very clearly that the CIA was in sole charge of the operations and that the member countries were to provide assistance if and in the circumstances required by the CIA. Therefore, the States where these detention facilities were to be found did not know the identity of the individuals held there and did not know how many people were arriving. However, they did know that the facilities were secret detention facilities and they were aware that there were flights which brought and took people away. That was confirmed to us by several sources."

323. As regards the sources of information and evidence, Senator Marty said, *inter alia*, that:

> "[T]he picture provided by the 2007 report is still very much a partial one. It was subsequently enhanced by other parallel items of evidence: (1) The statements of the detainees themselves, to which we obviously did not have access, but which today are known and will be presented by their representatives, I imagine. The others are the important elements represented by the report of the CIA inspectorate, and all these elements put together lead to the conclusion that (1) there was a "black site" in Poland, and (2) that the two individuals in question were detained in Poland."

He added:

"Thus, I can confirm that we did obtain information from very high-ranking sources within the Polish administration, the intelligence services and elsewhere, which all tallied and which allowed us to make such affirmations. I repeat that where we had just one source, or several sources that diverged, either we did not mention the information in the report or we referred to it with great caution, subject to all the necessary provisos."

D. Mr J.G.S.

324. Mr J.G.S. is a lawyer and investigator. He worked on multiple investigations under the mandate of the Council of Europe, including as advisor to the Parliamentary Assembly's Rapporteur Senator Marty (2006-2007) and as advisor to the former Commissioner for Human Rights, Mr Thomas Hammarberg (2010-2012). In 2008-2010 he served on the United Nations' international expert panel on protecting human rights while countering terrorism. He is presently engaged in official investigations into war crimes and organised crime cases.

325. In his testimony before the Court, he stated, among other things, as follows.

326. In response to questions whether on the basis of the evidence known to him, Poland had, or should have had, knowledge of the rendition programme enabling the authorities to be aware of the purposes for which the Szymany airport and the Stare Kiejkuty base were used by the CIA:

> "Categorically, yes, Poland should have known precisely the purpose of the clandestine flights into and out of its territory. These were conducted according to a repetitive pattern, involving the participation of multiple Polish officials at every stage from authorisation to execution. The needs and the demands of the American counterparts were so specific, indeed so peculiar, to detention operations of the type described, that it is my assertion that these operations could not have been for any other purpose other than detaining individuals held in the context of counterterrorism operations."

327. In response to the question whether it could be established that Mr Al Nashiri and Mr Abu Zubaydah were in Poland at the material time, he said:

> "Again, categorically, yes. The incoming flight which I described, on 5 December 2002, landing at Szymany airport at 14:56 hours GMT, was the subject of intensive, protracted investigations on my part under the supervision of Senator Marty and under the supervision of subsequent rapporteurs and colleagues. I have investigated that flight in its most intricate detail from its planning and authorisation to its execution through multiple, different corporate shells. I have spoken to persons involved in the actual execution of the flight, eyewitnesses, if you will. I have confirmed, corroborated and validated its execution in documents and I believe that there is simply no alternative explanation to that given in my presentation today. Regarding the duration of their detention, there is furthermore credible source testimony from persons involved in handling those individuals, and again corroborating documentary and flight data regarding the flights which took each of them out of Polish territory at their respective end dates of their detention. So I have personally satisfied myself that the facts described were exactly as they played out and I believe that it does meet a judicial standard of proof.

328. As regards an explanation why the Border Guard's letter of 23 July 2010 (see paragraph 292 above) in relation to flight N379P on 6 June 2002 (on which the applicant was transferred from Poland) stated that on arrival there was one passenger and two crew members and on departure two crew members and no passengers, the expert said:

> It should be made clear that with regard to the document in question, the letter of July 23, 2010 containing a collation of landings at Szymany, the number of persons listed as passengers by the Polish border guards neither includes nor does it purport to include detainees who were brought into or out of Polish territory involuntarily by means of clandestine HVD renditions. In fact the registration of arriving passengers and also of departing passengers are functions of immigration and foreign passport holders. In this case United States nationals are required to be officially recorded as having entered or exited Polish territory. In the event that these persons were ever to have encountered Polish officials and were asked to produce their personal documents for example, then they would have to have been able to demonstrate that they were present in the country legally and legitimately, whereas conversely, detainees transferred into Poland by means of HVD rendition were never accounted for in this manner. In fact on rendition flights as the Marty reports document, the detainees were

customarily bound to the floor, strapped to a hospital gurney or otherwise shackled and they were never listed among the persons on board filed vis-à-vis any official institution. The way I would describe it is that in fact from the perspective of the CIA the detainees were treated and transported as a form of human cargo and they are not included in any of the Polish documentary records therefore.

329. Regarding the alleged existence of a bilateral agreement between the USA and Poland, he stated:

"I wish to preface my answer by stating that clearly the majority of operational considerations were the reserve of the CIA and its operatives on the territory of the Republic of Poland. At no point is it found or alleged in the Marty Inquiry or in any of the findings of my investigations that Poland instigated or orchestrated the detention, interrogation and ill-treatment of the detainees on its territory. These were, as I mentioned, systematic policies promulgated by the CIA and executed not only in Poland but in analogous forms in multiple other countries around the world. However, that said, the CIA never executed detainee operations in any of its partner territories without first informing and liaising with its national counterparts. ...

Negotiations for the hosting of a detention facility began well in advance of the first transfer of detainees to Poland. We stated in the 2007 Marty report that these negotiations may have taken place beginning as early as one year in advance of the first transfers. And certainly whilst we did not see the classified documents in question, we were made aware of the existence of authorising agreements, which granted extraordinary protections and permissions to the CIA in its execution of detainee operations.

330. With regard to the involvement of the Polish authorities, he said:

"I can attest that Polish nationals witnessed the execution of some elements of these operations, for example the unloading of bound and shackled detainees from aircraft. I can further attest that in limited instances, Polish liaisons within the military intelligence sector were made aware of particular operations being prepared or about to be executed, notably the operation of 22 September 2003 when the site was closed and a very large aircraft landed at Szymany airport in order to remove the remaining detainees. There were in short several aspects to these operations so extraordinary in the normal life of this part of Poland and the operation of an airport like Szymany and indeed from the perspective of security. These were the highest value detainees held by the US in its global war on terror that on several occasions the United States consulted on specific, concrete operational details with its Polish counterparts. It is not only a basis for Poland's officials "should have known", it is a fact that Poland's officials "did know".

331. In response to a question regarding the scope of the Polish authorities' knowledge of the CIA operations in Poland, he said:

"To a limited extent, I can address this point. I would first state that I know that Polish officials were not in the room during the conduct of particular interrogations of the detainees held by the CIA. To be precise therefore, there were no Polish nationals present during the waterboarding of Khalid Sheikh Mohammed in Poland. There were no Polish nationals present during the incidents of abuse described vis-à-vis Mr Al Nashiri. That should be a limiting factor on the extent of knowledge. I do not believe nor does the evidence indicate that Polish officials were able to see interrogations being carried out or indeed learn of their outcomes. This was the reserve of the CIA and maintained strictly on a need-to-know basis.

However, in terms of scope of the operations, I believe that Polish officials and, by extension, the Polish state, knew about the parameters of the operations in terms of their timing, they knew when the first detainees were being brought to within a very short parameter of dates and they knew when the operations were being closed down to within a very short parameter of dates. They were fully aware that these interrogations were contributing intelligence to the United States' war on terror and they would have been able to assess the number of persons held based upon the number of flights incoming and outgoing at practically any point during this period from December 2002 until September 2003. Furthermore, such was the public knowledge of United States' practices in the global war on terror at that time. The Polish Government would have been aware – indeed I have a basis on which to state that they were aware – that detention and interrogation activities included practices that would contravene our European understanding of forms of treatment in contravention of Article 3 of the Convention, i.e. what might amount to torture, cruel, inhuman or degrading treatment. For example, the massive publicity around Guantánamo Bay, the conditions of confinement in that base and others like it, and furthermore, the fact that all of the named individuals, whose captures were announced, had thereafter disappeared and neither the Red Cross nor any other institution was able to vouch for the conditions of their confinement or indeed the fact of their being alive. So where Poland knew that it was receiving detainees from the CIA and where the CIA had acknowledged that several of these detainees were captured but nothing had been further heard from them, it follows that Poland knew that they were being detained in secret and that they were therefore vulnerable to forms of treatment in contravention of Poland's ECHR obligations.

He said also:

"As I responded in answer to an earlier question, I know of no single example of a country whose territory was used in the course of the rendition, detention and interrogation programme which did not actively participate and support the operations. There were agreements at a bilateral level between the CIA and every one of its national counterparts and liaisons. In the case of Poland, there were protracted negotiations leading to express authorisations for the level of protection and permissions that the CIA enjoyed on Polish territory. I cannot speculate as to whether the CIA could have done it without Poland, but I know as a result of my investigations, that they did not do it without Poland. In fact Poland was kept abreast, was actively involved and knew about the operations as previously described."

E. Senator Pinior

332. Senator Józef Pinior was a Member of the European Parliament from 2004 to 2009 and the Vice-Chair of the Subcommittee on Human Rights. He was a member of the TDIP in 2006-2008 (see also paragraph 267 above). At present, he is a member of the Polish Senate (the upper house of the Polish Parliament).

Senator Pinior testified before the Court as a witness and responded to questions put to him by the Court and the parties.

333. In response to the question in what context he had made his decision to submit the affidavit in *Husayn (Abu Zubaydah)* (see paragraph 303 above), he said:

"[I]t is related to my let's say, political activity. Thirty years ago I was one of the organisers of the Polish free trade union movement "Solidarity". In particular, in the time of the martial law in Poland, I was a leader of a clandestine solidarity structure in my region in Lower Silesia, so it was a kind of a base for my political activity, a problem of human rights. I was in prison myself and I am very sensitive for every breach of human rights or civil liberties and of course very sensitive to the problem of rule of law. So, when I researched in European Parliament that it could be a reality that in Poland, on Polish territory, existed so-called CIA black sites, I was naturally tried to research these questions. So after my research I have a clear opinion that such facility existed on Polish territory and for this reason I am still occupied with this problem in the Senate as a member of the Senate Committee of Human Rights, Rule of Law and Petitions, and I very closely tried to resolve this problem under the rule of law and it was the reason that I decided to make my affidavit to record about the facts which I know about this problem."

334. As regards his knowledge of the document described in his affidavit as the one which had been "drawn up under the auspices of the Government of Leszek Miller for the purpose of regulating the existence of the CIA prison in Poland", he stated, among other things:

"To my knowledge, in the hands of the Polish institutions in this investigation which is just now from 2008 provided in Poland, the Polish authorities, State institutions, have in the files of this investigation a draft of the document which was drawn up when these facilities were organised in Poland in 2003 and the purpose of regulating the existence of the CIA prison in Poland. To my knowledge in this document there are precise regulations concerning the foundation of the CIA secret prison in Stare Kiejkuty and to my knowledge, among other details, the document proposed a protocol for action in the event of prisoner's death. What is important I think here is information that to my knowledge in this draft they used the term "detainees". ... And it was drawn up in 2003 under the auspices of the Government of Poland at that time. ...[T]his document is not signed by the American side. It was not signed by the American side, it was a draft from the Polish intelligence to the Americans. Of course now it is only speculation what I will say. I think the Polish side tried to organise legally the situation and in my opinion it was quite amateurish from the Government and the Polish intelligence to try do it in such manner and of course the American side did not sign this agreement."

335. In response to the question regarding the Polish official's notes concerning various aspects of the alleged existence of the CIA prison in Stare Kiejkuty, as mentioned in the affidavit, he stated, *inter alia*, that:

"[T]o my knowledge, a lot of documents, notes are in the files of the investigation from which we have a quite clear picture about these facilities in Poland. For instance, to my knowledge, in the investigation files, there is a kind of receipt for a cage. It is a receipt for a cage which was made for the intelligence centre in Stare Kiejkuty. And it is a receipt which was made by a Polish company from Pruszków – Pruszków is a city in Poland – for a metal cage and even there is a dictate specification which was attached to the order specifying even the thickness of the bars of this cage. It was supposed to be big enough to fit a grown man and offer the option of adding a portable chemical toilet. There is a specification to this order made by this Polish company in the city of Pruszków.

There are a lot of notes in the investigation which [were] made by the Polish intelligence officers, just, as I understand, they were conscious that there is something

wrong in this situation and simply – it is my interpretation – wanted to protect themselves in case that there is a breach of law of this situation. So they, Polish officers, they made a lot of notes on every situation just to be sure that their behaviour is simply to provide orders from these authorities. And here we have facts about that the Polish side made a practical logistical support and servicing of the prison site, specifically we have a document, a record, that food has been provided to the site."

336. In response to the question whether the Polish authorities had been aware of the purposes for which the Szymany airport and the Stare Kiejkuty base had been used in connection with the landing of the CIA aircraft, he said, among other things:

"I have researched these questions from November 2005 and what I can say, first, the Polish authorities at that time have too, a clear understanding that there is a breach of fundamental law of Poland, of Polish constitutional and international law, a *habeas corpus*, because they agreed for operation of American intelligence facility, CIA facility, to keep persons on the territory of Poland without any legal status. ... So in my opinion it was clear for the Government and for the intelligence service of Poland that they cooperated in the fundamental breach of the Polish Constitution and international law, to agree to keep these persons on Polish territory without any legal basis. ...

Second, I do not know if they have knowledge what the Americans are doing with these persons in this facility. It is difficult to say for me. I think for some time, they must understand that it is a prison, simply a prison or a place where hard measures or tortures were used against these people. This paragraph in this draft document what should be done when someone will be found death in this place, I think it is a clear picture that they have understanding what this facility really is. But it is only my, let's say, interpretation of the situation, but coming back to my first opinion: from the beginning they have a clear picture that there is a breach of fundamental law to keep these persons on Polish territory without any legal basis, a clear breach of the Polish constitutional and international law."

337. In respect of his sources of information, he also said:

"I can only say that as a politician who tried to be very active in the sphere of human rights and civil liberties in Poland, I have had a lot of contacts with people who were in this case. Who are these people? People from a local population in Stare Kiejkuty. Broadly speaking officers of Polish intelligence or people from the Polish State institutions who simply feel humiliated by the American behaviour, it is a kind of an officer reason, a honour right, they are appal[ed] that the Polish intelligence was used by the Americans to a kind of a dirty war, so these people contacted me and speak with me about this issue of course on the base of anonymity."

338. He further added:

> "In December 21, 2005, 7 weeks after the Washington Post publication about the CIA black sites in Eastern Europe, there was a closed meeting of the Polish Parliamentary Secret Services Committee, meeting number 6, and the subject of this meeting was the current information from the Minister coordinating the activities of these secret services. The meeting in December 2005 was attended by the Minister Zbigniew Wassermann, Head of the Secret Services, Zbigniew Ziobro, Minister of Justice and Prosecutor General ... and other state representatives and two parliamentarians. There were two parliamentarians in this meeting because only two have clearances to be attended in such secret service meeting and in this meeting the documents revealed that the CIA operated a secret base in Stare Kiejkuty since 2002 and that the prison was located there. Even there is information in this document that apart from that, the documents confirmed that about 20 Polish intelligence officers were hired by the Americans for this working around this facility. "

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION ON NON-EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' arguments

1. The Government

339. The Government submitted that the application was premature, since the criminal investigation into the applicant's allegations of ill-treatment and secret detention in Poland was still pending.

The claims submitted by him to the national authorities and to the Court were identical in Convention terms. In that respect, the Government stressed that, in the light of the Court's established case-law, it was not its task to substitute itself for the national authorities, as they were better placed to examine the facts of cases and eliminate alleged violations.

340. The proceedings before the Court, they added, should not be aimed at determining factual circumstances referred to by applicants. The verification of the facts by the Court was, in the Government's opinion, in contradiction with the principle of subsidiarity, as defined by the Court itself. In the instant case, there were no grounds for replacing the national authorities by the Court because the facts of the case were currently being examined by the Polish prosecutors.

The authorities had taken all possible measures to safeguard the legally protected interests of the applicant, to whom they had granted injured party status and who exercised his procedural rights in the proceedings.

Accordingly, the Government concluded, the investigation constituted an "effective remedy" for the purposes of Article 35 § 1 and the application

should be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 § 4 of the Convention.

2. The applicant

341. The applicant disagreed and said that the pending criminal investigation into CIA prisons in Poland had been inordinately delayed, subject to undue political influence and ineffective. It had been pending for over five years with no public disclosures as to its precise scope, progress or any indication as to when it was likely to be concluded. The Government had provided no explanation as to why it had repeatedly been extended and was still pending with no credible sign of conclusion almost a decade after he had been secretly detained and tortured in Poland. Thus, the Convention did not require applicants to exhaust domestic remedies that were plainly ineffective.

342. The applicant further stressed that, despite the difficult circumstances under which he was currently detained, he had made every effort to engage the authorities in order to ensure an effective investigation of his case in Poland and had exhausted all available and effective domestic remedies.

On 21 September 2010 he had filed an application with the Polish prosecutor to intervene in the pending criminal investigation concerning CIA black sites in Poland. On 25 February 2011 he had lodged a complaint with the relevant court, alleging undue delay in the investigation. That complaint had been dismissed on 20 April 2011 by the decision that was final and could not be appealed against.

In view of the foregoing, the applicant asked the Court to reject the Government's preliminary objection.

B. The Court's assessment

343. The Court observes that the Government's objection raises issues concerning the effectiveness of the investigation into the applicant's allegations of torture and secret detention on Polish territory and is thus closely linked to his complaint under the procedural aspect of Article 3 of the Convention (see paragraph 3 above and paragraph 460 below). That being so, the Court considers that it should be joined to the merits of that complaint and examined at a later stage (see, *mutatis mutandis*, *Estamirov and Others v. Russia*, no. 60272/00, §§ 72 and 80, 12 October 2006; and *Kadirova and Others v. Russia*, no. 5432/07, §§ 75-76, 27 March 2012).

II. OBSERVANCE OF ARTICLE 38 OF THE CONVENTION BY POLAND

344. Although the structure of the Court's judgments traditionally reflects the numbering of the Articles of the Convention, it has also been customary for the Court to examine the Government's compliance with their procedural obligation under Article 38 of the Convention at the outset, especially if negative inferences are to be drawn from the Government's failure to submit the requested evidence (see, among other cases, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 209, ECHR 2013- ...; *Shakhgiriyeva and Others v. Russia*, no. 27251/03, §§ 134-140, 8 January 2009; *Utsayeva and Others v. Russia*, no. 29133/03, §§ 149-153, 29 May 2008; *Zubayrayev v. Russia*, no. 67797/01, §§ 74-77, 10 January 2008; and *Tangiyeva v. Russia*, no. 57935/00, §§ 73-77, 29 November 2007*;* see also paragraph 390 below).

345. On giving notice of the present case to the Government and, following the decision to examine Mr Al Nashiri's application simultaneously with the case of *Husayn (Abu Zubaydah)*, the Court in connection with its examination of both cases has asked the Government on numerous occasions to produce documentary evidence (see paragraphs 17-40 above).

Faced with the Government's failure to comply with its evidential requests, the Court asked the parties to comment, in particular in the light of *Janowiec and Others* and related case-law, on the Government's compliance with their obligation to "furnish all necessary facilities" for its examination of the case, as laid down in Article 38 of the Convention. This Article states as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

A. The parties' submissions

1. The Government

346. The Government justified their failure to submit evidence and information requested by the Court by the fact that the criminal investigation into the applicant's allegations of ill-treatment and secret detention by the CIA in Poland was pending. For that reason, they explained, they were not in a position to address in detail the questions put to them by the Court on communication of the case or to produce the requested documents. In their view, the interests of the administration of justice required them to adhere strictly to the secrecy of the investigation and for that reason they could not submit to the Court all the requested information and documents. Indeed, by answering the Court's questions

they might be seen as interfering with the competence of the prosecution and judicial authorities, which were independent of the Government.

In that respect, they relied, on an *a contrario* basis, on the case of *Nolan and K. v. Russia* (cited in paragraph 360 below).

347. At the same time, the Government stressed that they were fully aware of their duty under Article 38 of the Convention to cooperate with the Court as a matter of international law. This obligation, they affirmed, was also enshrined in Article 9 of the Polish Constitution, which laid down the principle of respect for international law, meaning that Poland had a duty to fulfil, in good faith, the obligations imposed on the State as a subject of international law.

348. In their subsequent written submissions (see also paragraphs 20-21; 26-27; 30; 33; 35 and 40 above) and at the public hearing the Government repeated that they were fully aware of the fact that the Court was the master of its own procedure and that it was up to the Court to make appropriate arrangements to ensure the confidentiality of the documents submitted.

However, they argued, unlike other international courts, for instance the International Criminal Court or the Court of Justice of the European Union, the Rules of Court did not indicate at all the manner in which sensitive documents submitted by the parties, especially the States, were to be protected. Nor were there any rules regulating the way in which classified documents were to be produced, made available, communicated to the other party or stored in the Court's Registry. No provision provided for sanctions to be imposed on a party disclosing the content of classified material to the public.

In the Government's submission, the possibility of restricting public access to documents under Rule 33 of the Rules of Court was insufficient and this provision was not materially adequate to ensure confidentiality. The decision of the President of the Court restricting access to documents was not a permanent one and could be changed subsequently without any consultation of the parties. In any event, the Rules of Court were merely an act of an internal nature.

349. At the public hearing, the Government expressed their disappointment with the Court's refusal to become acquainted – in the manner proposed by them – with material in the case file in Poland and the documents that could have been made available to the judges, in particular an extract from the non-confidential part of the file.

They said that the latter document had been prepared specially for the Court and contained information about the pending proceedings that was more detailed. Consequently, it contained some classified information, which required, in accordance with Polish law, an indication of the persons who could become acquainted with it. Under the national rules, it also had to be secured properly, even in the proceedings conducted by the Court *in camera*. However, the Court had decided not to take advantage of their

offers. Nor had it accepted prior, renewed proposals from the Government to assist it in making an application to the Kraków Prosecutor of Appeal for access to the investigation file.

350. In the Government's opinion, there was nothing to prevent the Court from admitting the evidence in the manner suggested by them. The document in question was necessary for the Court in order to gain thorough knowledge about the scope of the investigation and the steps taken to obtain evidence. Only this would have enabled the Court to assess the effectiveness and thoroughness of the investigation.

However, the Court, at the fact-finding hearing and the hearing *in camera*, had refused to apprise itself of the document and had not even given the Government an opportunity to discuss its structure. It had probably been guided by the opinion of the applicants' representatives, who had objected to the procedure proposed by the Government. In the Government's submission, this attitude on the part of the applicants' lawyers could be seen only in terms of what they described as a "preconceived process move deliberately preventing the Government from presenting the status of their domestic proceedings".

Instead, the Government added, the Court had demanded that the document be submitted in a redacted form. They had not been in a position to do so it because this would run counter to their intended purpose – they had wanted to present the Court with sensitive information on the ongoing and planned actions for gathering evidence and crucial findings of fact in the investigation to support their argument that it was thorough and effective and that, consequently, the application was premature. Yet, in order to protect the secrecy of the investigation, they could not provide such information in documents that would be distributed openly in the public domain.

351. The Government considered that the above arguments demonstrated that the situation in the present case could not be compared with the refusal to cooperate with the Court on the part of Russia in *Janowiec and Others* (cited above).

In particular, in *Janowiec and Others* the refusal concerned the decision taken by the prosecutor's office to discontinue an investigation into events that had occurred in 1940 and when the Court requested the Russian Government to produce the said decision, the proceedings had already been concluded. Moreover, unlike Poland, the Russian Government had not presented to the Court any suggestions as to how it might consult the document in question.

352. The Government concluded that they had complied with their obligation under Article 38 to furnish all necessary facilities for the Court's examination of the case.

2. The applicant

353. The applicant disagreed and submitted that the Polish Government, by its failure to provide the material requested by the Court, had violated Article 38 of the Convention and had hindered his effective exercise of the right of individual petition under Article 34 of the Convention.

354. To begin with, despite the Court's guarantee that any sensitive information conveyed by the State to the Court would be kept confidential, the Government had not supplied any meaningful information in response to the Court's questions put to the parties when it had given notice of the application. Moreover, the Government had provided no "reasonable and solid grounds", as required under *Janowiec and Others*, to justify the treatment of most of the relevant documents in the investigation as secret. Indeed, they had not even indicated which specific regulation of the Act on Protection of Classified Information had been the legal basis for the secrecy of the investigation file, or which agency had issued the decision to classify the documents, or why certain volumes of the documents in the case file had remained classified in their entirety instead of being released to the Court in redacted form.

355. This, the applicant pointed out, was in contrast to the approach of the Polish Government in *Janowiec and Others*, where they had argued that the Russian Government had not produced a reasoned decision on the classification of relevant documents. In any event, *Janowiec and Others* made it clear that a mere reference to the structural deficiency of the domestic law, which rendered impossible any communication of sensitive documents to international bodies, was an insufficient explanation to justify the withholding of the information requested by the Court. Accordingly, invoking limitations under Polish law regarding the classification of documents could not justify the Government's failure to cooperate with the Court.

356. The applicant also stressed that the Government had failed to comply in a timely manner with the Court's two procedural orders directing the production of an extract from the investigation file. In consequence, they had failed to abide by the standards reiterated in *Janowiec* and Others and the Court was entitled to draw adverse inferences from such conduct.

357. As regards the argument that the lack of specific provisions in the Rules of Court governing the handling of sensitive materials had prevented the Government from supplying the evidence requested, the applicant said that the Government's concerns were misplaced. The Court had successfully considered many cases concerning highly sensitive matters of national security, and the Rules of Court had demonstrated that they were sufficiently flexible and robust to deal with any concerns that might arise in the proceedings before the Court. The practice of the Court was clear – where the Government failed to provide the documentation requested by the

Court, an adverse inference might be drawn from their refusal to cooperate with the Court.

358. Furthermore, the Government had been given ample opportunity to produce relevant documents to the Court and to all of the applicant's representatives. Indeed, before the hearings, the Court had twice issued procedural orders instructing the Government to produce within a set time-limit an extract from the non-confidential part of the investigative file. The Government had failed to comply with these orders, prompting the Court to remind them that its decisions remained unchanged.

Despite that, the Government had still not produced the relevant documents in the manner specified by the Court. Instead, at the late stage of the 2 December 2013 hearing, without prior notice to the Court or to the applicants' representatives, the Government had announced that the extract could be viewed by the judges and Polish representatives for the applicants, thereby implying that non-Polish representatives of the applicants would be denied access.

Notwithstanding the Government's repeated failure to comply with the Court's orders, the Court had given them yet another opportunity to produce the extract, until two weeks after the hearing. The Government had not produced the document and, indeed, their letter of 17 December 2013 had indicated that this extract would not be forthcoming. Such conduct was incompatible with the tenor and substance of the Rules of Court and the Convention.

359. The applicant invited the Court to find that the Polish Government had not discharged their duty under Article 38 of the Convention.

B. The Court's assessment

1. Applicable principles deriving from the Court's case-law

(a) General principles

360. It is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States comply with their obligation under Article 38 to furnish all necessary facilities to make possible a proper and effective examination of applications, whether the Court is conducting a fact-finding investigation or performing its general duties as regards the examination of applications.

A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (see, among many examples, *Janowiec and Others*, cited above, § 202, *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 253-254, ECHR 2004 III;

Timurtaş v. Turkey, no. 23531/94, §§ 66 and 70, ECHR 2000 VI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 493, ECHR 2005-III).

361. In particular, in a case where the application raises issues concerning the effectiveness of the investigation, the documents of the criminal investigation are fundamental to the establishment of the facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility and at the merits stage (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999 IV; and *Imakayeva v. Russia*, no. 7615/02, § 200, ECHR 2006-XIII (extracts)).

362. The obligation laid down in Article 38 is a corollary of the undertaking not to hinder the effective exercise of the right of individual application under Article 34 of the Convention. The effective exercise of this right may be thwarted by a Contracting Party's failure to assist the Court in conducting an examination of all circumstances relating to the case, including in particular by not producing evidence which the Court considers crucial for its task. Both provisions work together to guarantee the efficient conduct of the judicial proceedings and they relate to matters of procedure rather than to the merits of the applicants' grievances under the substantive provisions of the Convention or its Protocols (see, among many other examples, *Janowiec and Others*, cited above, § 209, with further references).

363. The Court has repeatedly held that, being master of its own procedure and of its own rules, it has complete freedom in assessing the admissibility, the relevance and the probative value of each item of evidence before it (see also paragraph 388 below). Only the Court may decide whether and to what extent the participation of a particular witness would be relevant for its assessment of the facts and what kind of evidence the parties are required to produce for due examination of the case. The parties are obliged to comply with the Court's evidential requests and instructions, provide timely information on any obstacles to their compliance with them and give reasonable and convincing explanations for failure to comply. It is therefore sufficient for the Court to regard the evidence contained in the requested decision as necessary for the establishment of the facts in the case (see, among many other examples, *Ireland v. the United Kingdom*, 18 January 1978, § 210, Series A no. 25; *Janowiec and Others*, cited above § 208 with further references; *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 174, 1 July 2010; *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 77, ECHR 2005-II (extracts) and *Dedovskiy and Others v. Russia*, no. 7178/03, § 107, ECHR 2008 (extracts)).

364. The obligation to furnish the evidence requested by the Court is binding on the respondent Government from the time such a request has been made, whether on being given notice of an application or at a subsequent stage in the proceedings.

It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for. In addition, any material requested must be produced promptly and, in any event, within the time-limit fixed by the Court, for a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing (see *Janowiec and Others*, cited above, § 203, with further references).

(b) Cases where national security or confidentiality concerns are involved

365. The judgment by the national authorities in any particular case that national security considerations are involved is one which the Court is not well equipped to challenge. Nevertheless, in cases where the Government have advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the Court has had to satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential. Where such legitimate concerns exist, the Court may consider it necessary to require that the respondent Government edit out the sensitive passages or supply a summary of the relevant factual grounds (see, among other examples, *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009 and *Janowiec and Others,* cited above, §§ 205-206).

Furthermore, such concerns may, depending on the document, be accommodated in the Court's proceedings by means of appropriate procedural arrangements, including by restricting access to the document in question under Rule 33 of the Rules of Court, by classifying all or some of the documents in the case file as confidential *vis-à-vis* the public and, *in extremis*, by holding a hearing behind closed doors (see *Janowiec and Others*, cited above, §§ 45 and 215, and *Shamayev and Others*, cited above, §§ 15-16 and 21).

366. The procedure to be followed by the respondent Government in producing the requested classified, confidential or otherwise sensitive information or evidence is fixed solely by the Court under the Convention and the Rules of Court (see also paragraph 358 above). The respondent Government cannot refuse to comply with the Court's evidential request by relying on their national laws or the alleged lack of sufficient safeguards in the Court's procedure guaranteeing the confidentiality of documents or imposing sanctions for a breach of confidentiality (see *Nolan and K.* cited above; *Shakhgiriyeva and Others v. Russia*, no. 27251/03, §§ 136-140, 8 January 2009; and *Janowiec and Others,* cited above, §§ 210-211).

The Convention is an international treaty which, in accordance with the principle of *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties, is binding on the Contracting Parties and must be performed by them in good faith. Pursuant to Article 27 of the Vienna Convention, the provisions of internal law may not be invoked as

justification for a failure by the Contracting State to abide by its treaty obligations. In the context of the obligation flowing from the text of Article 38 of the Convention, this requirement means that the respondent Government may not rely on domestic legal impediments, for instance an absence of a special decision by a different agency of the State, to justify a failure to furnish all the facilities necessary for the Court's examination of the case (see, for instance, *Nolan and K.* cited above and *Janowiec and Others*, § 211).

2. Application of the above principles to the present case

367. Having regard to the particular circumstances of the case, including its background, the alleged involvement of the applicant in terrorist activities, the secrecy of the CIA rendition operations, the fact that many events that had given rise to the applicant's Convention claims still remained undisclosed and that a large part of the potentially relevant documentary evidence was classified, the Court was mindful that the evidence requested from the Government was liable to be of a sensitive nature or might give rise to national-security concerns. For that reason, already at the initial stage of the proceedings, it gave the Government an explicit guarantee as to the confidentiality of any sensitive materials they might have produced. Relying on Rule 33 § 3 and expressly referring to "the interests of national security in a democratic society" the Court left no doubt that any such concerns would be adequately addressed in the ensuing proceedings (see paragraphs 17-19).

Subsequently, the Court, at the Government's request, imposed confidentiality on the parties' written submissions (see paragraphs 20, 22 and 25-28 above). It also held a separate hearing *in camera*, devoted exclusively to matters of evidence (see paragraphs 12 and 14 above).

368. However, no national-security related arguments have ever been invoked by the Government in response to the Court's evidential requests and none of the requested documents have materialised. The Government justified their failure to produce the relevant evidence by the need to ensure the secrecy of the investigation into the applicant's allegations of torture and secret detention in Poland (see paragraphs 21, 27, 30, 35, 346 and 349-350 above). Notwithstanding several letters, reminding them that in examining cases the Court followed its own procedure and the Rules of Court, they suggested that the Court should conform to the rules of their national law (see paragraphs 21-40 and paragraphs 349-350 above).

369. Throughout the written procedure the Government expressed the wish for the Court to apply – with their assistance – to the Polish prosecution authorities for the judges to have access to the non-classified part of the investigation file, under Article 156 § 5 of the Code of Criminal Procedure. That provision, subject to the investigating prosecutor's permission, allowed "third parties" to have access to the case file

"in exceptional circumstances" (see paragraphs 21, 27, 29-30 and 189 above). Had such permission been granted, they further wished the judges of the Court to inspect the file in the prosecution's secret registry, subject to all the restrictions that applied under Polish law in that respect (see paragraphs 190-197 above).

In addition, the Government, of their own initiative, asked the Kraków Prosecutor of Appeal to prepare for the Court, by 1 October 2012, an "additional material" or a "special document" describing the progress in the investigation. That "special document" was again to be made available to the Court in compliance with Polish laws governing classified information. (see paragraphs 21-24 above).

The Government further stated that, upon the Court's request, they would ask the Kraków Prosecutor of Appeal to prepare a "comprehensive extract" from the non-confidential part of the investigation file which, however, had to be classified in order to secure the secrecy of the investigation (see paragraph 30 above). They wished the Court to become acquainted with this extract "pursuant to conditions agreed between the Government and the Court" (see paragraph 33 above).

370. As shown by subsequent actions of the Government, those "conditions" were again meant to be defined solely by them and with reference to the national laws, rather than by the Court and in the light of its own Rules and practice.

Although unrequested, the Government brought the said extract to the Court and, at the closure of the fact-finding hearing, invited the Court and the Polish counsel for the applicants to become acquainted with it on the spot, saying that "the document could be reviewed in the course of the hearing" and that "becoming acquainted with the document must be here *in situ*, here and now" and that afterwards the document had to be returned to them (see paragraph 36 above).

After finally having been asked to submit the document in a redacted version within two weeks, the Government refused, maintaining that this would be inconsistent with the purpose for which the document had been prepared. Nor could they submit the non-redacted version because the Rules of Court did not offer sufficient safeguards of confidentiality for sensitive material submitted to the Court (see paragraph 40 above). The same argument was repeated at the public hearing (see paragraphs 348-350 above).

371. The Court cannot accept the Government's view on this matter. The obligations that the Contracting States take upon themselves under the Convention read as a whole include their undertaking to comply with the procedure as set by the Court under the Convention and the Rules of Court. The Rules of Court are not, as the Government maintained, a mere "act of an internal nature" but they emanate from the Court's treaty-given power set

forth in Article 25 (d) of the Convention to adopt its own rules regarding the conduct of the judicial proceedings before it.

The absence of specific, detailed provisions for processing confidential, secret or otherwise sensitive information in the Rules of Court – which, in the Government's view justified their refusal to produce evidence – does not mean that the Court in that respect operates in a vacuum. On the contrary, and as pointed out by the applicant (see paragraph 357 above), over many years the Convention institutions have established sound practice in handling cases involving various highly sensitive matters, including national-security related issues. Examples of procedural decisions emerging from that practice demonstrate that the Court is sufficiently well equipped to address adequately any concerns involved in processing confidential evidence by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case (see, among other rulings, *Ireland v. the United Kingdom*, Commission's Report of 25 January 1976, §§ 138-140, Series B no. 23-I; *Cyprus v. Turkey, no. 25781/95*, Commission's Report of 4 June 1999, §§ 41-45 and 138; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 107-111, ECHR 2001-IV; and *Shamayev and Others*, cited above, §§ 15-17, 21, 53, 246 and 269).

372. In view of the foregoing and having regard to the Court's clear and settled case-law in cases where the same objection has previously been raised and rejected (see also paragraph 361 above), the respondent State's refusal to submit evidence based on an alleged lack of sufficient procedural safeguards guaranteeing the confidentiality of the material that they were asked to provide cannot be justified in terms of Article 38 of the Convention.

373. Nor can the Court accept the Government's plea that the domestic regulations on the secrecy of the investigation constituted a legal barrier to the discharge of their obligation to furnish evidence. As stated above, the respondent Government cannot refuse to comply with the Court's evidential request by relying on their national laws or domestic legal impediments; for instance, as in the present case, an alleged requirement for the judges of the Court to obtain permission from the investigating prosecutor to consult the case file. Indeed, the obligation under Article 38 implies putting in place any such procedures as would be necessary for unhindered communication and exchange of documents with the Court (see paragraph 366 above and cases cited therein, in particular *Nolan and K.*, cited above, § 56). The Court cannot have several national authorities or courts, or prosecutors at various levels, as interlocutors and it is only the responsibility of the Polish State as such – and not that of a domestic authority or body – that is in issue before it (see *Shamayev and Others*, cited above, § 498).

Consequently, it was incumbent on the respondent Government to ensure that the documents requested by the Court, and those later offered by them, be accordingly prepared by the prosecution authority and submitted either in

their entirety or, as directed, at least in a redacted form, within the prescribed time-limit and in the manner indicated by the Court.

374. Having regard to the conditions for the Court's access to the document offered by the Government – an extract from the non-confidential part of the investigation file – and the confirmed fact that counsel for the applicant and Mr Abu Zubaydah had had access to this part of the file and, to some extent, its confidential part (see paragraph 38 above and also *Nolan*, cited above, § 56), the Court finds it difficult to accept that the Government acted in accordance with their obligations under Article 38 of the Convention.

Against this background and account being taken of its repeated guarantees of confidentiality, the Court also finds unacceptable the Government's submission suggesting that for no good reason "the Court [had] refused to apprise itself of the document" or that sensitive information provided by them would be found "in documents that would be distributed openly in the public domain" (see paragraph 350 above).

375. Considering that part of the applicant's complaints concerned the alleged ineffectiveness of the criminal investigation in breach of Articles 3 and 13, the documents from that investigation were required for the Court's proper examination of the complaint (see paragraph 361 above). The Government openly conceded this (see paragraph 350 above).

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. Its failure to submit information in its 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).

376. Accordingly, the Court concludes that the Polish Government, by their refusals to comply with the Court's evidential requests have failed to discharge their obligations under Article 38 of the Convention.

III. THE COURT'S ESTABLISHMENT OF THE FACTS AND ASSESSMENT OF THE EVIDENCE

A. The parties' positions on the facts and evidence

1. The Government

377. The Government did not contradict the facts as related by the applicant.

In their written observations filed on 5 September 2012, they submitted that until the criminal investigation in Poland had been terminated they reserved their right to comment on and rectify the facts of the case as supplied to them when they were given notice of the application.

In their pleading of 15 March 2013 they stated the following: "the Polish Government do not contest in the proceedings before the Court the allegations submitted by the applicant's plenipotentiaries, nor [do they] contest the alleged facts".

At the oral hearing, the Government said that they were not prepared to affirm or negate the facts submitted by Mr Al Nashiri and Mr Abu Zubaydah because they believed that those facts should first be established and evaluated by the Polish judicial system. They added that, in contrast to the case of *El-Masri*, in these cases the Court was not confronted with two different versions of facts or differences in accounts of facts. Accordingly, in their view, there was no need for the Court to take the role of a first-instance court and to establish the facts of the cases itself before the domestic proceedings had been completed.

378. As regards the documentary and oral evidence obtained by the Court throughout the proceedings, the Government did not at any stage contest the admissibility, accuracy or credibility of the relevant materials and testimonies. Furthermore, at the hearing *in camera* held on 2 December 2013 (see paragraph 14 above), during which the parties were asked to state their positions on the oral evidence taken and on whether the parties could rely on that evidence at the public hearing, they confirmed that they had no objection to the parties' referring at the public hearing to the testimony of the experts and the witness. In their words, "this [was] knowledge that [was] already accessible, albeit *via* other channels, in the public domain anyway".

379. At the public hearing, in relation to that testimony, the Government drew the Court's attention to the fact that both Senator Marty and Mr Fava had carried out inquiries which were not judicial proceedings. Those inquiries, they said, were "pre-procedural examinations" instituted for the purpose of corroborating the participation of the European countries in the CIA HVD Programme. They had not dealt with individual cases. In terms of the standard of proof they were not comparable to criminal proceedings. In contrast, the investigation in Poland was being conducted in order to obtain

evidence concerning all possible offences, to establish individual perpetrators and to determine whether it was possible to bring an indictment to the court.

The Government admitted that the findings of the relevant international inquiries were a source of information about the potential evidence and indicated the direction for subsequent actions to be taken by prosecutors. However, they did not constitute evidence in the strict sense of the word and relying on them would not be sufficient for a prosecutor to bring a charge or indictment against an individual in respect of a specific offence.

380. Lastly, the Government, responding to a question from the Court at the hearing, concerning the injured party status accorded to the applicant and Mr Abu Zubaydah by the investigating prosecutor, explained that for a procedural decision to identify an individual as an injured party in criminal proceedings two elements had to be present. First, the subjective element, that is to say a person must have a sense of having suffered prejudice on account of the commission of an offence. The second, the objective element consisted in an indication that there existed a sufficient level of credibility that an offence had been committed to the detriment of that person in Poland. In the applicant's case the credibility was sufficiently high for him to be treated as a victim of an offence and the investigation continued in order to determine the extent to which he had been harmed and by whom.

2. The applicant

381. The applicant, in his submissions concerning Poland's knowledge of the HVD Programme, the probative value of the evidence before the Court, the burden of proof and the standard of proof as applicable in the present case stated, in particular, as follows.

382. Numerous documents, including reports prepared by international organisations, recounted that on 4 December 2002 the CIA had transported Mr Al Nashiri on a plane registered N63MU from Bangkok to Szymany airport. The airport was just under an hour's drive from Stare Kiejkuty.

Official documents disclosed by the Polish Border Guard, the 2007 Marty Report and other reports before the Court confirmed that this flight had landed on 5 December 2002 at Szymany airport. Mr Zubaydah's submissions, which the applicant adopted in so far as they supported his claims, provided further evidence corroborating the fact that he and Mr Al Nashiri had been flown from Thailand to Poland on the same flight.

383. The material before the Court also confirmed that the applicant had been transferred from Poland to Rabat on a plane registered N379P on 6 June 2003.

Official documents disclosed by the Polish Air Navigation Service Agency and the Polish Border Guard, the 2007 Marty Report and the CHRGJ Report stated that rendition aircraft N379P had departed from Szymany airport on 6 June 2003 for Rabat with the assistance of the Polish

authorities. The oral evidence from experts demonstrated how the Polish authorities had filed false flight plans and assisted in the cover-up of the CIA operations.

384. Evidence before the Court clearly showed that it had been Polish officials who had granted CIA rendition planes licences and overflight permissions as well as special exemptions. It had been the Polish authorities who had guided the planes in to land, and who had cleared the runway and secured the perimeter and grounds of Szymany airport so that detainees like Mr Al Nashiri could secretly be offloaded into vans bound for the secret prison.

In the Polish Air Navigation Services Agency, officials had assisted in disguising the existence and exact movements of incoming CIA rendition flights. Polish Border Guard officials had ensured that CIA flights were exempt from normal procedures for incoming foreign passengers. In the Customs Office officials had resolved irregularities in the payment of fees related to CIA operations. The manager of Szymany airport had provided significant information with respect to abnormal procedures allowed for rendition aircraft. The Court had heard expert testimony confirming that after a rendition operation – the very next day – Polish airport employees had been paid cash at a rate far higher than the usual rate.

385. The 2007 Marty Report showed that Polish officials had provided extraordinary physical security by setting up "buffer zones" around the CIA's detainee operations. The same report confirmed that several high-ranking Polish officials had known about, and had authorised, Poland's role in the secret CIA prison. The existence of an operational agreement between the Polish Intelligence Agency and the CIA had been mentioned in the 2007 Marty Report and various other material before the Court and had been confirmed by Senator Pinior's testimony. The agreement had set out detailed rules for running the prison on Polish territory and a provision for what would have to be done if a detainee had died there. Prime Minister Leszek Miller and President Aleksander Kwaśniewski had reportedly received oral reports from Polish intelligence officials about what had been going on in that CIA prison, including on the fact that the United States had been detaining individuals there.

386. Senator Pinior had publicly said that he had information showing that the Polish Intelligence Unit at Stare Kiejkuty had commissioned a local contractor to build a prisoner's cage. In his testimony to before the Court, he had confirmed that the cage had been built by a Polish company from Pruszków with specifications as to the thickness of the bars and size – the cage had been supposed to be big enough to hold a grown man and a portable toilet.

387. The applicant further stressed that at the fact-finding hearing the Court had heard cogent, credible and consistent evidence from four persons

of the highest integrity and the highest professional calibre, who had demonstrated that:

1) there had been a secret CIA prison at Stare Kiejkuty from December 2002 to September 2003;

2) the applicant had been detained in that prison from 5 December 2002 to 6 June 2003; indeed, the fact that the applicant had been granted injured party status in the investigation by a decision which was non-discretionary but mandated by evidence confirmed the fact that the prosecutor was in possession of evidence that that would support his claims;

3) in Stare Kiejkuty the applicant had been tortured and subjected to unauthorised interrogation techniques specifically set out in the 2004 CIA Report;

4) Poland had known, or should have known, of the CIA prison on its territory. It had known because it had been directly involved and entered into a secret agreement with the USA to host that prison;

5) the Polish authorities had displayed a pattern and practice of obscuring the truth, and during the relevant international inquiries there had been an extreme reluctance on their part to disclose what had in fact happened.

388. The applicant concluded that he had met his burden of proof in the present case. In contrast to the "strong, clear and concordant" facts put forward by him, the Polish Government had failed to answer the Court's questions on the merits. Where, as in the present case, "the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities", the burden of proof could be regarded as resting on the authorities to provide a convincing explanation. Where, as here, the authorities had failed to provide a convincing explanation, failed to conduct an effective investigation and failed to furnish the Court with the necessary information, the Court was entitled to draw inferences adverse to the authorities and in favour of the applicant.

In addition, unrebutted presumptions of fact led to the conclusion that the applicant's factual allegations were true. Indeed, the Government had conceded that they had not contested the facts as related by the applicant and his allegations.

B. Amnesty International (AI) and the International Commission of Jurists (ICJ) submissions on public knowledge of the US practices in respect of captured terrorist suspects

389. Referring to knowledge imputable to any Contracting State at the relevant time, AI and the ICJ pointed out, among other things, to the following facts that had been a matter of public knowledge.

On 13 November 2001 US President George W. Bush signed a military order authorising the indefinite detention without trial, and without access to

any court in the USA or elsewhere, of foreign nationals deemed by the President to be involved in international terrorism. In the same order, he had authorised military commissions, executive bodies in which the ordinary rules of criminal justice would not apply, for the trial of non-US nationals accused of broadly defined terrorism-related offences. On 21 March 2002 the US had published rules for the military commissions, which showed that these were purely executive bodies.

Reports of US renditions to secret detention were in the public domain as early as October 2001 and continued through 2003. It was widely disseminated that detentions at the Naval Base in Guantánamo Bay had begun in January 2002, and that by June 2003 there had been about 670 detainees held in that prison. By the same time it was also known that those who had been transferred to Guantánamo had included individuals picked up far from Afghanistan.

In major reports issued in April and June 2002 AI had warned that the USA was engaging in arbitrary detainee transfers into and from its custody and that some individuals had disappeared into secret US detention.

The 2003 AI report documented that there were over 600 detainees then at Guantánamo and reported on the USA's recourse to secret detention and transfer of detainees to possible torture in third countries. The report and documents published during 2002 provided further credible evidence of the USA's use of detention and rendition in the context of the "war on terror", including the use of undisclosed and incommunicado detention by US forces in Afghanistan.

390. In short, during 2002 and 2003 credible information emerged that the USA had committed and was continuing to commit gross human rights violations, including enforced disappearances by means of arbitrary, incommunicado and secret detention outside US territory as well as secret detainee transfers, in respect of individuals whom the US authorities suspected of involvement in or having knowledge of international terrorism.

Thus, by June 2003 any State would have known that the USA was engaging in the use of the death penalty; the secret detention of individuals it suspected of involvement in or having information about international terrorism; the holding of individuals incommunicado or virtually incommunicado in indefinite military detention without charge or trial; and preparations to subject individuals to an unfair trial by military commission, at Guantánamo, or elsewhere, without access to civilian courts, including in respect of individuals facing capital charges.

C. The Court's conclusion on the lack of dispute as to the facts and evidence

391. The Court notes that the Government did not take advantage of the opportunity to make comments on the facts as supplied by the applicant and that it was not their intention to contest them. It also notes that they did not challenge the admissibility, accuracy or credibility of documentary and oral evidence obtained by the Court throughout the proceedings (see paragraphs 377-379 above).

Consequently, the Court will proceed on the basis of there being no contestation as such by the Government as to the facts of the case as put forward by the applicant and no discernible dispute between the parties as to the evidence from various sources which was admitted by the Court and summarised above (see paragraphs 41-338 above).

D. The Court's assessment of the facts and evidence

392. With respect to the assessment of the facts and evidence gathered in the present case, the Court would first wish to reiterate the relevant principles.

1. Applicable principles deriving from the Court's case-law

393. The Court is sensitive to the subsidiary nature of its role and has consistently recognised that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Imakayeva*, cited above, no. 7615/02, § 113; *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 96, 18 December 2012; and *El-Masri*, cited above, § 154.)

394. 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. 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 the Court's 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, among other examples, *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII; *Creangă v. Romania* [GC], no. 29226/03, § 88, 23 February 2012; and *El-Masri*, cited above, § 151).

395. While it is for the applicant to make a *prima facie* case and adduce appropriate evidence, if the respondent Government in their response to his allegations fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred, strong inferences can be drawn (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 184, ECHR 2009, with further references; *Kadirova and Others v. Russia*, no. 5432/07, § 94, 27 March 2012; and *Aslakhanova and Others, cited above*, § 97).

396. Furthermore, the Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. According to the Court's case-law under Articles 2 and 3 of the Convention, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, for instance as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Imakayeva*, cited above, §§ 114-115, ECHR 2006-XIII (extracts); *El-Masri*, cited above, § 152).

In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government (see *El-Masri*, ibid.).

2. Preliminary considerations concerning the assessment of the facts and evidence in the present case

397. The Court observes at the outset that, in contrast to many other previous cases before it involving complaints about torture, ill-treatment in custody or unlawful detention, in the present case it is deprived of the possibility of obtaining any form of direct account of the events complained of from the applicant (for example, compare and contrast with *El-Masri*,

§§ 16-36 and 156-167; *Selmouni v. France* [GC], no. 25803/94, §§ 13-24, ECHR 1999-V; *Jalloh v. Germany* [GC], no. 54810/00, §§ 16-18, ECHR 2006-IX; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 188-211, ECHR 2004-VII).

As stated in the application, since the end of October 2002, when the applicant was captured by the CIA in Dubai, he has continually been in the custody of the US authorities, initially in the hands of the CIA in undisclosed detention at various black sites and then, as confirmed by President Bush on 6 September 2006, in the custody of US military authorities in Guantánamo (see paragraphs 71 and 83-127 above).

398. The regime applied to High Value Detainees in CIA custody such as the applicant is described in detail in the CIA documents and also, on the basis, *inter alia*, of the applicant's own account, in the 2007 ICRC Report. It "included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention". The transfers to unknown locations and unpredictable conditions of detention were specifically designed to deepen their sense of disorientation and isolation. The detainees were usually unaware of their exact location (see paragraphs 51, 62-70,101-102 and 281-282 above).

399. It is submitted that since an unknown date in October 2002 the applicant has not had contact with the outside world, save the ICRC team in October and December 2006, the military commission's members and his US counsel. In this regard, the Court also takes note of the statement by the applicant's representative at the public hearing:

> "[The applicant] is gagged from speaking publicly of his own torture in Poland because the United States takes the remarkable position that disclosure of his own memories, observations and experiences of what happened to him would reveal classified sources and methods. In addition, US regulations prevent his US lawyer, Ms Hollander, who is also counsel in this case, from addressing the issues before this Court."

400. The above 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).

3. Assessment of the facts and evidence relevant for the applicant's allegations concerning his transfer to Poland, secret detention in Poland and his transfer from Polish territory

(a) Whether the applicant's allegations concerning the events preceding his alleged detention in Poland (capture and initial detention from the end of October to 4 December 2002 and transfer from Thailand on 4 December 2002) were proved before the Court

401. The Court notes that the CIA official documents clearly confirm that by November 2002 the Agency had the applicant and Mr Abu Zubaydah, both referred to as "High-Value Detainees", in its custody and that they were interrogated at a CIA black site with the use of the EITs – the applicant immediately after his arrival at that place on 15 November 2002 (see paragraphs 83-90 above).

Those documents also attest to the fact that as from 15 November 2002 the applicant and Mr Abu Zubaydah were held in the same detention facility, that they were interrogated by apparently the same team of "psychologist/interrogators", that their interrogations were videotaped and that the series of the applicant's enhanced interrogations, including the so-called "waterboarding", "continued through 4 December 2002" (see paragraphs 85-89 above).

402. The CIA material further confirm in the cables of 3 and 9 December 2002 that this specific detention facility was closed following an inventory of the videotapes recording the enhanced interrogations of Mr Al Nashiri's and Mr Abu Zubaydah's. The inventory was carried out on 3 December 2002. No CIA cables from that location were sent to the Headquarters after 4 December 2002 (see paragraphs 89-90 above). The 2009 DOJ Report states that, after the enhanced interrogations of Mr Al Nashiri which, as noted above, continued at that black site until 4 December 2002, both he and Mr Abu Zubaydah were moved to "another CIA black site". The same fact is mentioned in the 2004 CIA Report (see paragraphs 87-88 above).

403. Senator Marty and Mr J.G.S., the experts who gave evidence to the Court, in their presentation at the fact-finding hearing explained in detail the above sequence of events with reference to documentary evidence available in the public domain, in particular the material released by the CIA. They identified the CIA detention facility in which the applicant and Mr Abu Zubaydah had been held during the period under consideration as

the one known under the codename "Cat's Eye" or "Catseye" and located in Bangkok. They conclusively confirmed that the closure of the site and interruption of Mr Al Nashiri's interrogation schedule on 4 December 2002 indicated the date of his physical transfer by means of the HVD rendition out of the black site in Thailand to another black site (see paragraphs 314-315 above).

404. In the light of the above first-hand CIA documentary evidence and clear and convincing expert evidence, the Court finds established beyond reasonable doubt that the applicant, following his capture, was detained in the CIA detention facility in Bangkok from 15 November 2002 to 4 December 2002, that Mr Abu Zubaydah was also held in the same facility at that time and that they were both moved together to "another CIA black site" on 4 December 2002 (see *Husayn (Abu Zubaydah)*, cited above, § 404).

(b) Whether the applicant's allegations concerning his transfer to Poland, secret detention at the "black site" in Stare Kiejkuty and transfer from Poland to other CIA secret detention facilities elsewhere (4/5 December 2002 – 6 June 2003) were proved before the Court

405. It is alleged that on 5 December 2002 the applicant, together with Mr Abu Zubaydah, had been transferred by the CIA under the HVD Programme from Thailand to Poland on a CIA contracted aircraft, registered as N63MU with the US Federal Aviation Authority. The flight flew on 4 December 2002 from Bangkok *via* Dubai and landed at Szymany airport on 5 December 2002. The applicant was then secretly detained in the Polish intelligence training base at Stare Kiejkuty.

It is further alleged that during his undisclosed detention in Poland the applicant was subjected to torture and various other forms of ill-treatment and deprived of any contact with his family. He was held in Poland until 6 June 2003. On that date he was secretly transferred by the CIA from Poland to Rabat on a rendition plane with tail number N379P (see paragraphs 91-106 above).

(i) Transfers and secret detention

406. The Court notes that the fact that after 4 December 2002 the applicant and Mr Abu Zubaydah were detained together to the same detention facility is conclusively confirmed in paragraph 91 of the 2004 CIA Report. The paragraph states that the same "interrogation team" was "to interrogate Al Nashiri and debrief Abu Zubaydah" and that "the interrogation team continued EITs on Al Nashiri for two weeks in December 2002" (see paragraph 99 above).

407. As regards the aircraft indicated by the applicant, the Court observes that there is abundant evidence identifying them as rendition planes used by the CIA for the transportation of detainees under the

HVD Programme. That evidence includes data from multiple sources, such as flight plan messages by Euro Control and information provided by the Polish Border Guard and the Polish Air Navigation Services Agency ("PANSA"), which was released and subsequently analysed in depth in the course of the international inquiries concerning the CIA secret detentions and renditions (see paragraphs 92-94, 258, 271 and 287-291 above).

408. In the light of that accumulated evidence, there can be no doubt that:

1) the N63MU, a Gulfstream jet with capacity for 12 passengers, flew on 4 December 2002 from Bangkok *via* Dubai to Szymany and landed there on 5 December 2002 at 14.56. The Polish Border Guard's official documents recorded that on arrival there were eight passengers and four crew and that the plane departed from Szymany on the same day at 15:43 with no passengers and four crew;

2) the N379P, also known as "Guantánamo Express", a Gulfstream V with capacity for eighteen passengers but usually configured for eight, arrived in Szymany on 5 June 2003 at 01:00 from Kabul, Afghanistan. It stayed on the runway for over two hours and then departed for Rabat, Morocco. The Polish Border Guard's official documents recorded that on arrival there was one passenger and two crew and on departure there were no passengers and two crew.

409. As regards transfers of High-Value Detainees between CIA black sites, the CIA declassified documents give, in meticulous detail, a first-hand account of the standard procedures applied to them. The transfer procedure is also related in the 2007 ICRC Report, which compiled consistent and explicit descriptions given by the fourteen High-Value Detainees, including the applicant (see paragraphs 64 and 282 above).

Nothing has been put before the Court to the effect that upon and during his transfer to and from "another black site" on, respectively, 4-5 December 2002 and 5 June 2003, the applicant could have been subjected to less harsh treatment than that defined in the strict and detailed rules applied by the CIA as a matter of routine. It accordingly finds it established beyond reasonable doubt (see paragraph 394 above) that for the purposes of his transfers on 4/5 December 2002 and 6 June 2003:

1) the applicant was photographed both clothed and naked prior to and again after the transfer;

2) he underwent a rectal examination and was made to wear a diaper and dressed in a tracksuit;

3) earphones were placed over his ears, through which loud music was sometimes played;

4) he was blindfolded with at least a cloth tied around the head and black goggles;

5) he was shackled by his hands and feet, and was transported to the airport by road and loaded onto the plane;

6) 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;

7) during the journey he was not allowed to go to the toilet and, if necessary, was obliged to urinate or defecate into the diaper.

In that regard, the Court would also note that a strikingly similar account of his transfers in CIA custody was given by the applicant in *El-Masri* (see *El-Masri*, cited above, § 205).

410. As regards the applicant's actual presence in Poland, the Court takes due note of the fact that there is no direct evidence that it was the applicant who was transported on board the N63MU flight from Bangkok to Szymany on 5 December 2002 or that he was then taken from Szymany to other CIA secret detention facilities on board N379P on 6 June 2003.

The applicant, who for years on end was held in detention conditions specifically designed to isolate and disorientate a person by transfers to unknown locations, even if he had been enabled to testify before the Court, would not be able to say where he was detained. Nor can it be reasonably expected that he will ever on his own be able to identify the places in which he was held. Also, having regard to the very nature and extreme secrecy of the CIA operations in the course of the "war on terror" and to how the declassification of crucial material demonstrating the CIA activities at that time currently stands – this being a matter of common knowledge – , no such direct evidence will soon be forthcoming in this regard.

411. No trace of the applicant can, or will, be found in any official records in Poland because his presence on the plane and on Polish territory was, by the very nature of the rendition operations, purposefully not to be recorded. As unequivocally confirmed by the expert, the Border Guard's records showing numbers of passengers and crew arriving and departing on the rendition planes in question "neither include[d], nor purport[ed] to include detainees who were brought into or out of Polish territory involuntarily, by means of clandestine HVD renditions" and those detainees "were never listed among the persons on board filed vis-à-vis any official institution" (see paragraph 328 above).

412. In view of the foregoing, in order to ascertain whether or not it can be concluded that the applicant was detained in Poland at the relevant time, the Court has taken into account all the facts that have already been found established beyond reasonable doubt (see paragraphs 401-404 and 408-409 above) and analysed other material in its possession, including, in particular, the expert evidence reconstructing the chronology of rendition and detention of the applicant and Mr Zubaydah in 2002-2003 (see paragraphs 314-318 above).

413. It has already been established that on 4 December 2002 the applicant was transferred from the black site in Bangkok together with Mr Abu Zubaydah and that they were subsequently detained in the same

CIA detention facility (see paragraph 404 above). The date of the transfer coincides exactly with the path followed by the N63MU, which took off from Bangkok on 4 December 2002 and then, after the stopover in Dubai, arrived in Szymany on 5 December 2002 (see paragraphs 92, 392 and 316 above).

The flight was the subject of protracted and intense investigations by the experts who gave evidence to the Court, who had investigated it "in its most intricate detail from its planning and authorisation to its execution through multiple, different corporate shells". They found no alternative explanation for its landing in Szymany other than the transfer of the applicant and Mr Abu Zubaydah from Bangkok to "another black site", which they categorically identified as the one codenamed "Quartz" and located at the Polish intelligence training base in Stare Kiejkuty near Szymany (see paragraphs 316-317 and 327 above)

414. The Court notes that the Polish Government have offered no explanation for the nature of, the reasons for, or the purposes of the landing of the N63MU on their territory on 5 December 2002, a plane which in all the relevant reliable and thorough international inquiries was conclusively identified as the rendition aircraft used for transportation of High-Value Detainees in CIA custody at the material time (see paragraph 407 above, with further references).

Nor have they explained the reasons for the subsequent series of landings of the CIA rendition aircraft (see paragraph 292 above). The landing of N63MU on 5 December 2002 was followed by five further landings of the N379P (the "Guantánamo Express"), the most notorious CIA rendition plane. One of those landings took place on 6 June 2003 – the date indicated by the applicant as that of his transfer from Poland and conclusively confirmed by the experts as that on which he had been transferred out of Poland (see paragraphs 292 and 328 above). The series ended with the landing of N313P on 22 September 2003 – the date indicated by Mr Abu Zubaydah for his transfer from Poland, confirmed by the experts as the date of his transfer out of Poland and identified by them as the date on which the black site "Quartz" in Poland had been closed (see paragraphs 317-318 above and also *Husayn (Abu Zubaydah*), cited above, § 414). Indeed, no other CIA-associated aircraft appeared in Szymany after that date (see paragraph 292 above).

415. In view of the lack of any explanation by the Government as to how the events in the present case occurred and their refusal to disclose to the Court documents necessary for its examination of the case (see paragraphs 17-40 and 375 above), the Court will draw inferences from the evidence before it and from the Government's conduct (see also paragraphs 360 and 395 above).

Consequently, on the basis of unrebutted facts and in the light of all the relevant documentary material in its possession and the coherent, clear and categorical expert evidence explaining in detail the chronology of the events occurring in the applicant's case between 4-5 December 2002 and 6 June 2003, the Court finds that the applicant's allegations to the effect that during that time he was detained in Poland are sufficiently convincing.

(ii) The applicant's treatment in CIA custody in Poland

416. Lastly, as regards the applicant's treatment in CIA custody over the period under consideration, a detailed description of "unauthorised techniques" applied to him by a CIA "senior operation officer" or "debriefer" in December 2002 and January 2003 comes from the most authoritative sources: the 2004 CIA Report and the 2009 DOJ Report (see paragraphs 99-100 above). This is supplemented by the applicant's own account of the ordeal as rendered in the 2007 ICRC Report (see paragraph 101 above). Senator Marty and Mr J.G.S. also gave an account of those events based on the relevant documentary evidence (see paragraph 317 above).

According to all these sources, in December 2002 and January 2003 in CIA custody the applicant was subjected to the "enhanced" and "unauthorised" interrogation techniques. As regards the latter, he was subjected to the following treatment:

1) mock executions with the use of a handgun when he sat shackled and with the use of a power drill during which he stood naked and blindfolded;

2) stress positions: he was required to kneel on the floor and lean back, he was held in a stress standing position and pushed when and lifted off the floor by his arms while his arms were bound behind his back with a belt;

3) threats;

4) during interrogations cigar smoke was blown into his face;

5) stiff brush was used to bathe him in the manner intended to induce pain;

6) standing on his shackles, resulting in cuts and bruises.

(iii) Court's conclusion

417. Assessing all the above facts and evidence as a whole, the Court finds it established beyond reasonable doubt that:

(1) on 5 December 2002 the applicant, together with Mr Abu Zubaydah, arrived in Szymany on board the CIA rendition aircraft N63MU;

(2) from 5 December 2002 to 6 June 2003 the applicant was detained in the CIA detention facility in Poland identified as having the codename "Quartz" and located in Stare Kiejkuty;

(3) during his detention in Poland under the HVD Programme he was interrogated by the CIA and subjected to EITs and also to unauthorised

interrogation techniques as described in the 2004 CIA Report, 2009 DOJ Report and the 2007 ICRC Report;

4) on 6 June 2003 the applicant was transferred by the CIA from Poland on the CIA rendition aircraft N379P.

4. Assessment of the facts and evidence relevant for Poland's alleged knowledge of and complicity in the CIA HVD Programme

(a) Special procedure for landings of CIA aircraft in Szymany airport followed by the Polish authorities

418. Several sources of evidence obtained by the Court confirm that the Polish authorities followed a special procedure for the landing of CIA rendition flights in Szymany.

That procedure was related before the TDIP by an eye-witness, a certain Ms M.P., who had been the manager of Szymany airport at the material time (see paragraphs 293-302 above). On the basis of her detailed account and statements from other persons, including the former director of Szymany airport and the former Chairman of the Board of that airport, the summary description of that procedure was included in the Fava Report (see paragraph 271 above). Furthermore, the 2007 Marty Report contained a compilation of testimonies obtained from confidential sources among Szymany airport employees, civil servants, security guards, and Border Guard and military intelligence officials, who had given an account of what had happened at the time immediately following the landing of the CIA-associated aircraft landed in Szymany (see paragraph 260 above).

The above-mentioned accounts of the special procedure, which are concordant and complementary, can be summarised as follows:

1) all the landings were preceded by a telephone call to Szymany airport from the Warsaw Headquarters of the Border Guard or a military intelligence official, informing the authorities of the airport of an arriving "American aircraft";

2) the army was informed at the same time and two military officials were on duty in the airport at that time;

3) prior to the landings two high-ranking Border Guard officers always appeared in the airport;

4) orders were given directly by the Border Guard, emphasising that the airport authorities should not approach the aircraft and that the military staff and services alone were to handle them;

5) the airport manager was instructed to adhere to strict protocols to prepare for the flights, including clearing the runways of all other aircraft and vehicles, and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees;

6) the role of the airport personnel was only to complete the technical arrangements after the landing;

7) the planes were treated as military planes and were not subjected to customs clearance; the military character of the flight was determined by the Border Guard and the relevant procedure was to be followed by the airport staff;

8) the perimeter and grounds of the airport were secured by military officers and the Border Guard;

9) the aircraft touched down in Szymany and taxied to a halt at the far end of the runway, several hundred metres (and out of visible range) from the four-storey terminal control tower; it always parked with the doors facing towards the wood;

10) the passengers never entered the airport;

11) the Border Guard approached the aircraft first and then drove away;

12) the "landing team" waited at the edge of the runway, in two or three vans with tinted windows, bearing the Stare Kiejkuty army unit's registration plates; the vans, with their engines often running, were parked in close proximity to the aircraft;

13) after the Border Guard drove away, the vans with tinted windows drove up to the aircraft and then drove away;

14) the planes left shortly afterwards;

15) the landing fees were paid to the airport in cash by a Pole (or a person who spoke Polish very well) the next day and were considerably higher – several times more – than those normally applicable (between 2,000 and 4,000 euros (EUR) per plane), including an amount for "non-standard handling".

(b) Special status exemptions, navigation through Poland's airspace without complete flight plans and validation of false flight plans for the CIA

419. Several sources of evidence obtained by the Court reveal that, in addition to granting the CIA rendition aircraft overflight permissions and navigating the planes through Poland's airspace, the Polish authorities, including PANSA, accorded them special status, various exemptions and authorisations. They also cooperated with the CIA in disguising the aircraft's actual routes and validated incomplete or false flight plans which served to cover-up the CIA activities in Poland, in contravention of international aviation regulations (see paragraphs 258, 271 and 291 above).

420. As explained in the 2007 Marty Report and by Senator Marty and Mr J.G.S. orally before the Court, Jeppesen, a usual provider of services for the CIA for rendition flights (see also paragraphs 72-74 above), filed multiple false – "dummy" – flight plans for those flights, including the landings in Poland. Those plans often featured an airport of departure and/or destination that the aircraft never intended to visit. In at least four out of six instances of the CIA aircraft landings in Szymany, including the landing of

N63MU on 5 December 2002 with the applicant and Mr Abu Zubaydah on board (see paragraphs 408 and 417 above), flight plans were disguised, false plans were filed and PANSA navigated the aircraft into Szymany without a valid flight plan (see paragraphs 258 and 316 above).

421. A detailed analysis of the rendition circuit of the flight N379P, including the stopover in Szymany on 6 June 2003 is included in the CHRGJ Report. That report explains how the aircraft made the entire circuit under various forms of exemption and special status, which indicated that the flights were planned and executed with the full collaboration of the US authorities and the "host" States through which the N379P travelled. Such exemptions are only granted when specifically authorised by the national authority whose territory is being used (see paragraph 291 above).

422. On 5 June 2003 PANSA navigated the N379P into Szymany, despite the fact that all relevant flight plans named Warsaw as the airport of destination. The fact that PANSA accepted Jeppesen's flight plan naming Warsaw but navigated the plane to Szymany demonstrated that the Polish authorities did not require it to comply with international aviation regulations and that they knowingly issued a false landing permit. In consequence, the rest of the aviation monitoring community, including Eurocontrol, mistakenly recorded the aircraft's stopover in Warsaw (see paragraphs 258, 291 and 316 above).

(c) The alleged existence of a "special" bilateral agreement with the CIA and authorisation of Poland's role in the CIA operations by Polish officials

423. Several sources of evidence before the Court have suggested the existence of a special bilateral agreement between Poland and the USA on the setting up and running of a secret prison in Poland.

424. The 2007 Marty Report, based on evidence from confidential sources, states that the CIA brokered an "operating agreement" with Poland to hold its High-Value Detainees in a secret detention facility and that Poland agreed to "provide the premises in which [that facility was] established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference" (see paragraphs 254-255 above).

In the context of the authorisation of Poland's role in the CIA rendition operations, the 2007 Report mentioned a number of names of the Polish high-ranking officials, stating that they had known and authorised the country's role "in the CIA operation of secret detention facilities for High-Value Detainees on Polish territory" and that they "could therefore be held accountable for these activities" (see paragraph 257, see also paragraph 240 above).

Senator Marty confirmed those statements before the Court and added that the operation had been organised within the framework of NATO. It had been decided that the CIA would be in sole charge of the operation and, if requested, the member countries would provide cooperation. As regards

the specific names of Polish officials that had been given in the 2007 Marty Report, he explained that they had been indicated "because the sources that [had] provided us with these names [had been] of such value, they [had been] so authoritative and there [had been] so much concurring evidence of the involvement of those persons" (see paragraph 321 above).

425. Mr J.G.S., when heard by the Court, said that whilst in the course of the Marty Inquiry they had not seen the classified documents in question, they had been made aware of the existence of authorising agreements, which granted extraordinary protections and permissions to the CIA in its execution of the rendition operations (see paragraph 329 above).

426. Senator Pinior, both in his affidavit and oral testimony before the Court, stated that he had been informed by an authoritative confidential source of a document – a draft prepared by the Polish intelligence – drawn up under the auspices of Mr Miller's Government for the purpose of regulating the operation of the CIA prison in Poland. According to him, that document, which was currently in the Polish prosecution authority's possession, contained precise regulations concerning the functioning of the prison and, among other things, a proposed protocol for action in the event of a prisoner's death. The word "detainees" was used in the text. The draft had not been signed on behalf of the US (see paragraphs 303 and 334 above).

427. The 2007 EP Resolution "note[d] with concern" that the Polish authorities' official reply of 10 March 2006 to the to the Secretary General of the Council of Europe, "indicate[d] the existence of secret cooperation agreements initialled by the two countries' secret services' themselves, which exclude[d] the activities of foreign secret services from the jurisdiction of the Polish judicial bodies" (see paragraph 275 above).

428. The Court does not find it necessary for its examination of the present case to establish whether such agreement or agreements existed and if so, in what format and what was specifically provided therein.

It considers that it is inconceivable that the rendition aircraft crossed Polish airspace, landed in and departed from a Polish airport and that the CIA occupied the premises in Stare Kiejkuty without some kind of pre-existing arrangement enabling the CIA operation in Poland to be first prepared and then executed.

(d) Poland's lack of cooperation with the international inquiry bodies

429. The Court considers that the respondent State's lack of cooperation in the course of the international inquiries into the CIA rendition operations in Europe undertaken in 2005-2007 is an element that is relevant for its assessment of Poland's alleged knowledge of, and complicity in, the CIA rendition operations.

430. To begin with, in their response dated 10 March 2006 to the Secretary General of the Council of Europe's questions in the procedure

launched under Article 52 of the Convention, the authorities "fully denied" the allegations of "the alleged existence in Poland of secret detention centres and related over-flights (see paragraph 242 above; the relevant letter is also mentioned above in paragraph 427 above). In that regard, they relied on the findings of "the Polish Government's internal inquiry". It is not clear what kind of "internal inquiry" was carried out and whether the authorities in fact meant the Parliamentary inquiry conducted in November-December 2005 (see paragraph 128 above) but, be that as it may, they could not have been unaware of the CIA operations in the country in 2002-2003 (see paragraphs 423-428 above).

431. A similar obstructive attitude was displayed during the Marty Inquiry. In the 2006 Marty Report it was noted that "the Polish authorities ha[d] been unable, despite repeated requests, to provide [the rapporteur] with information from their own national aviation records to confirm any CIA-connected flights into Poland" (see paragraph 248 above). The 2007 Marty Report noted that "in over eighteen months of correspondence, Poland ha[d] failed to furnish [the] inquiry with any data from its own records confirming CIA-connected flights into its airspace or airports" (see paragraph 259 above).

Senator Marty, at the fact-finding hearing, added that "Poland [had been] no exception" and that practically all governments that [had] had links with the secret detention centres or with 'extraordinary rendition' not only [had] not cooperate[d] but [had done] everything that they could in order to stifle the truth, to create obstacles in the search for the truth" (see paragraph 320 above).

432. The conduct adopted by the authorities in respect to the Fava Inquiry was no different. The Fava Report explicitly stated that the Polish authorities cooperation with the TDIP delegation had been "regrettably poor", that the delegation had not been able to meet any representatives of Parliament and that the Government had been "reluctant to offer full cooperation ... and receive [the] delegation at an appropriate political level". It was also noted that there had been confusion about flight registers of CIA planes transiting through Poland and contradictory statements about the existence of flight logs (see paragraph 270 above). The same observations were made in the 2007 EP Resolution (see paragraph 275 above).

In his testimony before the Court, Mr Fava stated that the Polish Government had "cooperated very little" with the TDIP and that almost all representatives of the Government whom they had asked for a meeting had declined the TDIP's request. He also confirmed that during his visit to Poland with the TDIP delegation he had "definitely" had the impression that there had been attempts on the authorities' part to conceal information (see paragraph 308 above).

433. Having regard to the above facts, the Court finds that in the course of the relevant international inquiries the Polish authorities displayed conduct that can be characterised as denial, lack of cooperation with the inquiry bodies and marked reluctance to disclose information of the CIA rendition activities in Poland.

(e) Informal transatlantic meeting

434. Mr Fava, in his oral testimony described in detail a document – the records or "the debriefing" of the informal transatlantic meeting of the European Union and North Atlantic Treaty Organisation foreign ministers with the US Secretary of State Condoleezza Rice, which had taken place on 7 December 2005. The meeting was convened in connection with recent international media reports concerning the CIA secret detentions and rendition, naming European countries that had allegedly had CIA black sites on their territory. The debriefing, obtained by the TDIP from a credible confidential source in the offices of the European Union, confirmed that the member States had had knowledge of the CIA rendition programme and there had been an "animated discussion" on the practices applied by the CIA. While Mr Fava could not recall whether there had been any intervention by the Polish Government at that meeting, he said that it had appeared from Ms Rice's statement "we all know about these techniques" that there had been an attempt on the USA's part to share "the weight of accusations" (see paragraph 306 above).

(f) Relations of cooperation between the Polish intelligence and the CIA

435. The Court further notes that Mr Fava also referred to the meeting held in the context of the Fava Inquiry with the former Polish head of the security service who, "although ... with great diplomacy", had confirmed that the CIA officials often landed in Szymany and that the Polish intelligence and the CIA had had "frequent relations of cooperation ... consisting in sharing certain practices and objectives" (see paragraphs 269 and 310 above).

436. Former President of Poland, Mr Kwaśniewski, in his press interview given on 30 April 2012, also referred to the "intelligence cooperation" with the CIA and stated that "the decision to cooperate with the CIA carried the risk that the Americans would use inadmissible methods" (see paragraph 240 above).

(g) Circumstances surrounding detainees transfer and reception at the black site

437. Having regard to the procedure for High-Value Detainees' transfers under which, as established above, a detainee such as the applicant was blindfolded, wore black goggles and was shackled by his hands and feet for the duration of his transfer (see paragraphs 64, 282 and 409 above), the

Court considers that those of the Polish authorities who received the CIA personnel on the Szymany airport runway, put them on the vans and drove them to the black site could not be unaware that the persons brought there with them were the CIA prisoners.

In particular, the Court finds it inconceivable they would not have seen or, as described by Mr J.G.S., "witnessed ... the unloading of bound and shackled detainees from aircraft" (see paragraph 330 above).

(h) Other elements

438. There are also other elements that the Court considers relevant for its assessment of Poland's knowledge of the nature and purposes of the CIA activities on its territory at the material time.

As recounted by Senator Pinior in his affidavit and subsequently confirmed in his oral testimony given to the Court, "in the period when the CIA prisoners were detained in Stare Kiejkuty" the authorities of the military base ordered from a Polish company a metal cage of the size fitting a grown man with the option of adding a portable chemical toilet (see paragraphs 303 and 335 above). No explanations have been offered by the respondent Government as to what kind of purposes that cage was to serve.

Furthermore, there were, as pointed out by one of the experts (see paragraph 330 above), other aspects of the CIA activity in Poland that were extraordinary from the perspective of the normal operation of an airport like Szymany.

For instance, the landing of the Boeing 737 (N313P on which Mr Abu Zubaydah was transferred from Poland; see *Husayn (Abu Zubaydah)*, cited above, §§ 408, 419 and 440) on 22 September 2003 at Szymany took place despite the fact that the airport did not have the necessary technical conditions for receiving such a large aircraft, in particular the facilities to refuel it, and the fact that the airport fire brigade was not adequately equipped for that purpose (see paragraphs 295 and 318 above). In the view of Ms M.P., the airport manager at the relevant time, "there must have been some very pressing reasons" for allowing that landing (see paragraph 296 above).

On another occasion in the winter, notwithstanding the severe weather conditions and the fact that snow had not been cleared at the airport for six weeks, the airport management were not in a position to refuse the CIA aircraft's landing and had to clear the runway because "if the aircraft concerned did not land, 'heads w[ould] roll'" (see paragraph 300 above).

For the airport civilian staff, the landing of the CIA aircraft was a "major event". Despite the fact that they were excluded from the handling of the aircraft and were taken to the airport terminal building during the CIA landings and departures (see paragraph 418 above), they perceived those

events as "spies" coming or a "changeover of intelligence staff" (see paragraph 297 above).

(i) Public knowledge of treatment to which captured terrorist-suspects were subjected in US custody

439. Lastly, the Court attaches importance to the fact that already between January 2002 and August 2003 ill-treatment and abuse to which captured terrorist suspects were subjected in US custody at different places, including Guantánamo Bay or Bagram base in Afghanistan was largely in the public domain through numerous statements or reports of international organisations (see paragraphs 214-228 and 389–390 above).

At the material time that topic was also present in the international and Polish media, which paid considerable attention to the situation of Al'Qaeda prisoners in US custody (see paragraphs 230–239 above).

5. Court's conclusions as to Poland's alleged knowledge of and complicity in the CIA HVD Programme

440. The Court has taken due note of the fact that knowledge of the CIA rendition and secret detention operations and the scale of abuse to which High-Value Detainees were subjected in CIA custody evolved over time (see paragraphs 47-71, 78-81, 214-239, 241-261, 266-275 and 281-286 above). In particular, the CIA's various secret or top secret documents, including the 2004 CIA Report, the CIA Background Paper and the 2009 DOJ Report – which, in the present case and in *Husayn (Abu Zubaydah)*, are among important items of documentary evidence relevant for the establishment of the facts relating to both applicants' rendition, secret detention and treatment by the US authorities – were disclosed to the public, in a heavily redacted form, as late as 2009-2010 (see paragraphs 49-50, 57 and 62 above). The 2007 ICRC Report, including the applicant's account of the treatment and material conditions of detention to which he was subjected under the HVD Programme, was leaked into the public domain in 2009 (see paragraph 277 above). The reports following the Marty Inquiry and the Fava Inquiry emerged earlier, in 2006-2007 (see paragraphs 246-261 and 266-272), but this was between three and a half and five years after the events complained of. As stated by Senator Marty, even "the picture provided by the 2007 [Marty] Report is still very much a partial one", having regard to the subsequent developments, such as the publication of the CIA materials and the availability of statements from detainees (see paragraph 323 above).

As already stated above (see paragraphs 42 and 397-400 above), the Court has relied extensively on those sources of evidence in its retrospective reconstruction and establishment of the facts concerning the applicant's transfers to and from Poland and his secret detention and ill-treatment by the CIA in Poland. However, the Polish State's knowledge of and complicity in

the HVD Programme must be established with reference to the elements that it knew or ought to have known at or closely around the relevant time, that is, between December 2002 and June 2003 in respect of the applicant and between December 2002 and September 2003 in respect of Mr Abu Zubaydah.

441. In that regard, the Court has taken into account the various attendant circumstances referred to above (see paragraphs 418-439 above). In the Court's view, those elements taken as a whole demonstrate that at that time the Polish authorities knew that the CIA used its airport in Szymany and the Stare Kiejkuty military base for the purposes of detaining secretly terrorist suspects captured within the "war on terror" operation by the US authorities. It is inconceivable that the rendition aircraft could have crossed Polish airspace, landed in and departed from a Polish airport, or that the CIA occupied the premises in Stare Kiejkuty and transported detainees there, without the Polish State being informed of and involved in the preparation and execution of the HVD Programme on its territory. It is also inconceivable that activities of that character and scale, possibly vital for the country's military and political interests, could have been undertaken on Polish territory without Poland's knowledge and without the necessary authorisation being given at the appropriate level of the State authorities.

The Court would again refer to the testimony given by the experts who, in the course of their inquiries, had the benefit of contact with various, including confidential, sources. They all stated, in unambiguous terms, that at the relevant time Poland had had, or should have had, knowledge of the CIA rendition operations. Poland had ensured the security of the area and had collaborated in concealing the rendition flights. The Polish officials' liaison units must have been aware of the preparation or execution of particular operations and their timing. They had known that the CIA interrogations had contributed intelligence to the United States' war on terror (see paragraphs 307, 321-323, 326 and 330-331 above).

This did not mean, in the experts' view, that the Polish authorities had known the details of what went on inside the black site, since the interrogations had been the exclusive responsibility of the CIA, or that they had witnessed treatment to which High-Value Detainees had been subjected in Poland (see paragraphs 322-323 and 330-331 above). The Court, being confronted with no evidence to the contrary, accepts the experts' above-mentioned assessment.

Notwithstanding the foregoing proviso as to the lack of direct knowledge of the treatment to which the applicant was subjected in Poland, as noted above, already between January 2002 and August 2003 numerous public sources were consistently reporting ill-treatment and abuse to which captured terrorist suspects were subjected in US custody in different places. Moreover, in the 2003 PACE Resolution adopted in June 2003 – of which Poland, as any other Contracting State was aware – the Parliamentary

Assembly of the Council of Europe was "deeply concerned at the conditions of detention" of captured "unlawful combatants" held in the custody of the US authorities. All these sources reported practices resorted to or tolerated by the US authorities that were manifestly contrary to the principles of the Convention (see paragraphs 214-224, 229-239 and 389-390 above). Consequently, there were good reasons to believe that a person in US custody under the HVD Programme could be exposed to a serious risk of treatment contrary to those principles (see also *El-Masri*, cited above, § 218).

442. Taking into consideration all the material in its possession (see paragraphs 418-439 above), the Court finds that there is abundant and coherent circumstantial evidence, which leads inevitably to the following conclusions:

(a) 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;

(b) 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 (see also *El-Masri*, cited above, §§ 217-221).

443. Consequently, Poland was in a position where its responsibility for securing "to everyone within [its] jurisdiction the rights and freedoms defined .... in [the] Convention" set forth in Article 1 was engaged in respect of the applicant at the material time.

IV. RESPONSIBILITY UNDER THE CONVENTION FOR COMPLICITY IN THE HVD PROGRAMME

A. The parties' submissions

1. The Government

444. No comments on the matter have been received from the Government.

2. The applicant

445. The applicant submitted that Poland was responsible under Article 1 of the Convention for the violation of his rights because it had knowingly, intentionally and actively collaborated with the CIA in the rendition programme.

Relying on *El-Masri* (cited above), he emphasised that Poland must be regarded as responsible under the Convention for acts performed – with its acquiescence and connivance – by foreign officials on its territory. Also, as had emerged from the Court's case-law, the Polish State had a positive obligation to protect detainees within its jurisdiction from ill-treatment contrary to Article 3.

Poland had been aware that those transferred to, detained on and transferred from its territory under the HVD Programme would be subjected to practices manifestly inconsistent with the Convention, yet it had permitted this detention and transfer outside any formal legal procedures. Since Poland had actively facilitated the applicant's detention and transfer, it was also responsible for his ill-treatment and unlawful, secret detention for the period following his transfer from Poland.

446. Poland was likewise responsible for cooperation in internationally wrongful acts under international law, in particular under the ILC Articles (see paragraph 207 above). In that respect, the applicant subscribed to AI's and the ICJ's comments on the matter (see paragraphs 447-450 below).

B. Third-party intervener – AI/ICJ

447. AI and the ICJ submitted that any Contracting Party's responsibility under the Convention for co-operation in renditions and secret detentions should be established in the light of international law principles of State responsibility.

In accordance with Article 16 of the ILC Articles, the responsibility of Contracting Parties that had co-operated in the rendition and secret detention programme could be established from the point where those States had had actual or constructive knowledge of the violations of international human rights obligations inherent in that programme; and where the action of the Contracting Party had contributed to the apprehension, transfer or continued detention of an individual within the programme. Furthermore, in the Court's jurisprudence, for example in *Ireland v. the United Kingdom* (cited above § 159) or *Ilaşcu and Others* (cited above, § 318) and under Article 7 of the ILC Articles, the co-operation of government agents, even without the authorisation of the government, engaged the responsibility of the State (see also paragraph 207 above).

448. State responsibility might arise from either active co-operation in or passive tolerance of, renditions or secret detentions. Under international

law, responsibility for assistance in an internationally wrongful act might arise either from positive steps taken to assist another State in a wrongful act, or from failure to take action, required by international legal obligations, that would have prevented a wrongful act by another State.

Consistent with these principles, the Convention imposed responsibility on States for both acts and omissions that entailed co-operation in acts contrary to the Convention. Under the positive obligations doctrine, States had obligations to take measures to prevent action by third parties leading to violations of Convention rights. A State's positive obligation to prevent would be breached where the State "knew or ought to have known" that the individual in question was at real and immediate risk of violation of his or her Convention rights, and failed to take reasonable measures of protection.

449. Thus, acts of co-operation by officials of Contracting Parties in renditions or secret detentions by the agents of a foreign State leading to arbitrary detention, enforced disappearances, torture or other ill-treatment, would engage the Convention responsibility of the Contracting Party. In addition, failure to take effective measures to prevent such operations, in circumstances where the State authorities knew or ought to have known of the risk that they would be carried out, would breach the State's positive obligations under the Convention read in the light of Article 16 of the ILC Articles.

450. Moreover, pursuant to Articles 41 § 1 and 41 § 2 of the ILC Articles, States were subject to additional obligations to refrain from co-operation in internationally wrongful acts where those acts amounted to "a serious breach", that is " a gross or systemic failure" by a State to fulfil "an obligation arising under a peremptory norm of general international law. These obligations arose, in the view of AI and the ICJ, in relation to the HVD Programme since it involved violations of the prohibitions of torture, enforced disappearances and prolonged arbitrary detention, which were violations of *jus cogens* norms.

C. Applicable general principles deriving from the Court's case-law

451. The Court notes that the applicant's complaints relate both to the events that occurred on Poland's territory and to the consequences of his transfer from Poland to other places of his undisclosed detention (see paragraph 3 above and paragraphs 460, 520, 552 and 570 below).

In that regard, the Court would wish to reiterate the relevant applicable principles.

1. As regards the State's responsibility for an applicant's treatment and detention by foreign officials on its territory

452. The Court reiterates that, in accordance with its settled case-law, the respondent State must be regarded as responsible under the Convention

for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others*, cited above, § 318; and *El-Masri*, cited above, § 206).

2. As regards the State's responsibility for an applicant's removal from its territory

453. According to the Court's settled case-law, removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination (see, among many other examples, *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91 and 113; Series A no. 161; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 90-91, ECHR 2005-I with further references; *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 149, ECHR 2010; *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 168, 10 April 2012; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 233 and 285, ECHR 2012 (extracts) and *El-Masri*, cited above, §§ 212-214 and 239, with further references).

454. In that context, the Court has repeatedly held that the decision of a Contracting State to remove a person – and, *a fortiori*, the actual removal itself – may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person in question would, if removed, face a real risk of being subjected to treatment contrary to that provision in the destination country (see *Soering*, cited above, § 91; and *El-Masri*, cited above, § 212).

Where it has been established that the sending State knew, or ought to have known at the relevant time, that a person removed from its territory was subjected to "extraordinary rendition", that is, "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, where there was a real risk of torture or cruel, inhuman or degrading treatment", the possibility of a breach of Article 3 is particularly strong and must be considered intrinsic in the transfer (see *El-Masri*, cited above, §§ 218- 221).

455. Furthermore, a Contracting State would be in violation of Article 5 of the Convention if it removed, or enabled the removal, of an applicant to a State where he or she was at real risk of a flagrant breach of that Article (see *Othman (Abu Qatada) v. the United Kingdom*, cited above § 233; and *El-Masri*, cited above § 239).

Again, that risk is inherent where an applicant has been subjected to "extraordinary rendition", which entails detention ..."outside the normal legal system" and which, "by its deliberate circumvention of due process, is

anathema to the rule of law and the values protected by the Convention" (see *El-Masri*, ibid.).

456. Similar principles apply to cases where there are substantial grounds for believing that, if removed from a Contracting State, an applicant would be exposed to a real risk of being subjected to a flagrant denial of justice (see *Othman (Abu Qatada)*, cited above, §§ 261 and 285) or sentenced to the death penalty (see *Al-Saadoon and Mufdhi*, cited above, § 123 and *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

457. While the establishment of the sending State's responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise.

In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other violations of the Convention (see *Soering*, cited above, §§ 91 and 113; *Mamatkulov and Askarov*, cited above, §§ 67 and 90; *Othman (Abu Qatada)*, cited above, § 258; and *El-Masri*, cited above, §§ 212 and 239).

458. In determining whether substantial grounds have been shown for believing that a real risk of the Convention violations exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material it has obtained *proprio motu*. It must examine the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there and his personal circumstances.

The existence of the alleged risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the removal. However, where the transfer has already taken place at the date of the Court's examination, the Court is not precluded from having regard to information which comes to light subsequently (see *Al-Saadoon and Mufdhi*, cited above, § 125 and *El-Masri*, cited above, §§ 213-214, with further references).

3. Conclusion

459. The Court will accordingly examine the complaints and the extent to which the events complained of are imputable to the Polish State in the light of the above principles of State responsibility under the Convention, as deriving from its case-law.

V. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

460. The applicant's complaints under Article 3 of the Convention involved both substantive and procedural aspects of this provision.

1) As regards his alleged ill-treatment and detention in Poland, he maintained that Poland had violated Article 3 in enabling his torture and ill-treatment on its territory. Poland knew and should have known about the CIA extraordinary rendition programme, the existence of the "black site" in Stare Kiejkuty and torture and inhuman and degrading treatment to which the CIA had subjected "High-Value Detainees" as part of this programme. Despite that, Poland had intentionally and knowingly enabled the CIA to detain him at the Stare Kiejkuty intelligence base customised to the CIA programme purposes for some 6 months.

2) As regards his transfer from Poland, the applicant submitted that Poland had knowingly and intentionally enabled his transfer from its territory despite substantial grounds for believing that there had been a real risk of his being subjected to further treatment contrary to Article 3 in CIA custody.

3) He also complained under Article 3 read alone and in conjunction with Article 13 of the Convention that the Polish authorities had failed to carry out an "effective and thorough investigation" within the meaning of this provision into his allegations of ill-treatment during his detention in a CIA-run detention facility in Stare Kiejkuty.

461. Article 3 of the Convention states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

462. The Court will first examine the applicant's complaint under the procedural aspect of Article 3 about the lack of an effective and thorough investigation into his allegations of ill-treatment when in CIA custody on Poland's territory.

A. Procedural aspect of Article 3

1. The parties' submissions

(a) The Government

463. The Government repeated that the application as a whole was premature. They stressed that Poland was in fact the only country that was conducting a proper criminal investigation into the allegations of rendition and secret detention. In their view, the alleged failure on the part of the Polish Government to cooperate with the international inquiry bodies in 2006-2007 should be seen in the light of the fact that since 2008 the investigation had progressed effectively.

464. As regards the conduct of the proceedings, the Government first of all relied on the exceptional complexity of the case. They submitted that it involved many and various offences, some of them so serious that they were not subject to the statute of limitation. There was a possibility that some individuals at the highest level might be indicted. Also, there was an unprecedented lack of possibility of procedural contact with the alleged victims in order to take evidence from them.

Furthermore, the international aspect of the proceedings constituted a considerable hindrance to their progress. It was clear that the key part of the findings in the investigation concerned the alleged existence of a CIA-run detention facility on Polish territory, which obviously involved intelligence operations of at least two countries – Poland and the USA – operations which were in principle strictly protected on the grounds of national security.

465. Despite that, the Government maintained, as of September 2012 the prosecution had already taken evidence from 62 persons. The case file comprised 43 volumes of documentary evidence. The actions taken during the proceedings included the checking of information of the alleged CIA detention facility contained in the 2006 and 2007 Marty Reports and the Fava Report. The circumstances of the CIA aircraft landings which had not been subject to border and customs controls had been checked and documents from PANSA had been received. Evidence obtained from witnesses included the testimony of the Szymany airport staff, air-traffic controllers and one member of the Fava Inquiry.

In view of the complex legal issues involved in the investigation, a report from experts in international law had been obtained, addressing such issues as international law regulations on the establishment of secret detention centres for suspected terrorists and the status of such detainees.

The need to obtain information from the US authorities had been, and continued to be, of crucial importance but the prosecutor's requests for legal assistance, including a request for the applicant's participation in procedural actions, had so far remained unsuccessful. That made the investigative tasks even more difficult.

At the public hearing, the Government added that, in the hope of cooperation on the part of the USA, they were also considering the possibility of taking evidence from injured persons remotely, by means of videoconferencing.

466. Referring to the applicant's arguments that the investigation was inordinately delayed, politically influenced and ineffective (see paragraphs 463–466 below), the Government said that these assertions had not been supported by any reliable evidence or logical explanation. The fact that at some stage the investigating prosecutor had been disqualified from dealing with the case and replaced by another prosecutor and that the case had been transferred from the Warsaw Prosecutor of Appeal to the Kraków

Prosecutor of Appeal could not be regarded as plausible evidence of undue political influence or a factor contributing to the length of the proceedings.

467. In the Government's submission, the investigation was transparent. The proceedings received constant attention from the public, media and non-governmental organisations. Information about them had been communicated to Amnesty International and the Helsinki Foundation for Human Rights to the fullest extent possible. The proceedings were also monitored by the Ombudsman, who had been provided with classified information.

The investigation was likewise supervised by the Prosecutor General, who had taken personal interest in the case and was fully informed about the current and planned actions.

There was no political pressure on prosecutors conducting the investigation.

The applicant's Polish lawyer had unrestrained access to unclassified materials in the case file and he had also been able to consult the classified materials on 19 January and 13 June 2012.

468. The Government further maintained that the Court, refusing to admit the document that they had wished to present at the fact-finding hearing, had made it difficult for them to prove that the investigation was thorough, effective and not excessively long.

They emphasised that the actual length of the investigation could not be a decisive criterion. It was true that it was lengthy, but not unduly lengthy, especially considering its exceptional complexity and the factors which had had an impact on its progress and which were beyond the Polish prosecution authority's control. In that context, they also pointed out that the applicant's complaint about the allegedly excessive length of the proceedings had been rejected by the Regional Court as ill-founded.

469. To sum up, the investigation, which was still pending, was both effective and thorough, in particular vis-à-vis the standards set for cases concerning the abuse of power by public officials. The investigation was being conducted in an objective, independent and efficient manner. There was no indication of negligence or obstruction to the objective of establishing the truth.

(b) The applicant

470. The applicant submitted that the application was not premature because Poland had failed to carry out an investigation that would satisfy the requirements of Article 3 of the Convention.

More than a decade had elapsed since the applicant had been secretly detained in Poland and the investigation remained pending without any sign of charges being brought or any credible sign of conclusion. It had begun on 11 March 2008, nearly six years after he had been transferred by the CIA from Poland and almost two and a half years after credible reports of a CIA

prison in Poland had become publicly available. Indeed, the investigation was so delayed and ineffective that the statute of limitations applicable to the abuse of power – the key offence that the prosecutors had publicly acknowledged they had been investigating – had in the meantime apparently expired.

471. In that regard, the applicant referred to the comments by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counteracting terrorism as regards the scope of the States' obligation to investigate allegations of torture and secret detention (see paragraphs 472–473 below). Fully endorsing those submissions, he stressed that Poland had failed to discharge this obligation.

472. First, the investigation had been neither promptly begun, nor had been promptly carried out. It had started nearly six years after the violations of the applicant's rights had occurred, even though the State agencies that had cooperated with the CIA had known of these violations while the applicant had been held captive and tortured in Poland. Publicly available sources indicated that the State agencies had known about those violations from the outset in 2002, since they had actively taken part in the preparation of special premises for the purposes of detention and torture. Yet the State had done nothing for five years. Only under strong domestic and international pressure, from such bodies as the Parliamentary Assembly of the Council of Europe, had the Polish prosecution authority finally initiated the proper investigation as late as 2008.

The passage of time had undermined the effectiveness of the investigation. The length of the proceedings had made it more difficult to gather evidence and, in particular, to interview witnesses, who would remember the relevant events less at the present time than they had done several years ago.

If, as the Government asserted, the investigation had progressed, this had not been reflected in the non-classified files to which the applicant's Polish lawyer had had access. The files did not show any significant actions having been taken since the case had been transferred to the Kraków Prosecutor of Appeal on 26 January 2012. Since September 2012 the total number of witnesses interviewed had remained static at 62. It appeared to be convenient for the Polish State to keep the case in a suspended state but such an indefinite investigation was the worst possible scenario for the victim. The applicant had neither the right to a full access to the case file, nor the possibility of having his rights vindicated in a criminal trial of the perpetrators.

473. Secondly, the investigation was not sufficiently independent, as demonstrated by the repeated and unexplained removal of prosecutors, apparently in response to their attempts to pursue charges against Polish officials. Furthermore, in September 2011 the President of Poland had

refused to relieve former President Kwaśniewski of his secrecy obligations for the purposes of providing information to the investigating prosecutors.

The prosecutors had been changed in the investigation three times at junctures that were important for the victim, with no specific explanation from the Prosecutor General or the Government. Each such change required the new prosecutor in charge to become familiar with the files, thereby delaying the investigation further. The first change had actually occurred after prosecutor Mierzewski granted Mr Al Nashiri injured person status in the proceedings. The second prosecutor in charge, Mr Tyl, had been disqualified from dealing with the case immediately after he had granted the Polish lawyers for the applicant and Mr Abu Zubaydah access to the classified materials for a very limited time.

In the applicant's submission, the fact that the prosecutors had been changed shortly after acts of cooperation with the victims' representatives suggested an unmeritorious reason behind the changes. As such, the investigation did not seem capable of leading to the identification or punishment of those responsible for the violations of the applicant's rights.

474. Thirdly, the investigation lacked the required transparency. It had been continually shrouded in secrecy. Since it had begun, no meaningful information as to its terms of reference, precise scope or its progress had been publicly disclosed.

The secrecy of the investigation had severely hampered the vindication of the applicant's rights. The confidentiality which protected every investigation in Poland, and which was invoked by the Government before the Court, served to ensure the effectiveness of proceedings. It did not prevent the prosecutor from making available to the public important information concerning the investigation. However, almost all the relevant material in the case was classified as secret or top secret. The Government had invoked the secrecy of the investigation but investigative secrecy was not a legal basis under Polish law for classifying documents as secret or top secret. In fact, the classification of documents served to protect illegitimate interests – interests of the State agencies that had played a role in the illegal cooperation with the CIA and in violations of human rights.

In that regard, the applicant again subscribed to the submissions of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counteracting terrorism, who had emphasised the importance of public accountability and the requirement that the findings of any investigation into acts of torture be made public (see paragraphs 479-483 below).

475. Lastly, the applicant's representatives submitted that they were unable to represent his interests properly in the domestic proceedings because they did not have sufficient access to the case file. The Polish lawyer for the applicant had had access to the classified part of the file for some three hours only and had not been allowed to make notes. This had

been a wholly insufficient time to inspect, understand and memorise the relevant fragments of the very extensive classified documentation. As a result of the excessive classification, the applicant's lawyers were also hindered in presenting important information to the Court in the present proceedings.

476. In conclusion, the applicant invited the Court to reject the Government's preliminary objection on non-exhaustion of domestic remedies and to find a violation of Article 3 of the Convention on account of Poland's failure to conduct a "thorough" and "effective" investigation for the purposes of that provision.

2. The third-party interveners

(a) Helsinki Foundation for Human Rights

477. The Helsinki Foundation for Human Right ("the Helsinki Foundation") stated that comments filed in the context of its intervention focused on its experience regarding the Polish involvement in the extraordinary rendition programme. Those comments should not, in its view, be treated as an interpretation of the facts of the case but as an illustration of the problems at issue.

The Helsinki Foundation stressed that, after the first media reports suggesting Poland's involvement in the CIA rendition programme had emerged, it had been one of a number of Polish organisations demonstrating continued interest in seeking an explanation for the issue.

478. The intervener listed or summarised various letters and requests for information that had been sent by the Helsinki Foundation to the domestic authorities, the responses received and the flight data regarding the CIA programme – the latter had already been included in the statement of facts of the case prepared by the Court on giving notice of the application. It also referred to media reports concerning the conduct of the investigation, emphasising that no meaningful information about the investigation had been disclosed to the public and that the authorities continually invoked secrecy to justify their refusal to respond to request for information.

(b) The UN Special Rapporteur

479. The UN Special Rapporteur stated that there was a growing international consensus as to the nature and scope of the duty to investigate allegations of secret detention, torture and rendition. Such consensus was summarised in the 2010 UN Joint Study recommendations in paragraphs 292(d)-(k) (see paragraphs 283-285 above), which echoed the findings of various governmental and inter-governmental reports in the period since 11 September 2001, including the 2006 and 2007 Marty Reports, the Fava Report and the Flautre Report (see paragraphs 244–275 and 277-279 above).

In the UN Special Rapporteur's submission, it could now be regarded as established that, where an allegation of torture was raised, States were obliged to carry out an investigation that was independent, promptly begun and promptly executed; was capable of leading to the identification and punishment of those responsible; was prepared to take reasonable steps to obtain evidence, and which would lead to adequate and prompt reparation.

Those requirements also mirrored the obligation to investigate deriving from the Court's case-law under Article 3 of the Convention.

480. A specific sub-set of international standards had emerged, in the post-2001 era, concerning disclosure of documents and transparency in cases where national security interests were involved.

First, it was essential for parliamentary and judicial inquiries into cases of torture to enjoy unfettered access to confidential information. That principle applied irrespective of any national-security issues that had arisen.

Secondly, independent judicial or quasi-judicial bodies should be established in order to determine any claims by State officials that certain information could not be disclosed to the alleged victim and the public on national security or related grounds. These procedures must provide an independent review of any government assertion of confidentiality and national security. Governments and security agencies must not be permitted to decide for themselves whether material was confidential. The confidentiality, or otherwise, of a particular documents should be established by an adversarial procedure. Irrespective of any finding concerning confidentiality, those documents should be available to the investigating authorities.

Thirdly, those independent bodies should apply a presumption in favour of disclosure. As it had emerged from the Court's case law, for instance in *A. v. the United Kingdom* (cited below in paragraph 494), where material was withheld from the alleged victim, his family and lawyers, the essential gist of the material should be disclosed sufficiently for the victim to participate fully in the inquiry.

Fourthly, where information or evidence could not be disclosed, governments should set up, at their own expense, a system in which other material which went beyond the essential gist could be tested by persons appointed to act in the interests of the alleged victim.

Fifthly, publication of as much as possible of the evidence and conclusions of the inquiry was necessary in order to secure adequate redress for the alleged victim and democratic accountability before the public at large. The ultimate decision as to what should and what should not be published must rest with the independent judicial authority. The decision must be taken balancing the interests of national security, as asserted by the Government, against the need to secure proper accountability for practices which constituted grave violations of international law.

481. At the public hearing, the UN Special Rapporteur submitted – also on behalf of the Human Rights Council of the United Nations and the UN High Commissioner for Human Rights – comments on the scope of the right to truth as construed in contemporary human rights law and its relationship with the duty to investigate secret detentions, torture and rendition and secure accountability of public officials for gross and systematic human rights violations committed in the context of State counter-terrorism initiatives.

He stressed that the process of seeking the truth about the Bush-era conspiracy had taken a very considerable time but it had been gathering momentum in the past three years or so. Independent investigations had reliably established the complicity to a greater or a lesser degree of the public officials of a large number of States in the CIA rendition, secret detention and torture programme – and the word "torture" was to be used without hesitation or qualification. A notion of "enhanced interrogation" as practised by the CIA could not be recognised as being anything other than torture. There had emerged credible evidence to show that CIA black sites had been located on the territory of Lithuania, Morocco, Poland, Romania and Thailand and that the officials of at least 49 other States within and outside the Council of Europe had allowed their airspace or airports to be used for rendition flights. Despite the emergence of these facts only one State – Italy – had so far brought any public official to justice.

The experience of the past decade had shown that there were various means by which the right to truth and the principle of accountability could be and had been frustrated, perpetuating effective impunity for the public officials involved in these crimes. They included, in particular, *de facto* immunities, officially authorised destruction of relevant evidence, objective obstruction of or interference in independent investigations, unjustified assertions of executive secrecy, dilatoriness, interruptions in investigations, and the suppression and delayed publication of reports.

482. Reverting to the meaning of the "right to truth", the UN Special Rapporteur said that within the United Nations it was seen as a right which had two dimensions – a private dimension and a public dimension. It was the consistent position of the UN mechanisms that where gross or systematic human rights violations were alleged to have occurred, the right to know the truth was not one that belonged solely to the immediate victim but also to society.

In the context of serious human rights violations there was a particular obligation which required States to inform not only the victims and their families but also society as a whole of what had happened. The right to truth implied not only clarification of the immediate circumstances of the particular violations but also the clarification of the general context, the policies and institutional failures and decisions that had enabled their occurrence. Beyond this, the realisation of the right to truth might require

the dissemination of information on violations in order to restore confidence in State institutions. For that reason, in *El-Masri* the collective aspect of the right to truth had been linked with the gravity of the allegations that were at issue in that case.

Once it was recognised that in cases of gross or systemic violations there was a free standing right to truth belonging to society at large, then it would follow that any individual with a legitimate interest in the truth was entitled to invoke that right. If the right to truth were to be confined to the individual who had suffered the violation or his representatives, then the exposure of grave and systematic international crimes would necessarily be dependent on the chance occurrence of there being an individual victim or relative who was able and willing to bring proceedings.

483. The UN Special Rapporteur next pointed to the existing differences of view as to whether the right was to be recognised as part of the adjectival obligation attaching to Article 3, as part of the right to receive information attaching to Article 10, or as the part of the right to reparation under Article 13.

The UN Human Rights mechanisms adopted a holistic approach to this – one which promoted the objective of ending impunity.

Whilst it was correct to locate the right to truth in the adjectival obligation owed under Article 3, the collective dimension of the right could only be fully reflected through the rubric of the right to receive information under Article 10. The right to receive information and the right to truth about gross and systematic human rights violations were inextricably intertwined. To locate the right to truth solely in Article 3 presupposed that at the international level it could be invoked only by the victim of the underlying violation. However, once it was recognised that it was a free standing principle of international law then the category of persons who were entitled to invoke that right would include those who had a legitimate interest and representative interest groups, as well as the media who had a duty to seek the truth and to inform the public.

3. The Court's assessment

(a) Admissibility

484. The Court considers that the applicant's complaint under the procedural aspect of Article 3 raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. Furthermore, the Court has already found that the Government's objection on non-exhaustion of domestic remedies should be joined to the merits of this complaint (see paragraph 343 above). Consequently, it cannot be considered that it is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it

inadmissible having been established, the complaint must therefore be declared admissible.

(b) Merits

(i) Applicable general principles deriving from the Court's case-law

485. Where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of agents of the respondent State or, likewise, as a result of acts performed by foreign officials with that State's acquiescence or connivance, that provision, read in conjunction with the Contracting States' general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other examples, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII; *Ilaşcu and Others*, cited above, §§ 318, 442, 449 and 454; and *El-Masri*, cited above, § 182).

486. The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

The investigation should be independent of the executive. Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms. Furthermore, the victim should be able to participate effectively in the investigation in one form or another (see, *El-Masri*, cited above, §§ 183-185 and *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167).

(ii) Application of the above principles to the present case

487. The Court has already found that, in view of the Government's unjustified failure to produce the necessary information from the investigation in the present case, it is entitled to draw inferences from their conduct in respect of the well-foundedness of the applicant's allegations (see paragraph 375 above).

488. Turning to the circumstances of the case as established on the basis of the available material, the Court notes that the Polish authorities opened the investigation into allegations concerning the existence of a CIA secret detention facility in Poland on 11 March 2008. Since then – for some 6 years and 4 months as at the date of the adoption of this judgment – this investigation has been pending seemingly still against persons unknown. In any case, there has been no confirmation from an official source that criminal charges have been brought against any individual (see paragraphs 132–172 and 470 above).

489. The proceedings began as late as some 6 years after the applicant's detention and ill-treatment, despite the fact that the authorities must necessarily have been involved already at an early, preparatory stage of the implementation of the HVD Programme in Poland and that they knew of the nature and purposes of the CIA's activities on their territory between December 2002 and September 2003 (see paragraph 442 above). However, at that time they did nothing to prevent those activities, let alone inquire into whether they were compatible with the national law and Poland's international obligations.

490. In the Court's view, this failure to inquire on the part of the Polish authorities, notwithstanding the abundance of publicly accessible information of widespread ill-treatment of al'Qaeda detainees in US custody emerging already in 2002-2003 (see also paragraphs 214-239 and 439 above), could be explained in only one conceivable way. As shown by the sequence of the subsequent events, the nature of the CIA activities on Polish territory and Poland's complicity in those activities were to remain a secret shared exclusively by the intelligence services of the two cooperating countries.

The Court sees no other reason capable of explaining why, when in November 2005 Poland was for the first time publicly named as a country that had possibly hosted a CIA secret prison and received CIA-associated flights at the Szymany airport (see paragraphs 226–228 and 234 above), there was no attempt to initiate any formal, meaningful procedure in order to clarify the circumstances surrounding the aircraft landings and the alleged CIA's use of, in the words of the 2005 HRW Statement, "a large training facility and grounds near the Szymany airport" maintained by the Polish intelligence service (see paragraph 226 above). Nor did the inquiries instituted by the Council of Europe and the European Parliament prompt the Polish State to probe into those widely disseminated assertions of human

rights violations. Indeed, the only response of the Polish authorities to the serious and *prima facie* credible allegations of their complicity in the CIA rendition and secret detention was to carry out a brief parliamentary inquiry in November-December 2005. The inquiry produced no results and was held behind closed doors. None of its findings have ever been made public and the only information that emerged afterwards was that the exercise did not entail anything "untoward" (see paragraphs 128–130 above).

491. Pursuant to the relevant provisions of the Code of Criminal Procedure, the prosecuting authorities – which, as the Government stressed, are independent of the executive (see paragraph 346 above) – had a duty to open an investigation of their own motion if there was a justified suspicion that an offence had been committed (see paragraphs 184–187 above). In any event – in November-December 2005 at the latest – in the face of allegations of serious criminal activity having been perpetrated in Poland, allegations which on account of the world-wide publicity could not have gone unperceived, the Polish prosecution authority should have promptly initiated an adequate investigation into the matter, notwithstanding the conclusion of the parliamentary inquiry (see also *El-Masri*, cited above, §§ 186 and 192).

Moreover, in 2006-2007, those allegations were further supported by the findings of the international inquiries (see paragraphs 236–256 above).

492. The Court notes that the Government suggested that their "alleged failure to cooperate in 2006-2007" should not be linked with the assessment of the conduct of the pending criminal investigation (see paragraph 463 above). The Court does not share this point of view.

Poland's denial of any complicity in the CIA operations and failure to cooperate at international level cannot be seen in isolation from an officially undeclared but, for all practical purposes, perceptible lack of will to investigate at domestic level the allegations that they were denying. The authorities decided not to carry out any further domestic inquiry from November-December 2005 until March 2008. This resulted in the opening of any proper investigation being delayed by nearly two and a half years. Having regard to the exceptional gravity and plausibility of the allegations, encompassing crimes of torture and undisclosed detention, such delay must be considered inordinate. As pointed out by the applicant, it inevitably undermined the Polish prosecution authority's ability to secure and obtain evidence and, in consequence, to establish the relevant facts (see paragraph 472 above).

493. As regards the procedural activity displayed by the Polish prosecutors, the Government maintained that the investigation had progressed and was still progressing smoothly, account being taken of the exceptional complexity of the case, the attitude of the US authorities to the requests for legal assistance and various other practical impediments to

obtaining evidence, including restrictions on access to and contact with the victims (see paragraphs 464–465 above).

The Court does not underestimate the difficulties involved in gathering evidence faced by the authorities. Nevertheless, as noted above, since March 2008 no meaningful progress in the investigation has been achieved and no persons bearing any responsibility have apparently been identified (see paragraphs 132–172 above).

Moreover, at advanced stages of the investigation two successive prosecutors in charge of it were disqualified from dealing with the case and, subsequently, the case was transferred to prosecutors in another region (see paragraphs 133–134, 159 and 473 above). While the Court does not find it necessary to ascertain whether or not these decisions by the Prosecutor General in any way support the applicant's contention that the investigation has lacked independence and has been politically influenced, they unavoidably contributed to the prolongation of the proceedings.

494. As explained above in relation to Poland's non-observance of Article 38 of the Convention, the Court has taken note of the fact that the investigation may involve national-security issues (see paragraph 367 above). However, this does not mean that reliance on confidentiality or secrecy gives the investigating authorities complete discretion in refusing disclosure of material to the victim or the public.

It is to be recalled 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 (see, *mutatis mutandis*, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 216-218, ECHR 2009).

495. Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.

An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see *Anguelova v. Bulgaria*, no. 38361/97, § 140, ECHR 2002-IV; *Al-Skeini and Others*, cited above, § 167 and *El-Masri*, cited above, §§191-192).

496. In the present case only sparse and vague information as to the terms of reference or scope of the proceedings, including the offences suspected or possibly involved, has so far been disclosed to the victims' representatives and the general public (see paragraphs 132–172 and 474-475 above). Even at the hearing before this Court the Government preferred to give an ambiguous description of the nature of the offences that have been the object of the investigation (see paragraph 464 above).

By contrast, as demonstrated by excerpts from the Polish media's publications produced by the applicant, certain important procedural actions taken by the prosecution have, notwithstanding the official secrecy pleaded by the Government, been described in a more or less detailed manner in the national press. Thus, a full list of questions put by the prosecution to experts obtained from unofficial sources was disclosed by the Polish press to the public. It has never been presented fully either to the Court in these proceedings or, as it would appear from the available material, even to the counsel for the victim (see paragraphs 137, 151 and 475 above).

The Polish counsel for the applicant submitted that his access to the case file was insufficient and that this hindered him seriously in representing the applicant properly in domestic proceedings and before the Court (see paragraph 475 above). The Court accepts that it has been so. In this regard it would recall that in cases where full disclosure is not possible, notably on account of national-security concerns, the difficulties that this causes should be counterbalanced in such a way that the party concerned can effectively defend its interests in the proceedings (see paragraph 494 above).

497. Moreover, the Court considers that the importance and the gravity of the issues involved require particularly intense public scrutiny of the investigation in the present case. First, those issues include the allegations of serious human rights violations, encompassing torture and occurring in the framework of a secret large-scale programme of capture, rendition, secret detention and interrogation of terrorist suspects operated by the CIA owing to cooperation with the intelligence services of Poland and many other countries. No less importantly, it involves the questions of the legality and the legitimacy of both of decisions taken by Polish State officials and of activities in which the national security and intelligence services were engaged in the implementation of the CIA HVD Programme on Poland's territory.

Securing proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the Polish State institutions' adherence to the rule of law and the Polish public has a legitimate interest in being informed of the investigation and its results. It therefore falls to the national authorities to ensure that, without unacceptably compromising national security, a sufficient degree of public scrutiny is maintained in the present case (see also paragraph 494 above).

498. The instant case, apart from raising an issue as to an effective investigation of alleged ill-treatment contrary to Article 3 of the Convention, also points out in this context to a more general problem of democratic oversight of intelligence services (see also paragraphs 262-265 above). The protection of human rights guaranteed by the Convention, especially in Articles 2 and 3, requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations. The circumstances of the instant case may raise concerns as to whether the Polish legal order fulfils this requirement.

499. Considering all the above elements, the Court finds that the proceedings complained of have failed to meet the requirements of a "prompt", "thorough" and "effective" investigation for the purposes of Article 3 of the Convention.

Consequently, the Court rejects the Government's preliminary objection on non-exhaustion of domestic remedies on the ground that the application was premature and finds that there has been a violation of Article 3 of the Convention, in its procedural aspect.

B. Substantive aspect of Article 3

1. The parties' submissions

(a) The Government

500. The Government submitted that, since the investigation into the applicant's allegations was still pending, they were not in a in a position to address in detail the questions concerning the merits of his complaint.

(b) The applicant

501. The applicant submitted that in the light of the Court's case-law Poland had been under a positive obligation under Article 3 to protect him from torture and other forms of ill treatment by the CIA on its territory and to prevent his transfer from Poland to other CIA secret detention facilities, which had exposed to him to further violations of that Article. However, the authorities, despite the fact that at the relevant time they knew, or should have known, that under the HVD Programme CIA prisoners were being subjected to interrogation methods and other practices manifestly incompatible with the Convention, had done nothing to stop or prevent the violations of his fundamental rights.

502. The treatment to which the applicant was subjected in CIA custody in Poland clearly passed the threshold set in the Court's case-law for "torture" within the meaning of Article 3.

As clearly demonstrated by the disclosed CIA material, he was deliberately subjected for a prolonged period of time to a wide range of abusive interrogation methods known as "enhanced interrogation techniques". Those methods, often used in combination, were specifically designed to elicit information by inflicting psychological and physical suffering on an interrogated person. Indeed, official U.S. government documents stated that the "goal of interrogation [was] to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner", and that interrogation procedures were used "to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner".

503. In the light of expert evidence and voluminous documentary, evidence, including most notably the CIA declassified documents, it was confirmed beyond reasonable doubt that in Poland the applicant had been subjected not only to "enhanced interrogation techniques" but also to "unauthorised techniques" – including mock executions and stress positions, the most significant form of abuse in the CIA programme.

In addition, the applicant's six-month solitary confinement and incommunicado detention in Poland also amounted to treatment in violation of Article 3.

504. The 2004 CIA Report admitted that the applicant had been subjected to "enhanced interrogation techniques" in the first two weeks of December 2002. The ICRC reported that Mr Al Nashiri had confirmed that in his third place of detention – in Poland – he had been held naked and subjected to mock executions, prolonged standing stress positions with his wrists shackled above his head to the ceiling for days at a time, almost dislocating his arms from his shoulders and to the direct physical pain through the use of a stiff brush and the interrogator's standing on his shackles. He had also been threatened with sodomy and with the arrest and rape of his family.

As such, the interrogation methods inflicted on the applicant in Poland had constituted torture, as defined by the Court, that is, "deliberate inhuman treatment causing very serious and cruel suffering".

505. Moreover, these methods had had devastating and lasting effects on the applicant, as demonstrated by his statements before the Combatant Status Review and by the fact that, as a result of torture, he was suffering from Post-Traumatic Stress Syndrome (see paragraphs 113 and 126 above).

2. The Court's assessment

(a) Admissibility

506. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) Applicable general principles deriving from the Court's case-law

507. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in time of war or other public emergency threatening the life of the nation (see, among many other examples, *Soering*, cited above, § 88; *Selmouni v. France*, cited above, § 95; *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV); *Ilaşcu and Others* cited above, § 424; *Shamayev and Others*, cited above, § 375 and *El-Masri*, cited above, § 195; see also *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 26-31, ECHR 2001-XI).

Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V; *Labita*, cited above, § 119; *Öcalan v. Turkey* [GC], no. 46221/99, § 179 ECHR 2005-IV and *El-Masri*, cited above, § 195

508. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, cited above, § 162; *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI *Jalloh v. Germany* cited above, § 67). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia*, *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004; and *El-Masri*, cited above, § 196).

In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aksoy*, cited above, § 62). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which

came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *İlhan v. Turkey* [GC], no. 22277/93, § 85, ECHR 2000-VII; and *El-Masri*, cited above, § 197).

509. The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III and *El-Masri*, cited above, § 198).

(ii) Application of the above principles to the present case

510. The Court has already found that the applicant's allegations concerning his ill-treatment and secret detention in Poland from 5 December 2002 to 6 June 2003 and his transfer from Poland to other CIA black sites on the latter date have been proved before the Court and that those facts are established beyond reasonable doubt (see paragraphs 405–417 above).

It remains to be determined whether the treatment to which he was subjected falls within the ambit of this provision and, if so, to what extent it can be imputed to the respondent State (see paragraphs 451–458 above)

(a) Treatment to which the applicant was subjected at the relevant time

511. In the light of the CIA declassified documents and the applicant's own account of events given to the ICRC, the Court has already found that in December 2002 and January 2003, during his secret detention in Poland, the applicant was interrogated by the CIA and subjected to EITs and a series of so-called "unauthorised" interrogation techniques (see paragraphs 99-101 and 416-417 above). The expression "unauthorised" meant that they were not included in the list of 10 permitted interrogation measures applied as a matter of standard procedure to High-Value Detainees – which are graphically described in the 2004 CIA Report, the 2004 CIA Background Paper and, additionally, in the 2009 DOJ Report (see paragraphs 54-68 above).

As can be seen from the CIA documents, those unauthorised measures included two mock executions, which apparently took place on the same day. The first one was with the use of an unloaded pistol being "cocked" to

his head while he was shackled in a sitting position, the second with a power drill while he was forced to stand naked and hooded in his cell. The applicant was also subjected to what was described in the 2004 CIA Report as "potentially injurious stress positions". That meant, as stated in that report, that he was required to kneel on the floor and lean back, that he was subjected to standing stress positions and pushed when in those positions and that he was lifted off the floor by his arms while his arms were bound behind his back with a belt. This apparently resulted in his arms nearly being dislocated from his shoulders. He was told that, if he did not "talk", his mother and family members would be brought to the black site – leaving him to infer from this that his female relatives might be abused in front of him. His "debriefer" stood on his shackles to induce pain, which caused further bodily injuries – cuts and bruises. The same "debriefer" blew smoke into his face during the interrogation sessions. Also, in order to induce pain on him, he was washed with the kind of stiff brush that "one uses ... to remove stubborn dirt" (see paragraphs 99-100 above).

512. The 2004 CIA Report further states that, in addition to those unauthorised measures, "the interrogation team continued EITs on Al Nashiri for two weeks in December 2002" and that, as he was perceived as "withholding information", hooding and handcuffing were "reinstated". Since the remaining parts of the relevant section, covering the period from December 2002 to September 2003, have been redacted, there is no indication as to which other specific techniques could have been inflicted on the applicant and no description of other aspects of the treatment to which he could have been subjected in Poland (see paragraph 99 above). However, it is to be noted that the CIA documents give a precise description of the treatment to which High Value Detainees were being subjected in custody as a matter of precisely applied and predictable routine, starting from their capture through rendition and reception at the black site, to their interrogations. As stated in the 2004 CIA Background Paper, "regardless of their previous environment and experiences, once a [High-Value Detainee] is turned over to CIA a predictable set of events occur" (see paragraphs 63-68 above). Even though the section devoted in that paper to interrogations is largely redacted, it gives a complete list of the stages of a CIA interrogation and the measures used. This specific part of the 2004 CIA Background Paper, although considerably redacted, gives a clear picture of a "prototypical interrogation" to be practised routinely at each and every CIA black site, together with the suggested time-frame and refers to effective combinations of various "techniques" described above (see paragraph 68 above).

513. A complementary account of the applicant's treatment and detention under the HVD Programme at the relevant time is given in the 2007 ICRC Report. It states that at the early stages of his detention – that is to say, over and up to several months following his capture in October 2002

– the applicant was subjected to "a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and information". It further states that throughout his entire period of his undisclosed detention he was kept in continuous solitary confinement, deprived of access to the open air, exercise, appropriate hygienic facilities and basic items in pursuance of interrogation (see paragraphs 69-70, 102 and 281-282 above).

514. The Court cannot speculate as to when, how and in what combination the specific "authorised" or "permitted" interrogation techniques were used on the applicant between 5 December 2002 and 6 June 2003. However, the predictability of the CIA standard procedures and treatment applied to its detainees gives sufficient grounds to believe that these measures could have been used in respect of the applicant during his detention in Poland and likewise elsewhere, following his transfer from Poland, as an integral part of the HVD Programme.

515. Nor does the Court find it necessary to analyse each and every aspect of the applicant's treatment in detention or the physical conditions in which he was detained. This treatment is to be characterised as "deliberate inhuman treatment causing very serious and cruel suffering" for the purposes of Article 3 (see paragraph 508 above).

All the measures were applied in a premeditated and organised manner, on the basis of a formalised, clinical procedure, setting out a "wide range of legally sanctioned techniques" and specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects. Those – explicitly declared – aims were, most notably, "to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence"; "to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner"; "to create a state of learned helplessness and dependence"; and their underlying concept was "using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence [a High-Value Detainee's] behaviour, to overcome a detainee's resistance posture" (see paragraphs 55 and 62-68 above).

516. In view of the foregoing, the Court concludes that the treatment to which the applicant was subjected by the CIA during his detention in Poland at the relevant time amounted to torture within the meaning of Article 3 of the Convention (see paragraph 508 above and *El-Masri*, cited above, § 211).

(β) Court's conclusion as to Poland's responsibility

517. The Court has already found that Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and cooperated in the preparation and execution of the CIA rendition, secret

detention and interrogation operations on its territory. It has also found 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, it ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention (see paragraph 442 above).

It is true that, in the assessment of the experts – which the Court has accepted – the interrogations and, therefore, the torture inflicted on the applicant at the Stare Kiejkuty black site were the exclusive responsibility of the CIA and that it is unlikely that the Polish officials witnessed or knew exactly what happened inside the facility (see paragraphs 441-442 above).

However, under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals (see paragraphs 443 and 509 above).

Notwithstanding the above Convention obligation, Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring. As the Court has already held above**,** on the basis of their own knowledge of the CIA activities deriving from Poland's complicity in the HVD Programme and from publicly accessible information on treatment applied in the context of the "war on terror" to terrorist suspects in US custody the authorities – even if they did not witness or participate in the specific acts of ill-treatment and abuse endured by the applicant – must have been aware of the serious risk of treatment contrary to Article 3 occurring on Polish territory.

Accordingly, the Polish State, on account of its "acquiescence and connivance" in the HVD Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory (see paragraph 452 above and *El-Masri*, cited above, §§ 206 and 211).

518. Furthermore, Poland was aware that the transfer of the applicant to and from its territory was effected by means of "extraordinary rendition", that is, "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, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see *El-Masri*, cited above, § 221).

In these circumstances, the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer (see paragraph 454 above). Consequently, by enabling the CIA to transfer the applicant to its other secret detention facilities, the Polish authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraphs 103, 442 and 453-454 above).

519. There has accordingly been a violation of Article 3 of the Convention, in its substantive aspect.

VI. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

520. The applicant complained that from 5 December 2002 to 6 June 2003 Poland had enabled the CIA to hold him on its territory in secret, unacknowledged detention, which had been imposed and implemented outside any legal procedures. In addition, by enabling the CIA to transfer him to other secret CIA detention facilities elsewhere, it had exposed him to a real and serious of risk further undisclosed detention.

He alleged a breach of Article 5 of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

1 The Government

521. The Government refrained from any comments on the admissibility and merits of this complaint.

2. The applicant

522. The applicant submitted that, despite the fact that the Polish authorities had known that terrorist suspects had been held by the US authorities in secret, incommunicado CIA detention they had done nothing to prevent or stop his detention and transfer. The authorities had known or should have known of the purposes for which the CIA had used the Stare Kiejkuty training base because they had signed a secret agreement and had customised the premises for the CIA's specific needs to detain and interrogate persons under the HVD Programme.

Accordingly, Poland had not only actively facilitated the CIA tasks but had also failed to fulfil its positive obligations under Article 3 to prevent his unlawful detention on its territory by CIA officials.

523. The fact that the CIA rendition and detention programme had operated in the context of an anti-terrorist initiative did not absolve the Polish authorities from their responsibility. Under the Court's case-law, the fight against terrorism did not mean that the Polish authorities could have assumed that the CIA had had a *carte blanche* under Article 5 to keep terrorist suspects in its custody outside any judicial scrutiny. Unacknowledged detention was a most grave violation of Article 5 and a complete negation of the additional Convention safeguards for the preservation of the right to life and freedom from torture of detained persons. A forced disappearance conflicted with some of the most basic protections against abuse of State power. The initial failure to record the fact and details of the detention (date, time and location), and the ongoing failure to account for the detainee's further whereabouts – as it could be found in the present case – constituted a most serious failing since this facilitated the official cover-up of future violations. Indeed, the CIA rendition scheme had not even contemplated the legal safeguards of Article 5.

524. As regards the applicant's transfer, the authorities should have –but had not – taken into account the fact that there had been sufficiently flagrant prospects of his continued arbitrary and secret detention in the CIA hands. As had emerged from the Court's case-law, for instance *Othman (Abu Qatada)* (cited in paragraph 455 above), a flagrant breach of Article 5 would occur if, as was the situation in the present case, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him to trial. By June 2003 it had been widely known that the

US rendition programme had involved secret detention in overseas locations. Accordingly, Poland had known that there had been substantial grounds for believing that the applicant had faced a real risk of being subjected to further incommunicado detention.

525. Lastly, the applicant referred to *El-Masri*, stating that in the light of that judgment, likewise concerning secret detention under the HVD Programme, his unacknowledged detention had amounted to disappearance and the Polish authorities had been responsible for the entirety of his detention in Poland and elsewhere, following his transfer.

B. The Court's assessment

1. Admissibility

526. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Applicable general principles deriving from the Court's case-law

527. The guarantees contained in Article 5 are of fundamental importance for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal*, cited above, § 118 and *El-Masri*, cited above, § 230). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311 and *El-Masri*, ibid.).

528. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness, by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptness and judicial supervision

assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see *Aksoy*, cited above, § 76). What is at stake is both the protection of the physical liberty of individuals and their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (see *El-Masri*, cited above, § 231).

529. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see *Aksoy*, cited above, § 78 and *El-Masri*, cited above, § 232).

The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see *Kurt v Turkey*, 25 May 1998, §§ 123-124, *Reports of Judgments and Decisions* 1998-III and *El-Masri*, cited above, § 233).

(b) Application of the above principles to the present case

530. The Court observes that secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme. As can be seen from the CIA declassified documents, the rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention, to mention only the right to be brought before a judge and be tried within a reasonable time or the *habeas corpus* guarantees. To this end, the whole scheme had to operate outside the jurisdiction of the US courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities (see paragraphs 50-51, 59 and 62-71 above).

The rendition operations had therefore largely depended on cooperation, assistance an active involvement of the countries which put at the USA's disposal their airspace, airports for the landing of aircraft transporting CIA prisoners and, last but not least, premises on which the prisoners could be securely detained and interrogated. While, as noted above, the interrogations of captured terrorist suspects was the CIA's exclusive responsibility and the local authorities were not to be involved, the cooperation and various forms of assistance of those authorities, such as for instance customising the premises for the CIA's needs, ensuring security and providing the logistics were the necessary condition for the effective operation of the CIA secret detention facilities (see paragraphs 325–326, 423, 435–436 above).

531. In relation to the applicant's complaint under the substantive aspect of Article 3, the Court has already found that Poland was aware that the applicant had been transferred from its territory by means of "extraordinary rendition" and that the Polish authorities, by enabling the CIA to transfer the applicant to its other secret detention facilities, exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraph 518 above). It finds that these conclusions are likewise valid in the context of the applicant's complaint under Article 5 and that Poland's responsibility is engaged in respect of both his detention on its territory and his transfer from Poland (see *El-Masri*, cited above, § 239).

532. Accordingly, there has been a violation of Article 5 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

533. The applicant further complained that Poland had violated his rights under Article 8 by enabling the CIA to ill-treat and detain him incommunicado on its territory and to deprive him of any contact with his family.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

534. The Government refrained from making any comments on the admissibility and merits of this complaint.

2. The applicant

535. Referring to his submissions concerning a breach of Articles 3 and 5, the applicant reiterated that in Poland he had been held in incommunicado detention and subjected to a range of abusive interrogation methods, including forced nudity, mock executions, hooding, handcuffing, shackling, stress positions, threats of injury (including of a sexual nature) to his mother and family, and pain induced through the use of a stiff brush on his body as well as by standing on his shackles. Such physical mistreatment had interfered with his physical and moral integrity and had resulted in a severe deterioration of his physical well-being and mental health, in violation of Article 8.

Moreover, as stated in the CIA official documents, the entire purpose of the rendition programme to which he was subjected, had been to disorient him and interfere with his psychological and physical integrity in order to extract information from him.

536. In the applicant's view, Poland had failed to fulfil its positive obligations to adopt measures in order to protect him against physical and psychological abuse and to ensure respect for his family rights. It had also failed adequately to prosecute and punish infringements of his physical and mental integrity committed on its territory. In so doing, the Polish authorities had been in breach of their obligation to respect and protect his physical and psychological integrity, including his dignity and personal autonomy, and had violated his right to respect for his family life.

B. The Court's assessment

1. Admissibility

537. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

538. The notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person. These aspects of the concept

extend to situations of deprivation of liberty (see *El-Masri*, cited above, § 248, with further references to the Court's case-law).

Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world. A person should not be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom" (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 65, ECHR 2002 III). Furthermore, the mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family. In that context, the Court would also reiterate that an essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities (see *El-Masri*, ibid.)

539. Having regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention (see paragraphs 517-519 and 531-532 above), the Court considers that the actions and omissions of Poland in respect of the applicant's detention and transfer also amounted to an interference with his rights protected by Article 8 of the Convention and engaged Poland's responsibility under that provision. In view of the circumstances in which it occurred, the interference with the applicant's right to respect for his private and family life must be regarded as not "in accordance with the law" and as inherently lacking any conceivable justification under paragraph 2 of that Article.

540. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

541. The applicant complained that Poland had been in breach of Article 13 of the Convention, taken separately and in conjunction with Article 3, on account of having failed to carry out an effective, prompt and thorough investigation into his allegations of serious violations of the Convention.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

542. The parties essentially reiterated their submissions concerning the procedural limb of Article 3.

543. The Government maintained that the criminal investigation in Poland had been thorough and effective and had, therefore, met the

requirements of an "effective remedy" for the purposes of Article 13 of the Convention.

544. The applicant disagreed and said that the investigation had been initiated after a considerable delay and with marked reluctance on the part of the Polish authorities, mostly owing to the international pressure following the findings of the inquiries conducted by the Council of Europe and the European Parliament. Despite the fact that the investigation had been pending for nearly six years, no meaningful progress had been achieved.

B. The Court's assessment

1. Admissibility

545. The Court notes that this complaint is linked to the complaint under the procedural aspect of Article 3, which has been found admissible (see paragraph 477 above). It must likewise be declared admissible.

2. Merits

(a) Applicable general principles deriving from the Court's case-law

546. Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see, among other authorities, *Kaya v. Turkey*, 19 February 1998, § 106, *Reports of Judgments and Decisions* 1998-I and *Mahmut Kay*, cited above, § 124).

547. Where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see *Anguelova*, cited above, §§ 161-162; *Assenov and Others*, cited above, §§ 114 et seq.; *Aksoy*, cited above, §§ 95 and 98 and *El-Masri*, cited above, § 255).

548. The requirements of Article 13 are broader than a Contracting State's obligation under Articles 3 and 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible (see, *El-Masri*, cited above, § 255, with further references to the Court's case-law).

549. Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant his expulsion or to any perceived threat to the national security of the State from which the person is to be removed (see *Chahal*, cited above, § 151 and *El-Masri*, cited above, § 257).

(b) Application of the above principles to the present case

550. The Court has already found the respondent State responsible for violations of the applicant's rights under Articles 3, 5 and 8 of the Convention (see paragraphs 510-540 above). There is, therefore, no doubt that his complaints are "arguable" for the purposes of Article 13 and that he should accordingly have been able to avail himself of effective practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation, as required by that provision (see paragraph 537 above and *El-Masri*, cited above, § 259).

For the reasons set out in detail above, the Court has found that the criminal investigation in Poland fell short of the standards of the "effective investigation" that should have been carried out in accordance with Article 13 (see paragraphs 487-499 above).

551. Consequently, there has been a violation of Article 13, taken in conjunction with Article 3 of the Convention.

IX. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

552. The applicant complained that Poland, by enabling the CIA to transfer him from its territory, had exposed to him to a real and serious risk of being transferred to a jurisdiction where he would be subjected to a flagrantly unfair trial, in breach of Article 6 § 1 of the Convention. That provision, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial by an independent and impartial tribunal established by law."

A. The parties' submissions

1. The Government

553. The Government submitted no comments on the admissibility and merits of this complaint.

2. The applicant

554. The applicant maintained that, having regard to the widespread public criticism of the military commission procedure at the time of his transfer from Poland, as well as the numerous deficiencies that were apparent from the published texts of the military orders governing that procedure, Poland had known, or should have known that he would face a flagrant denial of his right to a fair trial after his transfer from Poland. Those deficiencies had also been criticised in Resolution no. 1340 of the Parliamentary Assembly of the Council of Europe, by the Human Rights Chamber for Bosnia and Herzegovina, by non-governmental organisations including Human Rights Watch and Amnesty International, as well as in news reports.

555. At the relevant time – that is, in June 2003 – it had been evident that the military commissions had been neither independent nor objectively impartial. Military commission members had been appointed by the US Secretary of Defense (the "Appointing Authority") or his designee and could be removed by the same authority for good cause. Those members had been further subordinate to the Secretary of Defense or his designee because they all had been required to be commissioned officers of the United States armed forces. Moreover, post-trial review had been conducted by a review panel consisting of three military officers also designated by the Secretary of Defense. A Military Commission finding as to a charge and sentence had become final when the President, or if designated by the President, the Secretary of Defense had made a final decision thereon.

556. Military commissions could not be considered to constitute a tribunal "established by law" since, as held by the US Supreme Court in *Hamden v. Rumsfeld*, they had violated the law of the United States and the Geneva Conventions (see also paragraph 75 above).

557. At the material time it had been known that the military commissions had allowed for indefinite detention without trial since there had been no time-limits on bringing the accused to trial. There had been no bar on admission of evidence obtained by torture; evidence had been deemed admissible merely if the Presiding Officer or a majority of the Commission had been of the opinion that it "would have probative value to a reasonable person".

It had also been known that any trial would be held on the US military base at Guantánamo Bay, with no effective public access for observers.

558. Although military commission rules applicable to the applicant had changed since the time he had been transferred from Poland and were at present governed by the Military Commission Act of 2009, they still provided for the death penalty and retained many deficiencies associated with the previous scheme.

The US Secretary of Defense or his designee acted as the convening authority for a given commission, approved charges for trial by a military commission and selected the commission members who were required to be members of the armed forces on (or recalled to active duty) and as such were subordinate to the Secretary of Defense.

The current rules placed no limits on the length of time within which a suspect had to be charged or tried. Furthermore, they allowed for the accused to be denied access to classified information or evidence and, unlike US federal court procedures which barred the admission of hearsay, they expressly permitted hearsay evidence and did not bar convictions based mainly on such evidence.

559. Given the widespread torture and abuse in US custody of terrorist suspects whose statements could be introduced as hearsay evidence against the applicant, he was in consequence unable to confront witnesses against him. Unlike US federal court procedures, which barred the admission of evidence derived from coerced statements, the current military commission rules admitted evidence derived from coerced statements if that evidence would have been otherwise obtained and the use of such evidence would be consistent with the interests of justice.

The military commissions would still be held in the remote location of Guantánamo Bay, thereby significantly hindering public access to the proceedings against the applicant. Finally, there was considerable uncertainty associated with the current military commission rules, which had been applied so far in only three cases, none of which – in contrast to the applicant's case – involved the death penalty.

560. In sum, the applicant invited the Court to hold that Poland, by permitting his transfer from its territory despite the risk that he would be subjected to a flagrantly unfair trial, had been in breach of Article 6 § 1 of the Convention.

B. The Court's assessment

1. Admissibility

561. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Applicable principles deriving from the Court's case-law

562. In the Court's case-law, the term "flagrant denial of justice" is synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other examples, *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II and *Othman (Abu Qatada)*, cited above § 258).

In *Othman (Abu Qatada*), citing many examples from its case-law, the Court has referred to certain forms of unfairness that could amount to a flagrant denial of justice. These include conviction *in absentia* with no subsequent possibility to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed and deliberate and systematic denial of access to a lawyer, especially for an individual detained in a foreign country (ibid. § 259).

In other cases, the Court has also attached importance to the fact that if a civilian has to appear before a court composed, even only in part, of members of the armed forces taking orders from the executive, the guarantees of impartiality and independence are open to a serious doubt (see *Incal v. Turkey*, 9 June 1998, § 68 et seq. *Reports of Judgments and Decisions* 1998-IV and *Öcalan*, cited above, § 112).

563. However, "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada)*, cited above, § 260)

564. The Court has taken a clear, constant and unequivocal position of in respect of the admission torture evidence. No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself. The prohibition of the use of torture is fundamental (see *Othman (Abu Qatada*, cited above, §§ 264-265).

Statements obtained in violation of Article 3 are intrinsically unreliable. Indeed, experience has all too often shown that the victim of torture will say anything – true or not – as the shortest method of freeing himself from the

torment of torture (see *Söylemez v. Turkey*, no. 46661/99, § 122, 21 September 2006) and *Othman (Abu Qatada)*, cited above, § 264).

The admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome.

It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial (ibid. § 267).

(b) Application of the above principles to the present case

565. The Court has already found that during his detention in Poland the applicant was subjected by the CIA to treatment which amounted to torture within the meaning of Article 3 and that this occurred in the course of interrogations with the use of techniques specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects (see paragraphs 511-516 above).

Furthermore, as can be seen from the transcript of the applicant's recollection of what he had endured in CIA custody, as recounted at a hearing before the Combatant Status Review Tribunal, which took place in Guantánamo Bay on 14 March 2007, he confirmed before the US authorities that he had been tortured into confessing. He also stated that he had made up stories during the torture in order to stop it and that he had been tortured for "the last five years" (see paragraphs 112-113 above).

Accordingly, there can be little doubt as to the fact that a large part of the important or even decisive evidence against him is necessarily based on his self-incriminating statements obtained under torture or, as he pointed out, on other witnesses testimony by terrorist suspects likewise obtained by the use of torture or ill-treatment.

566. The Court notes that at the time of the applicant's transfer from Poland, the procedure before military commissions was governed by the Military Order of 13 November 2001 and the Military Commission Order no. 1 of 21 March 2002 (see paragraphs 75-76 above).

The commissions were set up specifically to try "certain non-citizens in the war against terrorism", outside the US federal judicial system. They were composed exclusively of commissioned officers of the United States armed forces. The appeal procedure was conducted by a review panel likewise composed of military officers.

The commission rules did not exclude any evidence, including that obtained under torture, if it "would have probative value to a reasonable person". On 29 June 2006 the US Supreme Court ruled in *Hamdan v. Rumsfeld* that the military commission "lacked power to proceed" and that the scheme had violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions (see paragraphs 75-77 above).

567. Having regard to the fact:

(i) that the military commission did not offer guarantees of impartiality of independence of the executive as required of a "tribunal" under the Court's case-law (see paragraph 562 above);

(ii) that it did not have legitimacy under US and international law resulting in, as the Supreme Court found, its lacking the "power to proceed" and that , consequently, it was not "established by law" for the purposes of Article 6 § 1;

(iii) and that there was a sufficiently high probability of admission of evidence obtained under torture in trials against terrorist suspects,

the Court concludes that at the time of the applicant's transfer from Poland there was a real risk that his trial before the military commission would amount to a flagrant denial of justice.

568. At that time, in the light of publicly available information, it was evident that any terrorist suspect would be tried before a military commission. Also, as the applicant pointed out, the procedure before the commission raised serious worldwide concerns among human rights organisations and the media. The 2003 PACE Resolution, adopted on 26 June 2003, expressed its "disapproval that those held in detention may be subject to trial by a military commission, thus receiving a different standard of justice than United States nationals, which amount[ed] to a serious violation of the right to receive a fair trial" (see paragraph 229 above). The authorities of Poland, as those of any other member State of the Council of Europe, must necessarily have known of the circumstances that gave rise to the grave concerns stated in the resolution.

Consequently, Poland's cooperation and assistance in the applicant's transfer from its territory, despite a real and foreseeable risk that he could face a flagrant denial of justice engaged the Polish State's responsibility under Article 6 § 1 of the Convention (see paragraphs 456 and 562-564 above with references to the Court's case-law).

569. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

X. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 6 TO THE CONVENTION

570. The applicant complained that Poland, by knowingly and intentionally enabling the CIA to transfer him from its territory, despite substantial grounds for believing that there had been a real and serious risk that he would be subjected to the death penalty, had violated Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention.

Article 2 of the Convention reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 1 of Protocol No. 6 to the Convention reads as follows:

"The death penalty shall be abolished. No-one shall be condemned to such penalty or executed."

A. The parties' submissions

1. The Government

571. The Government submitted no comments on the admissibility and merits of the complaint.

2. The applicant

572. The applicant submitted that at the time of his transfer it had been a matter of public knowledge that terrorist suspects held in US custody had been likely to be subjected to the death penalty following an inherently unfair trial before a military commission.

He had been at that time, and he currently remained, at a real risk of being subjected to capital punishment.

The capital charges against him had been approved on 28 September 2011 but the trial would not begin before 2 September 2014. The approval of the capital charges had already begun to expose him to serious ongoing harm and anguish associated with the prospects of the death penalty. That anguish and fear he would have to endure for many years to come before the trial came to an end.

573. The applicant further referred to the Court's case-law, in particular *Al Saadoon and Mufdhi* (cited in paragraph 456 above). Moreover, he stressed that in *Öcalan* (cited in paragraph 562 above) the Court had held that the imposition of the death penalty following an unfair trial would amount to an arbitrary deprivation of life in violation of Article 2 and also of Article 3, as it would subject a person wrongfully to the fear that he was going to be executed.

574. In view of the foregoing, the applicant invited the Court to find violations of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention.

B. The Court's assessment

1. Admissibility

575. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Applicable general principles deriving from the Court's case-law

576. Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see, *mutatis mutandis*, *Soering*, cited above, § 111; *Kaboulov v. Ukraine*, cited above, § 99 and *Al Saadoon and Mufdhi*, cited above, § 123; see also paragraph 456 above).

577. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as "convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings" (ibid., § 115).

(b) Application of the above principles to the present case

578. The Court finds that at the time of the applicant's transfer from Poland there was a substantial and foreseeable risk that he could be subjected to the death penalty following his trial before the military commission (see paragraphs 75-76 above). Considering the fact that the applicant was indicted on capital charges on 20 April 2011 (see paragraph 122 above), that risk has not diminished.

Having regard to its conclusions concerning the respondent State's responsibility for exposing the applicant to the risk of a flagrant denial of justice in breach of Article 6 § 1 of the Convention on account of his transfer to the military commission's jurisdiction, the Court considers that the actions and omissions of Poland likewise engaged its responsibility under Article 2 taken together with Article 1 of Protocol No. 6 and under Article 3 of the Convention.

579. There has accordingly been a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention.

XI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

580. Lastly, the applicant complained under Article 10 of the Convention that Poland, by its refusal to acknowledge, disclose and promptly and effectively investigate details of his secret detention, ill-treatment and rendition, had violated his and the public's right to the truth under Articles 2, 3, 5 and 10 of the Convention.

Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

581. The Court notes that a similar complaint was raised in *El-Masri* and declared inadmissible as being manifestly ill-founded (see *El-Masri*, cited above, § 264-265).

582. It finds no reason to hold otherwise and concludes that this complaint must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

XII. APPLICATION OF ARTICLE 46 OF THE CONVENTION

583. Article 46 of the Convention reads, in so far as relevant, as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. .."

584. The applicant asked the Court to order the Government to use all the available means – including by obtaining diplomatic assurances from the US Government – to preclude the death penalty in his case and to provide him with a proper form of investigative mechanism in Poland, in order to afford him redress.

In his submission, those means should include but not be limited to:

(i) making written submissions against the death penalty to the US Secretary of Defense, copying the applicant's military defence counsel;

(ii) obtaining diplomatic assurances from the US Government that it would not subject him to the death penalty;

(iii) taking all possible steps to establish contact with the applicant in Guantánamo Bay, including by sending delegates to meet him and monitor his treatment in custody;

(iv) retaining and bearing the costs of lawyers authorised and admitted to practice in relevant jurisdictions in order to take all necessary action to protect the applicant's rights while in US custody, including in military, criminal or other proceedings.

Furthermore, Poland had to put an end to the continuing violation of his rights through an effective investigation, also taking into account the importance for society in Poland and beyond to know the truth about his case.

585. The Government made no comments on the matter.

586. The Court reiterates that under Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation, the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 209, ECHR 201; *Assanidze v. Georgia* [GC],

no. 71503/01, §§ 198 and 202, ECHR 2004-II; *Ilaşcu and Others*, cited above, § 490 and *Al Saadoon and Mufdhi*, cited above. § 170).

587. However, in certain particular situations, the Court may find it useful or, indeed, even necessary to indicate to the respondent Government the type of measures that might or should be taken by the State in order to put an end to the situation that gave rise to the finding of a violation. Sometimes the nature of the violation found may be such as to leave no real choice as to the individual measures required (see *Hirsi Jamaa and Others*, cited above, §§ 209-211, ECHR 2012; *Assanidze*, cited above, § 202; *Al Saadoon and Mufdhi*, cited above, § 171 and *Savriddin Dzhurayev v. Russia*, no. 71386/10, §§ 252-254, ECHR 2013 (extracts)).

In particular, in cases where a removal of an applicant from the territory of the respondent State – notwithstanding whether by means of a lawful procedure such as, for example, extradition or deportation (see *Hirsi Jamma*, cited above, §§ 9-13 and *Al Saadoon and Mufdhi*, cited above, §§ 45-89) or by means of a forcible transfer (see *Savriddin Dzhurayev*, cited above, § 138) has exposed him to a serious risk of being subjected to ill-treatment contrary to Article 3 or to the risk of the death penalty being imposed on him, the Court may require the State concerned to "take all possible steps" to obtain the appropriate diplomatic assurances from the destination State. Those representations may be required even if an applicant has already been transferred from the territory of the respondent State but the risk still continues (see *Hirsi Jamaa*, cited above, § 211 and *Al Saadoon and Mufdhi*, cited above, § 171).

588. In the Court's view, these principles apply *a fortiori* in cases where a person, as in the present case, has been subjected to extraordinary rendition" –"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" (see *El-Masri*, cited above, §§ 219-221).

The current state of development of international law and international relations does not make it impossible for the respondent State to take tangible remedial measures with a view to protecting the applicant against the existing risks to his life and health in a foreign jurisdiction (see *Savriddin Dzhurayev*, cited above, § 254, with further references and *Al-Saadoon and Mufdhi*, cited above, § 171).

589. The Court has already found that, through the actions and inaction of the Polish authorities in the context of their complicity in the operation of the CIA HVD Programme on its territory, the applicant has been exposed to the risk of the death penalty being imposed on him (see paragraph 579 above). Even though the proceedings against him before the military commissions are still pending and the outcome of the trial remains uncertain, that risk still continues (see also paragraph 276 above). For the Court, compliance with their obligations under Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the

Convention requires the Government to seek to remove that risk as soon as possible, by seeking assurances from the US authorities that he will not be subjected to the death penalty.

XIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

590. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

591. The applicant made no claim for pecuniary damage.

592. As regards non-pecuniary damage, he submitted that he was a victim of multiple and extremely serious violations of the Convention. Pointing out the severity of the interrogation methods to which he had been subjected, the incommunicado detention and the violation of his right to respect for his private and family life that he had endured during the six months of his detention in Poland and his transfer from Poland in the face of the serious risk of further similarly serious violations of the Convention, he asked the Court to make an award of 300,000 euros (EUR) in that connection.

593. The Government submitted that the applicant's claims were premature.

594. Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.

In the present case the Court has found serious violations of several Convention provisions by the respondent State. It has held that the responsibility of the respondent State is engaged in respect of the applicant's treatment contrary to Article 3 and his secret detention in breach of Article 5. The respondent State has also failed to carry out an effective investigation as required under Articles 3 and 13 of the Convention. In addition, the Court has found a violation of the applicant's rights under Article 8. Furthermore, the respondent State has been found responsible for enabling the CIA to transfer him from its territory, despite the serious risk that he could receive a flagrantly unfair trial in breach of Article 6 § 1 and that the death penalty could be imposed on him, in violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention (see paragraphs 487–579 above).

In view of the foregoing, the Court considers that the applicant has undeniably suffered non-pecuniary damage which cannot be made good by the mere finding of a violation.

595. Consequently, regard being had to the extreme seriousness of the violations of the Convention of which the applicant has been a victim, and ruling on an equitable basis, as required by Article 41 of the Convention (see *El-Masri*, cited above, § 270), the Court awards him EUR 100,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

596. The applicant made no claim for the costs and expenses involved in the proceedings.

597. Accordingly, there is no call to award him any sum on that account.

C. Default interest

598. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's preliminary objection of non-exhaustion of domestic remedies and dismisses it;

2. *Holds* that the respondent State failed to comply with its obligations under Article 38 of the Convention;

3. *Declares* the complaints under Articles 2, 3, 5, 6 § 1, 8 and 13 of the Convention and Article 1 of Protocol No. 6 to the Convention admissible and the remainder of the application inadmissible;

4. *Holds* that there has been a violation of Article 3 of the Convention in its procedural aspect on account of the respondent State's failure to carry out an effective investigation into the applicant's allegations of serious violations of the Convention, including torture, ill-treatment and undisclosed detention;

5. *Holds* that there has been a violation of Article 3 of the Convention in its substantive aspect, on account of the respondent State's complicity in the CIA High-Value Detainees Programme in that it enabled the US authorities to subject the applicant to torture and ill-treatment on its territory and to transfer the applicant from its territory despite the existence of a real risk that he would be subjected to treatment contrary to Article 3;

6. *Holds* that there has been a violation of Article 5 of the Convention on account of the applicant's undisclosed detention on the respondent State's territory and the fact that the respondent State enabled the US authorities to transfer the applicant from its territory, despite the existence of a real risk that he would be subjected to further undisclosed detention;

7. *Holds* that there has been a violation of Article 8 of the Convention;

8. *Holds* that there has been a violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the applicant's grievances under Article 3 of the Convention;

9. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the transfer of the applicant from the respondent State's territory despite the existence of a real risk that he could face a flagrant denial of justice;

10. *Holds* that there has been a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention on account of the transfer of the applicant from the respondent State's territory despite the existence of a real risk that he could be subjected to the death penalty;

11. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

12. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President