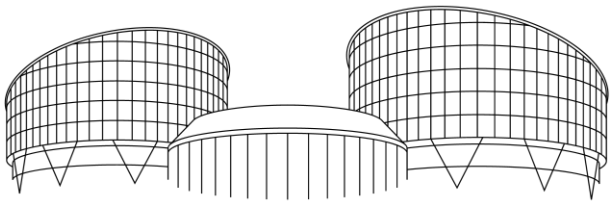

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Application no. 28761/11
Abd Al Rahim Hussayn Muhammad AL NASHIRI
against Poland
lodged on 6 May 2011

STATEMENT OF FACTS

1. The applicant, Mr Abd Al Rahim Hussayn Muhammad Al Nashiri, is a Saudi Arabian national of Yemeni descent, who was born in 1965. He is currently detained in the Internment Facility at the US Guantanamo Bay Naval Base in Cuba. The applicant is represented before the Court by Mr J.A. Goldston, attorney, member of the New York Bar and Executive Director of the Open Society Justice Initiative ("the OSJI"), Mr R. Skilbeck, barrister, member of the England and Wales Bar and Litigation Director of the OSJI, Mr A. Singh, attorney, member of the New York Bar and Senior Legal Officer at the OSJI, and also by Ms N. Hollander, attorney, member of the New Mexico Bar.

A. Background

1. USS Cole bombing in 2000

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

The applicant, considered to have been one of the most senior figures in al'Qaeda, has been the prime suspect in the 2000 bombing. He has been suspected of masterminding and orchestrating the attack (see also paragraph 55 below).

2. MV Limburg bombing

3. On 6 October 2002 a French oil tanker MV *Limburg*, while it was in the Gulf of Aden some miles offshore, was rammed by a small explosives-laden boat which detonated. The tanker caught fire and approximately 90,000 barrels (14,000 m^3) of oil leaked into the Gulf of Aden. One crew member was killed and twelve others injured. The style of the attack resembled the suicide *USS Cole* bombing described above. The applicant has been suspected of playing a role in the attack (see also paragraph 55 below)

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

4. 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.

5. On an unspecified later date the CIA established a programme in the Counter-terrorist Center to detain and interrogate terrorists at sites abroad. In further documents the American authorities referred to it as "the CTC program" (see also paragraphs 6-9 below) but, subsequently, it was also called "the High-Value Detainees Program" ("the HVD Programme") (see also paragraph 8 below), or the Rendition Detention Interrogation Program ("the RDI Program"). 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 66-82 below). For the purposes of the present case, it is referred to as "the HVD Programme".

6. 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; on the whole more than one-third of the 109-page document was blackened out.

7. The report starts from 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. It continues as follows:

> "He also informed OIG that he had just learned of and dispatched a team to investigate [REDACTED] In January 2003, the DDO informed OIG that he had received allegations that Agency personnel had used unauthorised interrogation techniques with a detainee, Abd Al-Rahim Al-Nashiri, at another foreign site, and requested that OIG investigate. Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights. In January 2003, OIG initiated a review of the Agency counter-terrorism detention and interrogation activities [REDACTED] and the incident with Al-Nashiri."

8. The background of that 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 U.S. policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community."

9. As explained in the 2004 CIA Report, "terrorist targets" and detainees referred to therein were generally categorised as "high value" or "medium value". This distinction was based on the quality of intelligence that they were believed likely to be able to provide about current terrorist threats against the United States. "Medium Value Detainees" were individuals believed to have lesser direct knowledge of terrorist threats but to have information of intelligence value. "High Value Detainees" (also called "HVD") were given the highest priority for capture, detention, and interrogation. In some CIA documents they are also referred to as "High Value Targets" ("HVT").

The applicant fell into this category.

10. In paragraph 6 of the report, in relation to the "legal parameters and constraints for interrogations" of suspected terrorists, it is stated that, following extensive consultations with the US Department of Justice and the National Security Council legal and policy staff, it was considered that "in most instances relevant to counter-terrorism detention and interrogation activities [redacted] the criminal prohibition against torture, ... is the controlling legal constraint on interrogations of detainees outside the United States". It was further mentioned that in August 2002 the US Department of Justice had provided the CIA with a legal opinion determining that 10 specific "Enhanced Interrogation Techniques" ("the 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".

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

" [1.] The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.

[2.] During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.

[3.] The facial hold is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.

[4.] With the facial or insult slap, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.

[5.] In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.

[6.] Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.

[7.] During wall standing, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.

[8.] The application of stress positions may include having the detainee sit on file floor with his legs extended straight out in front of him with his anus raised above his head or kneeling on the floor while leaning back at a 45 degree angle.

[9.] Sleep deprivation will not exceed 11 days at a time.

[10.] The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20.to 40 seconds and the technique produces the sensation of drowning and suffocation."

12. Appendix F to the 2004 CIA Report (Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations of 4 September 2003) refers to "legally sanctioned interrogation techniques". It states, among other things, that "captured terrorists turned over to the CIA for interrogation may be subjected to a wide range of legally sanctioned techniques. ... These are designed to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence".

The techniques included, in ascending degree of intensity:

1) Standard measures (i.e. 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.

13. The CIA agents were authorised to use 4 standard interrogation techniques (sleep deprivation not exceeding 72 hours; continual use of light or darkness in a cell, loud music and white noise (background hum)) as indentified in November 2002 without the Headquarters' prior approval. The use of the EITs required a prior approval (paragraph 89 of the 2004 CIA Report).

14. 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 in connection with the application of the EITs to Abu Zubaydah, the first high-ranking Al'Qaeda prisoner who was to be subjected to those interrogation methods. 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.

15. The CIA 2004 Report further states that, subsequently, the CIA Office of General Counsel ("OGC") continued to consult with the US Department of Justice in order to expand the use of EITs beyond the interrogation of Abu Zubaydah. According to the report, "this resulted in the production of an undated and unsigned document entitled "Legal principles Applicable to CIA Detention and Interrogation of Captured Al'Qaeda Personnel". The document is still classified as top secret. Certain parts are, however, rendered in the 2004 CIA report. For instance, the report states the following:

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

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

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

17. The application of the EITs to other terrorist suspects in CIA custody, including the applicant in the present case, began in November 2002.

18. 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 Guantanamo Bay.

4. Role of Jeppesen Company

19. 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.

20. In the light of reports on rendition flights (see paragraphs 99-102 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.

21. 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.

B. The circumstances of the case

22. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The applicant's capture, transfer to the CIA's custody and his subsequent detention in Afghanistan and Thailand

23. At the end of October 2002 the applicant was captured in Dubai, in the United Arab Emirates.

24. By November 2002, he was transferred to the custody of the CIA. This fact is mentioned in paragraph 7 of the 2004 CIA Report:

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

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

26. After a brief stay at the "Salt Pit", US agents took him to yet another secret CIA prison in Bangkok, Thailand, where he remained until 4 December 2002. The CIA subjected the applicant to the EITs (see also paragraphs 9-16 above) from November 2002 until 4 December 2002. In particular, during two separate interrogation sessions they subjected him to the so-called "waterboarding".

2. Transfer to Poland and detention in the so-called "black site" in Stare Kiejkuty

27. The applicant submits that he was "rendered" to Poland under the HVD Programme on or about 5 December 2002.

On 4 December 2002, the CIA transported the applicant on a chartered flight with tail number N63MU from Bangkok to a secret CIA detention site in Poland. The flight flew from Bangkok *via* Dubai and landed in Szymany, Poland, on 5 December 2002 at 14h56. The flight was disguised under multiple layers of secrecy characterising flights that the CIA chartered to transport persons under the HVD programme (see also paragraphs 81-83 and 99-102 below).

28. The fact that the applicant was transferred to a secret detention site on 5 December 2002 and then tortured is confirmed in paragraph 224 of the of the 2004 CIA Report, which states:

> "224. With respect to Al-Nashiri [REDACTED] reported two waterboard sessions in November 2002, after which psychologist/interrogators determined that Al-Nashiri was compliant. However, after being moved [REDACTED] Al-Nashiri was thought to be withholding information. Al-Nashiri subsequently received additional EITs, but not the waterboard. The Agency then determined Al-Nashiri to be 'compliant'. Because of the litany of techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why Al-Nashiri became more willing to provide information. However, following the use of EITs, he provided information about his most current operational planning and [REDACTED] as opposed to the historical information he provided before the use of EITs."

29. The applicant, relying on official documents disclosed by the Polish Border Guard to the Helsinki Foundation for Human Rights, states that those documents confirm that Polish officials cleared flight N63MU for arrival at Szymany airport on 5 December 2002. In this connection, the applicant produced a letter from the Border Guard Office to the Helsinki Foundation dated 23 July 2010. The letter, in so far as relevant, reads 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 takeoff 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. ..."

30. The applicant further refers to a 2007 Council of Europe report ("the 2007 Marty report" – see also paragraphs 73-82 below), which identifies N63MU as a "rendition plane" that arrived in Szymany from Dubai at 14h56 on 5 December 2002

31. The applicant was subjected to torture and inhuman and degrading treatment while he was held incommunicado in a secret prison on Polish territory.

The 2004 CIA Report, in paragraphs 90-98, refers to the following events that took place in December 2002 and January 2003 when he was, as he alleges, held in Poland:

"Specific Unauthorized or Undocumented Techniques

90. [REDACTED] This Review heard allegations of the use of unauthorized techniques [REDACTED]. The most significant, the handgun and power drill incident, discussed below, is the subject of a separate OIG investigation. In addition, individuals interviewed during the Review identified other techniques that caused concern because DoJ had not specifically approved them. These included the making of threats, blowing cigar smoke, employing certain stress positions, the use of a stiff brush on a detainee, and stepping on a detainee's ankle shackles. For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination regarding the facts. Thus, although these allegations are illustrative of

the nature of the concerns held by individuals associated with the CTC Program and the need for clear guidance, they did not warrant separate investigations or administrative action.

Handgun and Power Drill

91. [REDACTED] interrogation team members, whose purpose was to interrogate-Al-Nashiri and debrief Abu Zubaydah initially staffed [REDACTED]. The interrogation team continued EITs on Al-Nashiri for two weeks in December 2002 [REDACTED] they assessed him to be 'compliant'. Subsequently, CTE officers at Headquarters [REDACTED] sent a [REDACTED] senior operations officer (the debriefer) [REDACTED] to debrief and assess Al-Nashiri.

92. [REDACTED] The debriefer assessed AI-Nashiri as withholding information, at which point [REDACTED] reinstated [REDACTED] hooding, and handcuffing. Sometime between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information. After discussing this plan with [REDACTED] the debriefer entered the cell where Al-Nashiri sat shackled and racked [racking is a mechanical procedure used with firearms to chamber a bullet or simulate a bullet being chambered] the handgun once or twice close to Al-Nashiri's head. On what was probably the same day debriefer used a power drill to frighten Al-Nashiri. [REDACTED] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill.

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

Threats

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

...

Smoke

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

> Stress Positions
>
> 97. [REDACTED] OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed AI-Nashiri backward while he was in this stress position. On another occasion [REDACTED] said he had to intercede after [REDACTED] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [REDACTED] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.
>
> Stiff Brush and Shackles
>
> 98 [REDACTED] interrogator reported that he witnessed other techniques used on Al-Nashiri that the interrogator knew were not specifically approved by DoJ. These included the use of a stiff brush that was intended to induce pain on Al-Nashiri and standing on Al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [REDACTED] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. A CTC manager who had heard of the incident attributed the abrasions on Al-Nashiri's ankles to an Agency officer accidentally stepping on Al-Nashiri's shackles while repositioning him into a stress position."

32. The use of the EITS on the applicant and his ill-treatment, in particular threats and subjection to prolonged stress positions at the relevant time (i.e. in his "third place of detention" which was allegedly Poland) is also described 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 after they were transferred to Guantanamo Bay (for a detailed description see paragraphs 91-93 below).

3. Transfer to the US Gunatanamo Bay Naval Base

33. On or about 6 June 2003, Polish authorities assisted the CIA in secretly transferring the applicant from Poland to Rabat, Morocco, on a rendition plane flight N379P.

There was apparently no attempt by the Polish Government to seek diplomatic assurances from the United States to avert the risk of his being subjected to further torture, incommunicado detention, an unfair trial, or the death penalty when in the US custody.

34. The applicant submits that official documents released by the Polish Border Guard to the Helsinki Foundation for Human Rights confirm that flight N379P was cleared for departure from Szymany airport on 6 June 2003 (see paragraph 29 above).

In this connection, he also cites the 2007 Marty Report, which identifies flight N379P as a "rendition plane" that flew from Kabul and landed in Szymany airport the previous day, i.e., on 5 June 2003 (see paragraphs 74-82 below).

35. He further adds that 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 N379P's movements over

3-7 June 2003 "conform to the most typical attributes of a CIA rendition circuit". The data collected and examined in the CHRGJ Report shows that a Gulfstream V aircraft, registered with the US Federal Aviation Administration as N379P, embarked from Dulles Airport, Washington D.C. on Tuesday June 3, at 23 h33m GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries including Germany, Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal back to Dulles Airport on 7 June 2003 (for further details (see also paragraphs 99-102 below).

36. The applicant, relying on the CHRGJ flight data analysis, states that it confirms that the Polish Government granted licences and overflight permissions to facilitate the CIA rendition flight N379P and that the Polish Air Navigation Services Agency (PANSA) (*Polska Agencja Żeglugi Powietrznej*) officials collaborated with Jeppesen (and, by extension, with Jeppesen's client, the CIA) by accepting the task of navigating this disguised flight into Szymany. Indeeed, they knowingly issued a permit for Warsaw, despite the fact that they knew that the aircraft was actually going to land in Szymany (for further details see paragraphs 81-82 and 99-102 below).

4. The applicant's further transfers during CIA custody

37. After his transfer out of Poland, the applicant was detained in Rabat, Morocco, until 22 September 2003, when he was flown to the US Naval Base in Guantanamo Bay.

38. On 27 March 2004 the CIA flew the applicant from Guantanamo Bay back to Rabat.

39. Subsequently, he was moved to the CIA secret detention facility in Bucharest, Romania, and remained there until he was finally transferred to Guantanamo Bay.

5. The applicant's detention in Guantanamo Bay and his trial before the Military Commission

40. On 6 September 2006 President Bush publicly acknowledged that 14 "high value detainees", including the applicant, had been transferred from the HVD Programme run by the CIA to the custody of the Department of Defense in the Guantanamo Bay Internment Facility (see also paragraph 18 above).

41. Since an unspecified date, presumably in September 2006, the applicant has been detained in the US Naval Base in Guantanamo Bay. By that time, he had already been held in undisclosed detention for nearly 4 years.

42. On 14 March 2007 the applicant was heard by the Combatant Status Review Tribunal, which purported to review all the information related to the question whether he met the criteria to be designated as an "enemy combatant" (i.e. an individual who was part of or supporting Taliban or Al'Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including one who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces). The hearing was closed to the public. The applicant was not

afforded legal counsel at this hearing. A "personal representative" was appointed for him, but this person did not act as counsel and the applicant's statements to this representative were not privileged. He did not have access to any classified evidence that was introduced against him. Nor did he have the right to confront any of the accusations that were introduced at this hearing.

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

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

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

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

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

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

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

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

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

51. Military commission rules applicable to the applicant have changed since the time he was transferred from Poland and are now governed by the Military Commission Act of 2009, which was enacted on 28 October 2009. However, they still provide for the death penalty and retain many of the deficiencies associated with the previous military commission rules.

52. The United States Secretary of Defense or his designee acts as the convening authority for a given commission, approves charges for trial by a military commission and selects the commission members who are required to be members of the armed forces on or recalled to active duty, and as such are subordinate to the Secretary of Defense. Military commissions still apply only to non-US citizens. The current rules place no limits on the length of time within which a suspect must be charged or tried. Indeed, they expressly exempt military commissions from speedy trial requirements. Furthermore, the current military commission rules allow for the accused to be denied access to classified information or evidence and, unlike US federal court procedures which bar the admission of hearsay, they expressly permit hearsay evidence and do not bar convictions based mainly on such evidence.

53. The applicant submits that, given the widespread torture and abuse of US terrorism suspects, whose statements could be introduced as hearsay evidence against him, he is in consequence unable to confront witnesses against him. Unlike US federal court procedures which bar the admission of evidence derived from coerced statements, the current military commission rules admit evidence derived from coerced statements if that evidence would have been otherwise obtained and the use of such evidence would be consistent with the interests of justice. Moreover, the military commissions will still be held in the remote location of Guantanamo Bay, thereby significantly hindering public access to the proceedings against the applicant. Finally, there is considerable uncertainty associated with the current military commission rules, which were enacted as recently as October 2009 and have been applied so far in only three cases, none of which involved the death penalty.

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

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

two of his alleged co-conspirators in the USS *Cole* bombing – Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso – in the US federal court. The relevant indictment, filed on 15 May 2003 while the applicant was secretly held in CIA custody in Poland, identified him as an unindicted co-conspirator in the USS *Cole* bombing.

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

57. On 27 April 2011 Mr MacDonald informed the US military defence counsel for the applicant that he would accept written submissions against the death penalty until 30 June 2011. In the applicant's view, this implied that he would shortly thereafter make a decision on whether capital charges should be referred to a specified military commission for trial.

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

6. International inquiries relating to CIA secret detentions and renditions of suspected terrorists in Europe

(a) Human Rights Watch Reports

59. On 6 November 2005 the Human Rights Watch issued a "Statement on US Secret Detention Facilities in Europe" ("the 2005 HRW Statement"). 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 124 below).

60. 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."

61. 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:
>
> ...
>
> 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.
>
> ..."

(b) Council of Europe

(i) Procedure under Article 52 of the Convention

62. 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 – at that time 45 – 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.

63. 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:

> "I am writing to you after having studied your very substantial report under Article 52 ECHR which you published on the basis of the replies from all Member States on your question.
>
> I would like to underline an excellent expertise, balanced conclusions and important proposals for the farther standard setting process, presented in your report.

In a spirit of our good cooperation, I address you hoping that this additional explanation could change some criticism, concerning Poland's reply which you expressed.

1. I would like to add the information which also the Head of the Polish delegation to the Parliamentary Assembly, Mr. Karol Karski, passed the 9 of March to Mr. Dick Marty: 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.

2. Allow me also to clarify the misunderstanding which occurred in the meantime concerning Poland's position expressed on allegations. 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.

3. Allow me as well to complete and clarify the explanation, given in our reply with regard to the question on the activities of foreign agencies on the territory of the Republic of Poland ....

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 the 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."

64. 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.

(ii) Parliamentary Assembly's inquiry - "the Marty inquiry"

65. 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.

66. 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.

(α) The 2006 Marty Report

67. On 7 June 2006 Mr Dick Marty presented to the Parliamentary Assembly his first report prepared in the framework of the investigation launched on 1 November 2005 (see paragraph 65 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".

68. Chapter 1.3 of the 2006 Marty Report, entitled "Secret CIA prisons in Europe?", reads, in so far as relevant, as follows:

> "7. This was the news item circulated in early November 2005 by the American NGO Human Rights Watch (HRW), the Washington Post and the ABC television channel. Whereas the Washington Post did not name specific countries hosting, or allegedly having hosted, such detention centres, simply referring generically to 'eastern European democracies', HRW reported that the countries in question are Poland and Romania. On 5 December 2005, ABC News in turn reported the existence of secret detention centres in Poland and Romania, which had apparently been closed following the Washington Post's revelations.
>
> According to ABC, 11 suspects detained in these centres had been subjected to the harshest interrogation techniques (so-called "enhanced interrogation techniques') before being transferred to CIA facilities in North Africa. It is interesting to recall that this ABC report, confirming the use of secret detention camps in Poland and Romania by the CIA, was available on the Internet for only a very short time before being withdrawn following the intervention of lawyers on behalf of the network's owners. The Washington Post subsequently admitted that it had been in possession of the names of the countries, but had refrained from naming them further to an agreement entered into with the authorities. It is thus established that considerable pressure was brought to bear to ensure that these countries were not named. It is unclear what arguments prevailed on the media outlets in question to convince them to comply. ..."

69. Chapter 2.2, entitled "Components of the spider's web" describes the network of rendition flights. It is illustrated by a graph, showing connections between various places of rendition, transfer and detention places worldwide. It reads, in so far as relevant, as follows:

> "39. In addition to CIA black sites', the spider's web also encompasses a wider network of detention facilities run by other branches of the United States Government. Examples reported in the public domain have included the US Naval Base at Guantanamo Bay and military prisons such as Bagram in Afghanistan and Abu Ghraib in Iraq. Although the existence of such facilities is known, there are many aspects of their operation that remain shrouded in secrecy too.
>
> 40. It should also be noted that 'rendition' flights by the CIA are not the only means of transporting detainees between different points on the web. Particularly in the context of transfers to Guantanamo Bay, detainees have been moved extensively on military aircraft, including large cargo planes. Accordingly, military flights have also fallen within the ambit of my inquiry.
>
> The graphic included in this report depicts only a small portion of the global spider's web. It consists of two main components.
>
> 42. First it illustrates the flights of both civilian and military aircraft, operated by the United States, which appear to be connected to secret detentions and unlawful inter-state transfers also involving Council of Europe member States. This inquiry is based on seven separate sets of data from Eurocontrol, combined with specific information from about twenty national aviation authorities in response to my requests. In this way, we have obtained a hitherto unique database.
>
> 43. Second, it distinguishes four categories of aircraft landing points, which indicate the different degrees of collusion on the part of the countries concerned. These landing points have been placed into their respective categories as follows on the basis of the preponderance of evidence gathered:
>
> Category A: 'Stopover points' (points at which aircraft land to refuel, mostly on the way home); ...; Category B: 'Staging points'(points from which operations are often launched - planes and crews prepare there, or meet in clusters) ...; Category C: 'One-off pick-up points' (points from which, according to our research, one detainee or one group of detainees was picked up for rendition or unlawful transfer, but not as part of a systematic occurrence) ...; Category D: 'Detainee transfer / Drop-off points' (places visited often, where flights tend to stop for just short periods, mostly far off the obvious route – either their location is close to a site of a known detention facility or a prima facie case can be made to indicate a detention facility in their vicinity): Cairo; Amman; Islamabad; Rabat, Kabul; Guantanamo Bay; Timisoara/Bucharest; Tashkent; Algiers; Baghdad; Szymany."

70. Chapter 2.6.3 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.

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.

71. Chapter 6, entitled "Attitude of governments" states, among other things, the following:

"230. It has to be said that most governments did not seem particularly eager to establish the alleged facts. The body of information gathered makes it unlikely that European states were completely unaware of what, in the context of the fight against international terrorism, was happening at some of their airports, in their airspace or at American bases located on their territory. Insofar as they did not know, they did not want to know. It is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services. If this were the case, one would be justified in seriously questioning the effectiveness, and therefore the legitimacy, of such services. The main concern of some governments was clearly to avoid disturbing their relationships with the United States, a crucial partner and ally. Other governments apparently work on the assumption that any information learned via their intelligence services is not supposed to be known."

72. 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."

73. 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. This 'web', shown in the graphic, is composed of several landing points, which we have subdivided into different categories, and which are linked up among themselves by civilian planes used by the CIA or military aircraft.

...

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.

288. In this sense, it must be stated that to date, the following member States could be held responsible, to varying degrees, which are not always settled definitively, for violations of the rights of specific persons identified below (respecting the chronological order as far as possible):

...

289. Some of these above mentioned states, and others, could be held responsible for collusion – active or passive (in the sense of having tolerated or having been negligent in fulfilling the duty to supervise) - involving secret detention and unlawful inter-state transfers of a non specified number of persons whose identity so far remains unknown:

- Poland and Romania, concerning the running of secret detention centres;

..."

(β) The 2007 Marty Report

74. On 8 June 2007 the Parliamentary Assembly adopted the second report prepared by Mr Dick Marty ("the 2007 Marty Report"), 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.

75. The introductory remarks read, in so far as relevant:

> "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.
>
> 11. In our view, the countries implicated in these programmes have failed in their duty to establish the truth: the evidence of the existence of violations of fundamental human rights is concrete, reliable and corroborative. At the very least, it is such as to require the authorities concerned at last to order proper independent and thorough inquiries and stop obstructing the efforts under way in judicial and parliamentary bodies to establish the truth. International organisations, in particular the Council of Europe, the European Union and NATO, must give serious consideration to ways of avoiding similar abuses in future and ensuring compliance with the formal and

binding commitments which states have entered into in terms of the protection of human rights and human dignity.

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. ..."

76. 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 is 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).

...."

77. 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 reads, 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.

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."

78. Paragraphs 123-135 explain the US's choice of European partners. This part of the report reads, in so far as relevant, as follows:

"123. It is interesting to note that the United States chose, in the case of Poland and Romania, to form special partnerships with countries that were economically vulnerable, emerging from difficult transitional periods in their history, and dependent on American support for their strategic development.

124. In terms of both political and intelligence considerations, several sources confirmed that much of the Eastern European 'bloc' was considered 'out of bounds' for the CIA in contemplating sites for its covert HVD programme. A long-serving CIA officer shared the following analysis with us:

'In a lot of those counties, there is still a mindset formed during the Cold War that we are not always on their side. There is a certain tendency to be less than open to our advances. You have to remember most of the East European services are KGB services and that doesn't change overnight.

I think Poland is the main exception; we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it's intelligence, or economics, or politics or diplomacy – they are our allies. I guess if there is a special relationship outside of the 'four eyes' group, then it is the Americans and the Poles.'

125. In Poland's case, a specific strategic incentive tied in with the NATO framework was the United States' staunch support for the establishment in Poland of the lucrative 'NATINADS' programme - the NATO Integrated Air Defence System. Poland participated in the US-led military coalitions in both Afghanistan and Iraq, notably contributing significant Special Forces deployments to Operation Enduring Freedom, and later assuming control of one of the 'zones' of allied control

in Iraq. An ongoing process of realignment and reform of intelligence structures is dedicated primarily to purging the secret services of so-called 'communist remnants'.

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 Guantanamo Bay was announced by President Bush on 6 September 2006."

79. Paragraphs 167-179 describe the cooperation between the US and Polish intelligence services. The relevant passages red 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."

80. 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 Kwasniewski 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. ..."

81. 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 m 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 m 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 01h00 on 5 June 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’

...

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.”

82. Paragraph 197 explains the transfer of 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."

83. Referring 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."

(γ) The 2011 Marty Report

84. 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.

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 Guantanamo 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.

13. The human rights NGO Open Society Justice Initiative (OSJI) recently lodged an application against Poland before the European Court of Human Rights on Mr al-Nashiri's behalf. This is the second application by a victim of CIA renditions. ..."

(c) European Parliament

(i) "The Fava inquiry"

85. On 18 January 2006 the European Parliament set up a Temporary Committee on Extraordinary Rendition and appointed Mr Claudio Fava as

rapporteur with a mandate to investigate the alleged existence of CIA prisons in Europe. 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.

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

86. The report, deploring the passivity of some EU Member States in the face of illegal CIA operations, as well as the lack of co-operation from the EU Council of Ministers was approved with 382 votes in favour, 256 against with 74 abstentions on 14 February 2007.

87. As regards Poland, the report 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 Guantanamo in September 2006 coincide with those mentioned in a report by ABS News published in December 2005 (see paragraph 89 below) listing the identities of twelve to 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

88. The report censored the lack of cooperation of many member States and of the Council of the EU towards the Temporary Committee. The national governments specifically criticised for their unwillingness to cooperate with Parliament's investigations were those of Austria, Italy, Poland, Portugal and the United Kingdom.

(ii) The EU Parliament February 2007 Resolution

89. On 14 February 2007, following the examination of the Fava Inquiry 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 EU February 2007 Resolution"). It read, in so far as relevant, as follows:

> "The European Parliament,
>
> ...
>
> 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;
>
> 14. Believes that the serious lack of concrete answers to the questions raised by victims, nongovernmental organisations (NGOs), the media and parliamentarians has only served to strengthen the validity of already well-documented allegations;
>
> ...

36. Recalls that the programme of extraordinary rendition is an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves incommunicado detention and torture;

...

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 turnin 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;

...

POLAND

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;

...

176. Takes note of the declarations made by Szymany Airport employees, and notably by its former manager, according to which:

- in 2002, two Gulfsfream jets, and in 2003, four Gulfsfream jets with civilian registration numbers were parked at the edge of the airport and did not enter customs clearance;

- orders were given directly by the regional 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 to complete the technical arrangements only after the landing;

- according to a former senior official of the airport, no Polish civilian or military staff were permitted to approach the aircraft;

- excessive landing fees were paid in cash - usually between EUR 2,000 and EUR 4,000;

- one or two vehicles waited for the arrival of the 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 following the vehicles on one occasion and seeing them heading towards the intelligence training centre at Stare Kiejkuty;

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 Guantanamo 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 Waszykowski 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."

(iii) The 2011 Resolution

90. On 9 June 2011 the European Parliament adopted its resolution on Guantánamo: imminent death penalty decision (doc.B70375/2011) relating to the applicant. It reads:

"The European Parliament,

- having regard to its previous resolutions on the death penalty and notably those of 7 October 2010 on the World Day against the death penalty and of 10 July 2008 on the death penalty, particularly the case of Troy Davis, on Guantánamo, notably those or 13 June 2006 on the situation of prisoners at Guantánamo and of 10 March 2004 on the Guantánamo prisoners right to a fair trial, as well as those on alleged CIA flights and prisons on EU soil,

- having regard to the Joint study on global practices in relation to secret detention in the context of countering terrorism of 19 February 2010 by the UN Special Rapporteur on Torture, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Working Groups on Arbitrary Detention and Enforced or Involuntary Disappearances,

- having regard to Rule 122(5) of its Rules of Procedure,

A. whereas in response to the attacks of 11 September 2001 the United States responded by developing a global 'war' framework under which its interpretation of the laws of war would apply to the exclusion of international human rights law,

B. whereas, in consequence, the United States administration has resorted to illegal practices under international law such as torture and other forms of ill-treatment, enforced disappearances, secret prisons, indefinite detention outside the criminal justice system and unfair trials by military commission, established by President Bush by way of a Military Order on 13 November 2001,

....

F. whereas Abd al-Rahim al-Nashiri, a Saudi national, will be the first case to be tried in front of a military commission since President Obama ordered those trials to resume and whereas the government is seeking the death penalty on charges that Mr Al-Nashiri had a leading role in the attack on the USS Cole in Yemen on 12 October 2000 and on the French oil tanker MV Limburg on 6 October 2002,

G. whereas the option of the death penalty has to be approved by the 'convening authority'of the military commissions, Navy Vice Admiral Bruce MacDonald, who is prepared to receive written submissions until 30 June,

H. whereas Mr. Al-Nashiri was arrested in Dubai, United Arab Emirates, by local security forces in October 2002, handed over into US custody one month later and held in Secret custody at undisclosed locations by the USA's central intelligence agency (CIA) for almost four years, before being transferred to military custody at Guantánamo in September 2006,

I. whereas during the period of nearly 4 years in CIA custody - according to public sources - he was held incommunicado, in solitary confinement, was subjected to torture, including by 'water-boarding', as well as other cruel, inhuman or degrading treatment, such as shackling, hooding and nudity as well as to a number of 'unauthorized' techniques, including being threatened with a handgun and a electric power drill, 'potentially injurious stress positions' and the use of a stiff brush [used in bathing] that was intended to induce pain", and standing on al-Nashiri's shackles, which resulted in cuts and bruises,

J. whereas EU Member States have outlawed the death penalty on their territory, while the European Union has the abolition of the death penalty as a key objective and has adopted EU guidelines and supported initiatives on the international level for a moratorium on capital punishment,

K. whereas international human rights law, while recognizing that some countries retain the death penalty, prohibits the imposition and execution of a death sentence based on a trial that has not met the highest standards of fairness,

L. whereas in 2007 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms called on the United States to disestablish the military commissions and in 2009 the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged the US not to conduct any capital prosecutions before military commissions,

M. whereas Mr Al-Nashiri has alleged that he was held in a secret CIA detention centre in Poland between 2002 and 2003 for several months and tortured during that time, whereas on 10 May 2011 he appealed to the European Court of Human Rights supported by several human rights organizations, requesting that the Polish Government intervene with the US authorities to try to stop the military commission prosecution from seeking the death penalty,

N. whereas according to the UN Special Rapporteur on Torture, Manfred Novak new information seems to confirm that Abd al-Rahim al Nashiri was also for some time between 2003 and 2005 held in a small jail in Bucharest, Romania,

O. whereas the Polish authorities removed deputy prosecutor Jerzy Mierzewski from the case he was investigating on the alleged torture of Abd al-Rahim al-Nashiri, at a secret CIA prison in Poland, citing an 'administrative shuffle'; whereas his immediate superior Robert Majewski, was dismissed; whereas on 20 January 2011 the Polish prosecutor had officially recognized another prisoner, Abu Zubaydah, as a victim of secret CIA detention in Poland,

P. whereas according to reports the Polish state prosecutors had been considering bringing charges against members of the government at the time for their alleged involvement in secret CIA prisons located on Polish soil between 2002 and 2005, including former Prime Minister Leszek Miller, for violating Poland's Constitution by helping to illegally imprison a number of people and participating in war crimes and crimes against humanity, charging equally that an intelligence centre, located in Poland but outside of Polish jurisdiction would be in breach of the Polish Constitution,

1. Reiterates its condemnation of the continuing violations of international humanitarian and human rights law by the United States government in upholding its

practice of indefinite detention outside the criminal justice system and unfair trials by military commission;

2. Restates its long-standing opposition to the use of torture and ill-treatment as well as to the death penalty in all cases and under all circumstances and strongly criticizes the fact that no-one has been brought to justice for human rights violations to which Abd al-Rahim al-Nashiri and other prisoners held under the CIA secret program were subjected, either in Europe or in the United States;

3. Recognizes that Abd al-Rahim al-Nashiri has been accused of serious crimes while however expressing its deep concern that the US authorities in his case have violated international law for the last 9 years;

4. Calls on the 'convening authority' not to apply the death penalty on Abd al-Rahim al-Nashiri, on the grounds that the military commission trials do not meet the standards internationally required for the application of the death sentence;

5. Appeals to the particular responsibility of the Polish and the 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;

6. Calls on the High Representative Catherine Ashton and the Commission to actively support the Polish Government in any such move;

7. Insists that Mr Al-Nashiri and all other detainees in US custody should be charged in due time and tried according to international standards of rule of law or else be released; underlines, in this context, that the same standards of fair trial should be applied to all, regardless of national origin, descent or belief;

8. Calls on the Council and Commission to establish a mechanism for an independent investigation into any allegation of secret detention and 'extraordinary rendition' with a view to bringing the perpetrators to justice;

..."

(c) The 2007 ICRC Report

91. The International Committee of the Red Cross 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. 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 Guantanamo Bay Naval Base (see also paragraphs 18 and 89 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. On this basis, it drafted its Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody of February 2007 – the 2007 ICRC Report – which related to 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 report was (and formally remains) classified as "strictly confidential". 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[1].

92. The rendition programme as applied to those detainees is, 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 Guantanamo 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.

[1] http:///www.aclu.org

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

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. As such, the fourteen had become missing persons. In any context, such a situation, given its prolonged duration, is clearly a cause of extreme distress for both the detainees and families concerned and itself constitutes a form of ill-treatment.

In addition, the detainees were denied access to an independent third party. In order to ensure accountability, there is a need for a procedure of notification to families, and of notification and access to detained persons, under defined modalities, for a third party, such as the ICRC. That this was not practiced, to the knowledge of the ICRC, neither for the fourteen nor for any other detainee who passed through the CIA detention program, is a matter of serious concern.

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 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 Khaied 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.

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

...

1.3.10. THREATS

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

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

...

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 parries, 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 Reports

(i) The 2010 UN Joint Study

93. 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).

94. In the summary, the experts explained their methodology as follows:

"In conducting the present study, the experts worked in an open, transparent manner. They sought inputs from all relevant stakeholders, including by sending a questionnaire to all States Members of the United Nations. Several consultations were held with States, and the experts shared their findings with all States concerned before the study was finalized. Relevant excerpts of the report were shared with the concerned States on 23 and 24 December 2009.

In addition to United Nations sources and the responses to the questionnaire from 44 States, primary sources included interviews conducted with persons who had been held in secret detention, family members of those held captive, and legal representatives of detainees. Flight data were also used to corroborate information. In addition to the analysis of the policy and legal decisions taken by States, the aim of the study was also to illustrate, in concrete terms, what it means to be secretly detained, how secret detention can facilitate the practice of torture or inhuman and degrading treatment, and how the practice of secret detention has left an indelible mark on the victims, and on their families as well."

95. In respect of secret detention in general, the experts stated the following:

"Secret detention violates the right to personal liberty and the prohibition of arbitrary arrest or detention. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, held outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus. Secret detainees are typically deprived of their right to a fair trial when State authorities do not intend to charge or try them. Even if detainees are criminally charged, the secrecy and insecurity caused by the denial of contact to the outside world and the fact that family members have no knowledge of their whereabouts and fate violate the presumption of innocence and are conducive to confessions obtained under torture or other forms of ill-treatment. At the same time, secret detention amounts to an enforced disappearance. If resorted to in a widespread or systematic manner, secret detention may even reach the threshold of a crime against humanity.

Every instance of secret detention is by definition incommunicado detention. Prolonged incommunicado detention may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, and may in itself constitute such treatment. The suffering caused to family members of a secretly detained (namely, disappeared) person may also amount to torture or other form of ill-treatment, and at the same time violates the right to the protection of family life.

It is not only States whose authorities keep the detainee in secret custody that are internationally responsible for violations of international human rights law. The practice of 'proxy detention', involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure ('rendition' or 'extraordinary rendition'), often in disregard of the principle of non-refoulement, also involves the responsibility of the State at whose behest the detention takes place. The Geneva Conventions, applicable to all armed conflicts, also prohibit secret detention under any circumstances."

96. The experts also referred to State complicity in secret detention:

"The experts also address the level of involvement and complicity of a number of countries. For purposes of the study, they provide that a State is complicit in the secret detention of a person when it (a) has asked another State to secretly detain a person; (b) knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person, or solicits or receives information from persons kept in secret detention; (c) has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility, or otherwise be detained outside the legally regulated detention system; (d) holds a person for a short time in secret detention before handing them over to another State where that person will be put in secret detention for a longer period; and (e) has failed to take measures to identify persons or airplanes that were passing through its airports or airspace after information of the CIA programme involving secret detention has already been revealed."

97. 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-eastern 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 passagesare 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."

(ii) The 2010 UN Observations

98. The UN Human Right Committee, in its Concluding Observations on the sixth periodic report of the Republic of Poland of 27 October 2010 – "the UN 2010 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

99. 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 35 above). It analysed in detail data strings relating to flight N379P on which, as the applicant submits, he was

transferred by the CIA from the Polish territory to Morocco (see also paragraph 33 above)..

The methodology adopted was explained as follows:

"The center, partnering with human rights and intergovernmental organizations, has engaged in factual research to unearth information about the existence and operation of Central Intelligence Agency ('CIA') 'black sites' in Poland. This work has been undertaken in conjunction with its representation of two of its clients—both Yemeni nationals, Mr. Mohamed Farag Ahmed Bashmilah and Mr. Mohammed AbduaUah Saleh al-Asad—who were detained in CIA 'black sites' in unknown locations until 2005 and whom we have represented since 2006.

To advance CHRGJ's investigatory work, the Center negotiated and secured an agreement with the inquiry of Senator Dick Marty, the Parliamentary Assembly of the Council of Europe Rapporteur on Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees ('the Marty Inquiry') under which particular sets of aeronautical data strings obtained by the Marty Inquiry could be made available to the Center and shared publicly. Data strings are exchanges of messages or digital data between different entities (including aviation service providers. Air Navigation Services authorities, airport authorities and government agencies) around the world on the Aeronautical Fixed Telelcommunciation Network ("AFTN") or the Société Internationale Télécommunique Aéronautique ("SITA") Network' Data strings record all communications filed in relation to particular aircrafts' flight plans and movements.

Based on a detailed analysis of data strings obtained from the Marty Inquiry and of publicly available information – including documentation released by the Polish Air Navigation Services Agency ('PANSA') to the Helsinki Foundation for Human Rights ('HFHR') in response to a Freedom of Information request filed under the Statute on Access to Public Information – the Center has been able to assemble information regarding the following in relation to a specific set of flights:

■ Who planned the flights, through what medium, and in collaboration with whom;

■ To whom and to what extent information about these flights was communicated through the AFTN or tiie SITA Network;

■ What permissions were granted for the flights, by whom, and in what form;

■ Where the aircraft landed and took off, and which different regions of international airspace the aircraft traversed, at what precise times; and

■ The number of persons on board as declared in the flight plan.

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. ..."

100. The report 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.

...

101. The introductory remarks end 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."

102. The report further contains a detailed analysis of the data strings concerning flight N379P:

"Flight records drawn from the database compiled by Council of Europe ('CoE) Rapporteur Dick Marty show that a Gulfstream V aircraft, registered with the U.S. Federal Aviation Administration as N379P, embarked from Dulles Airport in Washington, D.C. on Tuesday June 3, 2003 at 23h33m GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries. These six countries, in the order in which the aircraft landed there, were: Germany, Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal to the United States and landed back at Dulles Airport in Washington, D.C. on Saturday June 7, 2003.

...

I. Who planned the flights, through what medium and in collaboration with whom

To a great extent, CHRGJ's analysis reveals that these flights conformed to the most typical attributes of a CIA rendition circuit. First, the familiar travel service provider, responsible for the overall itinerary, route and technical provisions for the aircraft, was Jeppesen. Jeppesen filed a total of eight messages via the AFTN to the movements of N379P in the period from June 3-7, 2003, including seven separate flight plans and one cancellation.

Second, the aircraft travelled the entire circuit under various forms of exemption and special status, which indicate that the flights were planned and executed with the full collaboration of the United States Government and the 'host' states through which the aircraft travelled. In departing from and landing in the United States, N379P's flight plans were filed with the annotation ‚Department of State Support'. For all other component routes of this circuit (i.e. those routes that did not involve a departure from or a landing in the United States), N379P's flight plans were designated 'STS/ ATFM EXEMPT APPROVED' or 'STS/STATE'. As indicated above, such special status exemptions in their invocation alone demonstrate collaborative planning on the part of the states whose territory or airspace is being traversed, because they are only granted when specifically authorized by the national authority whose territory is being used.

In each instance that Jeppesen invoked a special status designation for the aircraft N379P, the IFPS operator responded by formally recognizing the designation – first, through inclusion of the relevant portions of the flight plan in copies to other authorities via the AFTN, and second, through acceptance of the flight plans in question.

II. To whom and to what extent information about these flights was communicated through the Aeronautical Fixed Telecommunications Network or the Société Internationale Télécommunique Aéronautique Network

All of the communications CHRGJ has found relating to the flight circuit of N379P in this period were exchanged over the AFTN network. Using this medium, the IFPS operator notified multiple national aviation authorities responsible for the component routes planned by Jeppesen for this circuit, by sending a copy of the respective flight plan(s).

The information filed in relation to the Kabul, Afghanistan to Poland component route of the circuit is an example of the systematic disguise of CIA flights into Poland, involving both American and Polish collaborators, as uncovered by CoE Rapporteur Marty in his 2007 report. Rapporteur Marty concluded that several flights, including N379P's flight into Poland on June 5, 2003, landed at Szymany Airport in northern Poland notwithstanding the filing of flight plans that indicated the landing was to be in Warsaw. The fact that Szymany was the actual destination has been corroborated by documentation released by PANSA to HFHR in response to a Freedom of Information request filed under the Statute on Access to Public Information. This newly released documentation confirms that PANSA navigated N379P into Szymany on June 5, 2003 despite all relevant flight plans having named Warsaw as the airport of destination. This indicates that Jeppesen filed "dummy" flight plans for the Poland portion of the June circuit, designed to obscure the fact that the plane actually went to Szymany. The fact that PANSA accepted Jeppesen's flight plan naming Warsaw, yet nevertheless navigated the plane to Szymany, demonstrates that once N379P arrived in Polish airspace, Polish authorities did not require it to comply with international aviation regulations by filing a correct flight plan naming Szymany as the plane's actual point of destination and subsequent departure. PANSA officials therefore collaborated with Jeppesen (and, by extension, with Jeppesen's client, the CIA) by accepting the task of navigating this disguised flight into Szymany without adhering to international flight planning regulations.

CHRGJ's analysis of the data strings reveals that the actual destination of the flight did not feature in any single communication between Jeppesen, PANSA, and the operators of the IFPS. Instead, at 04h59m32s GMT on June 5, 2003, Jeppesen filed a flight plan for the 'dummy' route from Kabul to Warsaw, which was accepted at 04h59m37s GMT by the IFPS operator and copied to the Polish Area Control Centre.

Later the same day, the IFPS operator twice copied the Kabul-Warsaw flight plan to additional Polish authorities, including the Warsaw-based navigation agency and the Air Traffic Control Tower at Warsaw Airport. The 'dummy' flight plan was disseminated to other national aviation authorities, who were therefore also misled about the plane's actual destination.

According to CHRGJ's analysis, no entity on the AFTN network received notice of the actual destination of the aircraft N379P upon its departure from Kabul. Hence N379P touched down secretly in Szymany not – Warsaw – at 0lh00m local time on June 5, 2003, and stayed on the runway for over two hours while the rest of the aviation monitoring community, including Eurocontrol, mistakenly had recorded a stopover in Warsaw.

In normal circumstances, there would have had to exist a record of an in-flight change of plan for the aircraft to land at Szymany, or a new filing of an onward flight plan from Szymany; but, due to the invocation of 'ATFM EXEMPT APPROVED'

special status, N379P was not required to adhere to these carefully conceived air traffic management protocols.

The cover-up then continued with the filing of the flight plan for the next route of the circuit, this time with a false airport of departure in Poland. At 05h00m37s GMT, just one minute after the IFPS operator had accepted the Kabul-Warsaw 'dummy' plan – and over seventeen hours before the aircraft's scheduled landing in Poland – Jeppesen filed a flight plan for N379P to fly from Warsaw to Rabat, Morocco. Once again, the message was copied only to the Polish Area Control Centre before being accepted by the IFPS operator. At 17h04m42s GMT on June 5, 2003, Jeppesen cancelled its first Warsaw-Rabat plan; but six seconds later, 17h04m48s GMT Jeppesen filed a second, apparently identical plan. Both of these 'dummy' flight plans were subsequently circulated to multiple other national aviation authorities, who were therefore also misled as to N379P's actual point of departure in Poland.

III. What permissions were granted for the flights, by whom and in what form

National aviation authorities routinely grant permits for flights to use their airspace or land in their territory, generally upon the specific request of the flight planner. In this case, Jeppesen was granted such routine permits by multiple national authorities. For the route from Kabul, Afghanistan to Szymany, Poland – for which Jeppesen had declared Warsaw as its airport of destination in its flight plan – Jeppesen invoked overflight permits from four countries, as well as a landing permit for its declared destination. These permits appeared in the data strings and were accepted by die IFPS operator in the following abbreviated form: 'WARSAW PMT NDW 7113 113/03'. The data strings indicate that the request for permission to land in Poland was specific to the Warsaw Airport. CHRGJ's analysis of the data strings and the PANSA documents obtained by HFHR reveal that Polish officials knowingly issued a permit for Warsaw, despite the fact that they knew that the aircraft was actually going to land in Szymany."

(f) The 2010 Amnesty International Report

103. On 15 November 2010 Amnesty International published a report entitled "Open secret: Mounting evidence of Europe's complicity in rendition and secret detention". It compiled the latest evidence of European countries' complicity in the CIA's programmes in the context of the fight against terrorism in the aftermath of the 11 September 2001 attacks in the USA.

104. In respect of Poland, the report stated, among other things, the following:

"POLAND: EVIDENCE MOUNTS IN SECRET PRISON INVESTIGATION

In response to freedom of information requests, new evidence of Polish complicity in the US-led rendition and secret detention programmes came in 2009-2010 from the Polish Air Navigation Services Agency (PANSA) and the Polish Border Guard Office. A criminal investigation, initiated by the Appeal Prosecutor's Office in Warsaw in 2008, has never made public its terms of reference or timeline. In September 2010, the Prosecutor's Office publicly confirmed that it was investigating claims by Saudi national Abd al-Rahim al-Nashiri that he had been held in secret detention in Poland in 2002-2003. Abd al-Rahim al-Nashiri was granted formal status as a victim by the Prosecutor's Office in October 2010. Also in October 2010, the UN Human Rights Committee called on Poland to ensure that any inquiry into the secret prison allegations had full investigative powers to call witnesses and compel the production of documents.

In compliance with Poland's Statute on Access to Public Information, PANSA released 19 pages of raw flight data to the Polish Helsinki Foundation for Human

Rights (HFHR) and the Open Society Justice Initiative (OSJI) in December 2009. The data revealed not only that planes operating in the context of the US rendition and secret detention programmes had landed on Polish territory – mainly at Szymany Airport, near the alleged site of a CIA-operated secret detention facility at Stare Kiejkuty – but also that PANSA had actively collaborated with the CIA to create 'dummy' flight plans to cover-up the true destinations of some of the flights: some flight plans listed Warsaw as the destination when in fact the plane had landed at Szymany. According to the data, PANSA also assisted in navigating aircraft into Szymany on two occasions without having received any official flight plans at all.

After eight years of consistent and often vehement denials of any involvement in CIA counterterrorism operations, the release of the flight data from PANSA marked the first time that a Polish government agency officially confirmed the allegations of Polish involvement in the CIA's rendition programme.

Further confirmation of Polish involvement in these operations came in July 2010 with information released to the HFHR from the Polish Border Guard Office indicating that between 5 December 2002 and 22 September 2003 seven aircraft operating in the context of the CIA's rendition programme landed at Szymany airport. On five of the flights, passengers were aboard on arrival, but on departure only the crew remained on board.

...

The official information about passenger numbers partially resolved the question raised in an interview on Polish radio in February 2009 during which prosecutors from the State Prosecutor's Office publicly acknowledged that they had evidence that 11 flights had landed in Poland, but also stated that they had no evidence that any passengers were aboard. It is also consistent with the claims of unnamed Polish intelligence officials who told the Polish daily *Dziennik* in September 2008 that the CIA had operated a secret prison inside a military intelligence training base in Stare Kiejkuty in north-eastern Poland near Szymany airport.

The findings of the PACE and TDIP reports, in combination with the new evidence disclosed between 2008 and 2010, stand in stark contrast to the conclusions of a 2005 internal inquiry by the Parliamentary Special Services Committee (*Komisja do Spraw Służb Specjalnych*), which never made its report public, but categorically denied Poland's involvement in the CIA's rendition and secret detention programmes.

Some commentators have analyzed the Border Guard Office information and speculated that the flight landing dates in Poland coincided with the capture and/or transfer of so-called 'high value detainees who the US government has acknowledged were held in secret prisons abroad. Intergovernmental, non-governmental and press reports had previously identified persons that unnamed CIA sources claimed were held in a Polish secret detention facility. Those names included Abu Zubaydah, Khalid Sheikh Mohamed, and Ramzi bin al-Shibh, among others. Analysis contained in the February 2010 UN Joint Study on Secret Detention, supported by the statements of confidential sources, gave credence to the notion that one of the secret detainees held in Poland was Abd al-Rahim al-Nashiri, a Saudi national alleged to have masterminded the bombing of the USS Cole, and who is currently detained and awaiting trial by military commission in Guantanamo Bay.

...

The CIA IG's report included graphic descriptions of how between 28 December 2002 and 1 January 2003 – during the time it has been alleged that Adb al-Rahim al-Nashiri was held in secret detention in Poland – one "debriefer" (interrogator) threatened al-Nashiri by racking an unloaded handgun near his head and a separate time by holding a bitless power drill up to his head, while al-Nashiri stood naked and hooded, and revving up the drill. In another instance, the debriefer threatened to bring

Abd al-Rahim al-Nashiri's family to the detention facility believing that al-Nashiri would infer that this meant that women family members would be sexually assaulted.119 The IG's report labelled these techniques as 'unauthorized'and referred the case to the criminal division of the US Department of Justice, which declined to prosecute.

...

Further representations on Abd al-Rahim al-Nashiri's behalf were made in September 2010 when the Open Society Justice Initiative in co-operation with Polish lawyer Mikołaj Pietrzak submitted a request to the Appeals Prosecutor's Office to pursue specifically a criminal investigation into the ill-treatment of al-Nashiri while in Poland. It was the first time that an individual victim of the CIA's rendition and secret detention programmes had sought a legal remedy in Poland. ... A significant development came on 27 October 2010 when the Prosecutor granted Abd al-Rahim al-Nashiri formal status as a victim, giving his representatives the right to participate in the proceedings. An Associated Press story that same day cited unnamed former US intelligence officials stating that Abd al-Rahim al-Nashiri and Abu Zubaydah had been held in a secret detention facility codenamed "Quartz" in northern Poland.

...

Amnesty International wrote to Polish Premier Donald Tusk in February 2010 requesting that the government urge the investigating prosecutors to follow-up on the information provided in the UN joint study regarding Abd al-Rahim al-Nashiri and also to make as transparent as possible the terms of reference, general lines of inquiry, and timeline for the investigation. A reply from the Prosecutor's Office on 22 July 2010 reiterated that given to the UN experts: the Polish prosecutors could not comply with Amnesty International's request for information because the evidence gathered was classified and the prosecutors bound by confidentiality; thus, the results would not be published until the investigation was concluded.

Despite the general lack of transparency surrounding the investigation into the secret prison, the Polish daily *Gazeta Wyborcza* has reported that prosecutors were considering laying charges against some of Poland's highest level former officials. The prosecution theory alleges that former officials knew of and authorized the CIA operations and thus assumed legal responsibility for any crimes that may have been committed in the course of these operations. Cases against high-level officials for violations of the Polish Constitution and/or criminal acts require parliamentary approval and referral to Poland's [Court] of State.

On 27 October 2010 the UN Human Rights Committee called on the government of Poland to ensure that it establishes an independent inquiry, with public findings, into its role in CIA renditions and secret detention ... that has "full investigative powers to require the attendance

Recommendation

Amnesty International calls on the Polish Prosecutor's Office to ensure that the investigation into the allegations of Polish complicity in renditions and secret detention continues with as much transparency as possible and in conformity with Poland's international legal obligations. Representatives of any persons granted victim status should be permitted to participate in the proceedings in accordance with principles of victims' rights under Polish and international law."

7. Parliamentary inquiry in Poland

105. In November-December 2005 a brief parliamentary inquiry into allegations that a secret CIA detention site existed in the country was conducted in Poland. The inquiry was conducted by the Praliamentary 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". According to the 2006 Marty Report (see also paragraphs 67-73 above), "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 refers to the Polish parliamentary inquiry, stating, among other things that "the only public indication given by the commission was that there ha[d] not been any CIA prisons in Poland" (see also paragraph 84 above),

8. Criminal investigation in Poland

106. 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. The authorities did not disclose the terms of reference or the precise scope of the investigation. Later, on an unspecified date, 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.

107. On 1 April 2009 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 an unspecified date, presumably either at the end of 2011 or at the beginning of 2012, when it was transferred to the Kraków Prosecutor of Appeal (see paragraph 119 below).

108. 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 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. Theinformation 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 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 the wide range of procedural activities are classified, is not possible,
>
> Taking into consideration the above, it is not possible to indicate the precise date of the terminationof the investigation."

109. On unspecified date in 2009, in responding to a questionnaire from the UN experts working on the 2010 UN Joint Study (see also paragraphs 93-98 above), 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."

110. 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". They 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 paragraph 97 above).

111. On 21 September 2010 the Polish lawyer for the applicant filed an application with the Warsaw Regional Prosecutor, asking for an investigation into his detention and treatment in Poland to be opened. The application included numerous evidentiary motions, requesting that the investigating prosecutors hear evidence from the applicant and a number of other witnesses, admit documentary evidence and ask appropriate entities to disclose the identities and locations of persons who needed to be heard in the investigation.

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.

112. 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.

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

114. 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 98 above).

115. 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 international public law on the issues relevant for the investigation be obtained. The contents of the order, questions and answers from the experts were not made public but leaked to the press and were published by *Gazeta Wyborcza* daily on 30 May 2011. There was no subsequent *démenti* from the prosecution. The text of the prosecutors' order read, in so far as relevant, as follows:

> "... Order on obtaining a report – appointing an expert in the case concerning abuse of power by the State officials, i.e. the offence defined in Article 231 and others [of the Criminal Code].
>
> Robert Majewski, the 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 international public law, i.e. .....in order to establish whether [list of 10 questions rendered below]."

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

> "1. Are there any provisions of international public 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 international public law permitting to exclude a facility for holding persons suspected of terrorist activity 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 treated 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 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 laws of specific states.

9. Are the regulations issued by the USA authorities in respect of persons considered to conduct 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, [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 international public law relating to the legal status, treatment, methods of interrogation and procedural guarantees of persons arrested under suspicion of conducting terrorist activity."

116. On 25 February 2011 the applicant's lawyer filed, through the Warsaw Prosecutor of Appeal, a complaint with the Warsaw Regional Court (*Sąd Okręgowy*) under the Law of 17 June 2004 on complaints about the breach of the right to a trial within a reasonable time *(Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act"). The applicant asked the court to find that the length of the investigation had been excessive, order the investigating prosecutor to take actions to counteract the delay and to mitigate the consequences of the delay that had already occurred. He also asked the court to award him an appropriate sum in compensation.

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

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

117. On an unspecified date in mid-May 2011 the investigating prosecutor J. Mierzewski was disqualified from dealing with the case (see also paragraph 128 below).

118. 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 keeping 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 paragraphs 120 and 129 below), after the Head of the Intelligence Agency refused the investigating prosecutor's request to that effect.

119. On an unspecified date, presumably at the end of 2011 or at the beginning of 2012, by a decision of the Prosecutor General, the investigation was transferred to the Kraków Prosecutor of Appeal. The Prosecutor General, relying on the secrecy of the investigation, refused to give reasons for that decision.

120. On an unspecified date, presumably on 10 January 2012, the Kraków 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 131 below) and a 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 (see also paragraph 127 below). It is considered that the charges were eventually pressed mostly due to 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".

There has been no official statement from the prosecution regarding the charges. The suspect, however, gave many 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

121. 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 impeachment procedure 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. For the time being, both responded to those allegations by giving numerous interviews and denying the existence of any CIA prisons in Poland.

122. 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. By now, the case-file comprises 20 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 international public 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 international public 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 ..."

123. To date, the investigating prosecutor has not ruled on any of the evidentiary motions filed by the applicant's lawyer on 21 September 2010 (see paragraph 111 above). The applicant has not been informed of any procedural or other actions taken by the prosecution. No precise information about the investigation's terms of reference, exact scope, the nature of the charges, persons charged or heard as witnesses or about its progress has been publicly disclosed – any facts reported by the Polish press are based on leaks from various sources (see also paragraphs 128-129 below). Nor has the prosecutor provided any indication of when the criminal investigation into CIA black sites in Poland is likely to be terminated.

8. Selected international and national media reports on the CIA rendition operations and investigation in Poland

(a) International media

124. 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 but no specific locations in Eastern Europe were identified. 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 Guantanamo 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 Guantanamo 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 Guantanamo 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. ..."

125. The fact that Poland had hosted a CIA black site was first made public by Human Rights Watch on 6 November 2005. On that day, the Human Rights Watch issued its "Statement on US Secret Detention Facilities in Europe" (for further details see paragraphs 59-61 above).

126. On 30 August 2011 Wikileaks published a partial extract of the original cable, classified "confidential", sent by the US Ambassador in Poland to the Secretary of State Office and dated 13 December 2005. This was a report prepared in connection with the Polish Foreign Minister's upcoming visit to Washington. It read, in its relevant part, as follows:

"Meller's [Foreign Minister] staff expects that the rendition and "CIA prisons" issue will continue to dog the Polish government, despite our and the Poles' best efforts to put this story to rest. In response to sustained media pressure, PM Marcinkiewicz announced December 10 that his government will order an internal probe 'to close the issue'. Meller anticipates being asked about renditions by the Polish press while in Washington, and the MFA [Minstry for Foreign Affairs] has asked that we remain in close contact to coordinate our public stance."

127. On 29 March 2012 BBC published on its website material entitled "Polish PM promises truth on CIA rendition prisoners". It read, in so far as relevant, as follows:

"Poland's prime minister has promised to get to the truth behind claims that his country was involved in secret CIA interrogations of al-Qaeda suspects.

Donald Tusk was reacting to revelations that Poland's former intelligence chief has been charged over the affair.

Poland has always officially denied having any involvement with the interrogations.

In 2006 a report for the Council of Europe accused 14 member states, including the UK and Germany, of colluding in more than 1,000 CIA rendition flights across European territory.

Polish campaigners have published official records of several CIA planes, five of which were known to be carrying passengers, landing in 2002 and 2003 at Szymany, a Polish military base in the north-east.

It is claimed that the secret jail was located nearby in Kiejkuty.

Polish prosecutors launched an investigation into the claims in 2008.

Newspaper reports earlier this week revealed that the former head of Poland's intelligence services, Zbigniew Siemiątkowski, has now been charged with setting up secret prisons.

Mr Tusk said that 'No-one, whether in Poland or on the other side of the Atlantic, should have a shadow of a doubt that this affair will be resolved. 'Poland will never again be a country where politicians, even if they are working hand-in-hand with the

world's most powerful country, can make under-the-table deals', Mr Tusk said. 'We're not living in the 19th Century, or in some bantustan, and those who are in government must act entirely in line with their conscience and the law, both Polish and international', he added.

But he also cautioned those investigating the case should 'must rise to the highest standards of concern for state interest' and show the 'utmost discretion'.

The US has not denied that it flew prisoners across the world, though it insists it never authorised the use of torture. "

(b) Polish media

128. On 30 May 2011 *Gazeta Wyborcza* published an article entitled "CIA had prisons in Poland" (*CIA miało więzienia w Polsce*). It concerned the conclusions of the experts appointed by the prosecution (see paragraph 115 above) and comments on prosecutor J. Mierzewski's disqualification from the case. It read, in so far as relevant, as follows:

"A breach of Constitution, unlawful detention and complicity in crime against humanity - these were the charges that prosecutor Jerzy Mierzewski wanted to press against SLD [Democratic Left Alliance] public officials in the case concerning 'CIA secret prisons' in Poland. The case has been taken away from him.

The investigation has been pending since 2008. It is classified 'top secret' and one cannot even obtain information who has given evidence. '*Gazeta*' discloses questions that prosecutors put to a team of experts. They were to assess the compatibility of holding in Poland prisoners identified by CIA as Al-Kaida members with international law.

The prosecutors put the questions in February [2011] and received answers in May [2011]. The experts, in their 50-page long report, stated that 'there are no legal provisions permitting to set up in Poland a centre of foreign intelligence removed from the control of our authorities', that 'the functioning of such a centre and holding there suspects amounts to a breach of the Constitution and international conventions, that detainees can be qualified as victim s of war crimes and crimes against humanity ...

According to our sources, the experts answers closed the phase of the investigation after which prosecutor Mierzewski planned to press charges against officials of the [Democratic Left Alliance] Government. They gave their consent for setting up a secret CIA prison in Szymany district ...

However, two weeks ago – as '*Gazeta'* has disclosed – he was disqualified from dealing with the case. Earlier, Majewski lost his post of the Warsaw Deputy Prosecutor of Appeal. Their superior, Dariusz Korneluk, the Warsaw Prosecutor of Appeal refused to give reasons for it.

Mierzewski refused to talk with '*Gazeta'*, invoking secrecy of the investigation. We have established that the case was taken away from him by phone, just when he talked with a lawyer representing one of 2 Saudis, regarded as Al-Kaida terrorists by the Americans, who had been imprisoned in Poland. ...

Not so long ago, their legal representatives announced that the Polish prosecution granted them injured party status. As far as we know, one of the basis for that status is Article 189 [of the Criminal Code] defining 'unlawful deprivation of liberty with particular torment'.

...

It follows from our sources that the Intelligence Agency (which, on the Polish side, executed an agreement on running the detention facility) kept secret from the prosecution considerable materials. The American side refused any cooperation. Not long ago [the Warsaw Prosecutor of Appeal] assured us that the investigation "still remained priority". He denied that it was to be discontinued. However, our source from the Warsaw prosecution states that '*discontinuation would be a political suicide. That is why it has been agreed with the Americans that they would not answer a letter of request rather than – as before – refuse to proceed with it. We will say that we have been waiting for their answer and, finally, the investigation will be stayed. Perhaps we can wait until the limitation period has expired'*.

The issue of CIA prisons is inconvenient not only for the [Democratic Left Alliance]. In 2005, when information about them was revealed by the American media, the [Law and Justice], [League of Polish Families] and [Self-defence Party] Government denied it. It also denied the findings of the Council of Europe report which was unfavourable for Poland."

129. On 27 March 2012 *Gazeta Wyborcza* published an article entitled "Secret of CIA villa in Stare Kiejkuty" (*Tajemnica willi CIA w Starych Kiejkutach*). It read, in so far as relevant, as follows:

"Only the Supreme Court did make the Intelligence Agency transmit to the prosecution materials concerning the cooperation with the CIA and holding prisoners suspected of terrorism in Poland.

We have had the information about handing over classified materials concerning the cooperation with the CIA in 2002-03 by the intelligence confirmed by three sources in the prosecution and the Intelligence Agency. Officially, both these institutions consistently refuse to comment, shielding behind secrecy.

Handing the materials over by the Intelligence Agency was a breakthrough in the investigation. Although the investigation has been conducted since 2008, our intelligence very reluctantly cooperated with the prosecution. Initially, it transmitted only a memo handed down to Zbigniew Wassermann, the coordinator of special forces in the [Law and Justice] Government by the head of the [Intelligence Agency], general Zbigniew Nowek in 2006. It stated that a "CIA centre" had been set up in our country but without specifying for what purpose. ...

In May 2011 *Gazeta* wrote that the [Intelligence Agency] still kept secret its materials from the prosecution and the American side had not answered our requests for assistance in legal matters. It looked like a stalemate. As late as the end of last year the [Agency] transmitted the documents to the prosecution.

...

We have learnt that this prompted a negative reaction form the American side. 'We have received a clear signal from our allies that they are surprised and disappointed by our behaviour. They relied on the hitherto existing practice and examples of Romania and Lithuania where their intelligence services have been more restrained in passing on such information' – explains an officer from the Intelligence Agency. 'No wonder. This was an operation of the highest secrecy. Top Cosmic Secret. Divulging it will affect our relations with the Americans' - he adds."

130. On 11 May 2012 *Gazeta Wyborcza* published an article entitled "Secret intelligence memos about secret CIA prisons" (*Tajne notatki wywiadu o tajnych więzieniach CIA*). It read, in so far as relevant, as follows:

"What is the proof that Prime Minister Leszek Miller and President Aleksander Kwaśniewski violated Constitution in the case of CIA prisons and could be impeached

before the Court of State? Secret memos made by officers of the Polish intelligence – informs our source from the prosecution.

Pursuant to the Polish constitution, any deprivation of liberty beyond 72 hours is unlawful if not based on a court decision. The terrorists brought to Poland were detained without this.

According to our source from the prosecution, Miller and Kwaśniewski received oral reports about what was going on in the Polish intelligence base in Stare Kiejkuty from the intelligence officers. This included information that the Americans kept terrorists there. It is not known whether they reported torture.

The officers, after every oral report to the President or the Prime Minister, drafted memos. They understood that this business was stinking, fishy and prepared those memos just in case. In order to make clear that – if one spilled the beans and [the authorities] started to look for culprits – the highest superiors knew of everything and accepted , says our source. He/she claims that there are several such memos.

...

Kwaśniewski, in a recent interview for *Gazeta* said: 'decision on cooperation with the CIA carried the risk that the Americans would use inadmissible methods'. Miller officially denies and all the time repeats that he 'has nothing to say in this case'.

131. On 18 June 2012 *Gazeta Wyborcza* published an article entitled "The secret of the agreement on the Polish CIA prison" (*Tajemnica umowy o polskim więzieniu CIA*). It read, in so far as relevant, as follows:

"The agreement between the Intelligence Agency and the CIA on the secret prison in Poland is one of the main pieces of evidence possessed by the prosecution. The problem is that the document has not been signed by the Americans.

'The Americans laughed the agreement prepared for signature because they did not want to leave traces of violating human rights and their own Constitution. They considered us amateurs and explained that this kind of business could not be dealt with by means of formal agreements' – says our source.

And he adds: *'The fact that the agreement was not signed and therefore was not binding can become the Polish officials' line of defence'.*

The document in question was drawn up at the turn of 2001 and 2002. After attacks of 11 September the United States, supported by their allies (including Poland and Great Britain) entered Afghanistan in order to finish with the Taliban supporting al'Qaeda terrorists. At that time Poland, in addition to providing military help, cooperated with the US in intelligence matters. Within the framework of this cooperation, the Poles agreed to receiving CIA planes at the Szymany airport and holding prisoners suspected of terrorism in the Intelligence Agency's training base in Stare Kiejkuty. ...

A strictly secret investigation concerning the 'Polish CIA prison' has been instituted. ...

In April this year [2012] *Gazeta* and *Panorama* informed that the breakthrough in the investigation had come when the Polish intelligence had disclosed to the prosecution materials concerning the cooperation with the CIA. Among those materials, there is the agreement between the Polish and US services.

What do we know about it? According to sources from the prosecution, it sets out detailed rules for running the Kiejkuty base. *'It even contains a provision stipulating what should be done if any person held there died'* - says our source.

The agreement, which is bilingual, was prepared by the Polish side. It was signed by Zbigniew Siemiątkowski and contains a note: *'for the Prime Minister's information'* (at the time, Leszek Miller). There is also a space left for the CIA Director's signature. Empty.

'Now we have a problem because, on the one hand, the agreement constitutes hard evidence, on the other, it has no binding force as it has not been signed by the other party' - says our interlocutor. ..."

C. Relevant domestic law and practice

1. Criminal Code

132. Article 231 § 1 of the Criminal Code (*Kodeks karny*), 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 3 years."

133. Article 101 § 1 of the Criminal Code sets rules for statute of limitation on punishment for an offence. 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 liable to a sentence of imprisonment exceeding 5 years;

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

4) 5 years – in respect of other offences.

..."

134. 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.

135. 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 statute of limitation. It reads, in so far as relevant, as follows:

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

2. Code of Criminal Procedure

136. 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."

137. Article 303 imposes on the authorities a duty to open *ex prioprio motu* an investigation 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 institute an investigation shall be issued *ex prioprio motu* or upon a notification of offence. [That] decision shall specify an act subject to the proceedings and its legal qualification."

138. An offence shall be prosecuted by the authorities *ex prioprio motu.* 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).

139. Article 10 § 1 of the Code reads:

> "In respect of offences prosecuted *ex prioprio motu*, the authority responsible for prosecution of offences is obliged to institute and carry out an investigation and the prosecutor [is obliged] to file and maintain an indictment."

140. Pursuant to Article 304, every person, authority or institution that has learnt that an offence prosecuted *ex prioprio motu* has been committed has a civic duty (*obowiązek społeczny*) to notify the prosecutor or the police.

3. Laws on classified information and related ordinance

(a) The laws on classified information

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

141. 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 by 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."

142. 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*).

143. 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 equal category, if so required under international agreements – on the basis of the reciprocity principle."

144. 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.

145. 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."

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

146. 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.

147. 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 classified material. Section 5 of the 2010 Act maintains the previous levels of classification, i.e. "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.

(b) The 2003 Ordinance

148. The Ordinance of the Minister of Justice of 18 June 2003 on the handling of transcripts of questioning and other documents or items covered by the duty to keep state secret, official secret or secret related to the exercise of a profession or function (*Rozporządzenie Ministra Sprawiedliwości z dnia 18 czerwca 2003 r. w sprawie sposobu*

postępowania z protokołami przesłuchań i innymi dokumentami lub przedmiotami, na które rozciąga się obowiązek zachowania tajemnicy państwowej, służbowej albo związanej z wykonywaniem zawodu lub funkcji) ("the 2003 Ordinance") entered into force on 1 July 2003

149. Paragraphs 7-8 of the 2003 Ordinance provide that the president of a court or the head of the relevant prosecutor's office may classify a case file or particular parts of it as "top secret", "secret", "confidential" or "restricted" if it mostly includes information classified as state secret, official secret or 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 deposited in the court's or prosecution secret registry (paragraph 9.1).

Paragraph 10.1 of the 2003 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 the head of the relevant prosecutor's office.

In accordance with paragraph 10.2, an order referred to in the preceding provision, should indicate the person authorised to inspect the classified documents, case file or items, specify the time and place and designate a court or prosecution employee who will be present during the inspection.

Paragraph 10.3 prohibits the making of copies, photocopies or extracts and taking of notes from classified files and documents.

A person authorised to consult the classified documents is notified of the obligation to respect secrecy and the prohibition on making copies, photocopies, extracts and notes, and swears in writing to keep the information received secret before obtaining access to the case file (paragraph 12).

2. Law on intelligence agencies

150. 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 secret services, set up two civilian intelligence agencies.

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

The Intelligence Agency (also called in Polish *"AW"*) 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*).

151. 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 Repuublic of Poland and its economic and defence potential;

2) identifying and counteracting external threats to security, defence, independence and territorial integrity of the Republic of Poland;

3) protecting foreign representations of the Republic of Poland and their staff against foreign special services and other actions that may cause damage to the interests of the Republic of Poland;

...

5) identifying international terrorism, extremism and international organised-crime groups;

6) identifying the international trafficking in arms, ammunition and explosives, drugs and psychotropic substances, goods, technologies and services of a strategic importance for the State's security, as well as identifying the international trafficking in weapons of mass destruction and threats connected with the spreading those weapons and means for carrying them;

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."

Section 63) stipulates that the Intelligence Agency's activities in the territory of Poland may be conducted exclusively in connection with their activities abroad.

152. 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, annual reports on the agencies' activities for a previous calendar year."

153. 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."

154. 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, i.e. the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Agency (*Służba Kontrwywiadu Wojskowego*), the Military Intelligence Agency (*Służba Wwiadu Wojskowego*) and the Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*), as well as activities undertaken for the 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 participate in the Committee's meetings (section 12(2)-(3)).

155. 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.

156. 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, humanity and war crimes referred to in Article 105 § 1 of the Criminal Code (see paragraph 134 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 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 keep secret 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 or 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 disclose materials covered by secret."

D. International law

1. UN Geneva Conventions

(a) Geneva (III) Convention

157. Article 4 of the Geneva (III) Convention relative to the Treatment of Prisoners of War of 12 August 1949 ("the III Geneva Convention"), which defines prisoners of war, reads, in so far as relevant, as follows:

> "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

..."

158. Article 5 states:

"The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

159. Article 13 reads:

"Art 13. Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited."

160. Article 21 s reads, in so far as relevant:

"The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary."

(b) Geneva (IV) Convention

161. Article 3 of the Geneva (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ("the IV Geneva Convention") reads, in so far as relevant, as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

162. Article 4 reads, in so far as relevant, as follows:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. ..."

2. UN General Assembly Resolution 60/147

163. 62. 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".

COMPLAINTS

164. The applicant's complaints under the Convention relate to three principal issues: his ill-treatment in Poland while in US custody, his transfer from Poland and Poland's failure to conduct an effective investigation into the circumstances surrounding his ill-treatment, detention and transfer from the Polish territory.

1) As regards ill-treatment and detention in Poland

The applicant alleges that Poland violated Articles 3, 5 and 8 of the Convention in enabling his torture, ill-treatment and incommunicado detention on the Polish territory. Poland knew and should have known about the CIA's rendition programme, the "black site" in Poland, and torture and inhuman and degrading treatment to which the CIA subjected "high value detainees" as part of this programme. Despite that, Poland knowingly and intentionally enabled the CIA to detain the applicant at the Stare Kiejkuty facility for 6 months, thereby allowing the CIA to subject him on the Polish territory to: (1) treatment that amounted to torture in violation of Article 3 of the Convention; (2) detention without any legal basis in violation of Article 5; and (3) abuse and deprivation of any access to or contact with his family, in violation of Article 8.

2) As regards his transfer from Poland

The applicant submits that, in knowingly and intentionally enabling the applicant's transfer from Poland despite substantial grounds for believing that there was a real risk that he would be subjected to the death penalty, Poland (1) violated his rights under both Articles 2 and 3 of the Convention as well as Protocol No. 6 to the Convention, (2) violated his rights under Article 3 by allowing him to be transferred from Poland despite the real risk of further ill-treatment, (3) violated his rights under Article 5 by allowing him to be transferred despite a real risk of further incommunicado detention, and (4) violated his rights under Article 6 by allowing him to be transferred to a jurisdiction where he would be subjected to a flagrantly unfair trial.

3) As regards Poland's failure to conduct an effective investigation

The applicant submits that Poland violated Articles 2, 3, 5, and 8 as well as his right to an effective remedy under Article 13 by failing to conduct an effective investigation into the serious violations of his rights.

Furthermore, by its refusal to acknowledge, promptly and effectively investigate and disclose details of his detention, ill-treatment, enforced disappearance and rendition, Poland violated the applicant's and the public's right to truth under Articles 2, 3, 5 and 10 of the Convention.

QUESTIONS TO THE PARTIES

As to the facts of the case:

1. In the period from 5 December 2002 to 6 June 2003 was the applicant detained in a secret detention facility in Poland?

In this respect, the Government, on a confidentiality basis under Rule 33 § 2 of the Rules of Court, are asked to supply materials showing on which grounds the applicant was granted injured person (*pokrzywdzony*) status in the investigation opened on 11 March 2008 and whether the fact of his detention in Poland has been established in that investigation and on which evidence.

2. Does there exist a document (agreement) on setting up and running a secret CIA prison on the Polish territory prepared by the Polish authorities? If so, has this document been included in evidence gathered during the investigation?

If that document exists, the Government, on a confidentiality basis under Rule 33 § 2 of the Rules of Court, are asked to supply a copy.

As to the law:

I) Alleged ill-treatment and incommunicado detention on Polish territory

3. Assuming that the applicant was detained in Poland during the relevant period and in the light of the applicant's submissions and material produced by him:

i. has the applicant been subjected to torture or to other forms of treatment prohibited by Article 3 of the Convention while in U.S. custody on Polish territory?

ii. has he been held incommunicado in a secret detention facility in breach of Article 3 and Article 5 § 1 of the Convention?

iii. has he been abused and deprived of access to, or contact with, his family in breach of Article 8 of the Convention?

4. In case of an affirmative answer to any of the above questions:

i. what was the form and extent of the involvement of Poland's authorities and/or their agents in all or any of those facts?

ii. have Poland's acts and/or omissions in relation to the CIA High Value Detainees Programme as applied to the applicant on Polish territory amounted to:

(a) a violation of Article 3 of the Convention on account of enabling his torture or ill-treatment, and/or by reason of not protecting him against such torture and ill-treatment;

(b) a separate violation of Article 3 on account of enabling his incommunicado detention, and/or by reason of not protecting him against such detention;

(c) a violation of Article 5 § 1 of the Convention on account of his incommunicado detention;
(d) a violation of Article 8 of the Convention on account of enabling, and/or not preventing, his abuse and deprivation of contact with his family?

Reference is made, in particular, to *Ireland v. the United Kingdom* judgment of 18 January 1978, §§ 162 et seq.) and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII.

II) Alleged transfer of the applicant from Polish territory

5. Has the applicant been transferred from Polish territory to territory over which Poland has no jurisdiction?

6. In the event of an affirmative answer to the above question, have Poland's acts and/or omissions in respect of such transfer amounted to:
(a) a violation of Article 2 of the Convention, and/or
(b) a violation of Article 1 of Protocol No. 6 to the Convention
on account of his rendition to a country where he faced the death penalty?

7. In the event of an affirmative answer to question 2, above, has Poland violated Article 3 of the Convention by exposing the applicant to the risk of further torture and other forms of treatment prohibited by this provision?

8. Always in the event of an affirmative answer to the said question 2, has Poland exposed the applicant to the risk of further incommunicado detention, contrary to Article 3 and Article 5 § 1 of the Convention? In this respect, has Poland complied with its positive obligations under Article 5 § 1 of the Convention to protect the applicant from arbitrary detention (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, §§ 122 et. seq. and *Medova v. Russia* no. 25385/04, § 123, 15 January 2009)?

9. Has Poland violated Article 6 of the Convention in that it enabled his rendition to a country where he would face a flagrantly unfair trial (see *Ohman (Abu Qatada) v. the United Kingdom* (no. 8139/09), § 258 et seq., 17 January 2012)?

III. As regards the alleged failure to carry out an adequate investigation

10. Has Poland complied with its duty under Article 3 of the Convention to carry out an "effective and thorough" investigation into the allegations of torture, other forms of ill-treatment prohibited by this provision and incommunicado detention alleged to have occurred on its territory in connection with the CIA High Value Detainees Programme and in respect of the applicant?

11. In this regard, has there been a violation of Article 3 taken alone and/or in conjunction with Article 13 of the Convention?

Reference is also made to the statutory limitation period of 5 or 10 years (Articles 101-102 of the Criminal Code) applicable to the offence of abuse of power defined in Article 231 § 1 of the Criminal Code.

The Government, on a confidentiality basis under Rule 33 § 2 of the Rules of Court, are requested to describe in a detailed manner the course of the investigation, procedural and other decisions taken in, or in connection with, the investigation, its scope and the full list of offences investigated. They are also asked to indicate the circle of suspects and charges against them and submit the relevant decisions and documents.

12. Has the applicant had at his disposal an "effective remedy" within the meaning of Article 13 for his complaints under Articles 3, 5 § 1 and 8 of the Convention?

13. Has there been a breach of Article 10 of the Convention for the reasons indicated by the applicant?