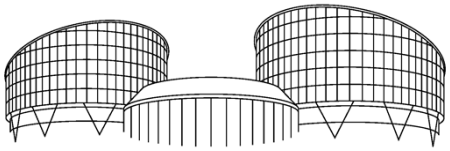

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FOURTH SECTION

CASE OF HUSAYN (ABU ZUBAYDAH) v. POLAND

(Application no. 7511/13)

JUDGMENT

STRASBOURG

24 July 2014

FINAL

16/02/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Husayn (Abu Zubaydah) 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 8 July 2014,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

A. Written and oral procedure

1. The case originated in an application (no. 7511/13) 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 stateless Palestinian, Mr Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah, ("the applicant"), on 28 January 2013.

2. The applicant was represented before the Court by Mr P. Hughes, a lawyer in the non-governmental organisation Interights, Ms H. Duffy, Senior Counsel in Interights, Ms V. Vandova, the Litigation Director of Interights, Mr J. Margulies, member of the Illinois Bar, Mr G.B. Mickum, IV, member of the District of Columbia and Virginia Bars, and Mr B. Jankowski, a lawyer practising in Warsaw.

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

3. The applicant alleged, in particular:

(i) a breach of Articles 3, 5 and 8 on account of the fact that Poland had enabled the CIA to detain him secretly on its territory, thereby allowing the CIA to subject him to treatment that amounted to torture, incommunicado detention, various forms of metal and physical abuse and deprivation of any access to, or contact with, his family or the outside world;

(ii) a breach of Articles 3, 5 and 6 § 1 on account of the fact that Poland enabled to CIA to transfer him from its territory, thereby exposing him to years of further torture, ill-treatment, secret and arbitrary detention and denial of justice in the hands of the US authorities;

(iii) a breach of Article 13 taken separately and in conjunction with Articles 3, 5 and 8 on account of Poland's failure to conduct an effective investigation into his allegations of serious violations of the Convention.

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

5. On 9 April 2013 the President of the Section gave priority to the application, in accordance with Rule 41.

6. On 9 July 2013 the Chamber that had been constituted to consider the case (Rule 26 § 1) gave notice of the application to the Government and decided that the case would be examined simultaneously with that of Al Nashiri v. Poland (no. 28761/11).

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 International Commission of Jurists and Amnesty International.

8. 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 United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism 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).

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 *Al Nashiri*

1. Background – information and documents requested by the Court in the case of Al Nashiri v. Poland

15. On 10 July 2012, on giving notice of Mr Al Nashiri's application to the Government, 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 127-167 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.

16. 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.

17. 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.

18. 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.

19. 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."

20. 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.

21. 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 considerations by means of appropriate security arrangements.

22. By 1 October 2012 the Government had not supplied any "additional material" referred to in their letter of 5 September 2012 (see paragraph 19 above). Nor did they produce the documents initially requested by the Court (see paragraphs 15-17 above).

23. 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.

24. 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.

25. 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."

26. 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.

27. 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 was considered to be, and remained, 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.

2. Information and documents requested in both cases

28. On 16 September 2013 the Government filed their written observations on the admissibility and merits in the present case. 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. ..."

29. 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 *Al Nashiri* 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 the present case, 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 case of *Al Nashiri* 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 the present cases as a "comprehensive extract from the non-confidential part of the case files Ap. V Ds. 12/12/S".

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

31. 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.

32. 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 29 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.

33. 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."

34. On 2 December 2013, on the closure of the fact-finding hearing (see also paragraph 13 above), the representatives of the Government informed that 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. ..."

35. 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.

36. 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.

37. 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.

38. 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".

39. 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.

40. 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 1971. 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 125-134 below), the observations of the parties, material available in the public domain (see paragraphs 207-296 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 12 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 260-266 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 238-255 below);

(3) Mr J.G.S., in his capacity as an advisor to Senator Marty in the Marty Inquiry (see also paragraphs 318-325 below);

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*" (see also paragraphs 305-312 below).

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 261, 297 and 326-328 below).

44. The relevant passages from the witnesses' testimony are reproduced below (see paragraphs 299-332 below).

II. BACKGROUND TO THE CASE

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

45. After 11 September 2001 the US Government began operating a special interrogation and detention programme designated 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.

46. 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" 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 240-255 below). For the purposes of the present case, it is referred to as "the HVD Programme".

1. The establishment of the HVD Programme

47. 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.

48. 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.

49. 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."

50. 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 was the first High-Value Detainee in CIA custody (see also paragraph 49 above).

2. Enhanced Interrogation Techniques

51. 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".

52. 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 the floor with his legs extended straight out in front of him with his arms 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."

53. Appendix F to the 2004 CIA Report entitled Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations of 4 September 2003 ("the OMS Guidelines") 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.

54. 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 Mr Abu Zubaydah, the applicant in the present case and the first allegedly 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 the "test 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.

55. 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. ..."

56. 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.

57. 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 Mr 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 Mr Abu Zubaydah and the conditions specified in that opinion.

58. As established in paragraph 51 of the report, in November 2002 CTC initiated 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).

59. 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)

60. 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.

61. 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".

62. 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."

63. 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."

64. 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."

65. 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."

66. 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

67. 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.

68. 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

69. 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.

B. Role of Jeppesen Company

70. 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.

71. In the light of reports on rendition flights (see paragraphs 240-255 and 281-285 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.

72. 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.

C. Military Commissions

1. Military Order of 13 November 2001

73. 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

74. 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

75. 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".

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

76. 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.

77. On 13 December 2012, Senator Dianne Feinstein, chairman of the Intelligence Committee gave a statement, which, in so far as relevant, read 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. ..."

78. 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 statement which read, 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."

79. 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

A. Restrictions on the applicant's communication with the outside world

80. The applicant's lawyers referred to what they called "the unprecedented restrictions on communication between Mr Abu Zubaydah, his counsel and the Court, which "precluded the presentation of information or evidence directly from or in relation to the client". Only the applicant's US counsel with top-secret security clearance could meet with the applicant and all information obtained from him was presumptively classified, so that counsel could not disclose to other members of the legal team or to the Court any information obtained from the applicant or other classified sources without approval by the detaining authority.

A request for release of an affidavit from Abu Zubaydah had been pending before the US authorities for more than two years but, as was routinely the case, this request would involve the need for litigation in a US court. In addition, if the document were released, it would likely be heavily

redacted. Attempts to declassify drawings and writings by the applicant during his detention had been unsuccessful.

According to the applicant's lawyers, "Abu Zubaydah [was] a man deprived of his voice, barred from communicating with the outside world or with this Court and from presenting evidence in support of his case". For that reason, his case was presented by reference principally to publicly available documentation.

81. The facts of the case, as submitted on behalf of the applicant by his representatives, may be stated as follows.

B. The applicant's capture in Pakistan and his subsequent detention in Thailand (27 March 2002 - 4 December 2002)

82. On 27 March 2002 agents of the United States and Pakistan seized the applicant from a house in Faisalabad, Pakistan. In the course of the operation, he was shot several times in the groin, thigh and stomach, which resulted in very serious wounds. He was taken into the custody of the CIA.

83. At the time of his capture the applicant was considered one of the key Al'Qaeda members and described by the American authorities as the "third or fourth man" in Al'Qaeda, who had had a role in its every major terrorist operation, including the role of a planner of the attacks on 11 September 2001. It was also alleged that he had been Osama bin Laden's senior lieutenant. As mentioned above, he was the first so-called "high-value detainee" ("the HVD") detained by the CIA at the beginning of the "war on terror" launched by President Bush after the 11 September 2001 attacks in the United States (see paragraphs 49 and 54-55 above).

84. The 2004 CIA Report stated that the applicant's capture accelerated the development of the HVD Programme. Paragraph 30 of the Report read:

> "30. [REDACTED] The capture of Senior Al-Qaida operative Abu Zubaydah on 27 March 2002 presented the Agency with the opportunity to obtain actionable intelligence on future threats to the United States from the most senior Al-Qaida member in U.S. custody at that time. This accelerated CIA's development of an interrogation program [REDACTED]"

85. Subsequently – for more than four years from the day on which he was seized in Faisalabad until his transfer from the CIA's to the US Department of Defense's custody in September 2006 – the applicant was held in incommunicado detention in secret detention facilities, the so-called "black sites" run by the CIA around the world.

86. After his arrest, the applicant was transferred to a secret CIA detention facility in Thailand code-named "Cat's Eye" (often written as one word "Catseye" in CIA documents), where he was interrogated by CIA agents and where a variety of EITs were tested on him. Mr Al Nashiri was detained in the same facility as from 15 November 2002 (see paragraphs 89-90 below and *Al Nashiri v. Poland,* no. 28761/11, judgment

of 24 July 2014, §§ 85 and 88). At this site, the interrogations of both applicants were videotaped.

87. The 2004 CIA Report referred to the videotapes of interrogations as follows:

> "Headquarters had intense interest in keeping abreast of all aspects of Abu Zubaydah's interrogation [REDACTED] including compliance provided to the site relative to the use of EITs. Apart from this, however, and before the use of EITs, the interrogation teams [REDACTED] decided to videotape the interrogation sessions. One initial purpose was to ensure a record of Abu Zubaydah's medical condition and treatment should he succumb to his wounds and questions arise about the medical care provided to him by CIA. ... There are 92 videotapes, 12 of which include EIT applications. ..."

88. The 2009 DOJ Report, relying on the 2004 CIA Report, also confirmed that the interrogation sessions were videotaped:

> "According to [the 2004 CIA report], the interrogation team decided at the outset to videotape Abu Zubaydah's sessions, primarily in order to document his medical condition. CIA OIG examined a total of 92 videotapes, twelve of which recorded the use of EITs. Those twelve tapes included a total of 83 waterboard applications, the majority of which lasted less than ten seconds."

It further added:

> "After the on-site interrogation team determined that Abu Zubaydah had ceased resisting interrogation, they recommended that EITs be discontinued. However, CTC headquarters officials believed the subject was still withholding information [REDACTED] Senior CIA officials reportedly made the decision to resume the use of the waterboard [REDACTED] to assess the subject's compliance. After that session [REDACTED] agreed with the on-site interrogators that the subject was being truthful, and no further waterboard applications were administered."

89. The 2009 DOJ Report and the 2004 CIA Report confirmed that on 15 November 2002 Mr Al Nashiri was brought to the same facility, that they both were subjected to EITs, and that they both were subsequently transferred to another CIA "black site".

Paragraph 7 of the 2004 CIA Report read:

> "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."

Paragraphs 74-76 of the same report read:

> " 74. [REDACTED] psychologist/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. ...
>
> 76. [REDACTED] ...
>
> 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."

The relevant part of the 2009 DOJ Report read:

> "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] ..."

90. 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."

91. In the total list of cables from "FIELD" [CIA station] to "HQTRS" [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.

C. Transfer to Poland and detention in the "black site" in Stare Kiejkuty (4/5 December 2002 - 22 September 2003)

1. Transfer (4-5 December 2002)

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

93. 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 Al Nashiri 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 14h56. 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 paragraph 252 below).

94. The collation of data from multiple sources, including flight plan messages released by Eurocontrol, invoices, and responses to information disclosure requests made on behalf of the applicant and/or Mr Al Nashiri

(see also paragraphs 252, 265, 281-285 and 310-311 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
LondonLuton, UK (EGGW)	Washington, DC (KIAD)	6 Dec 2002
Washington, DC(KIAD)	Elmira,New York KELM	6 Dec 2002

95. 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 286 below).

96. A 2007 Council of Europe report ("the 2007 Marty Report" – see also paragraph 252 below) drawn up by Senator Marty in the Marty Inquiry identifies N63MU as a "rendition plane " that arrived in Szymany from Dubai at 14h56 on 5 December 2002.

97. 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 287-296 below).

It was also described in the Fava Report (see paragraph 265 below) and the 2007 Marty Report (see paragraph 254 below)

98. In accordance with that routine procedure, the applicant and Mr Al Nashiri 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.

99. No official records of the Polish Border Guard disclosed Mr Abu Zubaydah's and Mr Al Nashiri's presence on Polish territory (see also paragraph 322 below).

2. Detention and ill-treatment (5 December 2002 – 22 September 2003)

100. During his detention in Stare Kiejkuty from 5 December 2002 to 22 September 2003 the applicant was subjected to the further application of EITs and various other forms of ill-treatment and abuse. He was also deprived of any contact with his family or the outside world.

101. In that regard, the applicant relied on the only public source giving his own description of his experience in CIA custody, which was related in the International Committee for the Red Cross ("the ICRC") Report on the Treatment of Fourteen "High-Value Detainees" in CIA Custody of February 2007 ("the 2007 ICRC Report"), based on interviews with the applicant and 13 other High-Value Detainees, including Mr Al Nashiri, after they were transferred to Guantànamo Bay (for more details, see paragraphs 275-276 below).

Annex I to the 2007 ICRC Report contains examples of excerpts from some of the interviews conducted with the fourteen prisoners. These excerpts are reproduced verbatim. The verbatim record of the interview with the applicant gives details of his ill-treatment in the CIA custody "regarding his detention in Afghanistan where he was held for approximately nine months from May 2002 to February 2003".

The applicant's account of the abuse that he endured in CIA custody as rendered in the 2007 ICRC Report read, in so far as relevant, as follows:

> "I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.
>
> I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilt over me. ... I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall with the plywood covering and repeatedly slapped in the face by the same two interrogators as before.
>
> I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold. This went on for approximately one week. During this time the whole procedure was repeated five times. On each occasion, apart from one, I was suffocated once or twice and was put in the vertical position on the bed in between. On one occasion the suffocation was repeated three times. I vomited each time I was put in the vertical position between the suffocation.
>
> During that week I was not given any solid food. I was only given ensure to drink. My head and beard were shaved every day.
>
> I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor."

102. The fourteen High-Value Detainees, including Mr Abu Zubaydah, 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. ... "

103. The 2007 ICRC Report gave a detailed account of "other methods of ill-treatment" inflicted on the 14 detainees. For the purposes of clarity of its report, each method of ill-treatment was detailed separately. However, each specific method was in fact applied in combination with other methods, either simultaneously, or in succession. Not all the methods were used on all detainees.

Mr Abu Zubaydah was the only one who stated that all the methods described below had been used on him. The description of those methods reads as follows:

> "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.
>
> 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 1 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. ..."

104. The description of the circumstances in which those methods were applied to the applicant read, in so far as relevant, as follows:

"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

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.

...

While being held in this position some of the detainees were allowed to defecate in a bucket. A guard would come to release their hands from the bar or hook in the ceiling so that they could sit on the bucket. None of them, however, were allowed to clean themselves afterwards. Others were made to wear a garment that resembled a diaper. ...Many of the detainees who alleged that they had undergone this form of ill-treatment commented that their legs and ankles swelled as a result of the continual forced standing with their hands shackled above their head. They also noted that while being held in this position they were checked frequently by US health personnel. ...”

1.3.3. BEATING BY USE OF A COLLAR

Six of the fourteen alleged that an improvised thick collar or neck roll was placed around their necks and used by their interrogators to slam them against the walls. For example, Mr Abu Zubaydah commented that when the collar was first used on him in his third place of detention, he was slammed directly against a hard concrete wall. He was then placed in a tall box for several hours (see Section 1.3.5., Confinement in boxes). After he was taken out of the box he noticed that a sheet of plywood had been placed against the wall. The collar was then used to slam him against the plywood sheet. He thought that the plywood was in order to absorb some of the impact so as to avoid the risk of physical injury. Mr Abu Zubaydah also believed that his interrogation was a form of experimentation with various interrogation techniques. Indeed some forms of ill-treatment were allegedly used against him that were not reported to have been used on other detainees. He claimed that he was told by one of the interrogators that he was one of the first to receive these interrogation techniques.”

...

1.3.5. CONFINEMENT IN A BOX

One of the fourteen reported that confinement inside boxes was used as a form of ill-treatment. Mr Abu Zubaydah alleged that during an intense period of his interrogation in Afghanistan in 2002 he was held in boxes that had been specially designed to constrain his movement. One of the boxes was tall and narrow and the other was shorter, forcing him to crouch down. Mr Abu Zubaydah stated that: ‘As it was not high enough even to sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant that my wounds both in the leg and stomach became very painful. I think this occurred about three months after my last operation". He went on to say that a cover was placed over the boxes while he was inside making it hot and difficult to breathe. The combination of sweat, pressure and friction from the slight movement possible to try to find a comfortable position, meant that the wound on his leg began to reopen and started to bleed. He does not know how long he remained in the small box; he says that he thinks he may have slept or fainted. The boxes were used repeatedly during a period of approximately one week in conjunction with other forms of ill-treatment, such as suffocation by water, beatings and use of the collar to slam him against the wall, sleep deprivation, loud music and deprivation of solid food. During this period, between sessions of ill-treatment he was made to sit on the floor with a black hood over his head until the next session began.”

1.3.6. PROLONGED NUDITY

The most common method of ill-treatment noted during the interviews with the fourteen was the use of nudity. Eleven of the fourteen alleged that they were subjected to extended periods of nudity during detention and interrogation, ranging from several weeks continuously up to several months intermittently. ...

Mr Abu Zubaydah alleged that after spending several weeks in hospital following arrest he was transferred to Afghanistan where he remained naked, during interrogation, for between one and a half to two months. He was then examined by a woman he assumed to be a doctor who allegedly asked why he was still being kept naked. Clothes were given to him the next day. However, the following day, these clothes were then cut off his body and he was again kept naked. Clothes were subsequently provided or removed according to how cooperative he was perceived by his interrogators."

1.3.7 SLEEP DEPRIVATION AND USE OF LOUD MUSIC

Eleven of the fourteen alleged that they were deprived of sleep during the initial interrogation phase from seven days continuously to intermittent sleep deprivation that continued up to two or three months after arrest. Sleep was deprived in various ways, and therefore overlaps with some of the other forms of ill-treatment described in this section, from the use of loud repetitive noise or music to long interrogation sessions to prolonged stress standing to spraying with cold water.

For example, Mr Abu Zubaydah alleged that, while detained in Afghanistan 'I was kept sitting on a chair, shackled by hands and feet for two to three weeks. During this time I developed blisters on the underside of my legs due to the constant sitting. I was only allowed to get up from the chair to go to the toilet, which consisted of a bucket'. He alleged that he was constantly deprived of sleep during this period 'If I started to fall asleep a guard would come and spray water in my face', he said. The cell was kept very cold by the use of air-conditioning and very loud 'shouting' music was constantly playing on an approximately fifteen minute repeat loop twenty-four hours a day. Sometimes the music stopped and was replaced by a loud hissing or crackling noise.

1.3.8. EXPOSURE TO COLD TEMPERATURE/COLD WATER

Detainees frequently reported that they were held for their initial months of detention in cells which were kept extremely cold, usually at the same time as being kept forcibly naked. The actual interrogation room was also often reported to be kept cold. Requests for clothing or for blankets went unanswered. For example, Mr Abu Zubaydah alleged that his cell was excessively cold throughout the nine months he spent in Afghanistan.

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 of an interrogation process to which 'no rules applied'.

Mr Abu Zubaydah alleged that, in his third place of detention, he was told by one of the interrogators that he was one of the first to receive these interrogation techniques,'so no rules applied'. ...

1.3.11. FORCED SHAVING

Two of the fourteen alleged that their heads and beards were forcibly shaved. Mr Abu Zubaydah alleged that his head and beard were shaved during the transfer to Afghanistan. ...

1.3.12. DEPRIVATION/RESTRICTED PROVISION OF SOLID FOOD

Eight of the fourteen alleged that they were deprived of solid food for periods ranging from three days to one month. This was often followed by a period when the provision of food was restricted and allegedly used as an incentive for cooperation. Two other detainees alleged that, whilst they were not totally deprived of solid food, food was provided intermittently or provided in restricted amounts.

For example, Mr Abu Zubaydah alleged that in Afghanistan, during the initial period of two to three weeks while kept constantly sitting on a chair, he was not provided with any solid food, but was provided with Ensure (a nutrient drink) and water. After about two to three weeks he began to receive solid food (rice) to eat on a daily, once a day, basis. Approximately one month later, during a resumption of intense questioning he was again deprived of food for approximately one week and only given Ensure and water."

105. A further indication of the nature of the conditions of detention and treatment to which he was, as a matter of routine, subjected in Poland was provided in the authorised conditions of detention and transfer and interrogation techniques applicable at the relevant time (see paragraphs 60-68 above).

106. The 2004 CIA Report related the following facts that had occurred during the applicant's detention between August 2002 and 30 April 2003:

"223. [REDACTED] Prior to the use of EITs, Abu Zubaydah provided information for [REDACTED] intelligence reports. Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002. During the period between the end of the use of the waterboard and 30 April 2003, he provided information for approximately [REDACTED] additional reports. It is not possible to say definitely that the waterboard is the reason for Abu Zubaydah's increased production, or if another factor, such as the length of detention, was the catalyst. Since the use of the waterboard, however, Abu Zubaydah has appeared to be cooperative."

107. The 2004 CIA Report, in the section covering the period from December 2002 to September 2003, in paragraphs 90-98, refers to the application of the so-called "unauthorised interrogation techniques on Mr Al Nashiri, which took place in December 2002 and January 2003 (see also *Al Nashiri*, cited above, §§ 99). The relevant part reads:

"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."

D. Transfer from Poland on 22 September 2003

108. On 22 September 2003, according to the applicant, he was transferred by means of extraordinary rendition from Polish territory, on a Boeing 737 airplane registered as N313P with the US Federal Aviation Authority and operated by Stevens Express Leasing, to other CIA secret detention facilities. Those locations are believed to include Guantànamo Bay in Cuba, Morocco, Lithuania and Afghanistan, from where he was subsequently transferred back to Guantànamo Bay.

In respect of his secret detention and ill-treatment in a detention facility allegedly located in Lithuania, the applicant has lodged a separate application with the Court (see *Abu Zubaydah v. Lithuania* (no. 46454/11), lodged on 14 July 2011; Statement of facts available on the Court's website www.echr.coe.int).

109. The collation of data from multiple sources, including flight plan messages released by Eurocontrol, responses to information disclosure requests and media reports, shows that N313P travelled the following routes:

Take-off	Destination	Date of flight
Washington, DC(KIAD)	Prague,Czech Republic(LKPR)	21 Sept 2003
Prague, Czech Republic(LKPR)	Tashkent, Uzbekistan (UTTT)	22 Sept 2003
Kabul, Afghanistan (OAKB)	Szymany, Poland (EPSY)	22 Sept 2003
Szymany, Poland (EPSY)	Constanta, Romania (LRCK)	22 Sept 2003
Constanta, Romania (LRCK)	Rabat, Morocco (GMME)	23 Sept 2003
Rabat, Morocco (GMME)	Guantànamo Bay, Cuba (MUGM)	24 Sept 2003

110. A letter from the Polish Border Guard, dated 23 July 2010 (see paragraph 282 below), in response to an information disclosure request from the Helsinki Foundation for Human Rights attests to the plane registered N313P arriving at Szymany airport on 22 September 2003 with no passengers and seven crew, and departing with five passengers and seven crew.

111. Flight plan and SITA (Société Internationale de télécommunication aéronautique) messages disclosed by the Polish Air Navigation Services Agency ("PANSA") to the Helsinki Foundation for Human Rights in Warsaw show that N313P landed in Szymany, en route from Kabul, at 18:50 on 22 September 2003 and left Szymany at 19:56 on the same day.

112. According to data disclosed by PANSA, N313P had filed an initial schedule of Kabul (22 September 2003, 15:00) - Warsaw (22 September 2003, 20:50) - Otopeni (23 September 2003, 00:05). This schedule was cancelled, however, and an urgent new schedule was filed of Kabul (22 September 2003, 12:30) - Szymany (22 September 2003, 10:00) - Constanta (22 September 2003, 22:00). Flight plans were then filed for N313P to leave Kabul at 13:00 on 22 September 2003 and arrive in Szymany 5 hours and 49 minutes later; and to leave Szymany at 21:00 that

same day, arriving in Constanta 1 hour and 36 minutes later (with alternative destination of Bucharest).

113. A hand-written log of take-offs and landings at Szymany airport confirmed that N313P arrived in Szymany on 22 September 2003 at 21:00 (local time) and departed at 21:57 (local time). Flight plan messages disclosed by Eurocontrol to Senator Marty during his investigation for the Parliamentary Assembly of the Council of Europe (see also paragraph 248 below) corroborated this account. Multiple messages for each log of the journey attest to an itinerary of Washington, DC – Prague – Tashkent – Kabul-Szymany – Constanta – Rabat – Guantànamo Bay. These flight plan messages also show that N313P was operated by Stevens Express Leasing Inc., a company based in the US and identified by the media as a CIA-front company

114. Jeppesen Dataplan Inc., a US corporation-based in California, alleged to have been a major provider of flight services to the CIA that enabled the rendition operations was responsible for trip planning services for N313P's-mission (see also paragraphs 70-72 above).

115. The 2007 Marty Report identified N313P as a "rendition plane " that flew from Kabul and landed in Szymany airport on 22 September 2003 at 21:00 (see paragraph 252 below).

116. The flight data procured by 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 N3139 P's movements over 20-23 September 2003 conformed to the typical attributes of a CIA clandestine rendition circuit. (for further details see paragraphs 281-285 below).

E. Further transfers during CIA custody (22 September 2003 - September 2006)

117. It was submitted that after leaving Poland the applicant had continued to be held in CIA secret detentions elsewhere, including Guantànamo Bay, Morocco, and Lithuania, until September 2006. At around that time he was transferred again to Guantànamo Bay, where he is currently detained. During this entire period, he was continually held in incommunicado detention and solitary confinement, and subjected to torture and ill-treatment under the HVD Programme.

F. The applicant's subsequent detention in Guantànamo Bay Internment Facility

118. Since September 2006, the applicant has been held in the US Guantànamo Bay Naval Base in the highest security Camp 7 in extreme

conditions of detention. Camp 7 was established to hold the High-Value Detainees transferred from the CIA to military custody.

Visitors other than lawyers are not allowed in that part of the Internment Facility. The inmates are required to wear hoods whenever they are transferred from the cell to meet with their lawyers or for other purposes. The applicant's US lawyers have so far not been allowed inside Camp 7. Lawyers for some detained who face trial before the Guantànamo military commissions have been allowed to do so only after volunteering to wear the same hoods as detainees.

The applicant is subjected to a practical ban on his contact with the outside world, apart from mail contact with his family.

119. The applicant has not been charged with any criminal offence. The only review of the basis of his detention was carried out by a panel of military officials as part of the US military Combatant Status Review Tribunal on 27 March 2007. The panel determined that he could be detained.

120. The applicant is not listed for trial by military commission.

121. According to the applicant, as a result of torture and ill-treatment to which he was subjected when held in detention under the HVD Programme, he is suffering from serious mental and physical health problems.

The applicant's US counsel have been unable to provide many of the details of his physical and psychological injuries because all information obtained from him is presumed classified. They have stated that publicly available records described how prior injuries had been exacerbated by his ill-treatment and by his extended isolation, resulting in his permanent brain damage and physical impairment.

The applicant is suffering from blinding headaches and has developed an excruciating sensitivity to sound. Between 2008 and 2011 alone he experienced more than 300 seizures. At some point during his captivity, he lost his left eye. His physical pain has been compounded by his awareness that his mind has been slipping away. He suffers from partial amnesia and has difficulty remembering his family

G. Parliamentary inquiry in Poland

1. Parliamentary inquiry in Poland

122. 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

123. The 2006 Marty Report (see also paragraphs 240-244 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

124. Similar concerns were expressed in the Fava Report, which stated that "the Polish government investigated the allegations in internal, secret inquiry (see also paragraphs 262-263 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 269 below).

H. Criminal investigation in Poland

125. Given that the Polish Government disclosed only limited information of the investigation, 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 Al Nashiri v. Poland

126. 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.

127. 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.

128. On 1 April 2009, as the Government state, "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 153 below).

129. 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 filed in the present case 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."

130. In the course of the investigation evidence form 62 persons have 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.

131. 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".

132. 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 143 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 147 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.

133. 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."

134. 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 Al Nashiri v. Poland and certain materials available in the public domain

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

136. 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."

137. On an unspecified date in 2009, responding to a questionnaire from the UN experts working on the 2010 UN Joint Study (see also paragraphs 278-280 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."

138. 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.

139. 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.

140. 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.

141. 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.

In October 2010, the prosecutor granted injured-party (pokrzywdzony) status to Mr Al Nashiri.

142. On 16 December 2010 the Polish lawyer for the applicant and Interights filed an application with the Warsaw Regional Prosecutor, reporting the commission of offences against the applicant during his detention in Poland and asking for him to be granted injured-party status in the investigation. The application described how the applicant had been transferred by the CIA from Thailand to Poland on 5 December 2002 and related the conditions of his detention and his ill-treatment over the subsequent months, during which – as he alleged – he had been held in Poland. It included evidence of the roles played by the CIA agents and Polish officials in the HVD Programme in Poland, the rendition flights that transported the applicant into and out of Poland, the names of private companies involved in those flights, and the operation of the CIA secret prison site in Stare Kiejkuty.

On 11 January 2011 the Warsaw Regional Prosecutor granted the applicant injured-party status in the investigation.

143. 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 132 above). The Prosecutor did not publicly disclose the content of the mutual assistance request due to "State secrecy".

144. 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 143 above).

145. 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 134 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 law regulating 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. "

146. On 25 February 2011 Mr Al Nashiri'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.

147. 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 132 above).

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

149. 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.

150. The applicant and Mr Al Nashiri 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 purpose of providing information to the prosecutors.

151. 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 199 below), after the Head of the Intelligence Agency refused the investigating prosecutor's request to that effect.

152. 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 172 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 151 above and paragraph199 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.

153. After the investigation was transferred to the Kraków Prosecutor of Appeal on 26 January 2012, the Prosecutor General (see also paragraph 128 above), relying on the secrecy of the investigation, refused to give reasons for the decision to transfer the case.

154. 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.

155. 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."

156. 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 ..."

157. 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.

158. 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 128 and 153 above).

159. 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."

160. 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.

161. 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."

162. 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.

163. 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.

164. 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, particularly since the statute of limitations with respect to the abuse of power by Polish officials – the principal offence publicly disclosed by the prosecutors as being subject to investigation – appears to have expired. No formal charges have been officially announced to date, and there is no indication as to when the investigation is likely to be terminated.

165. 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.

166. 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

167. 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 277-280 below).

(ii) The UN Human Rights Committee

168. 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 280 below).

(iii) The UN Committee against Torture

169. 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

170. 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

171. 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

172. 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

173. 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.

..."

174. 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.

175. 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)

176. 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

177. 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."

178. 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."

179. 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).

180. 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."

181. 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

182. 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."

183. 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"

184. 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."

185. 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".

186. 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.

187. 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"

188. 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".

189. 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

190. 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.

191. 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

192. 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*).

193. 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."

194. 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.

195. 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."

196. 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."

197. 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)).

198. 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.

199. 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

200. 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

201. 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

202. 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

203. 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."

204. 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."

205. 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

206. 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

207. The applicant, Mr Al Nashiri 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

208. 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

209. 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)

210. 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

211. 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

212. 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

213. 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

214. 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

215. 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

216. 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

217. 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

218. 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

219. 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

220. 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).

221. 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

222. 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

223. 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

224. 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."

225. 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."

226. 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.

227. 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. ..."

228. 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

229. 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.

230. 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.

231. 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.

232. 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.

233. 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

234. 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

235. 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.

236. 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."

237. 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

238. 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.

239. 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

240. 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".

241. 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."

242. 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."

243. 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."

244. 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

245. 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.

246. 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. ..."

247. 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).

...."

248. 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.

249. 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."

250. 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."

251. 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. ..."

252. 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'

..."

253. 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."

254. 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."

255. 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

256. 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.

257. 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."

258. 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."

259. 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

260. 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.

261. 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.

262. As regards Poland, the Fava Report, in paragraph 178, noted 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 269 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.

263. 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."

264. 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."

265. 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."

266. 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

267. 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, ...”

268. 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;”

269. 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

270. 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

271. 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 260–266 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").

272. 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;"

273. 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

274. 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

275. 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 69 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).

276. 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 104 above]

...

1.3.10. THREATS

[the relevant passages are rendered in paragraph 104 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

277. 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).

278. 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."

279. 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

280. 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

281. 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 116 above). It analysed in detail data strings relating to flight N313P on which, according to the applicant, he had been taken from Poland on 22 September 2003 and also flight N379P on which Mr Al Nashiri had allegedly been transferred by the CIA from Polish territory 6 June 2003 (see also *Al Nashiri*, cited above, §§ 103-106 and 287).

282. 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. ..."

283. 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."

284. 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."

285. An analysis of the data strings concerning flight N313P (see also paragraph 117 above) read, in so far as relevant, as follows:

> "Flight records drawn from the database compiled by [Council of Europe's] Rapporteur Dick Marty show that a Boeing 737 aircraft, registered with the U.S. Federal Aviation Administration as N313P, embarked from Dulles Airport in Washington, D.C. on Saturday September 20, 2003 at 22h02m GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries, as well as the U.S. naval installation at Guantànamo Bay, Cuba.
>
> These six countries, in the order in which the aircraft landed there, were: the Czech Republic, Uzbekistan, Afghanistan, Poland, Romania, and Morocco. The aircraft flew from Rabat, Morocco to Guantànamo Bay on the night of Tuesday September 23, 2003, landing in the morning of Wednesday September 24, 2003."

As regards the planning of the flights and collaboration in its execution, the CHRGJ Report stated:

> "*I. Who planned the flights, through what medium and in collaboration with whom*
>
> The key travel planning services for N313P's September 20-23, 2003 circuit were carried out by Jeppesen. For the period of September 20-23, 2003, CHRGJ has traced a total of twenty messages filed by Jeppesen via the AFTN [Aeronautical Fixed Telecommunication Network] relating to the movements of the aircraft N313P. These twenty messages comprised eight separate flight plans and two cancellations—all ten of which were filed in duplicate.
>
> However, it should also be noted that at least six further messages originating from Jeppesen, time-stamped between 22h50m GMT and 23h57m GMT on the night of September 21, 2003, are missing from the recorded inputs on the available data strings from the input-manager's files for that date. These messages may have been deleted in an attempt to cover up the flight's movements. However, by analyzing various responses to these missing inputs in the output-manager's files, CHRGJ has discovered copies of many of these entries through its analysis of the data strings and is thus able to reconstruct the flight plans for the routes from Kabul to Szymany, Szymany to Constanta, and Constanta to Rabat. By identifying Jeppesen's 'originator address in the data strings, CHRGJ has found that Jeppesen filed flight plans for the routes from Kabul, Afghanistan to Szymany, Poland; Szymany to Constanta, Romania; and Constanta to Rabat, Morocco.
>
> Just as with N379P's flight circuit involving Poland in June 2003, on all six of the routes analysed Jeppesen's original flight plans for the aircraft N313P featured a very important special status, or STS, designation that is supposed to be used only in strictly limited circumstances: "STS/STATE." In each instance that Jeppesen invoked a special status designation for the aircraft N313P, the IFPS [Initial Flight Plan

Processing System] 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. 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."

As regards communication of information of the flights, the report stated:

"*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 N313P during 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).

It is noteworthy that Jeppesen does not appear to have filed any "dummy" flight plans for the flight from Kabul, Afghanistan to Szymany, Poland. Documentation released by PANSA to HFHR in response to a Freedom of Information request ...filed under the Statute on Access to Public Information reveals that Jeppesen originally requested a landing permit for Warsaw, then cancelled its request, and finally requested – and was issued – a landing permit for Szymany itself. Thus, the listed destination of the flight corresponds with what we know to be the actual destination – Szymany Airport in northern Poland. Against a background of the systematic disguise of CIA flights into Poland, involving both American and Polish collaborators, as uncovered by [Senator] Marty in his 2007 report, such an honest filing is rare. This instance, the only undisguised landing of the aircraft N313P at Szymany, is unique precisely because there was not ultimately an effort to disguise the flight into Poland, but rather only the flight out of Poland to the onward destination of Romania. In addition, CHRGJ notes that the only recipient of a copy of the Kabul-Szymany flight plan was the Area Control Centre for Polish Airspace, whereas the flight planner typically requests that IFPS send flight plans to all countries whose territory will be traversed.

One of the most significant features of this flight circuit is the route from Szymany, Poland to Romania. CHRGJ's analysis of the data strings reveals that a "dummy" flight plan was filed for this leg of the circuit. Significantly, Romanian officials filed a flight plan indicating that N313P's destination was Bucharest while Jeppesen filed flight plans which indicated that N313P's destination was Constanta. This suggests that either the Romanian officials or Jeppesen were attempting to disguise N313P's actual destination. As discussed above, 'dummy' flight plans may be used to disguise detainee transfers. The use of 'dummy' flight plans for the Romanian portion of this circuit may therefore indicate the transfer of at least one detainee into Romania at this time. Information available on the public record appears to corroborate this theory. The plan was initially copied only to the Area Control Centre for Polish Airspace but the next morning the IFPS operator sent it to six entities in Ukraine, along with Jeppesen and Szymany local authorities. ..."

As regards permissions granted for the flights in Poland, the report stated:

> "*III. What permissions were granted for the flights, by whom and in what form*
>
> As indicated above, in the course of filing flight plans, 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, Jeppesen invoked overflight permits from four countries, as well as a landing permit for its country of destination. These permits appeared in the data strings. The Poland landing permit was accepted by the IFPS operator in the following abbreviated form: 'POLAND LANDING PMT DWLOP 842/03.' The landing permit recorded in die data strings indicates permission to land in Poland, but does not specify a particular airport. The PANSA documents located by HFHR clarify that Jeppesen initially filed a request for landing at the Warsaw airport, then cancelled that first request, and filed a second request for permission to land at Szymany."

VIII. OTHER DOCUMENTARY EVIDENCE BEFORE THE COURT

A. Polish Border Guard's letter of 23 July 2010

286. In a letter dated 23 July 2010 the Polish Border Guard, in response a request for information from to 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"

287. 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.

288. 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."

289. 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."

290. 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."

291. 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."

292. 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."

293. 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."

294. 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."

295. 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."

296. 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)*

297. 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

298. 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

299. 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 260-269 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.

300. 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 267 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."

301. 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 269 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."

302. As regards the Polish Government's cooperation with the TDIP, 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."

303. 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 262-263 and 269 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."

304. 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*"

305. 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.

306. 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."

307. 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 referred to as "the 2004 CIA Report"; see also paragraphs 47 et seq. 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."

308. The presentation was further devoted to explaining the chain of events starting from the detention of the applicant and Mr Al Nashiri 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 83-117 above and *Al Nashiri* cited above, §§ 83-106).

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".

309. 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 also paragraph 55 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. ..."

310. 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."

311. 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-Nashiri 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 ..."

312. 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 (see paragraphs 108-116 above) 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

313. 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 248-249 above)

314. 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 244-245 above) 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."

315. As regards the names of the Polish officials listed in paragraph 174 of the 2007 Marty Report (see also paragraph 251 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."

316. 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 plane s, the CIA plane s, 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."

317. 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.

318. 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.

319. In his testimony before the Court, he stated, among the other things, as follows.

320. 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."

321. 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."

322. As regards an explanation why the Border Guard's letter of 23 July 2010 (see paragraph 286 above) in relation to flight N379P on 6 June 2002, on which Mr Al Nashiri was allegedly transferred by the CIA from Poland (see *Al Nashiri*, cited above, §§ 103-106), 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."

323. 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."

324. 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". "

325. 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 further added:

> "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

326. 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 261 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.

327. In response to the question in what context he had made his decision to submit the affidavit in *Abu Zubaydah*, 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."

328. 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."

329. 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."

330. 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."

331. 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."

332. 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

333. 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.

334. 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

335. The applicant disagreed and submitted that he found the Government's foregoing arguments extraordinary, having regard to the fact that over five years had passed since the investigation had begun.

The unclear nature and scope of the criminal investigation, the on-going delays, the suggestion of state interference, and the lack of any meaningful progress all clearly indicated that the investigation would not provide an effective remedy to the applicant. The assertion relied on by the Polish Government that Contracting Parties had to be given the opportunity to prevent or put right the violations complained of could not be sustained in the light of the incontrovertible facts. The Government had acknowledged in their written observations that the investigation period had been extended, for the tenth time. There appeared to have been no meaningful developments since it had been initiated.

Thus, the Court's case-law made clear that an applicant was not required to exhaust domestic remedies that were ineffective. Consequently, he was entitled to bring his application to the Court in circumstances where Poland had utterly failed to provide an effective remedy within the meaning of both Article 35 § 1 and Article 13 of the Convention.

336. In view of the foregoing, the applicant asked the Court to reject the Government's objection.

B. The Court's assessment

337. 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 451 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

338. 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 likely 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).

339. On giving notice of the present case to the Government and, following the decision to examine Mr Abu Zubaydah's application simultaneously with the case of *Al Nashiri*, the Court in connection with its examination of both cases has asked the Government on numerous occasions to produce documentary evidence (see paragraphs 15-40 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

340. 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 357 below).

341. 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.

342. In their written submissions (see also paragraphs 18, 28, and 33 above) and at the public hearing the Government maintained 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.

343. 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 some contained 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.

344. 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.

345. 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.

346. 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

347. The applicant submitted that the Polish Government had failed to comply with their obligations under Article 38 of the Convention.

To begin with, they had not responded to any questions put to the parties by the Court on giving notice of the application. Nor had they, at a later stage, submitted documents from the criminal investigation, which were fundamental to the Court's establishment of the facts. The absence of those documents had had the effect of prejudicing the Court's proper examination of the applicant's complaints. The Polish State had wilfully obstructed the Court in establishing the truth in the present case. Consequently, in accordance with its case-law, the Court could – and the applicant invited it to do so – draw negative inferences from the Government's failure to disclose the documents in question.

348. In the applicant's view, the Government's conduct before the Court and their reliance on the secrecy of the relevant material reflected the attitude that they had adopted at domestic level. The investigation in Poland had been conducted in a shroud of secrecy with its scope and methodology kept from public view. Thus, the Government's refusal to comply with the Court's evidential requests on the grounds of blanket confidentiality was consistent with their attempts to avoid any scrutiny that might lead to accountability for their actions and inactions. For the same reason, they had sought to have the all oral hearings in the present case held behind closed doors.

349. Poland claimed that it could not submit to the Court the document – an extract, as must be stressed, from "non-confidential part" of the investigation file – on the basis that the Rules of Court allegedly did not indicate the manner in which sensitive material was to be protected. The Government suggested alternative methods, such as, but not limited to, visiting their premises in Strasbourg or the office of the Prosecutor General in Warsaw. However, they gave no indication as to the length of the document, its content or its complexity. There was no explanation as to how the applicant's legal representatives were to become acquainted with the document and whether they would be allowed to make copies or take notes in order to better understand its importance. In short, the alternatives suggested by the State were vague and unsatisfactory.

350. The applicant further stated that the Government's assertion that the Court was unable to protect sensitive information lacked any foundation and was a clear attempt to frustrate the Court's efforts to access all relevant information and to hinder it in its examination of the case.

Were the Government's arguments to be accepted, the States would routinely challenge the Court's jurisdiction by arguing that whenever there was a pending investigation the Court, should not be able to access information concerning that investigation in order to establish whether it complied with the Convention standards, thereby effectively circumventing the Court's scrutiny.

351. In view of the foregoing, the applicant invited the Court to find that the respondent State had not complied with its obligations to furnish all necessary facilities for the Court's examination of the case.

B. The Court's assessment

1. Applicable principles deriving from the Court's case-law

(a) General principles

352. 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).

353. 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)).

354. 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).

355. 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)).

356. 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

357. 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. Even if 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).

358. 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 351 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

359. The Court considers that the Government's conduct in the present case cannot be examined in isolation from their actions and omissions in *Al Nashiri* and that their attitude displayed in respect to the Court's evidential requests in the latter case should be taken into account as a background underlying its ruling under Article 38 of the Convention in the present case.

360. In *Al Nashiri*, 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 15-17 above and *Al Nashiri v. Poland*, no. 28761/11, cited above, §§ 17-19).

Subsequently, the Court, at the Government's request, imposed confidentiality on the parties' written submissions (see paragraphs 20 and 23-26 above). It also held a separate hearing *in camera*, devoted exclusively to matters of evidence (see paragraphs 10 and 12 above).

361. 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 19, 25, 27-28, 31, 33, 340 and 343-344 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 19-38 and paragraph 343-344 above).

362. 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 19, 25, 27-28 above and paragraph 182 below). 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 184-191 below).

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 19-25 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 28 above). They wished the Court to become acquainted with this extract "pursuant to conditions agreed between the Government and the Court" (see paragraph 31).

363. 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 34 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 38 above). The same argument was repeated at the public hearing (see paragraphs 342 and 344 above).

364. 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 paragraphs 349-350 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).

365. 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.

366. 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 358 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.

367. 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 36 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 344 above).

368. 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 353 above). The Government openly conceded this (see paragraph 344 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. Their failure to submit information in their possession must, therefore, be seen as hindering the Court's tasks under Article 38 of the Convention. On these grounds, the Court is entitled to draw inferences from the Polish Government's conduct in the present case (see paragraph 352 above and also *Shamayev and Others,* cited above, §§ 503-504).

369. 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

370. The Government, in their written observations filed on 16 September 2013, 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 had been given notice of the application.

They further added that they could not address in detail the Court's questions concerning the violations of Articles 3, 5, 6 and 8 of the Convention due to the fact that the criminal investigation was still pending.

As it could not be assumed that the applicant had been transferred to and from Poland and had legally or illegally been detained on its territory, no answer could be given at this stage to questions concerning his alleged treatment contrary to Article 3, his incommunicado detention in a secret detention facility and deprivation of access to his family. Likewise, no answer could be given to the question concerning the involvement of the Polish authorities in the events complained of.

371. At the public 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.

372. 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 12 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 assessment, this knowledge was already accessible, albeit *via* other channels, in the public domain.

373. 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.

374. Lastly, the Government, responding to a question from the Court at the public hearing, concerning the injured-party status accorded to the applicant and Mr Al Nashiri 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

375. The applicant, in his submissions concerning the facts of the case, the probative value of the evidence before the Court, the burden of proof and the standard of proof as applicable in the present case and Poland's knowledge of the HVD Programme stated, in particular, as follows.

(a) Explanation of discrepancy between certain dates given by the applicant

376. On giving notice of the application to the respondent Government, the Court asked the applicant's representatives to explain the discrepancy between the statements regarding the dates of his detention in 2002-2003.

In particular, the Court referred to the dates given in his application and those given in the applicant's own account of his detention as rendered in the verbatim record of the interview with him included in the 2007 ICRC Report. In the application, it was stated that he had had been detained in Poland from 5 December 2002 to 22 September 2003 (see paragraphs 82-108 above), whereas in the interview, he had recounted details of his ill-treatment "regarding his detention in Afghanistan where he [had been] held for approximately nine months from May 2002 to February 2003" (see paragraph 101 above).

377. The applicant's representatives provided the following explanation.

The facts of the applicant's case were based on a wide range of publicly available documents, reports and investigations into the CIA HVD Programme that had come into the public domain only after he had been transferred from Poland on 22 September 2003.

Given that no information as to the places and periods of his detention had been given to him and that the range of abusive interrogation techniques had been inflicted on him, the applicant could not be expected to have known his precise location when he had been held in CIA custody. In fact, as demonstrated by the CIA declassified material, concerted and meticulous efforts had been made by the CIA to prevent High-Value Detainees from knowing their transfer destinations. On his transfers from one CIA black site to another the applicant had been shackled and blindfolded, with ear muffs restricting his hearing and a hood placed over his head. At the black site, he had been subjected to detention conditions that had included "white noise/loud sounds and interrogations aimed at creating "a state of learned helplessness and dependence" and designed to psychologically "dislocate" him.

As a result of his ill-treatment he was suffering from serious and debilitating physical and mental condition.

378. Taking all the circumstances into account the applicant could not have been expected at the time of making the statement to the ICRC to have been able to provide an accurate and detailed account of where he had been detained and for how long. Should any discrepancy arise concerning such details, the applicant's representatives asked the Court to take into account the exceptional features of the case, in particular the difficulty in obtaining evidence from the applicant and the fact that this case presented extraordinary challenges for the victim. As stated in the application, the applicant's lawyers were not in a position to provide the Court with further statements from the applicant. He was prevented from communicating with

the outside world, including the Court, and his US counsel were precluded from disclosing to the Court any information that he conveyed to them.

(b) Comments on evidence

379. The applicant maintained that numerous documents submitted to the Court, including reports prepared by international organisations and oral evidence from the experts and the witness confirmed that he had been detained in Poland from 5 December 2002 to 22 September 2003.

380. There was no doubt that the CIA secret prison in Poland had been established deliberately. Senator Marty, in his 2007 Report, had highlighted the existence of bilateral agreements between the Polish Government and the CIA, allowing this secret prison to operate. Senator Pinior, in his affidavit, had given evidence of an agreement drawn up for the purpose of regulating the existence of this prison and of documents that illustrated the "provision of practical logistical support" and "servicing" of the prison site by the Polish authorities.

381. At the public hearing, the applicant's representatives said that in the light of the documentary evidence and the experts' testimony, it was now proven beyond reasonable doubt that Mr Abu Zubaydah had been transferred into Poland. It was also beyond any credible dispute that he had been imprisoned at a CIA secret prison in Stare Kiejkuty.

A letter from the Polish Border Guard to the Helsinki Foundation of Human Rights confirmed that plane number N63MU landed in Szymany on 5 December 2002 with eight passengers and four crew and departed on the same day with no passengers. This account of the aircraft's arrival was verified by a handwritten log of landings and take-offs at Szymany airport. The experts had explained how intense and multiple efforts had been made to disguise the true route of this flight. Information disclosed by Eurocontrol to Senator Marty for his 2007 Report showed that false flight plans had been filed for N63MU, omitting Szymany from the record of the plane's movements. Further evidence pointing to concerted attempts to cover up these flights was provided by Senator Marty in his 2007 Report, which noted that the filing of false flight plans had been done so that "their actual movements would not be tracked or recorded – either 'live' or after the fact – by the supranational air safety agency Eurocontrol. The system of cover-up entailed several different steps involving both American and Polish collaborators".

The applicant thus submitted that, in the light of the entirety of this evidence, it was clear that he had been rendered out of Thailand on the flight in question and taken to Poland.

As also demonstrated by evidence given by the experts and witness to the Court, after over nine months of secret detention in a CIA black site in Poland, on 22 September 2003 Abu Zubaydah was then transferred from Poland, on board N313P, a plane that had at this time been flying under

official "State" status and was already known to the Court from its role in the El-Masri case (see El-Masri, cited above, §§ 46 and 159)

382. In the applicant's view, this evidence taken together clearly established that he had been imprisoned on Polish territory. The evidence before the Court was detailed, specific and consistent, and concerned the entire period of his detention in Poland, as well as the circumstances surrounding that period.

This evidence had been uncovered in the face of determined efforts by State agents and State organisations to stymie any attempt at getting to the truth of Abu Zubaydah's case.

In that context, the applicant also pointed out that Poland had never provided an explanation of the events as described in his application and further pleadings. Instead, it had relied on a secretive and stalled investigation to deflect attention away from its failure to cooperate in the Court's examination of the case.

(c) Poland's knowledge of the HVD Programme

383. In the applicant's submission, the nature of abuse by the CIA in the context of the extraordinary rendition operations had been a matter of public knowledge in 2002-2003. This had been documented by the applicant from both Polish and international sources disclosing widespread abuse of terrorist suspects in the custody of the US authorities at the material time.

384. Moreover, evidence before the Court confirmed that numerous State agents and State authorities at all levels of the Polish Government had been involved, in different ways, in the CIA secret prison system. As Senator Pinior stated at the fact-finding hearing, the Polish authorities had had full knowledge of the illegality of this operation and they had known that it had been in breach of the Polish Constitution and that it had been clear that the Polish authorities had cooperated with the CIA.

385. According to the 2007 Marty Report, the former President Kwaśniewski had been "the foremost national authority on the High-Value Detainee programme". Indeed, President Kwaśniewski confirmed this in an interview in Poland where he had stated that "of course, everything [had taken] place with my knowledge" and that "the decision to cooperate with the CIA [had] carried a risk that the Americans would use unacceptable methods". He also asked whether, if a CIA agent had brutally treated a prisoner in the Warsaw Marriott, should the management of that hotel be charged for the actions of that agent (see also paragraph 230 above). This, in the applicant's view, provided a telling insight into the Polish Government's attitude to the CIA HVD Programme and demonstrated, at the highest level of the Government, involvement in the operation of the secret prison and knowledge of the illegal methods used by the CIA.

386. The CIA prison could not have operated on Polish territory without the support and assistance of the Polish Government.

While the full form and extent of the involvement of the Polish authorities and agents was not known owing to the secrecy surrounding the CIA operations, it was clear that Poland through its acts and omissions had cooperated with the CIA and facilitated the applicant's secret detention and ill-treatment.

The level of cooperation was readily illustrated by the fact that Poland had entered into, as mentioned in the 2007 Marty Report, "operating agreements" with the US authorities, specifying the use and maintenance of secret detention facilities whereby it had "agreed to provide premises in which these facilities [had been] established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference". As stated in that report, the operational agreements for different types of cooperation had been "negotiated on the part of [sic] the President's office by the National Security Bureau".

Accordingly, the assistance and support given by Poland included ensuring physical security to facilitate the CIA's detention and transfer of detainees under the HVD Programme, assigning Polish intelligence agents to the CIA at the relevant time to provide open-ended assistance for their dealings in Poland, navigating CIA aircraft through Polish airspace without completed flight plans, clearing the Szymany airport runway of other aircraft, providing vehicles and staff to allow the CIA rendition flights to land, including the planes transporting the applicant and securing the route from Szymany airport to Stare Kiejkuty – all this in order for the CIA to have their prisoners secretly detained.

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

387. AI/ICJ stressed that already on 16 September 2001, the US Vice President Richard Cheney had said that, in response to the attacks of 11 September, US intelligence agencies would operate on "the dark side", and had agreed that US restrictions on working with "those who [had] violated human rights" would need to be lifted. AI warned in November 2001 that the USA might exploit its existing rendition policy in the context of what it had been called the "global war on terror" , in order to circumvent human rights protections.

From early 2002 it had become clear that non-US nationals outside the USA suspected of involvement in international terrorism had been at a real risk of secret transfer and arbitrary detention by US operatives.

In particular, from January 2002 through 2003, the USA had transferred more than 600 foreign nationals to the US Naval Base in Guantànamo Bay, Cuba, with reports from the outset of ill-treatment during transfers, and

detention without charge or trial or access to the courts, lawyers or relatives. By mid-July 2003, there had been approximately 660 detainees held there.

388. Cases of arbitrary detention and secret transfer had continued to emerge during 2002. In April 2002, AI had reported that, in addition to the case of Abu Zubaydah, the US authorities had transferred dozens of people to countries where they could be subjected to interrogation tactics, including torture.

In December 2002 the Washington Post had reported on a secret CIA facility at Bagram, Afghanistan and the CIA's use of "stress and duress" techniques, including sleep deprivation, stress positions and hooding, and the use of renditions by the agency.

389. Thus, as early as the end of 2002, any Contracting Party had been or should have been aware that there had been substantial and credible information in the public domain that the USA had engaged in practices of enforced disappearance, arbitrary detention, secret detainee transfers, torture and other forms of ill-treatment.

390. In its annual reports covering the years 2002 and 2003, AI had made multiple references to human rights violations in the context of US counterterrorism operations, not only in the entries on the USA, but also in respect of a number of other countries. Paper copies of these reports had been widely distributed, including to the media and governments.

By mid-2003 no Contracting Party could reasonably have found credible the USA's assurances that it had been committed to human rights and the rule of law in the counter-terrorism detention context, including the prohibition of torture and other ill-treatment.

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 and evidence obtained by the Court throughout the proceedings (see paragraphs 370-373 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 facts of the case as related by the applicant and as to the evidence from various sources which was admitted by the Court and summarised above (see paragraphs 42-332 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, ECHR 2006-XIII (extracts); *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 v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 97, 18 December 2012)

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 *El-Masri,* cited above, § 152; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Imakayeva v. Russia*, no. 7615/02, §§ 114-115, ECHR 2006-XIII (extracts).

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 27 March 2002, when the applicant was captured by the CIA in Pakistan, 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 69 and 82-121 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 53-68, 102-103 and 276 above).

399. It is submitted that since 27 March 2002 the applicant had not had contact with persons from the outside world, save the ICRC team in October and December 2006 and, following his transfer to the jurisdiction of military commission in the Guantánamo Naval Base, his US counsel with top-secret security clearance. All his communication with his counsel has been presumptively classified. In fact, he is subjected to a practical ban on his contact with the outside world, apart from mail contact with his family (see paragraphs 80, 101 and 117-118 above).

400. The above circumstances have inevitably had an impact on the applicant's ability to plead his case before this Court. Indeed, as his representatives maintained, 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.

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 27 March 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 the date of the applicant's capture – 27 March 2002 – the event, which, as stated in the 2004 CIA Report – "accelerated CIA's development of an interrogation program" (see paragraph 84 above).

Those documents also confirm that by November 2002 the Agency had the applicant and Mr Al Nashiri, 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 and that their interrogations were videotaped. The applicant was first to have been detained and interrogated there, Mr Al Nashiri was brought to that facility as a "second prisoner" on

15 November 2002. The interrogation of Mr Al Nashiri "continued through 4 December 2002" (see paragraphs 84-87 above).

Those documents also attest to the fact that as from 15 November 2002 the applicant and Mr Al Nashiri 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 Mr Al Nashiri's enhanced interrogations, including the so-called "waterboarding", "continued through 4 December 2002" (see also *Al Nashiri*, cited above, § 401).

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 90-91 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 paragraph 89 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 Al Nashiri 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 308-309 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 on 27 March 2002, was detained in the CIA detention facility in Bangkok from an unknown date following his capture to 4 December 2002, that Mr Al Nashiri was also held in the same facility from 15 November 2002 to 4 December 2002 and that they were both moved together to "another CIA black site" on 4 December 2002 (see also *Al Nashiri*, 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 – 22 September 2003) were proved before the Court

405. It is alleged that on 5 December 2002 the applicant, together with Mr Al Nashiri, 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 (see paragraphs 92-107 above).

It is further alleged that during his undisclosed detention in Poland the applicant was subjected to various forms of ill-treatment and abuse and deprived of any contact with his family. He was held in Poland until 22 September 2003. On that date he was transferred by means of extraordinary rendition from Polish territory, on a Boeing 737 registered as N313P, to other CIA secret detention facilities elsewhere (see paragraphs 109-117 above).

(i) Transfers and secret detention

406. The Court notes that the fact that after 4 December 2002 the applicant and Mr Al Nashiri were transferred 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 107 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 Eurocontrol 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 95-96, 252, 265, 281-286, 310 and 312 above).

408. In the light of that accumulated evidence, there can be no doubt that:

(1) the aircraft 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 aircraft N313P, a Boeing 737, landed in Szymany en route from Kabul, Afghanistan on 22 September 2003. The hours of the arrival and landing were recorded by PANSA as 18:50 and 19:56 respectively. A hand-written log of take-offs and landings at Szymany airport recorded that N313P arrived in Szymany on 22 September 2003 at 21:00 (local time) and departed at 21:57 (local time). The Polish Border Guard's official documents recorded that on arrival there were no passengers and seven crew and on departure there were five passengers and seven 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 62 and 276 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 22 September 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 22 September 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 elsewhere on board N313P on 22 September 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 322 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 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 Al Nashiri in 2002-2003 (see paragraphs 305-312 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 Al Nashiri 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 93-96 and 408 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 Al Nashiri 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 310-311 and 321 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 paragraphs 93-96, 248, 265, 281-285, 310, 312 and 321 above).

Nor have they explained the reasons for the subsequent series of landings of the CIA rendition aircraft (see paragraph 286 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 Mr Al Nashiri 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 paragraph 311 above). The series ended with the landing of N313P on 22 September 2003 – the date indicated by the applicant 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 paragraph 312 above and also *Al Nashiri*, cited above, § 414). Indeed, no other CIA-associated aircraft appeared in Szymany after that date (see paragraph 286 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 368-369 above), the Court will draw inferences from the evidence before it and from the Government's conduct.

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 22 September 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, in contrast to Mr Al Nashiri whose treatment in CIA custody in the relevant period is described at least partly in the CIA documents (see paragraph 107 above and *Al Nashiri*, cited above, §§ 416-417), the unredacted sections of those documents give very sparse information about the applicant's situation. The 2004 CIA Report merely states that in December 2002 the purpose of the interrogation team assigned to the black site in which the applicant was detained was to "interrogate Al Nashiri and debrief Abu Zubaydah" (see paragraph 107 above).

As confirmed by the experts, upon the point of his transfer to Poland, the applicant was described as having been compliant and was undergoing a process known as "debriefing", which was interviewing for the provision of intelligence and information rather being subjected to the EITs of a more aggressive or harsh nature. In their view, it was not known what techniques were applied to the applicant in Poland (see paragraph 311 above).

The 2004 CIA Report, with reference to the applicant's detention between August 2002 and 30 April 2003, that is, during the period which partly overlaps with his detention in Poland, seems to confirm that the applicant at some point became "compliant". It states that after the applicant was subjected to the waterboard "at least 83 times during August 2002" and during the period between the end of the use of the waterboard and 30 April 2003 he "provided information". In that respect, the document speaks of the applicant's "increased production", which appears to have meant that the aims of the enhanced interrogation had been achieved, although the authors of the report expressed doubts as to whether his "compliance" should be attributed to the use of waterboard or the length of his – undisclosed – detention (see paragraph 106 above). The 2009 DOJ Report also refers to the fact that at some point the use of the waterboard on the applicant was discontinued (see paragraph 88 above).

417. In the Court's view, the above elements confirm that the use of this particular interrogation technique stopped but this left open the application of other EITs on the applicant throughout his undisclosed detention, including in the period between 5 December 2002 and 22 September 2003 in Poland.

Furthermore, the Court finds it inconceivable that during the applicant's detention in Poland any of the standard methods applied by the CIA to persons detained under the HVD Programme as a matter of routine were lifted in respect of him on account of his "compliance".

418. It is to be recalled that the applicant was the first High-Value Detainee for whom the EITs were specifically designed by the CIA and on whom they were tested before ever being applied to other captured terrorist suspects as from November 2002 (see paragraphs 49 and 54-59 above). Having regard to the fact that the CIA "legally sanctioned interrogation techniques" encompassed a variety of measures, ranging from "standard" to "enhanced" and that the CIA applied to each and every detainee the same "standard procedures and treatment" (see paragraphs 53 and 60-68 above), the Court finds it established beyond reasonable doubt that the treatment to which the applicant was subjected in CIA custody in Poland must have included the elements defined in the CIA documents as those routinely used in respect of High-Value Detainees (see paragraphs 51-68, 98 and 102-105 above).

(iii) Court's conclusion

419. 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 Al Nashiri arrived in Szymany on board the CIA rendition aircraft N63MU;

(2) from 5 December 2002 to 22 September 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 "debriefed" by the CIA interrogation team and subjected to the standard procedures and treatment routinely applied to High-Value Detainees in the CIA custody, as defined in the relevant CIA documents;

(4) on 22 September 2003 the applicant was transferred by the CIA from Poland to another CIA secret detention facility elsewhere on board the rendition aircraft N313P.

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

420. 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 287-296 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 265 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 254 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

421. 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 252, 265 and 285 above).

422. 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 70-72 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 413 above), flight plans were disguised, false plans were filed and PANSA navigated the aircraft into Szymany without a valid flight plan (see paragraphs 252, 310 and 312 above).

423. A detailed analysis of the rendition circuit of the flight N379P – on which, as established in *Al Nashiri*, Mr Al Nashiri was transferred out of Poland on 6 June 2003 (see also paragraph 412 above and *Al Nashiri,* cited above, § 417), 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 285 above).

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 253, 286 and 311 above).

424. The CHRGJ Report also gave a detailed analysis of the rendition circuit of the flight N313 P – on which, as established above (see paragraph 408 and 419 above) the applicant was taken out of Poland on 22 September 2003. While it does not appear that on this occasion Jeppesen filed any "dummy" flight plans for the flight from Kabul to Szymany, it did, as in case of N379P's flight circuit in June 2003, invoke a special status designation. As stated in that report, such "special status exemptions in their invocation alone demonstrate a collaborative planning on the part of the states whose territory or airspace is being traversed, because they are only granted when specifically authorised by the national authority whose

(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

425. 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.

426. 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 248–249 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 251, see also paragraph 234 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 315 above).

427. 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 323 above).

428. 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 297 and 328 above).

429. 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 269 above).

430. 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

431. 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.

432. 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 236 above; the relevant letter is also mentioned in paragraph 429 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 122 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 424-430 above).

433. 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 242 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 253 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 314 above).

434. 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 264 above). The same observations were made in the 2007 EP Resolution (see paragraph 269 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 302 above).

435. 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

436. 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 300 above).

(f) Relations of cooperation between the Polish intelligence and the CIA

437. 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 264 and 305 above).

438. 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 234 above).

(g) Circumstances surrounding detainees transfer and reception at the black site

439. 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 62, 276 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 324 above).

(h) Other elements

440. 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 297 and 329 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 324 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 the applicant was transferred from Poland; see paragraphs 408 and 419 above) 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 289-290 and 312 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 290 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 would roll'" (see paragraph 294 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 420 above), they perceived those events as "spies" coming or a "changeover of intelligence staff" (see paragraph 291 above).

(i) Public knowledge of treatment to which captured terrorist-suspects were subjected in US custody

441. 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 208–223 above and *Al Nashiri,* cited above, §§ 384-385 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 224–333 above).

5. Court's conclusions as to Poland's alleged knowledge of and complicity in the CIA HVD Programme

442. 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 47-68, 76-79, 235-255, 260-269, 275-280 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 *Al Nashiri*, 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 47, 55 and 60 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 276 above). The reports following the Marty Inquiry and the Fava Inquiry emerged earlier, in 2006-2007 (see paragraphs 240-255 and 260-266), 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 317 above).

As already stated above (see paragraphs 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 Al Nashiri.

443. In that regard, the Court has taken into account the various attendant circumstances referred to above (see paragraphs 420-441 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 301, 315-317**,** 320 and 324–325 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 316-317 and 324-325 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 208-218 and 223-233 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).

444. Taking into consideration all the material in its possession (see paragraphs 413-435 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).

445. 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

446. No comments on the matter have been received from the Government.

2. The applicant

447. 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 and facilitated his secret detention in Poland and his transfer from Poland to other CIA secret detention facilities elsewhere.

While the full form and extent of Poland's involvement was not known, it was beyond any credible dispute that the Polish authorities had cooperated with the CIA and made possible his secret detention and torture on Polish soil.

In the applicant's view, 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. Since Poland had actively facilitated the applicant's detention and transfer, it was also responsible for his ill-treatment and unlawful, secret detention during the period following his transfer from Poland.

B. Applicable general principles deriving from the Court's case-law

448. 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 paragraphs 3 and 82-118 above and paragraphs 457, 515, 527, 535 and 546 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

449. 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

450. 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).

451. 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).

452. 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.).

453. 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).

454. 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).

455. 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

456. 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

457. 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 complained that the Polish authorities had knowingly and intentionally enabled the CIA to hold him in secret detention at the Stare Kiejkuty site for more than nine months. Poland had known about the CIA's rendition programme on its territory and of the real and immediate risk of torture to which High-Value Detainees under this programme had been subjected. Poland had actively agreed to establish a secret detention site and to facilitate the CIA unhindered use of that site.

2) Furthermore, the applicant alleged that Poland, by enabling the CIA to transfer him from its territory to its other secret black sites, had exposed him to years of further torture and ill-treatment. The Polish authorities had known, or should have known, of the real risk that he would continue to be held in the same detention regime as that to which he had been subjected until that point.

3) He also complained under Article 3 taken separately and in conjunction with Article 13 of the Convention that the Polish authorities had been in breach of the procedural obligations under Article 3 and that he had been denied the right to a remedy under Article 13, since they had failed to conduct an effective investigation into his into his allegations of torture, ill-treatment and secret detention in a CIA-run detention facility in Stare Kiejkuty and of being unlawfully transferred to places where he had faced further torture and ill-treatment.

458. Article 3 of the Convention states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

459. 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

460. 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.

461. 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.

462. 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.

463. Referring to the applicant's arguments that the investigation was inordinately delayed, politically influenced and ineffective (see paragraph 461 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.

464. 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 2012 and 13 March 2013.

465. 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 procrastinated.

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.

466. 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

467. The applicant submitted that the investigation had been delayed and was ineffective and that it lacked the necessary transparency and independence required under Article 3.

The first credible assertions concerning the existence of a CIA black site in Poland had been made public at the beginning of November 2005. The only response of the Polish authorities had been, as described by Senator Pinior at the fact-finding hearing, the "closed meeting of Polish Parliament and Government members". It had not been until May 2008 that the Polish

Government had decided to initiate an investigation, in clear breach of the well-established Convention requirements of promptness and expedition. In the meantime, three comprehensive, official reports from international inquiry bodies had been published, establishing that CIA black sites had operated on Polish territory.

In that regard, the applicant relied on *Estamirov and Others v. Russia*, at paragraph 89 (cited in paragraph 337 above), in which the Court had found that even a delay of only a few months in opening an investigation might amount to a "delay that must have affected the effectiveness of the proceedings" because "the passage of time would inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence would cast doubt on the good faith of the investigative efforts".

468. In the applicant's view, the fact that the proceedings had eventually been initiated and had been described by the Government as "progressing" did not mean that they were thorough and effective and or that they guaranteed the victims' rights.

The Government relied on the US authorities' failure to reply to their requests for legal assistance to explain the length of the investigation. The first request concerning the landing of the CIA aircraft in Poland had been made in March 2009, a year after the opening of the investigation. Three other requests, described by the Government in vague terms, had been sent at intervals of nearly two years – the first in March 2011 and the next two in May 2013. Considering the central and critical role of the CIA agents in the HVD Programme, the lapse of time between the requests and the authorities' passive approach to the US responses did not attest to the effectiveness of the investigation.

469. Furthermore, the prosecutors had considerably limited the access of the applicant's representatives to the case-file. In particular, the representatives had consistently and arbitrarily been denied access to the complete material. This had considerably restricted the applicant in the exercise of his procedural rights and prevented him from communicating to the Court information that was relevant for its examination of the case. In fact, the victims had had no influence on or knowledge of the current situation in the investigation. The Polish counsel for the applicant had been allowed to consult the classified part of the file only twice since 2010, without the possibility of making notes. On the first occasion for three hours and on the second for fifteen minutes – in order to inspect the allegedly classified document which, in fact, should not even have been rated as such. In addition, the lawyers had been unable to take part in the process of obtaining evidence and had not even been informed or allowed to participate in the taking of evidence from witnesses or experts.

470. The exact scope and object of the investigation had still remained unclear for the victims and the public alike. Apart from publicly available speculations concerning one individual, a member of the Polish Intelligence

Service, no charges had appeared to have been brought against individuals who should be held responsible for the violations of the applicant's rights.

The investigation had been repeatedly and automatically prolonged by the Prosecutor General without any public grounds being given for those decisions.

471. Lastly, the applicant maintained that there had been serious concerns regarding the independence of the investigation and that there was, accordingly, the reason to believe that it was politically influenced. There had been unexplained dismissals, on two subsequent occasions, of the prosecutors in charge of the case which had taken place in the circumstances suggesting that there had been unmeritorious reasons behind those decisions, as it the dismissals had taken place, respectively, after an attempt to bring charges against a politician and the victims' lawyers had been granted access to the case file.

472. In conclusion, the investigation had been neither thorough nor independent and it was wholly ineffective.

2. Third- party intervener – AI/ICJ's comments on duty to investigate gross violations of human rights

473. AI/ICJ, relying on the Court's case-law, submitted that a duty to investigate implied an obligation to act "with the required determination to identify and prosecute those responsible. Criminal proceedings were a critical element of ensuring an effective remedy for gross violations of Convention rights. They were the primary means through which the victims' right to the truth could be realised, including in respect of identification of the perpetrators. Although there was no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities had to, where the facts warranted this, take the necessary steps to bring those who had committed serious human rights violations to justice"

474. With regard to the State parties' involvement or complicity in systematic human rights violations such as those that had occurred in the CIA secret detention and rendition programme, failure to investigate timely and effective prosecutions in appropriate cases would violate the Convention rights, including rights under Articles 3 and 5 ECHR, and would fatally undermine public confidence in Contracting Parties' adherence to the rule of law throughout the Council of Europe.

475. Furthermore, the State's duty to initiate and continue an investigation could not be limited by the fact that alleged victims found themselves in situations where it was impossible for them to produce evidence of violations of their Convention rights. This was the case not only regarding detention by public authorities, but also in cases of detention by third parties.

476. In order to be effective, an investigation had to be initiated promptly once the matter had come to the attention of the authorities and

must be conducted with reasonable expedition. As regards the latter requirement, the Court had, for instance, criticised situations where multiple adjournments of an investigation had occurred.

The obligation to ensure an effective investigation would not be met where significant delays were combined with a restricted scope of a criminal investigation – for example, one which deliberately focused only on offences which were subject to limitation periods under domestic law where the allegations related to offences that were not time-barred under international law.

477. Lastly, the interveners, referring to El-Masri (cited above) and the "right to the truth", maintained that the right to an effective investigation, under, inter alia, Articles 3 and 5, taken together with Article 13, entailed a right to the truth concerning the violations of Convention rights perpetrated in the context of the 'secret detentions and renditions system'. This was so, not only because of the scale and severity of the human rights violations concerned, but also in the light of the widespread impunity for these practices, and the suppression of information about them, which had persisted in multiple national jurisdictions. Where renditions or secret detentions had taken place with the co-operation of Contracting Parties to the Convention, or in violation of those States' positive obligations of prevention, the positive obligations of those States required that they take all reasonable measures open to them to disclose to victims, their families and society as a whole, information about the human rights violations that those victims suffered within the renditions system.

3. The Court's assessment

(a) Admissibility

478. 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 333 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

479. 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).

480. 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

481. 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 368 above).

482. 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 126–166 and 470 above).

483. 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 paragraphs 430 and 444 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.

484. 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 208–233 and 441 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 220–222 and 228 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 221 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 122–124 above).

485. 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 340 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 178–181 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 240–266 above).

486. 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 460 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 paragraphs 467-468 above).

487. 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 461–462 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 126–166 and 470 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 128, 153, and 471 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.

488. 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 360 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).

489. 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).

490. 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 126–166 and 470 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 461 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 134, 145 and 469 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 469 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 488 above)

491. 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 488 above).

492. 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 256-259 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.

493. 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

494. 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 the applicant's complaint.

(b) The applicant

495. The applicant stressed that on account of the obstacles experienced in his communication with the outside world, including the Court, he was unable to present first hand, direct evidence of his treatment inside the secret detention facility in Poland.

However, strong and concordant inferences as to the conditions of his detention and ill-treatment could be drawn, in particular from information that related to the regime of detention conditions and interrogation techniques that had been authorised for use on CIA detainees during the period when he had been held in Poland. Indeed, the application of any of these three elements – conditions of detention, conditions of transfer, interrogation techniques – would, in and of itself, be sufficient to violate Article 3. Their gravity and impact had been heightened by their use in combination and in the context of extraordinary rendition and secret detention.

All those three elements had specifically been designed to elicit information through infliction of severe pain, fear and humiliation. Official records were explicit in this respect. For instance, the OMS Guidelines (see paragraph 53 above) explicitly described enhanced interrogation techniques as "designed to psychologically dislocate the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist [the] efforts to obtain critical intelligence." Likewise, the excerpt from the 2004 CIA Background Paper (see paragraph 60 above), apparently written to secure legal approval of the rendition, detention and interrogation programme, stated that the effective interrogation was based on the concept of using both physical and psychological pressures to influence behaviour, in order to overcome a detainee's resistance posture.

According to the ICRC Report, the applicant had been the only one High-Value Detainee subjected to all of the enhanced interrogation techniques employed by the CIA. He had been, at various times, chained to a chair for extended periods of time, repeatedly thrown against concrete

walls; forced into confined spaces for extended periods of time; hanged from the ceiling, held naked, and sprayed with cold water to keep him awake, and subjected to waterboarding.

Moreover, the applicant had been held incommunicado and in isolation from other prisoners for the entire period spent in CIA custody. The conditions of detention meant that the applicant, as any other High-Value Detainee had been "in constantly illuminated cells, substantially cut off from human contact, and under 24-hour-a-day surveillance" for many years.

496. In the applicant's submission, the cumulative effect of the following features of his rendition and secret detention showed beyond reasonable doubt that he was a victim of torture:

(1) The complete arbitrariness of the rendition programme and the dearth of any protection in law, which had greatly enhanced his perceived and real level of vulnerability.

(2) The uncertainty as to his fate, which had been entirely in the hands of his captors and abusers, and the deliberate manipulation of fear and disorientation, which had been designed to and had in fact resulted in extreme anxiety and a profound long term psychological impact. The acknowledgment by the Court of the undeniable nature of the anxiety generated in such a situation, and its psychological impact, had been confirmed in the *El-Masri* judgment.

(3) The prolonged duration of the secret unacknowledged detention compounded its intensity and effect. The applicant had been held: in secret, unacknowledged detention for a prolonged period of several years, from the date of his arrest on 27 March 2002, at least until his transfer to the custody of the US Department of Defence at the US Naval Base at Guantànamo Bay on 6 September 2006. This period included more than nine months of secret detention in Poland.

(4) The manifest denial of the safeguards found by the Court to constitute an integral aspect of the obligation to secure respect for the prohibition on torture.

In conclusion, there could be little doubt that the above-mentioned elements and measures, used in combination and in pursuance of the aim of causing severe pain or suffering in order to obtain information, amounted to torture.

497. 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 its territory to other CIA secret detention facilities, which had exposed to him to further torture, ill-treatment and abuse in CIA custody. However, the authorities, despite the fact that at the relevant time they knew, or ought to have known, that under the HVD Programme CIA prisoners had been subjected to interrogation methods and other practices manifestly incompatible with the Convention, had failed to prevent his transfer to other secret CIA detention

sites elsewhere, thus exposing him to a continued and prolonged risk of treatment contrary to Article 3 of the Convention.

2. The Court's assessment

(a) Admissibility

498. 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

499. 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 the event of a public emergency threatening the life of the nation (see, among many other examples, *Soering*, cited above, § 88; *Selmouni*, cited above, no. 25803/94, § 95, ECHR 1999-V; *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).

500. 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*, 18 January 1978, § 162, Series A no. 25; *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). 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).

501. Furthermore, a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment (see *Gäfgen*, cited above, § 91 and, *mutatis mutandis*, *D.F. v. Latvia*, no. 11160/07, § 85, 29 October 2013).

502. 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

503. The Court has already found that the applicant's allegations concerning his secret detention under the HVD Programme in Poland from 5 December 2002 to 22 September 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 415-419 above).

The Court has also found it established beyond reasonable doubt that during his detention in Poland the applicant was "debriefed" by the CIA interrogation team and subjected to the standard procedures and treatment routinely applied to High-Value Detainees in CIA custody, as defined in the relevant CIA documents (see paragraphs 418-419 above).

It remains to be determined whether the treatment to which he was subjected falls within the ambit of Article 3 and, if so, to what extent it can be imputed to the respondent State (see paragraphs 444-450 and 493 above)

(α) Treatment to which the applicant was subjected at the relevant time

504. The Court notes 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 60-61 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 (see paragraph 65 above)

Furthermore, this specific part of the 2004 CIA Background Paper, although considerably redacted, gives a clear notion 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 66 above).

505. It is true that the applicant – at least in December 2002 – was subjected to the "debriefing" process, which, as the experts confirmed, in contrast to "interrogation" did not involve the most aggressive enhanced interrogation methods but consisted in obtaining information by means of interviewing (see paragraphs 51-58, 107, 306, 311 and 416-419 above). That process apparently continued at least until 30 April 2003, the date by which the applicant had provided information for an unspecified – expunged in the document – number of CIA "additional reports" (see paragraphs 106 and 416 above).

506. However, in addition to "enhanced measures", every High-Value Detainee could at any time be subjected to "standard measures", described in the CIA documents as those "without physical or substantial psychological pressure", including shaving, stripping, diapering (generally for periods not greater than 72 hours), hooding, isolation, white noise or loud music, continuous light or darkness, uncomfortably cool environment, restricted diet, including reduced caloric intake, shackling in upright, sitting, or horizontal position; water dousing; sleep deprivation for up to 72 hours (see paragraph 53 above).

507. In accordance with the 2003 CIA Guidelines, at least six "standard conditions of confinement" were applied to CIA detainees during the period of the applicant's detention in Poland. They included blindfolding and hooding within the detention facility, solitary confinement, exposure to constant noise, continuous light and use of leg shackles in all aspects of a detainee management and movement (see paragraph 67 above). As regards

solitary confinement, the CIA documents drawn up on the closure of the HVD Programme in 2006 seemed to have recognised its serious effects on detainees, stating that "the isolation experience by the CIA detainees m[ight] impose a psychological toll" (see paragraph 68 above).

508. Furthermore, the Court considers that the applicant's experience in CIA custody prior to his detention in Poland is an important factor to be considered in its assessment of the severity of the treatment to which he was subsequently subjected.

The applicant, as already mentioned, was the first High-Value Detainee for whom the EITs were painstakingly designed and on whom they were tested after the CIA psychologists had eventually proposed twelve such techniques to be used on him, including the waterboarding (see paragraphs 49 and 54-58 above). He was reportedly the only one CIA detainee who was continually and systematically subjected to all those aggressive measures applied one by one or in combination. The 2007 ICRC report gives a shocking account of the cruel treatment to which the applicant was subjected in CIA custody, from the waterboarding, through beating by the use of a collar and confinement in a box, to exposure to cold temperature and food deprivation (see paragraphs 101-103 above). As stated in that report, the initial period of interrogation of the High-Value Detainees was "the harshest, where compliance was secured by the infliction of various forms of ... ill-treatment". This was followed by a "reward-based interrogation approach with gradually improving conditions of detention albeit reinforced by the threat of returning to former methods" (see paragraph 103 above).

509. As noted above, at the beginning of his detention in Poland such a "reward-based interrogation approach" – "debriefing"– was apparently applied to the applicant (see paragraphs 416-419 above). However, even though at least for some of the time the harshest elements of the detention and interrogation regime were presumably removed, the applicant, having beforehand experienced brutal interrogation methods – such as at least 83 waterboard sessions in a single month of August 2002 – inevitably faced the constant fear that, if he failed to "comply", the previous cruel treatment would at any given time be inflicted on him again (see also paragraph 501 above). The Court considers that this permanent state of anxiety caused by a complete uncertainty about his fate in the hands of the CIA and a total dependence of his survival on the provision of information during the "debriefing" interviews must have significantly exacerbated his already very intense suffering arising from the application of the "standard" methods of treatment and detention in the exceptionally harsh conditions summarised above (see paragraphs 506-508 above).

510. The Court does not 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.

Nor can the Court speculate as to when, how or in what combination the specific interrogation techniques were used on the applicant between 5 December 2002 and 22 September 2003. However, the predictability of the CIA interrogation practices used on its detainees gives sufficient grounds to believe that these practices could have been applied to the applicant during his detention in Poland and likewise elsewhere, following his transfer from Poland, as an integral part of the HVD Programme.

Even if, as noted above, at least during the initial phase of his detention in Poland the most physically aggressive measures were not necessarily inflicted on him, the applicant was subjected to an extremely harsh detention regime and permanent emotional and psychological distress caused by the past experience and fear of his future fate (see paragraph 501 above). Thus, Article 3 does not refer exclusively to the infliction of physical pain but also to that of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault (see *El-Masri* , cited above, § 202).

Accordingly, considering all the elements of the treatment to which the applicant must have been subjected and its cumulative effects on him, there can be no doubt that it is to be characterised as "deliberate inhuman treatment causing very serious and cruel suffering".

511. The CIA documents state that this treatment was inflicted on the applicant with the aim of obtaining information – in particular, "actionable intelligence of future threats to the United States" (see paragraphs 84 and 88 above).

It is also to be noted that all the measures applicable to High-Value Detainees –"standard" and "enhanced" alike – were used 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 53 and 60-66 above).

In that context, it is immaterial whether in Poland the applicant was interrogated or "only" debriefed as both procedures served the same purpose, the only difference being that the former had recourse to physically aggressive methods and the latter to the relatively lesser physical abuse combined with psychological pressure. In any event, both caused deep fear, anxiety and distress arising from the past experience of inhuman and

degrading treatment in the hands of the interrogators, inhuman conditions of detention and disorientation of a detainee.

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 500 above and *El-Masri*, cited above, § 211).

(β) Court's conclusion as to Poland's responsibility

512. 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 444 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 443-444 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 445 and 502 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 449 above and *El-Masri*, cited above, §§ 206 and 211).

513. 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 451 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 108, 444 and 450-451 above).

514. 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

515. The applicant complained that from 5 December 2002 to 22 September 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 and designed to ensure the complete denial of any of the safeguards contained in Article 5 of the Convention. In addition, by enabling the CIA to transfer him from its territory to other secret CIA detention facilities elsewhere, it had exposed him to a real and serious of risk further undisclosed, incommunicado 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

516. The Government refrained from making any comments on the admissibility and merits of this complaint.

2. The applicant

517. The applicant submitted that his incommunicado secret detention was had not been "in accordance with a procedure prescribed by law" and had, therefore, been in violation of Article 5 § 1. No arrest warrant had been issued in respect of him and he had not been provided with access to a lawyer, had not been brought before a judge. Nor had he had access to any form of due legal process.

Poland's acts and omissions in relation to the CIA HVD Programme as applied to the applicant on Polish territory had also amounted to a breach of its positive obligations under Article 5. Thus, where persons directly responsible for deprivation of liberty of an individual were not the State authorities, but private persons, or another State's authorities, the State's responsibility would be engaged where it had failed to meet its positive duty to protect those within its territory and jurisdiction from arbitrary detention. The positive obligation to protect included an obligation to prevent deprivation of liberty of which the authorities had known or ought to have known, including by ensuring access to counsel and to judicial supervision and to regularly inspect places of confinement to ensure that detention was justified and that the safeguards enshrined in Article 5 had been provided.

518. Not only had Poland failed to comply with its positive obligations, it had also intentionally collaborated with the CIA to ensure that it could operate its HVD Programme on Polish territory, outside the oversight or interference of any judicial body or institution. It had facilitated the operation of the CIA black site and the secrecy of that programme.

The CIA secret prison could not have operated on Polish territory without the support and assistance of the Polish Government.

519. After leaving Poland the applicant had continued to be subjected to CIA secret detention elsewhere, ultimately having been transferred to Guantánamo Bay, where he was currently held in detention. The Polish authorities knew or ought to have known of the real and substantial risk that he would continue to be held in essentially the same regime of detention as that to which he had been subjected up to that point. At the time of his transfer, information about the treatment of detainees at Guantánamo Bay had been a matter of common knowledge.

In view of the foregoing, the applicant asked the Court to find a violation of Article 5 of the Convention.

B. The Court's assessment

1. Admissibility

520. 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

521. 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.).

522. 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).

523. 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

524. 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 45-46, 48-49, 57, 60-68, 240-255, 260-269, 275-276, 299-332 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 45-46, 48-49, 57, 60-68, 240-255, 260-269, 275-276, 299-332 and 512-513 above).

525. 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 paragraphs 513-514 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).

526. Accordingly, there has been a violation of Article 5 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

527. The applicant further complained that Poland had violated his rights under Article 8 by enabling the CIA to ill-treat him, to subject him to various forms of physical and mental abuse, to detain him incommunicado on its territory and to deprive him of any form of contact with his family or the outside world.

> "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

528. The Government refrained from making any comments on the admissibility and merits of this complaint.

2. The applicant

529. The applicant submitted that under Article 8 of the Convention, the right to respect for private life covered the physical, psychological and moral integrity of the person, including crucially the mental health of an individual.

The secret incommunicado detention had completely isolated him and removed his ability to interact with the outside world. The physical and psychological abuse to which he had been subjected in CIA custody constituted a striking infringement of the right to the physical and psychological integrity of the person, which were integral aspects of Article 8.

In addition to the abusive conditions of detention and interrogation, he had been subjected to the systematic recording, including when he had been asleep in his cell. This had constituted the negation of any sense of private space and an interference with his right to private life.

The absolute ban on contact with his family members or with the outside world had amounted to an interference with his private and family life, and with his correspondence. For over nine months of his detention in Poland, the applicant had not been allowed any form of contact with his family. Nor had he been allowed any contact with a lawyer.

Secret detention, he added, being designed to remove the person from all contact with and support from the outside world, was the antithesis of the letter and spirit of Article 8 of the Convention.

530. The interference with his rights under Article 8 rights had had no legal basis and had not been "in accordance with the law", whether Polish or international. It had specifically pursued aims antithetical to the Convention, as it had been aimed at enhancing his vulnerability and removing him from the protection of the law, in order to achieve the all-consuming end of unfettered intelligence gathering. It had not pursued any of the legitimate aims listed in paragraph 2 of Article 8, and could not be considered "necessary" or proportionate for the purposes of that provision.

B. The Court's assessment

1. Admissibility

531. 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

532. 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.)

533. Having regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention (see paragraphs 512-514 and 525 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.

534. 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 ARTICLES 3, 5 and 8 OF THE CONVENTION

535. The applicant complained that the Polish authorities, in breach of Article 13 taken separately and in conjunction with Articles 3, 5 and 8 of the Convention, had denied his right to an effective remedy on account of having failed to carry out an effective 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

536. The parties essentially reiterated their submissions concerning the procedural aspect of Article 3.

537. 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.

538. The applicant disagreed and said that he had not had access to an "effective remedy" within the meaning of Article 13 for his complaints under Articles 3, 5 and 8 of the Convention because the investigation had been delayed, ineffective and lacked the requisite independence and transparency.

B. The Court's assessment

1. Admissibility

539. 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 478 above). It must likewise be declared admissible.

2. Merits

(a) Applicable general principles deriving from the Court's case-law

540. 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).

541. 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).

542. 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).

543. 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

544. 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 514, 526 and 534 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 541 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 3 (see paragraph 493 above).

545. Consequently, there has been a violation of Article 13, taken in conjunction with Articles 3, 5 and 8 of the Convention.

IX. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

546. The applicant complained that Poland, by enabling the CIA to transfer him from its territory, had exposed him to a real and serious risk of denial of justice in the hands of the US authorities, in breach of Article 6 § 1 of the Convention. Even though he had not been charged, that risk continued as long as he was held in the custody of the US authorities.

Article 6 § 1 of the Convention, 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 tribunal established by law. ..."

A. The parties' submissions

1. The Government

547. The Government submitted no comments on the admissibility and merits of this complaint.

2. The applicant

548. The applicant submitted that he had never been charged with any criminal offence by the US authorities and was not listed for trial by military commission. However, to the extent that it could have been anticipated at the time of his transfer that the High-Value Detainees would have been tried in any criminal proceedings at all, it would have been before the military commission established by the US administration in 2001. At the time of his transfer from Poland, the orders governing the practice and procedure of the military commissions under whose jurisdiction he was likely to have been placed had been publicly available and had become the subject of intense debate and criticism.

549. Thus, at the relevant time Poland had known, or ought to have known that the military commissions were neither independent nor impartial. Members of the military commissions had been appointed by the US Secretary of Defence or his designee from the ranks of commissioned officers of the US armed forces. Review of decisions had been conducted by a panel of military officers appointed by the Secretary of Defence. Findings had only become final when either the US President or the Secretary of Defense, having been so designated by the President, had decided to make them so.

550. Many deficiencies in the commission's practice and procedure had included in principle the denial of the accused's right of access to all the evidence adduced against him and observations filed. For instance, both the accused and counsel for the accused could be excluded from key parts of the proceedings and could be denied access to potentially exculpatory evidence. This had clearly been in breach of the principle of equality of arms and the right to an adversarial trial.

Although he had not been listed for trial and was held in indefinite detention without any charge, the risk of a future breach continued as long as he was held in the custody of military authorities and remained under the jurisdiction of the military commission.

In view of the foregoing, the applicant asked the Court to find a breach of Article 6 § 1 of the Convention.

B. The Court's assessment

1. Admissibility

551. 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

552. 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).

553. 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).

554. 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 avbove, § 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

555. 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 paragraph 511 above).

Accordingly, if the applicant were ever to be tried by the military commission, 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 on other witnesses testimony by terrorist suspects likewise obtained by the use of torture or ill-treatment.

556. 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 73-74 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 73-75 above).

557. 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 552 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.

558. At that time, in the light of publicly available information, it was evident that any terrorist suspect would be tried before a military commission. Moreover, 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". The representatives 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 (see paragraph 223 above).

559. The Court notes that the applicant has not been listed for trial before the military commission and that since 27 March 2002, that is for over twelve last years, has remained in indefinite detention without ever being charged with a criminal offence. The last review of the legality of his detention took place more than seven years ago, on 27 March 2007 (see paragraph 119 above). This, in the Court's view, by itself amounts to a flagrant denial of justice (see also paragraphs 552-553 above).

560. 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 453 and 552-554 with references to the Court's case-law).

561. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

562. 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

563. The applicant requested the following order from the Court:

1) Thorough and effective investigation

(a) Poland should open an effective, expeditious, thorough and independent investigation to provide a full account of the applicant's rendition into and out of Poland and his treatment while there. The investigation should include guarantees of independence and transparency, and victim participation, in line with the State's obligations. It should pursue vigorously the investigation of past crimes, including by taking all possible measures to secure information and cooperation from the United States and conducting a rigorous forensic investigation. The investigation should lead to a full public account of Polish involvement in the rendition programme, including *inter alia*:

- a full account of the facts and circumstances of the applicant's secret detention in and rendition to and from Poland;
- a full account of the decision-making processes that led to the violation of his rights;
- the reasons for the related failures of any preventive mechanisms;
- the identification of officials and agencies at all levels of government with responsibility for the violations of the applicant's rights and the failure to ensure an effective investigation thereafter;

- the publication of the results of the investigation to date and of any future effective investigation, and publication of all documentary and other evidence collected by the prosecutor in the course of the investigation opened in March 2008,

(b) Those persons who are understood, upon proper investigation, to be responsible for crimes committed against the applicant on Polish territory should be subject to prosecution and appropriate punishment in accordance with the gravity of the crimes; that the State should clarify that there can be no legal impediments to accountability for the crimes in question under Polish law;

(c) The State should formally recognise the violations of the applicant's rights and acknowledge its wrongdoing and responsibility for those violations, and its contribution to his current circumstances; the State should provide suitable guarantees of non-repetition to ensure that violations committed against the applicant will not be repeated in the future and that its cooperation will be consistent with its human rights obligations under the Convention;

(d) Poland should secure, through diplomatic or other means, the cooperation and assistance of the United States Government in order to establish the full and precise details of the applicant's treatment at the hands of the CIA, and it should make such representations and interventions, individually or collectively, as are necessary to bring an end to the on-going violations of his rights.

564. The applicant also asked the Court to award him EUR 150,000 for non-pecuniary damage. He submitted that the Convention violations which he had sustained had caused significant harm to his mental and physical health. In his view, the factors relevant for an assessment of non-pecuniary harm in the present case included the "extreme seriousness of the violations of the Convention," their duration, context and lasting impact.

565. The Government said that the sum claimed by the applicant in respect of the alleged non-pecuniary damage deviated significantly from the sums awarded by the Court under the relevant provisions of the Convention.

566. 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 torture and secret detention on its territory. 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 of a flagrantly unfair trial in breach of Article 6 § 1 (see paragraphs 456-561 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.

567. 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.

568. As regards the specific measures requested by the applicant, the Court finds that these issues have adequately been addressed by its finding of a violation of Article 3 in its procedural part and violations of other provisions of the Convention.

B. Costs and expenses

569. The applicant also claimed EUR 30,000 for the costs and expenses incurred before the Court.

570. The Government were of the view that the sum claimed with respect to the costs of the proceedings was exorbitant and had not been in any way substantiated by the applicant's lawyer.

571. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 30,000 for the proceedings before the Court.

C. Default interest

572. 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 application admissible;

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 Articles 3, 5 and 8 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*

(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, the following amounts:

(i) EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *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