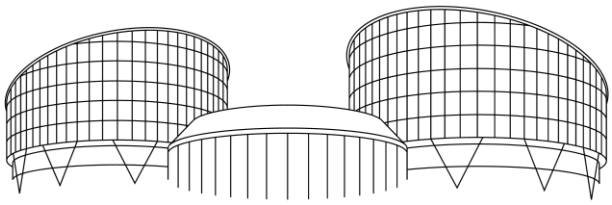

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Application no. 7511/13
Zayn Al-Abidin Muhammad HUSAYN (ABU ZUBAYDAH)
against Poland
lodged on 28 January 2013

STATEMENT OF FACTS

1. The applicant, Mr Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah, is a stateless Palestinian, who was born in 1971 in Saudi Arabia and is currently detained in the Internment Facility at the US Guantànamo Bay Naval Base in Cuba. He is represented before the Court by Ms D. Vedernikova, Security and Rule of Law lawyer in the non-governmental organisation Interights, Ms H. Duffy, Senior Counsel in Interights, Ms V. Vandova, the Litigation Director of Interights, Mr J. Margulies, member of the Illinois Bar, Mr G.B. Mitckum, IV, member of the District of Columbia and Virginia Bars, and Mr B. Jankowski, a lawyer practising in Warsaw.

A. Background

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

2. 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.

3. On an unspecified later date the CIA established a programme in the Counterterrorist Center to detain and interrogate terrorists at sites abroad. In further documents the American authorities referred to it as "the CTC program" (see also paragraphs 5-8 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 Programme"). In the Council of Europe's documents it is also described as "the CIA secret detention programme" or "the extraordinary rendition programme" (see also paragraphs 86-103 below). For the purposes of the present case, it is referred to as "the HVD Programme".

(a) The establishment of the HVD Programme

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

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

6. Paragraph 4 describes the applicant as "the first high-value detainee" captured by the CIA. The document further states that

> "the capture of senior Al-Qa'ida operative Abu Zubaydah on 27 March 2002 presented the Agency with the opportunity to obtain actionable evidence on future threats to the United States from the most senior Al-Qa'ida member in the US custody at that time. This accelerated CIA's development of an interrogation program [redacted]".

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

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

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

(b) Enhanced Interrogation Techniques

9. In paragraph 6 of the 2004 CIA 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" ("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".

10. 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."

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

The techniques included, in ascending degree of intensity:

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

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

12. The CIA agents were authorised to use four 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 identified in November 2002 without the Headquarters' prior approval. The use of the EITs required a prior approval (paragraph 89 of the 2004 CIA Report).

13. Appendix C to the 2004 CIA Report (Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency of 1 August 2002) was prepared by Jay S. Baybee, Assistant Attorney General in connection with the application of the EITs to the applicant, the first high-ranking Al'Qaeda prisoner who was to be subjected to those interrogation methods. This document, a classified analysis of specific interrogation techniques proposed for use in the interrogation of Abu Zubaydah, was declassified in 2009. It concludes that, given that "there is no specific intent to inflict severe mental pain or suffering ..." the application "of these methods separately or a course of conduct" would not violate the prohibition of torture as defined in section 2340 of title 18 of the United States Code.

14. The US Department of Justice Office of Professional Responsibility Report: "Investigation into the Office of Legal Counsel's Memoranda

Concerning Issues Relating to the Central Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" ("the 2009 DOJ Report"; a document released by the US authorities in a considerably redacted form[1], states, in so far as relevant:

> "The issue how to approach interrogations reportedly came to a head after the capture of a senior al'Qaeda leader, Abu Zubaydah, during a raid in Faisalabad, Pakistan, in late March 2002. Abu Zubaydah was transported to a 'black site', a secret CIA prison facility [REDACTED] where he was treated for gunshot wounds he suffered during his capture.
>
> ... the FBI and CIA planned to work together on the Abu Zubaydah interrogation. ... the CIA was in charge of the interrogation and ... the FBI was there to provide assistance. Because the CIA interrogators were not yet at the site when the FBI agents arrived, two experienced FBI interrogators began using 'relationship building' or 'rapport building' techniques on Abu Zubaydah. During this initial period the FBI was able to learn his true identity, and got him to identify a photograph of another important al'Qaeda leader, Khalid Sheikh Muhammad, as 'Muktar', the planner of the September 11, 2001 attacks.
>
> When the CIA personnel arrived, they took control of the interrogation. The CIA interrogators were reportedly unhappy with the quality of information being provided, and told the FBI that they needed to use more aggressive techniques. ... the CIA interrogators were convinced that Abu Zubaydah was withholding information and that harsh techniques were the only way to elicit further information, According to an FBI interrogator ..., the CIA began using techniques that were 'borderline torture' and Abu Zubaydah, who had been responding to the FBI approach, became uncooperative. According to one of the FBI interrogators, CIA personnel told him that the harsh techniques had been approved 'at the highest level'."

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

16. The 2004 CIA Report states that, subsequently, the CIA Office of General Counsel ("OGC") continued to consult with the US Department of Justice in order to expand the use of EITs beyond the interrogation of Abu Zubaydah. According to the report, "this resulted in the production of an undated and unsigned document entitled "Legal principles Applicable to CIA Detention and Interrogation of Captured Al'Qaeda Personnel". 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

1. The report is 260 pages long but all the parts that seem to refer to locations of CIA "black sites" or names of interrogators are blackened.

> 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.

17. As established in paragraph 51 of the report, in November 2002 CTC initiated training courses for CIA agents involved in interrogations. On 28 January 2003 formal "Guidelines on Confinement Conditions for CIA Detainees" and "Guidelines on Interrogations Conducted Pursuant to [REDACTED]" were approved (paragraph 50); see also paragraph 46 below).

18. The application of the EITs to other terrorist suspects in CIA custody began in November 2002.

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

19. On 30 December 2004 the CIA prepared a background paper on the CIA's combined interrogation techniques ("the 2004 CIA Background Paper"), addressed to D. Levin, the US Acting Assistant Attorney General. The document, originally classified as "top secret" was released on 24 August 2009 in a heavily redacted version. It explains standard authorised procedures and treatment to which high-value detainees – the HVD – in CIA custody were routinely subjected from their capture through their rendition and reception at a CIA "black site" to the interrogation.

20. The first section of the 2004 CIA Background Paper, entitled "Initial Capture", is devoted to the process of capture, rendition and reception at the "black site". It states that "regardless of their previous environment and experiences, once a HVD is turned over to CIA a predictable set of events occur". The "set of events" following the capture starts from rendition, which is described as follows:

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

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

> "The HVD is subjected to administrative procedures and medical assessment upon arrival at the Black Site. [REDACTED] the HVD finds himself in the complete control of Americans; [REDACTED] the procedures he is subjected to are precise, quiet, and almost clinical; and no one is mistreating him. While each HVD is different, the rendition and reception process generally creates significant

apprehension in the HVD because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of US custody. Reception procedures include:

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

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

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

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

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

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

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

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

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

The "conditioning techniques" are related as follows:

"The HVD is typically reduced to a baseline, dependent state using the three interrogation techniquesdiscussed below in combination. Establishing this baseline state is important to demonstrate to the HVD that he has no control over basic human needs. The baseline state also creates in the detainee a mindset in which he learns to perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting. The use of these conditioning techniques do not generally bring immediate results; rather, it is the cumulative effect of these techniques, used over time and in combination with other interrogation techniques and intelligence exploitation methods, which achieve interrogation objectives. These conditioning techniques require little to no physical interaction between the detainee and the interrogator. The specific conditioning interrogation techniques are

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

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

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

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

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

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

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

c. Facial Hold. The facial hold is a corrective technique and is used sparingly throughout interrogation. The facial hold is not painful and is used to correct the detainee in a way that demonstrates the interrogator's control over the HVD [REDACTED]. Because of the physical, dynamics of the various techniques, the facial hold can be used in combination with water dousing, stress positions, and wall standing. Other combinations are possible but may not be practical.

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

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

"These techniques – walling, water dousing, stress positions, wall standing, and cramped confinement – are typically not used in combination, although some combined use is possible. For example, an HVD in stress positions or wall standing

can be water doused at the same time. Other combinations of these techniques may be used while the detainee is being subjected to the conditioning techniques discussed above (nudity, sleep deprivation, and dietary manipulation). Examples of coercive techniques include:

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

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

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

d. Wall Standing. The frequency and duration of wall standing are based on the interrogator's assessment of its continued effectiveness during interrogation. Wall standing is usually self-limiting in that temporary muscle fatigue usually leads to the HVD being unable to maintain the position after a period of time. Because of the physical dynamics of the various techniques, wall standing can be used in combination with water dousing and abdominal slap. While other combinations are possible, they may not be practical.

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

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

It reads as follows:

"1) [REDACTED]

2) Session One

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

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

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

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

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

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

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

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

i. [REDACTED]

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

3) Session Two.

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

b. [REDACTED]

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

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

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

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

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

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

i. As noted above, the duration of this session may last from 30 minutes to several hours based on the interrogators' assessment of the HVD's resistance posture. In this example of the second session, the following techniques were used: sleep deprivation, nudity, dietary manipulation, walling, water dousing, attention grasp, insult slap, and abdominal slap. The three Conditioning Techniques were used to keep the HVD at a

baseline, dependent state and to weaken his resolve and will to resist. In combination with these three techniques, other Corrective and Coercive Techniques were used throughout the interrogation session based on interrogation objectives and the interrogators' assessment of the HVD's resistance posture.

4) Session Three

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

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

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

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

Interrogators will often use one technique to support another. As an example, interrogators would tell an HVD in a stress position that he (HVD) is going back to the walling wall (for walling) if he fails to hold the stress position until told otherwise by the HVD. This places additional stress on the HVD who typically will try to hold the stress position for as long as possible to avoid the walling wall. [REDACTED] interrogators will remind the HVD that he is responsible for this treatment and can stop it at any time by cooperating with the interrogators.

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

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

5) Continuing Sessions.

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

a. [REDACTED]

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

c. [REDACTED]

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

e. [REDACTED].

f. [REDACTED]

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

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

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

(d) Closure of the HVD Programme

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

2. Role of Jeppesen Company

27. 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.

28. In the light of various reports on rendition flights (see paragraph 118 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.

29. 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 Ninth 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 Ninth 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

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

A request for release of an affidavit from Abu Zubaydah has been pending before the US authorities for more than two years but, as is routinely the case, this request will involve the need for litigation in a US court. In addition, if the document is released, it is likely to be heavily redacted. Attempts to declassify drawings and writings by the applicant during his detention have been unsuccessful.

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

31. The facts of the case, as submitted on behalf of the applicant, may be re-stated as follows.

1. The applicant's capture in Pakistan and further detention in Thailand

32. On 28 March 2002 agents of the United States and Pakistan seized the applicant from a house in Faisalabad, Pakistan. In the course of the operation, he was shot several times in the groin, thigh and stomach, which resulted in very serious wounds. He was taken into the custody of the CIA.

At the time of his capture the applicant was considered one of the key Al'Qaeda members and described by the American authorities as the "third or fourth man" in Al'Qaeda, who had had a role in its every major terrorist operation, including the role of a planner of the attacks on 11 September 2001. It was also alleged that he had been Osama bin Laden's senior lieutenant. As mentioned above (see paragraphs 6-7 above), he was the first so-called "high-value detainee" ("the HVD") detained by the CIA at the beginning of the "war on terror" launched by President Bush after the 11 September 2001 attacks in the United States.

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

34. After his arrest, the applicant was transferred to a secret CIA detention facility in Thailand, where he was interrogated by CIA agents and where a variety of EITs were tested on him. Media reports have consistently identified this location as a CIA site code-named "Cat's Eye". At this site, the interrogations of the applicant were videotaped.

35. The 2009 DOJ Report, relying on the 2004 CIA Report, confirms that interrogation sessions with the applicant were videotaped:

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

36. The 2009 DOJ Report and the 2004 CIA Report state that on 15 November 2002 another HVD, Abd Al Rahim Al Nashiri, was brought

to the same facility[1] and that they both were subsequently transferred to another CIA prison. The relevant part of the 2009 DOJ Report reads:

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

37. The applicant, relying on a Vaughn Index released by the CIA to the ACLU, submits that on 3 December 2002 a cable was sent to a CIA site from the CIA Headquarters entitled "Closing of facility and destruction of classified information". The cable text itself, released in a redacted form, instructed the CIA station to create an inventory of videotapes. As it transpires from the previous cable (see paragraph 35 above), the videotapes referred to documented "interrogation sessions with Abu Zubaydah".

Another cable, sent on 9 December 2002, recorded that the inventory had been carried out:

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

38. In the total list of cables from "FIELD" [CIA station] to "HQTRS" [CIA headquarters] relating to Abu Zubaydah's interrogation at the Cat's Eye site, no cables were sent after 4 December 2002.

39. In the applicant's view, this, taken together with the materials contained in the 2004 CIA Report and in the 2009 DOJ Report" (see paragraph 35 above) , demonstrates that on 4 December 2002 both he and Abd Al Rahim Al Nashiri were moved together from the Cat's Eye facility in Bangkok to the same CIA "black site" located elsewhere.

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

40. The applicant submits that he arrived in Poland on 5 December 2002 and that he was held there in a CIA detention facility in Stare Kiejkuty until 22 September 2003.

(a) Transfer

41. According to the applicant, on 4-5 December 2002 a CIA contracted aircraft, registered as N63MU with the US Federal Aviation Authority and operated by First Flight Management/Airborne Inc., flew him from Thailand to the Szymany military airbase in Poland[2].

The flight flew from Bangkok *via* Dubai and landed in Szymany, Poland, on 5 December 2002 at 14h56. It departed from there on the same day at

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1. See also *Al Nashiri v. Poland* , application no. 28761/11, lodged with the Court on 9 May 2011, § 26 of the Statement of facts available on the Court's website www.echr.coe.int

2. In his application, Al Nashiri alleges that he was transferred from Bangkok to Poland on the board of the same rendition plane N63MU (See *Al Nashiri v. Poland*, Statement of facts §§ 26-30).

15h43. 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 100-102 and 118 below).

42. The applicant further submits that the collation of data from multiple sources, including flight plan messages released by Euro Control, invoices, and responses to information disclosure requests (see also paragraphs 100-102 below), confirms that between 3 and 6 December 2002, N63MU travelled the following routes:

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

43. A letter dated 23 July 2010 from the Polish Border Guard to the Helsinki Foundation for Human Rights confirms that the airplane N63MU landed at Szymany airport on 5 December 2002 with eight passengers and four crew and departed from there on the same day with no passengers and four crew[1].

44. The applicant also refers to a 2007 Council of Europe report ("the 2007 Marty report" – see also paragraph 100 below), which identifies N63MU as a "rendition plane" that arrived in Szymany from Dubai at 14h56 on 5 December 2002.

(b) Detention and ill treatment

45. The applicant submits that during his detention in Stare Kiejkuty from 5 December 2002 to 22 September 2003 he was subjected to the further application of EITs and various other forms of abuse.

In this regard, he relies on the only public source of his own description of his experience related in the International Committee for the Red Cross ("the ICRC") Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody of February 2007 ("the 2007 ICRC Report")[2], based on interviews with the applicant and 13 other high-value detainees after they were transferred to Guantànamo Bay (for more details, see paragraphs 109-112 below).

The applicant's account of the alleged abuse that he endured while in the CIA custody given to the ICRC refers, among other things, to the following facts:

> "I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour

1. See *Al Nashiri v. Poland*, Statement of facts § 29, in which the text of the letter is rendered in a full version.
2. The report remains formally classified and it was disclosed without authorisation.

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

46. The applicant submits that a further indication of the nature of the conditions of detention and treatment to which he was subjected in Poland is provided in the authorised conditions of detention and transfer and interrogation techniques applicable at the relevant time (see paragraphs 7, 9-15 and 19-25 above).

From 2003 to 2006 the conditions of detention at CIA detention facilities abroad were governed by the Guidelines on Confinement Conditions for CIA Detainees, signed by the CIA Director, George Tenet, on 28 January 2003 (see also paragraph 17 above). According to the guidelines, at least the following "six standard conditions of confinement" were in use in 2003, at the time of his detention in Poland:

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

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

(iii) incommunicado, solitary confinement;

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

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

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

47. In combination, this meant that "high-value detainees" such as the applicant were in constantly illuminated cells, substantially cut off from

human contact, and under 24-hour-a-day surveillance for more than four years, including throughout his detention in Poland. The conditions of confinement were designed to enhance interrogations in addition to providing security within the facility.

3. Transfer from Poland to other CIA "black sites"

(a) Transfer

48. The applicant submits that on 22 September 2002 he was transferred by means of extraordinary rendition from Polish territory to CIA secret detention facilities in locations believed to include Guantànamo Bay in Cuba, Morocco, Lithuania and Afghanistan, from where he was subsequently transferred back to Guantànamo Bay. In respect of his secret detention and ill-treatment in a detention facility allegedly located in Lithuania, the applicant has lodged a separate application with the Court[1].

49. The applicant states that Poland and the US have not disclosed relevant information concerning his transfer from Poland, including the circumstances of the flight that transferred him out of Polish territory. However, several sources indicate that he was transferred from Poland on 22 September 2003, on a Boeing 737 airplane registered as N313P with the US Federal Aviation Authority and operated by Stevens Express Leasing.

50. In the applicant's view, the collation of data from multiple sources, including flight plan messages released by EuroControl, responses to information disclosure requests and media reports, shows that N313P travelled the following routes:

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

51. A letter from the Polish Border Guard, dated 23 July 2010[2], in response to an information disclosure request from the Helsinki Foundation for Human Rights attests to the plane registered N313P arriving at the Szymany airport on 22 September 2003 with zero passengers and seven crew, and departing with five passengers and seven crew.

52. Flight plan and SITA[3] messages disclosed by the Polish Air Navigation Services Agency ("PANSA") to the Helsinki Foundation for Human Rights in Warsaw show that N313P landed in Szymany, en route from Kabul, at 18:50 on 22 September 2003 and left Szymany at 19:56 the same day.

53. According to data disclosed by PANSA, N313P had filed an initial schedule of Kabul (22 September 2003, 15:00) - Warsaw (22 September 2003, 20:50) - Otopeni (23 September 2003, 00:05). This schedule was

1. See *Abu Zubaydah v. Lithuania* (no. 46454/11), lodged on 14 July 2011, Statement of facts available on the Court's website www.echr.coe.int
2. For a full version see *Al Nashiri v. Poland*, Statement of facts § 29.
3. Société Internationale Télécommunique Aéronautique.

cancelled, however, and an urgent new schedule was filed of Kabul (22 September 2003, 12:30) - Szymany (22 September 2003, 10:00) - Constanta (22 September 2003, 22:00). Flight plans were then filed for N313P to leave Kabul at 13:00 on 22 September 2003 and arrive in Szymany 5 hours and 49 minutes later; and to leave Szymany at 21:00 that same day, arriving in Constanta 1 hour and 36 minutes later (with alternative destination of Bucharest).

54. A hand-written log of take-offs and landings at Szymany airport confirms that N313P arrived in Szymany on 22 September 2003 at 21:00 (local time) and departed at 21:57 (local time). Flight plan messages disclosed by EuroControl to Dick-Marty during his investigation for the Parliamentary Assembly of the Council of Europe (see also paragraphs 100 and 118 below) corroborate this account. Multiple messages for each leg of the journey attest to an itinerary of Washington, DC – Prague – Tashkent – Kabul-Szymany – Constanta – Rabat – Guantànamo Bay. These flight plan messages also show that N313P was operated by Stevens Express Leasing Inc., a company based in the US and identified by the New York Times as a CIA-front company

55. Jeppesen Dataplan Inc., a US corporation-based in Californa, was responsible for trip planning services for N313P's-mission. Jeppesen is alleged to have been a major provider of flight services to the CIA that enabled the clandestine transportation of many terrorist suspects (see also paragraphs 27-29 above).

56. The applicant also relies on the data released by PANSA to the Helsinki Foundation for Human Rights, demonstrating that LOT Grounds Services, a Polish private company, was sub-contracted by Jeppesen Dataplan to perform ground-handling services at the Szymany airbase and that World Fuel-Service provided fuel there.

(b) Further transfers during CIA custody

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

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

58. Since being transferred to the US Guantànamo Bay Naval Base in September 2006, the applicant states that he has been held in the highest security Camp 7 in extreme conditions of detention. Camp 7 was established to hold the High Value Detainees transferred from the CIA to military custody. Visitors other than lawyers are not allowed in that part of the Internment Facility. The inmates are required to wear hoods whenever they are transferred from the cell to meet with their lawyers or for other purposes. The applicant's US lawyers have so far not been allowed inside Camp 7. Lawyers for some detained who face trial before the Guantànamo

military commissions have been allowed to do so only after volunteering to wear the same hoods as detainees.

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

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

60. According to the applicant, as a result of torture and ill-treatment to which he was subjected when held in detention under the HVD Programme, he suffers from serious mental and physical health problems. The applicant's US counsel are unable to provide many of the details of his physical and psychological injuries because all information obtained from him is presumed classified. However, the lawyers state that publicly available records describe how prior injuries were exacerbated by his ill-treatment and by his extended isolation, resulting in his permanent brain damage and physical impairment. He suffers from blinding headaches and has an excruciating sensitivity to sound. Between 2008 and 2011 alone he experienced more than 300 seizures. At some point during his captivity, he lost his left eye. His physical pain is compounded by his awareness that his mind is slipping away. He suffers from partial amnesia and has difficulty remembering his family

61. At present, 166 inmates are held in the Gunatanamo Bay Internment Facility but only seven were tried and six are about to be tried by the military commissions.

On 6 February 2013 thirteen detainees began a hunger strike in reaction to what they said were abusive cell searches and deteriorating conditions of detention. Over the subsequent weeks the strike has rapidly turned into a larger protest by prisoners against their indefinite detention without charge or trial over the last eleven years. As of 13 June 2013, 100 prisoners went on hunger strike.

5. Authority form for the applicant's lawyers

62. The applicant's lawyers submit that the applicant has signed an authority form empowering Ms Vedernikova, Ms Duffy, Ms Vandova and Mr Jankowski to represent him in the Convention proceedings. This signed authority form, which contains no classified information whatsoever, was submitted to the US authorities for declassification review, as required by a US court order. The US authorities refused even to consider the request for declassification, thereby preventing the lawyers from submitting it to the Court at this stage. The lawyers state that upon receipt of the declassified form, they will submit it to the Court but until then they request the Court to accept the authority form signed by the applicant's US representative, J. Margulies (also representative before the Court).

6. Poland's knowledge of the HVD Programme

(a) Reports on CIA secret prisons obtained through international inquiries

63. On 16 January 2002 the United Nations High Commissioner for Human Rights expressed concerns regarding the protection of Taliban and Al'Qaeda detainees and called on governments to uphold international human rights and humanitarian law obligations in their treatment. During 2002 reports emerged from non-governmental organisations such as Human Rights Watch and Amnesty International, raising concerns about arbitrary detention, detainee abuse and transfer, and reporting on detainees being held by the US in undisclosed locations.

64. In February 2003 the UN Commission on Human Rights received reports from non-governmental organisations concerning ill-treatment of US detainees. The International Rehabilitation Council for Torture ("the IRCT") submitted a statement in which it expressed its concern over the United States' reported use of "stress and duress" methods of interrogation, as well as the contraventions of *refoulement* provisions in Article 3 of the Convention Against Torture. The IRCT report criticised the failure of governments to speak out clearly to condemn torture; and emphasised the importance of redress for victims. The Commission on Human Rights communicated this document to the United Nations General Assembly on 8 August 2003.

65. The existence of a secret prison in Poland was first disclosed in early November 2005, when Human Rights Watch stated publicly that its investigations had unravelled information about CIA-chartered planes landing at the Szymany Airport in the north of Poland in 2003, around the same time that the United States was transporting top Al'Qaeda prisoners from Afghanistan to other locations, including the US prison at Guantànamo Bay (see paragraphs 79-80 below).

66. The applicant submits that the 2007 Marty Report (see paragraphs 94-103 below) discloses that the Polish authorities agreed to hold High Value Detainees in a secret detention facility on its territory. They 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. Various agencies and individuals at all levels of government knew the HVD Programme and provided the required authorisation for Poland's role. The 2007 Marty Report describes the former Polish President Kwaśniewski as "the foremost national authority on the HVD Programme". Other high level officials identified in the report as having had first-hand knowledge of the operations of the HVD Programme in Poland were the Chief of the National Security Bureau, Marek Siwiec, the Minister of National Defence, Jerzy Szmajdziński, and the Head of Military Intelligence, Marek Dukaczewski (see paragraphs 99 and 101-102 below)

In the light of that report, Polish Government officials have informed official enquiries that Poland concluded an unspecified number of special agreements governing particular forms of cooperation. 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" (see paragraph 100 below). As these agreements are classified, their content is not known to the public.

67. The applicant further cited an interview with Mr A. Kwaśniewski, President of Poland in 2000-2005, published on 30 April 2012 in a Polish daily *Gazeta Wyborcza.* Mr A. Kwaśniewski, in response to questions concerning Poland's cooperation with the CIA in rendition operations and running the alleged "black site" in Stare Kiejkuty, said:

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

68. In the applicant's view, the direct involvement of Polish agents in various aspects of the secret detention programme, as described above, necessarily entailed direct knowledge of that programme. This included the direct knowledge of high ranking government officials – up to and including the President of Poland – who authorised the operation of the programme on Polish soil, and that of Polish intelligence agents, who provided physical security to the CIA or otherwise facilitated the implementation of the programme.

(b) Various selected media reports

69. The applicant states that information on the extraordinary rendition programme and its abusive characteristics has been widely disseminated in the public domain since 2002, including through reports by national and international media commonly disseminated in Poland during his detention in the Stare Kiejkuty "black site".

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

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

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

> "a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation; in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred. ...

> 'If you don't violate someone's human rights some of the time; you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists."

The article also noted that

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

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

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

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

73. On 2 April 2002 ABC News reported:

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

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

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

and:

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

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

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

77. On 6 August 2003 *Rzeczpospolita* reported on the detention of two UK detainees among the 680 held indefinitely at Guantànamo, and the consequent public outrage in the UK. It emphasised that this practice of detention was a clear human rights violation and that the situation was

viewed by the world as further proof that, when it came to the war on terror, America would not hesitate to brush away human rights and other legalities as insignificant.

(c) Senator Pinior's affidavit submitted to the Court

78. The applicant supplied an affidavit made by Mr Józef Pinior, a member of the Polish Senate (*Senat*)[1]

"Affidavit of Józef Pinior to the European Court of Human Rights

Abu Zubaydah v Poland

Background

1. My name is Józef Pinior. I was born on 9 March 1955.1 have an MA degree from the Faculty of Law at the Wrocław University and postgraduate degrees in Ethics and Religious Studies from both the University of Wrocław and the Centre for Social Studies at the Institute of Philosophy and Sociology of the Polish Academy of Sciences.

2. During the communist regime in Poland, I was an active member of the political opposition. I was a founder and one of the chairmen of the Lower Silesian region of the independent, self-governing trade union NSZZ Solidamość. In 1984 and 1988 I was described by Amnesty International as a prisoner of conscience. Following to the political transformation in Poland, I pursued an academic career. In 2004, I was elected to the European Parliament. As a Member of the European Parliament I was a member of the Group of European Socialists,

3. During my term in the European Parliament I was a vice-chairman of the Subcommittee on Human Rights, a member of the Committee on Regional Development and a member of the Delegation for relations with the United States.

4. In 2006-2008 I was a member of the European Parliament's 'Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners" (TDIP), working alongside rapporteur Giovanni Claudio Fava.

5. In 2011 I was elected to the Polish higher chamber of Parliament, the Senate. I am a senator of the Group of Civic Platform (*Platforma Obywatelska*), and a member of two commissions - the Commission of Human Rights, Rule of Law and Petitions, and the Commission on European Union issues.

Confirmation of Statements concerning CIA detention in Poland

6. With this affidavit I confirm to the Honorable Court the accuracy of certain statements that have been reported publicly concerning my knowledge of the CIA's secret prison in Poland. My knowledge of the programme initially stemmed from my involvement in the TDIP in 2006-8. Subsequent to that involvement, many people, both officials and people living in the vicinity of State Kiejkuty, have over time come to me to discuss various elements of this case. The information referred to below derives from information obtained, in these various contexts, from credible sources.

7. I can confirm that in the course of my research into this case, I was informed, by an authoritative source, of a document drawn up under the auspices of the government of Leszek Miller for the purpose of regulating the existence of the CIA prison in Poland.

In this document there are precise regulations concerning the foundation of the CIA secret prison in Stare Kiejkuty. Among other details, the document proposed a protocol for action in the event of a prisoner's death.

8. In 2006, this document was found by the then-Coordinator of the Secret Service in Poland, Minister Zbigniew Wasserman. He handed it in to the then Minister of

1. Upper house of the Polish Parliament.

Justice, Zbigniew Ziobro. I have been informed of a transcript of the meeting during which this document was handed over, in the presence of other politicians from the then ruling party, *Prawo i Sprawiedliwość.*

9. Furthermore, according to my information, among the other documents that are in the possession of the Prosecutor's Office, there is a receipt for a cage which was made for the Intelligence Centre in Stare Kiejkuty. The receipt dates back to the period when the CIA prisoners were detained in Stare Kiejkuty. My assumption is that this cage was intended to hold prisoners.

10.I have also been informed that Polish officials made many different notes concerning various aspects of the CIA prison existence in Stare Kiejkuty. These notes were intended to prove that any actions of the Polish officers were based on their supervisors' orders. I understand that these written notes are also among documents gathered by the Prosecutor's Office.

11. I understand that the Prosecutor's investigation has also gathered information indicative of practical logistical support and servicing of the prison site: specifically documents record food being provided to the site, and US officials dumping Polish sausages outside the fence of the villa on the military base and a memo written by a Polish official asking the Americans not to do this.

12. From the information that has been provided to me, as illustrated above, it would appear that considerable information is available to the prosecutors office indicating the close involvement of the Polish authorities, in various ways, in the establishment and operation of the Stare Kiejkuty secret prison on Polish soil.

Signed	Date	Witness
[Mr Pinior's signature]	26 March 2013	[Signature illegible]"

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

(a) Human Rights Watch Reports

79. On 6 November 2005 Human Rights Watch issued a "Statement on US Secret Detention Facilities in Europe" ("the 2005 HRW Statement"). It was given two 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 65 above and paragraph 159 below).

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

"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."

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

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

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

> Many of the detainees listed below are suspected of involvement in serious crimes, including the September 11, 2001 attacks; the 1998 U.S. Embassy bombings in Kenya and Tanzania; and the 2002 bombing at two nightclubs in Bali, Indonesia. ... Yet none on this list has been arraigned or criminally charged, and government officials, speaking anonymously to journalists, have suggested that some detainees have been tortured or seriously mistreated in custody.
>
> The current location of these prisoners is unknown.
>
> List, as of December 1, 2005:
>
> ...
>
> 4. Abu Zubaydah (also known as Zain al-Abidin Muhammad Husain). Reportedly arrested in March 2002, Faisalabad, Pakistan. Palestinian (born in Saudi Arabia), suspected senior al-Qaeda operational planner. Listed as captured in 'George W. Bush: Record of Achievement. Waging and Winning the War on Terror', available on the White House website. Previously listed as 'disappeared' by Human Rights Watch.
>
> ...
>
> 9. Abd al-Rahim al-Nashiri (or Abdulrahim Mohammad Abda al-Nasheri, aka Abu Bilal al-Makki or Mullah Ahmad Belal). Reportedly arrested in November 2002, United Arab Emirates. Saudi or Yemeni, suspected al-Qaeda chief of operations in the Persian Gulf, and suspected planner of the USS *Cole* bombing, and attack on the French oil tanker, *Limburg*. Listed in 'George W. Bush: Record of Achievement, Waging and Winning the War on Terror', available on the White House website. Previously listed as 'disappeared' by Human Rights Watch.
>
> ..."

(b) Council of Europe

(i) Procedure under Article 52 of the Convention

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

83. The Polish Government replied on 10 March 2006. The letter was signed by Mr W. Waszczykowski, 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."

84. 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"

85. 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.

86. 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

87. On 7 June 2006 Senator Marty presented to the Parliamentary Assembly his first report prepared in the framework of the investigation launched on 1 November 2005, 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".

88. 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. ..."

89. 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 Guantànamo 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 Guantànamo 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; Guantànamo Bay; Timisoara/Bucharest; Tashkent; Algiers; Baghdad; Szymany."

90. Chapter 2.6.3 refers to Poland. In so far as relevant, it states 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."

91. 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."

92. 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."

93. 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

94. On 8 June 2007 the Parliamentary Assembly adopted the second report prepared by Mr Dick Marty ("the 2007 Marty Report"– see also paragraph 66 above), 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.

95. 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. ..."

96. 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).
>
> ...."

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

98. Paragraphs 123-135 explain the US's choice of European partners. This part of the report, in so far as relevant, reads 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 Guantànamo Bay was announced by President Bush on 6 September 2006."

99. 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 in 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."

100. 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. ..."

101. 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 01 h00O on 5 June 2003

...

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

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

mentioning the name of the Polish airport where the aircraft actually landed – Szymany.

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

...

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

'STS/ATFM EXEMPT APPROVED

POLAND LANDING APPROVED'

...

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."

102. 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."

103. 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

104. 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 Guantànamo 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"

105. 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.

106. 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.

107. 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 Guantànamo in September 2006 coincide with those mentioned in a report by ABS News published in December 2005 (see paragraph § 177 of the resolution described in paragraph 109 below) listing the identities of twelve top 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

108. 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

109. 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 (2006/2200(INI) – "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 turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees, and recalls their positive obligations arising out of the case law of the European Court of Human Rights, as reiterated by the European Commission for Democracy through Law (Venice Commission);

44. Is concerned, in particular, that the blanket overflight and stopover clearances granted to CIA-operated aircraft may have been based, inter alia, on the NATO agreement on the implementation of Article 5 of the North Atlantic Treaty, adopted on 4 October 2001;

...

48. Confirms, in view of the additional information received during the second part of the proceedings of the Temporary Committee, that it is unlikely that certain European governments were unaware of the extraordinary rendition activities taking place in their territory;

...

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 Guantànamo 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."

(d) The 2007 ICRC Report

110. 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 fourteen terrorist suspects ("high-value detainees") – including the applicant – detained under the CIA detention programme had been transferred to the military authorities in the US Guantànamo Bay Naval Base (see also paragraphs 26 and 45 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].

111. 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

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

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 Guantànamo in September 2006.

The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. Mr Abu Zubaydah alleged that during one transfer operation the blindfold was tied very tightly resulting in wounds to his nose and ears. He does not know how long the transfer took but, prior to the transfer, he reported being told by his detaining authorities that he would be going on a journey that would last twenty-four to thirty hours.

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 Khaled Shaik Mohammed and Mr Al Nashiri.

In each case, the person to be suffocated was strapped to a tilting bed and a cloth was placed over the face, covering the nose and mouth. Water was then poured continuously onto the cloth, saturating it and blocking off any air so that the person could not breathe. This form of suffocation induced a feeling of panic and the acute impression that the person was about to die. In at least one case, this was accompanied by incontinence of the urine. At a point chosen by the interrogator the cloth was removed and the bed was rotated into a head-up and vertical position so that the person was left hanging by the straps used to secure him to the bed. The procedure was repeated at least twice, if not more often, during a single interrogation session. Moreover, this repetitive suffocation was inflicted on the detainees during subsequent sessions. The above procedure is the so-called ‘water boarding’ technique.

...

1.3.2. PROLONGED STRESS STANDING

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

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.

...

1.3.3. BEATING BY USE OF A COLLAR

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

...

1.3.5. CONFINEMENT IN A BOX

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

1.3.6. PROLONGED NUDITY

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

...

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

1.3.7 SLEEP DEPRIVATION AND USE OF LOUD MUSIC

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

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

1.3.8. EXPOSURE TO COLD TEMPERATURE/COLD WATER

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

1.3.10. THREATS

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

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

... 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. 3.11 . FORCED SHAVING

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

1.3.12. DEPRIVATION/RESTRICTED PROVISION OF SOLID FOOD

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

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

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).

112. Annex I to the 2007 ICRC Report contains examples of excerpts from some of the interviews conducted with the fourteen prisoners. These excerpts are reproduced verbatim. The verbatim record of the interview with the applicant gives details of his ill-treatment in the CIA custody "regarding his detention in Afghanistan where he was held for approximately nine months from May 2002 to February 2003". It also states that "he had previously been held for what he believes were several weeks and had several operations to severe gunshot injuries sustained at the time of arrest".

(e) United Nations Reports

(i) The 2010 UN Joint Study

113. 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).

114. 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."

115. 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."

116. 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."

117. In relation to Poland, the report (in paragraphs 114-118 stated, among other things, the following:

"114. In Poland, eight high-value detainees, ... were allegedly held between 2003 and 2005 in the village of Stare Kiejkuty. ... The Polish press subsequently claimed that the authorities of Poland – during the term of office of President Aleksander Kwasniewski and Prime Minister Leszek Miller – had assigned a team of 'around a dozen' intelligence officers to cooperate with the United States on Polish soil, thereby putting them under exclusive American control and had permitted American 'special purpose planes' to land on the territory of Poland. The existence of the facility has

always been denied by the Government of Poland and press reports have indicated that it is unclear what Polish authorities knew about the facility.

115. While denying that any terrorists had been detained in Poland, Zbigniew Siemiątkowski, the head of the Polish Intelligence Agency in the period 2002-2004, confirmed the landing of CIA flights. Earlier, the Marty report had included information from civil aviation records revealing how CIA-operated planes used for detainee transfers landed at Szymany airport, near the town of Szczytno, in Warmia-Mazuria province in north-eastem Poland ... between 2003 and 2005. Marty also explained how flights to Poland were disguised by using fake flight plans.

116. In research conducted for the present study, complex aeronautical data, including 'data strings' retrieved and analysed, have added further to this picture of flights disguised using fake flight plans and also front companies. For example, a flight from Bangkok to Szymany, Poland, on 5 December 2002 (stopping at Dubai) was identified, though it was disguised under multiple layers of secrecy, including charter and sub-contracting arrangements that would avoid there being any discernible 'fingerprints' of a United States Government operation, as well as the filing of 'dummy' flight plans. The experts were made aware of the role of the CIA chief aviation contractor through sources in the United States. The modus operandi was to charter private aircraft from among a wide variety of companies across the United States, on short-term leases to match the specific needs of the CIA Air Branch. Through retrieval and analysis of aeronautical data, including data strings, it is possible to connect the aircraft N63MU with three named American corporations, each of which provided cover in a different set of aviation records for the operation of December 2002. ... Nowhere in the aviation records generated by this aircraft is there any explicit recognition that it carried out a mission associated with the CIA. Research for the present study also made clear that the aviation services provider Universal Trip Support Services filed multiple dummy flight plans for the N63MU in the period from 3 to 6 December 2002. In a report, the CIA Inspector General discussed the interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri. Two United States sources with knowledge of the high-value detainees programme informed the experts that a passage revealing that 'enhanced interrogation of al-Nashiri continued through 4 December 2002" and another, partially redacted, which stated that: 'However, after being moved, al-Nashiri was thought to have been withholding information;', indicate that it was at this time that he was rendered to Poland. The passages are partially redacted because they explicitly state the facts of al-Nashiri's rendition – details which remain classified as 'Top Secret'.

...

118. ...While the experts appreciate the fact that an investigation has been opened into the existence of places of secret detention in Poland, they are concerned about the lack of transparency into the investigation. After 18 months, still nothing is known about the exact scope of the investigation.

The experts expect that any such investigation would not be limited to the question of whether Polish officials had created an 'extraterritorial zone' in Poland, but also whether officials were aware that 'enhanced interrogation techniques' were applied there."

(ii) The 2010 UN Observations

118. The UN Human Rights 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."

(f) The CHRGJ Report

119. On 9 March 2010 the Centre for Human Rights and Global Justice ("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. A more detailed description of the report is included in paragraphs 99-102 of the Statement of facts in the case of *Al Nashiri v. Poland* (no. 28761/11).

The CHRGJ Report 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 Guantànamo Bay in Cuba (see also paragraphs 48-49 above). It confirmed that a Boeing 737 aircraft, registered with the US Federal Aviation Administration as N313P, embarked from Dulles Airport in Washington, D.C. on Saturday 20 September 2003 at 22h02m 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: the Czech Republic, Uzbekistan, Afghanistan, Poland, Romania and Morocco. The aircraft flew from Rabat, Morocco to Guantànamo Bay on the night of Tuesday September 23, 2003, landing in the morning of Wednesday 24 September 2003.

(g) The 2010 Amnesty International Report

120. 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.

A detailed rendition of the passages relating to Poland is included in paragraph 104 of the Statement of facts in the case of *Al Nashiri v. Poland*.

8. Parliamentary inquiry in Poland

121. 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 Parliamentary Committee for Special Services (*Komisja do Spraw Służb Specjanych*) behind closed doors and none of its findings have been made public. The only public statement that the Polish Government made was at a press conference when they announced that the inquiry had not turned up anything "untoward". According to the 2006 Marty Report (see paragraph 92 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 104 above),

9. Criminal investigation in Poland

(a) Information supplied by the Polish Government in their written observations filed in the case of *Al Nashiri v. Poland*

122. 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.

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

123. 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 26 January 2012. On that date, by virtue of the Prosecutor General's decision, the case was transferred to the Kraków Prosecutor of Appeal (see also paragraph 144 below).

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

125. In the course of the investigation evidence form 62 persons have been heard. The case-file comprises 21 volumes. Procedural steps taken in the investigation include "checking information contained in Dick Marty's reports drafted for the Council of Europe in 2006-2007 and in the report of the European Parliament concerning possible detention in the territory of Poland of persons suspected of terrorism, as well as the use against them of illegal methods of interrogation". The Government add that the actions taken by the prosecution "concerned procedural verification of the circumstances of the landings, while omitting border and customs control in the Szymany airport used by the [CIA]".

Border Guard and Customs Service officers, the staff of the Szymany airport, air traffic controllers, one member of the European Parliament's Commission that had carried out an inquiry into the circumstances surrounding the CIA operations in Poland at the relevant time were heard as witnesses. The PANSA provided materials concerning aircraft landings in the Szymany airport (see also paragraph 129 and 137 below).

126. According to the Government, "due to the complex legal nature of the proceedings, opinion of experts on public international lawhas been sought in order to provide answers to questions concerning international law regulating the establishment and running of detention centres for persons suspected of terrorism and the status of such persons".

127. The Polish authorities addressed two requests for legal assistance to the US authorities.

The first request for information concerning the landing of US aircraft in the Szymany airport, dated 18 March 2009, was declined by the US Department of Justice on 7 October 2009 (see also paragraph 134 below).

The second request, dated 9 March 2011, concerned, according to the Government's description, "the need to perform acts with the participation of two persons who have the status of injured persons and whose representatives declared their participation in the preparatory proceedings". One of those persons was Mr Al Nashiri. As of 5 September 2012 (the date on which the Government filed their observations) there had been no answer to the request (see also paragraph 139 below).

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

(b) Facts as supplied by the applicant and supplemented by the facts related in the case of *Al Nashiri v. Poland*

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

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

> "...in reference to the Resolution of the European Parliament regarding the investigation into the alleged use of European countries by the Central Intelligence Agency of the United States to transport and illegally detained prisoners, the 5th Department for Organized Crime and Corruption of the Warsaw Prosecutor of Appeal is conducting the investigation in the case AP V DS. 37/09 regarding the abuse of power by State officials, namely the offence defined in Article 231 § 1 of the Criminal Code.
>
> The proceedings were commenced on March 11, 2008 by the Warsaw [Regional Prosecutor].
>
> In the course of the investigation there are conducted open and classified procedural activities.
>
> Within open activities, landings of American aircrafts in Szymany airport were confirmed. The information quoted in your letter, sourced by the web site, does not correspond with the exact wording of the prosecutor. The prosecutor possesses information over the report of the International Red Cross.
>
> The interest of the Helsinki Foundation for Human Rights of the case is obvious. Nevertheless the presentation of prosecutor's intentions, due to the fact that a wide range of procedural activities is classified, is not possible,
>
> Taking into consideration the above, it is not possible to indicate the precise date of the termination of the investigation."

130. On an unspecified date in 2009, in responding to a questionnaire from the UN experts working on the 2010 UN Joint Study (see paragraphs 113-117 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."

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

132. 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.

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

134. In a letter of 15 December 2010, replying to the Helsinki Foundation for Human Rights' request for information, the prosecution authorities revealed that on 18 March 2009 the Warsaw Prosecutor of Appeal had submitted a legal assistance request to the US judicial authorities regarding the investigation. On 7 October 2009 the US Department of Justice informed the Polish authorities that under Article 3(1)(c) of the Mutual Legal Assistance in Criminal Matters Agreement ("the MLAT") signed by the United States and Poland, the request had been refused and American authorities considered the case closed (see also paragraph 127 above). The Prosecutor did not publicly disclose the content of the mutual assistance request due to "State secrecy".

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

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

137. In a letter of 4 February 2011 addressed to the Helsinki Foundation for Human Rights the prosecutor provided information about certain procedural actions undertaken in the course of the investigation. According

to the letter, steps undertaken by the prosecutors were related to the verification of the landings without clearance by the CIA planes between 2002 and 2003 at the Szymany airport. Evidence from Border Guard and Customs Service officers had been heard, as well from employees of the Szymany airport, flight controllers and a member of the European Parliament's Commission that carried out an inquiry into the circumstances under investigation (see also paragraph 125 above).

138. Apparently on 17 February 2011 the Warsaw Deputy Prosecutor of Appeal, Mr R. Majewski, and the investigating prosecutor, Mr J. Mierzewski, ordered that evidence from three experts on public international law on the issues relevant for the investigation be obtained (see also paragraph 126 above). The contents of the order, questions and answers from the experts were not made public but were leaked to the press and published by *Gazeta Wyborcza* daily on 30 May 2011. There was no subsequent disclaimer from the prosecution. The text of the prosecutors' order read, in so far as relevant, as follows:

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

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

> "1. Are there any provisions of public international lawregulating the setting up and functioning of facilities for holding persons suspected of terrorist activity? If so, which of them are binding on Poland?
>
> *Answer*: Terrorism is a criminal offence and is prosecuted on the basis of legal provisions of a given State.
>
> 2. Are there any provisions of public international law permitting a facility for holding persons suspected of terrorist activity to be excluded from jurisdiction of the State on whose territory such a facility has been set up? If so, which of them are binding on Poland?
>
> *Answer:* There are no such provisions. The setting up of such a facility would amount to a breach of the Constitution and an offence against sovereignty of the R[epublic of] P[oland].
>
> 3. In the light of international public law, what is the legal status of an arrested person suspected of terrorist activity?
>
> *Answer:* This is regulated by criminal law of a given country unless [a person] is a prisoner of war.
>
> 4. What influence on the legal status of an arrested person suspected of terrorist activity does have the fact that the arresting authority considers that the person belongs to the organisation described as Al-Khaida?
>
> *Answer*: It does not have any importance. Membership in Al-Khaida is not separately regulated by any provisions of criminal law.
>
> 5. In the light of the provisions of international public law, what importance for the legal status of an arrested person suspected of terrorist activity does have the fact that the person has been arrested outside the territory which is occupied, seized or on which an armed conflict takes place?

Answer: Such arrest can be qualified as unlawful abduction.

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

Answer: Such a qualification is justified.

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

Answer: Yes and it should be prosecuted.

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

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

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

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

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

139. According to press reports, on 9 March 2011 the prosecution submitted the second legal assistance request to the US Department of Justice, sought under the MLAT. Although the prosecutors have never officially disclosed its content, it is reported that they asked, *inter alia*, for evidence to be heard from the applicant. There has apparently been no answer by the US authorities to this request (see also paragraph 127 above).

140. On an unspecified date in mid-May 2011 the investigating prosecutor J. Mierzewski was disqualified from dealing with the case (see also paragraph 163 below).

141. On 7 June 2011 the press reported that the disqualified investigating prosecutor had intended to ask the present President of Poland to release the former President of Poland, Mr A. Kwaśniewski, from his secrecy obligations in order to have him questioned in connection with the alleged operation of the CIA "black site" in Poland. In September 2011 the President of Poland refused the request.

142. 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 maintaning the secrecy of classified materials in connection with the investigation into secret CIA prisons in Poland and ordering the Intelligence Agency (*Agencja Wywiadu*) to disclose classified materials to the prosecution. This decision was apparently given in a review

procedure (see also paragraph 191 below), after the Head of the Intelligence Agency refused the investigating prosecutor's request to that effect.

143. On an unspecified date, presumably on 10 January 2012, the Warsaw Prosecutor of Appeal charged Mr Z. Siemiątkowski, the Head of the Intelligence Agency in 2002-2004, during the Democratic Left Alliance (*Sojusz Lewicy Demokratycznej*) Government, with abuse of power (Article 231 of the Criminal Code – see also paragraph 167 below) and with violation of international law by "unlawful detention" and "imposition of corporal punishment" on prisoners of war. Information about the charges leaked to the press towards the end of March 2012 and was widely disseminated in Polish and international media (see also paragraph 162 and 166-167 below). It is considered that the charges were eventually brought mostly because of the fact that the Intelligence Agency had been obliged – pursuant to the First President of the Supreme Court's decision – to supply certain classified materials relating to their cooperation with the CIA in the first stage of the "war on terror".

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

144. After the investigation was transferred to the Kraków Prosecutor of Appeal on 26 January 2012, the Prosecutor General (see also paragraph 123 above), relying on the secrecy of the investigation, refused to give reasons for that decision.

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

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

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

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

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

"1. The investigating prosecutor in the case concerning the suspicion that there were CIA prisons in Poland is Ms K.P.

2. The case is registered under no. Ap V Ds. 12/12/S.

3. The case concerns an offence defined in Article 231 §1 of the Criminal Code and in other provisions.

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

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

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

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

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

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

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

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

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

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

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

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

151. On 14 March 2013 the Polish lawyer for the applicant filed a motion with the Kraków Prosecutor of Appeal, requesting permission to submit to the Court, for the purposes of proceeding with the present

application, documents that he had earlier personally filed with the Prosecutor's Office.

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

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

(c) The applicant's lawyers' access to the investigation file

154. Since recognition of the applicant's status as an injured party, his Polish representative, despite several written and oral motions, has had access only to a very limited part of the case-file. The file is classified as subject to several layers of secrecy.

The counsel may not share his knowledge about the content of the file with anyone without prior consent of the prosecutors in charge of the investigation. The part of the file classified as "top secret" may not be shared with anyone. Most materials in the investigation file appear to have been classified as "top secret". The applicant's representative had very limited access to information covered by this classification. Any disclosure by anyone of the results of the investigation that fall under this category would constitute a criminal offence of unauthorised disclosure of classified information (Article 256 of the Polish Criminal Code).

Another level of secrecy applies to the rest of the case-file, namely the "secrecy of investigation" which by law covers criminal investigations in their preparatory phase. Where the representative has access to information, the regime of access is very narrowly construed.

155. During the inspection of the material on the file, the applicant's representative was not allowed to use a laptop, or take notes with a pen, although under the relevant legal provisions the authorities may in principle allow the representative to establish his own file with notes within the case-file, which he can access during every visit to the secret registry (see paragraph 184 below).

Despite several oral and written motions to review the full case-file or at least to review its secret parts again, the applicant's representative claims that he has not been allowed to do so.

(d) Concerns regarding the investigation expressed by international organisations

(i) United Nations

156. The 2010 UN Joint Study, in its paragraph 118, recorded its "concern . . . about the lack of transparency into the investigation" observing that "[a]fter 18 months, still nothing is known about the exact scope of the investigation". The UN experts added that they "expect that any such investigation would not be limited to the question of whether Polish officials had created an 'extraterritorial zone' in Poland, but also whether officials were aware that 'enhanced interrogation techniques' were applied there (see paragraph 113 above).

157. 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 118 above).

(ii) Amnesty International

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

> "Poland has been in the spotlight since 2005, long accused of hosting a secret detention facility operated by the CIA where suspects were held and tortured between 2002 and 2005. As this report has documented, a stream of credible reports by the media, intergovernmental, and non-governmental organizations – coupled with official data from Polish governmental agencies – leaves little room for doubt that Poland is implicated.
>
> The lawyers of both of the named victims – Abd al-Rahim al-Nashiri and Abu Zubaydah – maintain that the information now available is enough to trigger prosecutions, but the on-going Polish criminal investigation, shrouded in secrecy, drags on. Since its inception in 2008, the investigation has been plagued by sudden personnel changes, an unexplained shift from Warsaw to Krakow, and complaints by al-Nashiri's and Abu Zubaydah's representatives that prosecutors have frustrated their attempts to participate fully in the Polish proceedings. Other potential victims, such as Walid bin Attash, may be waiting in the wings, searching as well for justice in Poland.
>
> Yet accusations abound of delay in the investigation as a deliberate tactic as a result of political influence on the process. Attempts to get answers from the Polish authorities are met with cryptic acknowledgements that 'something happened' in Poland; or denials of knowledge of or wrong-doing in relation to the operations; or . . . with silence. ..."

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

(a) International media

159. On 2 November 2005 *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 Guantànamo 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 Guantànamo 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 Guantànamo 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. ..."

160. 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 79-81 above).

161. 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."

162. 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 '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

163. 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 international-law 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 on 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 the setting up in Poland of a centre of foreign intelligence removed from the control of our authorities', that 'the functioning of such a centre and holding suspects there amounts to a breach of the Constitution and international conventions, and that detainees can be characterised as victims 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 as the Warsaw Deputy Prosecu,tor 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 two 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 had granted them injured-party status. As far as we know, one of the bases for that

status is Article 189 [of the Criminal Code] defining 'unlawful deprivation of liberty with particular torment'.

...

It emerges 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."

164. 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 made the Intelligence Agency transmit to the prosecution materials concerning the cooperation with the CIA and the holding of 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 themselves behind secrecy.

Handing the materials over by the Intelligence Agency was a breakthrough in the investigation. Although the investigation has been under way 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 that 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."

165. 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 tried

before the Court of State? Secret memos drawn up by officers of the Polish intelligence – says our source within 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 within the prosecution, Miller and Kwaśniewski received oral reports about what was going on in the Polish intelligence base in Stare Kiejkuty from 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 smelled fishy and prepared those memos just in case. In order to make clear that – if the beans were spilled and [the authorities] started to look for culprits – the highest superiors knew of everything and acquiesced , 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'.

166. 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 at 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/she 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 the 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 receive CIA's planes at the Szymany airport and hold 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* reported 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 within 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

167. 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 three years."

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

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

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

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

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

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

4) 5 years – in respect of other offences.

..."

169. 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.

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

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

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

2. Code of Criminal Procedure

(a) Prosecution

171. 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."

172. Article 303 imposes on the authorities a duty to open of their own motion 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 initiate an investigation shall be issued [by the authorities] of [their] own motion or upon a notification of offence. [That] decision shall specify an act subject to the proceedings and its legal characterisation."

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

174. Article 10 § 1 of the Code reads:

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

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

(b) Classified materials

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

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

3. Laws on classified information and related ordinance

(a) The laws on classified information

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

177. 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."

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

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

179. 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.

180. 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"

181. 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".

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

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

(b) The 2012 Ordinance

183. The Ordinance of the Minister of Justice of 20 February 2012 on the handling of transcripts of questioning and other documents or items covered by the duty to maintain secrecy of classified information or the duty of secrecy related to the exercise of a profession or function (*Rozporządzenie Ministra Sprawiedliwości z dnia 20 lutego 2013 r. w sprawie sposobu postępowania z protokołami przesłuchań i innymi*

dokumentami lub przedmiotami, na które rozciąga się obowiązek zachowania tajemnicy informacji niejawnych albo zachowania tajemnicy związanej z wykonywaniem zawodu lub funkcji) ("the 2012 Ordinance") entered into force on 13 March 2012.

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

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

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

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

4. Law on intelligence agencies

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

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

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

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

186. 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 the 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 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 transporting 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.

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

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

...

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

188. 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."

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

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

The Committee comprises the Prime Minister, Secretary to the Committee, the Minister for the Interior, the Minister for Foreign Affairs,

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

190. 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.

191. The Head of the Intelligence Agency may allow officers or staff members to supply classified information to a specific person or institution (section 39). He has full discretion in granting or refusing the disclosure of classified information. Only if so ordered by the First President of the Supreme Court in the review procedure under section 39(6) is he obliged to disclose classified information. This exception, however, is limited to proceedings for crimes against peace, crimes against humanity and war crimes referred to in Article 105 § 1 of the Criminal Code (see paragraph 170 above) and serious fatal offences.

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

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

D. International law

1. UN Geneva Conventions

(a) Geneva (III) Convention

192. 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.

..."

193. 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."

194. 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."

195. 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

196. 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."

197. 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

198. 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

199. The applicant's complaints relate to three principal issues: his ill-treatment and incommunicado detention 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. He invokes Articles 3, 5, 6, 8 and 13 of the Convention.

200. As regards the applicant's ill-treatment and detention in Poland.

1) The alleged violation of Article 3

In the applicant's submission, the egregious nature of his total experience of the rendition process itself amounted to a violation of his substantive and procedural rights under Article 3 of the Convention.

He was transferred and detained without information as to his destination, his whereabouts or the reasons for his detention as part of the HVD Programme, which was deliberately designed and implemented to maximise the disorientation and vulnerability of an individual. The programme sought to ensure that neither he nor anyone else knew of his whereabouts, or could seek protection. This secret detention regime,

considering the applicant's conditions of detention and the transfer and methods of interrogation as applied to him in CIA custody, including in Poland, amounted to torture under Article 3.

Furthermore, the applicant's secret, unacknowledged detention, with a view to removing him from the protection of law, also amounted to enforced disappearance of persons, which is in turn recognised as constituting torture under international law.

In the applicant's submission, Poland knew about the CIA's rendition programme on its territory and of the real and immediate risk of torture to which "High Value Detainees" under this programme were subjected. Poland actively agreed to establish a secret detention site, and to facilitate the CIA unhindered use of the site, without any framework of law. The applicant claims that the Polish authorities knowingly and intentionally enabled the CIA to hold him in secret detention at the Stare Kiejkuty site for more than nine months. The State failed to take all necessary and appropriate measures to protect him from torture while he was on Polish territory.

2) Alleged violation of Article 5.

The applicant claims that he was detained in Poland for over nine months, yet his detention was not, and still is not, acknowledged. No custody records and no official trace of his detention appear to exist. His detention had no basis in law and did not correspond to any of the permissible grounds of detention under Article 5 § 1 of the Convention.

It was designed to ensure the complete denial of any of the safeguards contained in Article 5 of the Convention and his removal from the protection of the law. Throughout his detention on Polish territory the applicant was not allowed contact with a lawyer. Nor was he brought before a court and allowed to challenge the lawfulness of his detention. He was not informed of the reasons for, or even the place of, his detention. His detention therefore violated Article 5 §§ 1, 2, 3, 4 and 5 of the Convention.

In the applicant's opinion, Poland is responsible as the sovereign State on whose territory he was detained without any legal basis and denied access to the legal safeguards afforded to all detainees under Polish law and the Convention. Poland's role in the applicant's arbitrary detention was decisive. Without the active cooperation of Poland, the applicant's confinement on its territory would not have happened. The Polish authorities authorised the establishment of the CIA secret detention site on its territory and assisted in its maintenance. It actively facilitated the unhindered transfer of the detainees to the Polish "black site". According to the applicant, it denied to persons detained there the protection of Polish law to which they were entitled. It failed to comply with its positive obligation to provide oversight and to inspect the CIA detention facility in order to prevent arbitrary, incommunicado detention.

3) Alleged violation of Article 8.

The applicant complains that the absolute ban on contact with family members or with the outside world constituted interference with his private and family life and with his correspondence. For over nine months while in detention in Poland the applicant was not permitted any contact with his family, who had no information whatsoever as to his whereabouts.

Moreover, physical and psychological abuse to which the applicant claims he was subjected during his detention constituted a striking infringement of the right to physical and psychological integrity of the person.

In addition to the abusive conditions of detention and interrogation, the systematic recording of the applicant, including when he was asleep in his cell amounted to the negation of any sense of private space and interference with his right to private life.

201. As regards the applicant's transfer from Poland.

The applicant alleges that his transfer from Polish territory exposed him to years of further prolonged arbitrary detention, enforced disappearance, secret detention, torture and ill-treatment, which violated his rights under Articles 3, 5 and 6 of the Convention. The Polish authorities would and/or should have known of the real risk that he would continue to be held in the same detention regime to which he had been subject up to that point. The Guantànamo detention facility, its arbitrary detention regime, the lack of basic protection against arbitrary detention and denial of justice, were all facts that were already in the public domain at the time of the applicant's transfer from Poland.

202. As regards Poland's failure to conduct an effective investigation.

The applicant submits that the Polish authorities, in breach of the procedural obligations under Article 3 and 5 and the right to a remedy under Article 13, have failed to conduct an effective investigation into his claim that he was unlawfully detained and tortured on Polish territory and unlawfully transferred to places where he faced torture, prolonged arbitrary detention and flagrant denial of justice. In that regard, he stresses that to date no-one has been held to account for the crimes committed against him during his extraordinary rendition on Polish soil.

There was a crucial delay in opening the criminal investigation – more than five years after the applicant's transfer to the Polish "black site" and more than two years after the parliamentary inquiry into the first allegations that a secret CIA prison existed in the country. In the applicant's view, credible claims had arisen regarding the Polish CIA "black site" at least as early as November 2005, after the publication of the 2005 HRW Statement. The prosecution authorities should have taken resolute action and launched an investigation immediately when the issue came to light. The investigation has also been repeatedly extended and further delayed by several unexplained changes of the prosecutors in charge of the investigation. The Polish authorities have never disclosed the terms of reference or the precise scope of the investigation. Neither the applicant, nor his lawyers have meaningful access to information in relation to the case.

In conclusion, the applicant claims no effective criminal investigation can be considered to have been carried out with regard to his complaints under Articles 3, 5 and 8, and that thus there has been a violation of Article 13 of the Convention, taken in conjunction with these Articles.

QUESTIONS

As to the facts of the case:

1. In the period from 5 December 2002 to 22 September 2003 was the applicant detained in a secret detention facility in Poland?

In this respect, the applicant's lawyers are requested to explain the discrepancy between the applicant's various statements regarding the places and periods of his detention (see and compare paragraphs 40-41, 45, 48-51 and 112).

As to the law:

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

2. 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 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?

3. 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 violation of Article 5 of the Convention on account of his incommunicado detention;

(c) 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.); *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII; and *El-Masri v.the former Yugoslav Republic of Macedonia* [GC] (no. 39630/09) §§ 195–211, 230–243 and 248–250).

II) Alleged transfer of the applicant from Polish territory

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

5. In the affirmative,

i. 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?

ii. has Poland exposed the applicant to the risk of further incommunicado detention, contrary to Article 5 of the Convention? In this respect, has Poland complied with its obligations under Article 5 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.; *Medova v. Russia*, no. 25385/04, § 123, 15 January 2009; and *El Masri*, §§ 212–222 and 230–233)?

6. 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 *Othman (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

7. 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?

8. In this regard, has there been

i. a violation of Article 3 taken alone and/or in conjunction with Article 13 of the Convention?

ii. a violation of Article 5 and 8 read in conjunction with Article 13?

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.

9. Has the applicant had at his disposal an "effective remedy" within the meaning of Article 13 for his complaints under Articles 3, 5, 6 and 8 of the Convention?