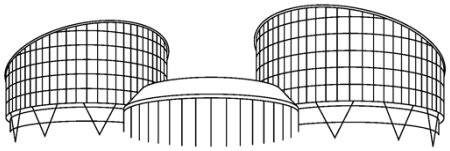

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF AL NASHIRI v. ROMANIA

(Application no. 33234/12)

JUDGMENT

STRASBOURG

31 May 2018

FINAL

08/10/2018

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

In the case of Al Nashiri v. Romania,

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

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Robert Spano,
Aleš Pejchal,
Mirjana Lazarova Trajkovska,
Paul Mahoney, *judges,*
Florin Streteanu, ad hoc *judge,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 29 June 2016 and 11 April 2018,

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

PROCEDURE

1. The case originated in an application (no. 33234/12) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Saudi Arabian national of Yemeni descent, Mr Abd Al Rahim Husseyn Muhammad Al Nashiri ("the applicant"), on 1 June 2012.

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

The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

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

(i) Articles 3, 5 and 8 in that Romania had enabled the Central Intelligence Agency of the United States ("the CIA") to detain him on its territory at a secret detention facility, thereby allowing the CIA to subject him to treatment that had amounted to torture, incommunicado detention and deprivation of any access to, or contact with, his family;

(ii) Articles 2 and 3 of the Convention, Article 1 of Protocol No. 6 to the Convention and also Articles 5 and 6 of the Convention in that Romania had enabled the CIA to transfer him from its territory to other CIA-run detention facilities elsewhere, despite a real risk of his being subjected to further

torture, ill-treatment, incommunicado detention, a flagrantly unfair trial and the imposition of the death penalty;

(iii) Article 3 alone and in conjunction with Article 13 and also Articles 5 and 8 of the Convention in that Romania had failed to conduct an effective and thorough investigation into his allegations of serious violations of his rights protected by the Convention during his secret detention on Romanian territory.

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

5. On 4 September 2012 the President of the Third Section gave priority to the application, in accordance with Rule 41.

6. On 18 September 2012 the Chamber that had been constituted to consider the case (Rule 26 § 1) gave notice of the application to the Government, in accordance with Rule 54 § 2 (b).

7. The Government and the applicant each filed written observations on the admissibility and merits of the case. In addition, third-party comments were received from Amnesty International, (hereinafter also referred to as "AI") and the International Commission of Jurists (hereinafter also referred to as "ICJ"), the Association for the Defence of Human Rights in Romania – the Helsinki Committee ("APADOR-CH"), the twelve media organisations ("Media Groups"), represented by Howard Kennedy Fsi LLP, and the United Nations (UN) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ("the UN Special Rapporteur").

8. On 26 May 2015 the President of the Section decided to invite the parties to submit further observations on certain factual developments. They were also invited to make comments on the case in the light of the Court's judgment in the case of *Al Nashiri v. Poland* (no. 28761/11, 24 July 2014).

9. Following the re-composition of the Court's Sections, the application was assigned to the First Section of the Court, pursuant to Rule 52 § 2.

10. Iulia Motoc, the judge elected in respect of Romania, withdrew from sitting in the case (Rule 28). The President accordingly appointed Mr Ioan Florin Streteanu to sit as an *ad hoc* judge in her place (Article 26 § 4 of the Convention and Rule 29 § 1).

11. Subsequently, the Chamber of the First Section that had been constituted to consider the case, having consulted the parties, decided that a public hearing on the admissibility and merits of the case be held on 29 June 2016.

The Chamber also decided, of its own motion, to hear evidence from experts (Rule A1 of the Annex to the Rules of Court). The date for a fact-finding hearing was set for 28 June 2016.

In this connection, the President of the Chamber directed that verbatim records of both hearings be made, pursuant to Rule 70 of the Rules of Court

and Rule 8 of the Annex to the Rules of Court, and instructed the Registrar accordingly.

12. On 28 June 2016 the Chamber held a fact-finding hearing and heard evidence from experts, in accordance with Rule A1 §§ 1 and 5 of the Annex.

In the course of the fact-finding hearing the parties were also invited to state their position on the confidentiality (Rule 33 § 2) of certain documents produced by the Romanian Government, in particular annexes to the Romanian Senate Report of 2007 ("the 2007 Romanian Senate Report" – see also paragraphs 165-169 below) and material collected in the context of a criminal investigation carried out by the Romanian authorities (see paragraphs 171-190 below). The applicant was in favour of full disclosure, whereas the Government considered that the confidentiality of annexes nos. 1-11 to the 2007 Romanian Senate Report in the redacted versions supplied by them could be lifted and that transcripts of evidence given by witnesses during the investigation could be referred to in public, without using any element that would allow the witnesses to be identified. That included their names and surnames and their exact workplaces or institutions that they represented.

As regards the material from the investigation file, the Government in addition produced an English summary of annexes with documents submitted by them. They did not object to the content of the summary being referred to in public, in particular in the parties' oral submissions at the public hearing.

The Court acceded to the Government's requests.

13. A public hearing took place in public in the Human Rights Building, Strasbourg, on 29 June 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs C. BRUMAR, Agent of the Government, Ministry of Foreign Affairs,
Mrs A.-L. RUSU, Chargé d'affaires a.i., Deputy to the Permanent Representative of Romania to the Council of Europe, Counsel,
Mrs M. LUDUȘAN, judge seconded to the Agent of the Government before the European Court of Human Rights, Ministry of Foreign Affairs, Counsel,
Mr V.H.D. CONSTANTINESCU, judge seconded to the Agent of the Government before the European Court of Human Rights, Ministry of Foreign Affairs, Counsel,
Mr R. BODNAR, Bucharest Airports National Company, Counsel,
Mr M. SIMIONIS, Romanian Civil Aviation Authority, Counsel,
Mr A. ȘTEFAN, Romanian Air Traffic Services Administration, Counsel;

(b) *for the applicant*

Mr R. SKILBECK, Counsel,
Ms A. SINGH, Counsel,
Ms D.-O. HATNEANU, Counsel,
Ms N. HOLLANDER, Adviser.

The Court heard addresses by Ms Brumar, Ms Luduşan, Ms Singh and Ms Hatneanu.

14. The fact-finding hearing and the public hearing were presided over by Mirjana Lazarova Trajkovska, former President of the First Section of the Court. Following the end of her term of office and the elections of Section Presidents, Linos-Alexandre Sicilianos, the President of the First Section, became the President of the Chamber (Rules 8 § 1, 12 and 26 § 3). Judges Lazarova Trajkovska and Mahoney continued to deal with the case after the end of their terms of office (Rule 26 § 3).

THE FACTS

15. The applicant was born in 1965 and is currently detained in the Internment Facility at the US Guantánamo Bay Naval Base in Cuba

I. PRELIMINARY CONSIDERATIONS REGARDING THE ESTABLISHMENT OF THE FACTS

16. It is to be noted that in the present case involving, as the applicant's previous application before the Court, complaints of secret detention and torture to which he was allegedly subjected during the extraordinary rendition operations by the United States' authorities (see paragraphs 22-70 and 78-97 below) the Court is deprived of the possibility of obtaining any form of direct account of the events complained of from the applicant (see *Al Nashiri v. Poland*, no. 28761/11, § 397, 24 July 2014; see also *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 397, 24 July 2014).

As in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland,* the facts as adduced by the applicant were to a considerable extent a reconstruction of dates and other elements relevant to his rendition, detention and treatment in the US authorities' custody, based on various publicly available sources of information. The applicant's version of the facts as stated in his initial application of 1 June 2012 evolved and partly changed during the proceedings before the Court (see paragraphs 115-116 below).

The respondent Government contested the applicant's version of the facts on all accounts, maintaining that there was no evidence demonstrating that

they had occurred in Romania (see paragraphs 395-402 and 419-443 below).

17. Consequently, the facts of the case as set out below (see paragraphs 98-164 below) are based on the applicant's account supplemented by various items of evidence in the Court's possession.

II. EVIDENCE BEFORE THE COURT

18. In order to establish the facts of the case the Court has relied on its findings in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* (both cited above), documentary evidence supplied by the applicant and the Government, including witness testimony obtained in the criminal investigation (see paragraphs 298-325 below), observations of the parties, material available in the public domain (see paragraphs 212-245 below), an affidavit made by Mr Thomas Hammarberg, the former Commissioner for Human Rights of the Council of Europe, a dossier that he produced for the Romanian Prosecutor General and his written reply to questions put to him by the Court and the parties (see paragraphs 333-353 below), an affidavit made by Senator Dick Marty (see paragraph 354 below) and testimony of experts who gave oral evidence before the Court at the fact-finding hearing held on 28 June 2016 (see paragraphs 359-393 below).

In the course of that hearing the Court, with the participation of the parties, took evidence from the following persons:

(1) Mr Giovanni Claudio Fava, in his capacity as the Rapporteur of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of Prisoners ("the TDIP"), the relevant inquiry also being called "the Fava Inquiry" and so referred to hereinafter (see paragraphs 268-277 below).

(2) Senator Dick Marty, in his capacity as Rapporteur of the Council of Europe's Parliamentary Assembly ("PACE") in the inquiry into the allegations of CIA secret detention facilities in the Council of Europe's member States (hereinafter the "Marty Inquiry" – see paragraphs 249-267 below).

(3) Mr J.G.S., in his capacity as advisor to Senator Marty in the Marty Inquiry and advisor to Mr Hammarberg who had dealt with, among other things, compiling data on flights associated with the CIA extraordinary rendition (see paragraphs 249-267 and 334-342 below), as well as an expert who had submitted a report on the applicant's case in *El-Masri v. the former Yugoslav Republic of Macedonia* (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 75, ECHR 2012) and who had given oral evidence before the Court in the cases of *Al Nashiri v. Poland* (cited above, §§ 42, 311-318 and 324-331) and *Husayn (Abu Zubaydah) v. Poland* (cited above, §§ 42, 305-312 and 318-325) and also in

connection with his investigative activities concerning the CIA extraordinary rendition operations in general.

In the course of giving evidence to the Court, Senator Marty and Mr J.G.S also gave a PowerPoint presentation entitled "Distillation of available documentary evidence, including flight data, in respect of Romania and the case of *Al Nashiri*".

(4) Mr Crofton Black, in his capacity as an investigator at the Bureau of Investigative Journalism, an expert in the investigation by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' ("LIBE Committee") into the alleged transportation and illegal detention of prisoners in European countries by the CIA (see paragraphs 286-287 and 353-356 below) and also in connection with his involvement in research and various investigative tasks concerning the CIA extraordinary rendition operations in general, including tasks performed for the UK-based non-governmental organisation Reprieve.

19. The relevant passages from the experts' testimony are reproduced below (see paragraphs 104, 107-108, 110, 119, 121, 124-125,129-132 and 357-391 below).

III. BACKGROUND TO THE CASE

A. Terrorist attacks of which the applicant has been suspected

1. USS Cole bombing in 2000

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

The US authorities considered the applicant to have been one of the most senior figures in al-Qaeda and a suspect in this bombing. He has been suspected of masterminding and orchestrating the attack (see also paragraphs 142-156 below).

2. MV Limburg bombing in 2002

21. On 6 October 2002 a French oil tanker MV *Limburg*, while it was in the Gulf of Aden some miles offshore, was rammed by a small explosives-laden boat which detonated. The tanker caught fire and approximately 90,000 barrels (14,000 sq.m) of oil leaked into the Gulf of Aden. One crew member was killed and twelve others injured. The style of the attack resembled the suicide *USS Cole* bombing described above. The US authorities have suspected the applicant of playing a role in the attack (see also paragraphs 142-156 below).

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

22. On an unspecified date following 11 September 2001 the CIA established a programme in the Counterterrorist Center ("CTC") to detain and interrogate terrorists at sites abroad. In further documents the US authorities referred to it as "the CTC program" but, subsequently, it was also called "the High-Value Detainee Program" ("the HVD Program") or the "Rendition Detention Interrogation Program" ("the RDI Program"). In the Council of Europe's documents it is also described as "the CIA secret detention programme" or "the extraordinary rendition programme" (see also paragraphs 250-265 below). For the purposes of the present case, it is referred to as "the HVD Programme".

23. A detailed description of the HVD Programme made on the basis of materials that were available to the Court in the case of *Al Nashiri v. Poland* on the date of adoption of the judgment (8 July 2014) can be found in paragraphs 47-71 of that judgment. Those materials included the classified CIA documents released in redacted versions in 2009-2010 (see also paragraphs 36-58 below).

24. On 9 December 2014 the United States authorities released the Findings and Conclusions and, in a heavily redacted version, the Executive Summary of the US Senate Select Committee on Intelligence's "Study of the Central Intelligence Agency's Detention and Interrogation Program". The full Committee Study – as stated therein "the most comprehensive review ever conducted of the CIA Detention and Interrogation Program", which is more than 6,700 pages long, remains classified (see also paragraphs 23-25 above). The declassified Executive Summary (hereinafter "the 2014 US Senate Committee Report") comprises 499 pages (for further details concerning the US Senate's review of the CIA's activities involved in the HVD Programme see paragraphs 79-98 below).

25. The 2014 US Senate Committee Report disclosed new facts and provided a significant amount of new information, mostly based on the CIA classified documents, about the CIA extraordinary rendition and secret detention operations, their foreign partners or co-operators, as well as the plight of certain detainees, including the applicant in the present case. However, all names of the countries on whose territories the CIA carried out its extraordinary rendition and secret detention operations were redacted and all foreign detention facilities were colour code-named. The 2014 US Senate Committee Report explains that the CIA requested that the names of countries that hosted CIA detention sites, or with which the CIA negotiated hosting sites, as well as information directly or indirectly identifying those countries be redacted. The countries were accordingly listed by a single letter of the alphabet, a letter which was nevertheless blackened throughout the document. Furthermore, at the CIA's request the original code names for

CIA detention sites were replaced with new identifiers – the above-mentioned colour code-names.

26. The 2014 US Senate Committee Report refers to eight specifically colour code-named CIA detention sites located abroad: "Detention Site Green", "Detention Site Cobalt", "Detention Site Black", "Detention Site Blue", "Detention Site Gray", "Detention Site Violet", "Detention Site Orange" and "Detention Site Brown" (see also paragraph 159 below).

27. The description of the "HVD Programme" given below is based on the CIA declassified documents that were available to the Court in *Al-Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, supplemented by the 2014 US Senate Committee Report.

1. The establishment of the HVD Programme

(a) The US President's memoranda

(i) Memorandum of 17 September 2001

28. The 2014 US Senate Committee Report states that on 17 September 2001 President George W. Bush signed a covert action Memorandum of Notification ("the MON") to authorise the Director of the CIA to "undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities". Although the CIA had previously been provided with certain limited authority to detain specific, named individuals pending the issuance of formal criminal charges, the MON provided unprecedented authority, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of their detention. The MON made no reference to interrogations or interrogation techniques.

29. Before the issuance of the MON, on 14 September 2001, the Chief of operations of the CIA, based on an urgent request from the Chief of the Counterterrorism Center ("CTC"), had sent an email to CIA Stations seeking input on appropriate locations for potential CIA detention facilities.

30. A CIA internal memorandum, entitled "Approval to Establish a Detention Facility for Terrorists", drawn up on an unspecified date in November 2001, explained that detention at a US military base outside of the USA was "the best option". In the context of risks associated with the CIA maintaining a detention facility, it warned that "as captured terrorists may be held days, months, or years, the likelihood of exposure will grow over time". It anticipated that "in a foreign country, close cooperation with the host government will entail intensive negotiations" and warned that "any foreign country poses uncontrollable risks that could create incidents, vulnerability to the security of the facility, bilateral problems, and uncertainty over maintaining the facility". The memorandum recommended

the establishment of a "short-term facility in which the CIA's role would be limited to oversight, funding and responsibility".

It further stated that the CIA would "contract out all other requirements to other US Government organizations, commercial companies and, as appropriate, foreign governments".

(ii) Memorandum of 7 February 2002

31. On 7 February 2002 President Bush issued a memorandum stating that neither al-Qaeda nor Taliban detainees qualified as prisoners of war under the Geneva Conventions and that Common Article 3 of the Geneva Conventions (see paragraphs 204-209 below), requiring humane treatment of individuals in a conflict, did not apply to them. The text of the order read, in so far as relevant, as follows:

"...

2. Pursuant to my authority as commander in chief and chief executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the attorney general in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaida is not a High Contracting Party to Geneva.

...

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al-Qaida or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to armed conflict not of an international character.

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al-Qaida, al-Qaida detainees also do not qualify as prisoners of war.

3. Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

...

6. I hereby direct the secretary of state to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach."

32. On the same day, at the press conference, the White House Press Secretary announced the President's decision. The President's memorandum was subsequently widely commented in the US and international media.

(b) Abu Zubaydah's capture and transfer to a CIA covert detention facility in March 2002

33. On 27 March 2002 the Pakistani authorities working with the CIA captured Abu Zubaydah, the first so-called "high-value detainee" ("HVD") in Faisalabad, Pakistan. Abu Zubaydah's capture accelerated the development of the HVD Programme (see *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 82-84).

34. According to the 2014 US Senate Committee Report, in late March 2002, anticipating its eventual custody of Abu Zubaydah, the CIA began considering options for his transfer to CIA custody and detention under the MON. The CIA rejected the option of US military custody, mostly relying on the lack of security and the fact that in such a case Abu Zubaydah would have to be declared to the International Committee of the Red Cross ("the ICRC").

35. On 29 March 2002 President Bush approved moving forward with the plan to transfer Abu Zubaydah to a covert detention facility – Detention Site Green – in a country whose name was blackened in the 2014 US Senate Committee Report. The report further stated:

> "Shortly thereafter, Abu Zubaydah was rendered from Pakistan to Country [name REDACTED] where he was held at the first CIA detention site, referred to in this summary as 'DETENTION SITE GREEN'."

(c) Setting up the CIA programme "to detain and interrogate terrorists at sites abroad"

36. On 24 August 2009 the US 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.

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

38. 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."

39. 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 "HVDs") were given the highest priority for capture, detention and interrogation. In some CIA documents they are also referred to as "high-value targets" ("HVTs"). The applicant fell into this category of detainees.

2. Enhanced Interrogation Techniques

(a) Description of legally sanctioned standard and enhanced interrogation techniques

40. According to the 2004 CIA Report, in August 2002 the US Department of Justice had provided the CIA with a legal opinion determining that 10 specific "Enhanced Interrogation Techniques" ("EITs"), to be applied to suspected terrorists, would not violate the prohibition of torture.

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

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

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

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

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

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

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

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

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

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

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

42. 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.

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

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

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

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

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

(b) Expanding the use of the EITs beyond Abu Zubaydah's interrogations

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

According to the report, "this resulted in the production of an undated and unsigned document entitled 'Legal principles Applicable to CIA Detention and Interrogation of Captured Al'Qaeda Personnel'". Certain

parts of that document are rendered in the 2004 CIA Report. In particular, the report cites the following passages:

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

The report, in paragraph 44, states that according to OGC this analysis embodied the US Department of Justice's 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.

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

3. Standard procedures and treatment of "high-value detainees" in CIA custody (combined use of interrogation techniques)

48. 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 HVDs – in CIA custody were routinely subjected from their capture through their rendition and reception at a CIA "black site" to their interrogation. It "focuses on the topic of combined use of interrogation techniques, [the purpose of which] is to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner ... Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence HVD behaviour, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence ... The interrogation process could be broken into three

separate phases: Initial conditions, transition to interrogation and interrogation" (see also *El-Masri*, cited above, § 124).

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

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

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

51. 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."

52. 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Walling. Walling is one of the most effective interrogation techniques because it wears down the HVD physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the HVD knows he is about to be walled again. [REDACTED] interrogator [REDACTED]. An HVD may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a

question. During an interrogation session that is designed to be intense, an HVD will be walled multiple times in the session. Because of the physical dynamics of walling, it is impractical to use it simultaneously with other corrective or coercive techniques.

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

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

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

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

54. 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". A detailed description of such "prototypical interrogation" can be found in *Al Nashiri v. Poland* (see *Al Nashiri v. Poland*, cited above, § 68).

55. From the end of January 2003 to September 2006 the rules for CIA interrogations were set out in the Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001 ("the DCI Interrogation Guidelines"), signed by the CIA Director, George Tenet, on 28 January 2003.

The 2014 US Senate Committee Report states that, although the above guidelines were prepared as a reaction to the death of one of the HVDs, Gul Rahman, at Detention Site Cobalt and the use of unauthorised interrogation techniques on Mr Al Nashiri at Detention Site Blue (see *Al Nashiri v. Poland*, cited above, §§ 99-100), they did not reference all interrogation

practices that had been employed at CIA detention sites. For instance, they did not address whether techniques such as the "rough take down", the use of cold water showers and prolonged light deprivation were prohibited.

According to the 2014 US Senate Committee Report, the CIA officers had a "significant amount of discretion" in the application of the interrogation measures. The relevant part of the 2014 US Senate Committee Report reads:

> "... [B]y requiring advance approval of 'standard techniques' whenever feasible, the guidelines allowed CIA officers a significant amount of discretion to determine who could be subjected to the CIA's 'standard' interrogation techniques, when those techniques could be applied, and when it was not 'feasible' to request advance approval from CIA Headquarters. Thus, consistent with the interrogation guidelines, throughout much of 2003, CIA officers (including personnel not trained in interrogation) could, at their discretion, strip a detainee naked, shackle him in the standing position for up to 72 hours, and douse the detainee repeatedly with cold water without approval from CIA Headquarters if those officers judged CIA Headquarters approval was not 'feasible'. In practice, CIA personnel routinely applied these types of interrogation techniques without obtaining prior approval."

4. Conditions of detention at CIA "black sites"

56. From the end of January 2003 to September 2006 the conditions of detention at CIA detention facilities abroad were governed by the Guidelines on Confinement Conditions for CIA Detainees ("the DCI Confinement Guidelines"), signed by George Tenet on 28 January 2003. This document, together with the DCI Interrogation Guidelines (see paragraph 55 above), set out the first formal interrogation and confinement guidelines for the HVD Programme. The 2014 US Senate Committee Report relates that, in contrast to earlier proposals of late 2001, when the CIA expected that any detention facility would have to meet US prison standards, the guidelines set forth minimal standards and required only that the facility be sufficient to meet "basic health needs".

According to the report, that meant that even a facility comparable to the "Detention Site Cobalt" in which detainees were kept shackled in complete darkness and isolation, with a bucket for human waste, and without heat during the winter months, met the standard.

57. According to the guidelines, at least the following "six standard conditions of confinement" were in use during that period:

(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 illuminated the cell to about the same brightness as an office;

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

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

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

5. The scale of the HVD Programme

59. According to the 2014 US Senate Committee Report, the CIA held detainees from 2002 to 2008.

Early 2003 was the most active period of the programme. Of the 119 detainees identified by the Senate Intelligence Committee as held by the CIA, fifty-three were brought into custody in 2003. Of thirty-nine detainees who, as found by the Committee, were subjected to the EITs, seventeen were subjected to such methods of interrogation between January 2003 and August 2003. During that time the EITs were primarily used at the Detention Site Cobalt and the Detention Site Blue.

The report states that by the end of 2004 the overwhelming majority of CIA detainees – 113 of the 119 identified in the report – had already entered CIA custody. Most of the detainees remaining in custody were no longer undergoing active interrogations; rather, they were infrequently questioned and awaiting a "final disposition". The CIA took custody of only six new detainees between 2005 and January 2009: four detainees in 2005, one in 2006, and one in 2007.

6. Closure of the HVD Programme

60. 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 Guantánamo Bay.

61. In January 2009 President Obama signed Executive Order 13491 that prohibited the CIA from holding detainees other than on a "short-term,

transitory basis" and limited interrogation techniques to those included in the Army Field Manual.

C. The United States Supreme Court's judgment in *Rasul v. Bush*

62. On 28 June 2004 the US Supreme Court gave judgment in *Rasul v. Bush*, 542 U.S. 466 (2004). It held that foreign nationals detained in the Guantánamo Bay detention camp could petition federal courts for writs of *habeas corpus* to review the legality of their detention. The relevant part of the syllabus reads as follows:

> "United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay.
>
> (a) The District Court has jurisdiction to hear petitioners' *habeas* challenges under 28 U.S.C. § 2241, which authorizes district courts, within their respective jurisdictions, to entertain *habeas* applications by persons claiming to be held in custody in violation of the ... laws ... of the United States, §§ 2241(a), (c)(3).
>
> Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty. ..."

D. Role of Jeppesen Dataplan, Richmor Aviation and other air companies in the CIA rendition operations

63. According to various reports available in the public domain and materials collected during international inquiries concerning the CIA's HDV Programme (see paragraphs 250-265, 268-277 and 355-358 below), the CIA used a network of at least twenty-six private planes for their rendition operations. The planes were leased through front companies. The CIA contracts remain classified but parts of the contracts between front companies (such as, for example, Richmor Aviation) and their contractors are publicly available

1. Jeppesen Dataplan Inc.

64. Jeppesen Dataplan. Inc. 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.

65. In the light of reports on rendition flights (see paragraphs 260, 289-293 and 318 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.

66. In 2007 the American Civil Liberties Union ("the ACLU") filed a federal lawsuit against Jeppesen Dataplan, Inc., on behalf of three extraordinary rendition victims with the District Court for the Northern

District of California. Later, two other persons joined the lawsuit as plaintiffs. The suit charged that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly disappear these five men to torture, detention and interrogation.

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

2. Richmor Aviation

67. Richmor Aviation is an aircraft company based in Hudson, New York.

68. According to Reprieve, documents detailing Richmor Aviation's involvement in CIA renditions missions were made public by it in 2011. These documents included litigation material concerning a dispute for a breach of contract between Richmor Aviation and Sportsflight, a contractor organising flights. They show that Richmor Aviation was involved in the rendition operations in particular through a Gulfstream jet under their management, N85VM, which was later redesignated as N227SV (see also paragraphs 116-121 below). Other planes operated by Richmor Aviation were also involved in the programme.

Richmor Aviation became a part of this programme as early as June 2002, when the US government's initial prime contractor DynCorp entered into single entity charter contract with broker Capital Aviation to supply Richmor Aviation's Gulfstream jet N85VM.

Under that contract, Richmor Aviation was subcontracted to perform numerous missions. For instance, Hassan Mustafa Osama Nasr aka Abu Omar's rendition flight from Germany to Egypt on 17 February 2003 was operated by Richmor Aviation on behalf of DynCorp (see also *Nasr and Ghali v. Italy*, no. 44883/09, §§ 39, 112 and 231, 23 February 2016).

It is also reported that the CIA, acting through Computer Sciences Corporation, arranged for Richmor Aviation jet N982RK to transfer Mr El-Masri from a CIA "black site" in Afghanistan to Albania (see *El-Masri*, cited above, § 46).

3. Other companies

69. The Fava Inquiry (see paragraph 18 above and paragraphs 268-277 below) examined, among other things, the use by the CIA of private companies and charter services to carry out the rendition operations. The

relevant parts of working document no. 4 produced in the course of the inquiry read as follows:

> "Within the context of the extraordinary renditions, the CIA had often used private companies and charter services for aircraft rentals. Through the civil aviation it is possible to reach places where the military aircraft would be seen suspiciously. Thanks to the civil aviation, the CIA avoids the duty to provide the information required by States concerning government or military flights.
>
> Most of these companies are the so-called shell companies: they only exist on papers (post offices boxes, for instance) or they have a sole employee (normally a lawyer). These shell companies appear the owners of some aircrafts which are systematically object of buy-and-sell operations. After each transaction, planes are re-registered in order to [lose] their tracks. ...
>
> Sometimes shell companies used by CIA rely on other real companies endowed with premises and employees (so called: operating companies). These companies are entrusted to stand behind the shell companies; they provide the CIA aircrafts with all necessary logistics (pilots, catering, technical assistance). In some cases the operating companies are directly linked to the CIA. One example is Aero Contractor, a company described by the New York Times as the 'major domestic hub of the Central Intelligence Agency's secret air service'.
>
> The system is well described by the New York Times:
>
> '*An analysis of thousands of flight records, aircraft registrations and corporate documents, as well as interviews with former C.I.A. officers and pilots, show that the agency owns at least 26 planes, 10 of them purchased since 2001. The agency has concealed its ownership behind a web of seven shell corporations that appear to have no employees and no function apart from owning the aircraft. The planes, regularly supplemented by private charters, are operated by real companies controlled by or tied to the agency, including Aero Contractors and two Florida companies, Pegasus Technologies and Tepper Aviation.'*
>
> Finally, in other cases, the CIA leases airplanes from normal charter agents, as it is the case for Richmor Aviation. Richmor Aviation is one of the oldest charter and flight management companies. The Gulfstream IV, N85VM belongs to Richmor Aviation (plane involved in the abduction of Abu Omar).
>
> Ultimately, in this inextricable net, there is also the possibility that single aircrafts change their registration numbers (as for the Gulfstream V, from Richmor Aviation, registered as N379P, then, N8068V and then N44982).
>
> There are indeed 51 airplanes alleged to be used in the extraordinary renditions, but, according the Federal Aviation Administration records, there would be 57 registration numbers. It comes out that some of them are registered more than once.
>
> **Among the 51 airplanes alleged to be used by CIA:**
>
> 26 planes are registered to shell companies and sometimes supported by operating companies.
>
> 10 are designed as 'CIA frequent flyers', they belong to Blackwater USA, an important CIA and US Army 'classified contractor'. It provides staff, training and aviation logistic. In this case there is no intermediation of shell companies.
>
> The other 15 planes are from occasional rental from private companies working with CIA as well as with other customers."

70. The document listed the following operating companies involved in the rendition operations: Aero Contractors, Ltd; Tepper Aviation; Richmor Aviation; and subsidiaries of Blackwater USA.

Aero Contractors was the operating company for the following shell companies: Steven Express Leasing Inc., Premier Executive Transport Service, Aviation Specialties Inc.; and Devon Holding and Leasing Inc..

E. Military Commissions

1. Military Order of 13 November 2001

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

The relevant parts of the order read as follows:

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

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

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

2. Military Commission Order no. 1

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

The relevant parts of the order read as follows:

"2. ESTABLISHMENT OF MILITARY COMMISSIONS

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

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

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

(2) Number of Members

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

(3) Qualifications

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

6. CONDUCT OF THE TRIAL

...

B. Duties of the Commission during Trial

The Commission shall:

(1) Provide a full and fair trial.

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

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order

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

...

D. Evidence

(1) Admissibility

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

(5) Protection of Information

(a) Protective Order

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

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

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

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

(iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

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

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

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

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

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

...

G. Sentence

Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.

Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

...

(2) Finality of Findings and Sentence

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

...

(4) Review Panel

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

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

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

(5) Review by the Secretary of Defense

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

(6) Final Decision

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

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

73. On 29 June 2006 the Supreme Court ruled in *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006), that the military commission "lack[ed] the power to proceed because its structure and procedures violate[d] both the UCMJ [Uniform Code of Military Justice] and the four Geneva Conventions signed in 1949". It further held:

"(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to 'close'. Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other 'protected information', so long as the presiding officer concludes that the evidence is 'probative' and that its admission without the accused's knowledge would not result in the denial of a full and fair trial."

74. In consequence, the Military Commission Order was replaced by the Military Commissions Act of 2006 ("the 2006 MCA"), an Act of Congress,

passed by the US Senate and US House of Representatives, respectively, on 28 and 29 September 2006 and signed into law by President Bush on 17 October 2006.

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

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

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

4. Publicly expressed concerns regarding the procedure before the military commission

75. On 28 November 2001 the Human Rights Watch published "Fact Sheet: Past U.S. Criticism of Military Tribunals", which, in so far as relevant, read as follows:

> "Under President Bush's November 13th Military Order on military commissions, any foreign national designated by the President as a suspected terrorist or as aiding terrorists could potentially be detained, tried, convicted and even executed without a public trial, without adequate access to counsel, without the presumption of innocence or even proof of guilt beyond reasonable doubt, and without the right to appeal.
>
> The U.S. State Department has repeatedly criticized the use of military tribunals to try civilians and other similar limitations on due process around the world. Indeed, its annual Country Reports on Human Rights Practices evaluate each country on the extent to which it guarantees the right to a 'fair public trial' – which it defines to include many of the due process rights omitted by the President's Military Order. The Order may make future U.S. efforts to promote such standards appear hypocritical. Indeed, even if its most egregious failings are corrected in subsequent regulations, the text of the Order may become a model for governments seeking a legal cloak for political repression."

76. On 8 December 2001 *New York Times* published two reports relating to the procedure before the military commissions – "United Nations: Rights Official Criticizes U.S. Tribunal Plan" in its World Briefing and an article "Nation challenged".

The material in the World Briefing read:

> "The United Nations human rights commissioner, Mary Robinson, criticized the Bush administration plan to set up military tribunals for terrorist suspects, saying they skirt democratic guarantees. These safeguards, including right to a fair trial, must be upheld even in crises, she said, adding that it was not enough to say trust me as a government. She said that the Sept. 11 terrorist attacks were crimes against humanity meriting special measures but said that the plan for secret trials was so overly broad and vaguely worded that it threatened fundamental rights."

The article read, in so far as relevant, as follows:

"More than 300 law professors from around the country are protesting President Bush's order to establish military tribunals for foreign terrorist suspects.

In a letter that originated at Yale Law School, the lawyers assert that such tribunals are 'legally deficient, unnecessary and unwise'.

The lawyers, who represent varying institutions and political philosophies, say the tribunals as outlined so far would violate the separation of powers, would not comport with constitutional standards of due process and would allow the president to violate binding treaties.

The tribunals, they say, assume that procedures used in civil courts or military courts-martial would be inadequate to handle such cases. And they say that using them would undercut the ability of the United States to protest when such tribunals are used against American citizens in other countries.

The letter was sent to Senator Patrick J. Leahy, the Vermont Democrat who is chairman of the Judiciary Committee and who questioned Attorney General John Ashcroft at length on Thursday about the tribunals.

Mr. Ashcroft defended them, saying they would be used only for war crimes. Referring to the Sept 11 terrorist attacks, Mr. Ashcroft said, 'When we come to those responsible for this, say who are in Afghanistan, are we supposed to read them the Miranda rights, hire a flamboyant defense lawyer, bring them back to the United States to create a new cable network of Osama TV?' ..."

77. On 22 March 2003 Amnesty International issued a public statement "USA – Military commissions: Second-class justice" which, in so far as relevant, read as follows:

"The operating guidelines for trials by executive military commission, issued by the US Secretary of Defence yesterday, have thrown into stark relief the fundamental defects of the Military Order signed by President Bush on 13 November 2001, Amnesty International said today.

'We have said from the start that the Military Order was too flawed to fix and should be revoked', Amnesty International said. 'That the Pentagon has paid lip service to due process in its commission guidelines cannot disguise the fact that any trial before these executive bodies would violate the USA's international obligations'.

Amnesty International is repeating its call for the Military Order to be rescinded, and for no person to be tried before the military commissions. The fundamental flaws include:

! The Military Order is discriminatory. US nationals will not be tried by military commission, even if accused of the same offence as a foreign national, but rather tried by ordinary civilian courts with a broad range of fair trial protections. Under the Order, selected foreign nationals will receive second-class justice, in violation of international law which prohibits discriminatory treatment, including on the basis of nationality.

! The commissions would allow a lower standard of evidence than is admissible in the ordinary courts, including hearsay evidence. The Pentagon guidelines do not expressly exclude statements extracted under torture or other coercive methods. These deficiencies are particularly troubling given the lack of due safeguards during interrogation and the fact that the commissions will have the power to hand down death sentences.

! In violation of international law, there will be no right of appeal to an independent and impartial court established by law. Instead, there would be a review by a three-member panel appointed by the Secretary of Defence.

! The military commissions would entirely lack independence from the executive. The President has given himself or the Secretary of Defence the power to name who will be tried by the commissions, to appoint or to remove the members of those commissions, to pick the panel that will review convictions and sentences, and to make the final decision in any case.

...

The procedures infringe the right to a fair trial in a number of other ways, including failing to guarantee that civilian defence counsel will be able to see all the evidence against their clients, permitting the use of secret evidence and anonymous witnesses, failing to guarantee that all relevant documents will be translated for the accused, and forcing the accused to accept US military lawyers as co-counsel against their wishes.

Moreover, Pentagon officials yesterday stated that even if acquitted by the military commissions, the defendants may remain in detention indefinitely. Amnesty International is concerned that the Military Order of 13 November allows for indefinite detention without trial. The USA is currently holding without charge or trial more than 500 people in Afghanistan and Guantánamo Bay.

They have been denied access to the courts or to legal counsel. This is despite the fact that interrogations at Camp X-Ray have been continuing for two months. ...”

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

1. Course of the review

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

That review originated in an investigation that had begun in 2007 and concerned the CIA’s destruction of videotapes documenting interrogations of Abu Zubaydah and Al Nashiri. The destruction was carried out in November 2005.

79. The Committee’s “Study of the Central Intelligence Agency’s Detention and Interrogation” was finished towards the end of 2012. The document describes the CIA’s HVD Programme between September 2001 and January 2009. It examined operations at overseas CIA clandestine detention facilities, the use of the EITs and conditions of 119 known individuals detained by CIA during that period (see also paragraphs 22-24 above).

The US Senate Committee on Intelligence, together with their staff reviewed thousands of CIA cables describing the interrogations of Abu Zubaydah and Al Nashiri and more that than six million pages of CIA material, including operational cables, intelligence reports, internal

memoranda and emails, briefing materials, interview transcripts, contracts and other records.

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

> "The Senate Intelligence Committee this afternoon voted to declassify the 480-page executive summary as well as 20 findings and conclusions of the majority's five-year study of the CIA Detention and Interrogation Program, which involved more than 100 detainees.
>
> The purpose of this review was to uncover the facts behind this secret program, and the results were shocking. The report exposes brutality that stands in stark contrast to our values as a nation. It chronicles a stain on our history that must never again be allowed to happen. ...
>
> The report also points to major problems with CIA's management of this program and its interactions with the White House, other parts of the executive branch and Congress. This is also deeply troubling and shows why oversight of intelligence agencies in a democratic nation is so important. ...
>
> The full 6,200 page full report has been updated and will be held for declassification at a later time."

The executive summary with findings and conclusions was released on 14 December 2014 (see also paragraph 22 above).

81. The passages of the 2014 US Senate Committee Report relating to Mr Al Nashiri's secret detention relevant for the present case are rendered below (see paragraphs 99, 109, 114, 126-127, 133, 139-140 and 160-164 below).

2. Findings and conclusions

82. The Committee made twenty findings and conclusions. They can be summarised, in so far as relevant, as follows.

83. Conclusion 2 states that "the CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness".

84. Conclusion 3 states that "[t]he interrogations of the CIA were brutal and far worse than the CIA represented to policymakers and others". In that regard, it is added:

> "Beginning with the CIA's first detainee, Abu Zubaydah, and continuing with numerous others, the CIA applied its enhanced interrogation techniques with significant repetition for days or weeks at a time. Interrogation techniques such as slaps and 'wallings' (slamming detainees against a wall) were used in combination, frequently concurrent with sleep deprivation and nudity. Records do not support CIA representations that the CIA initially used an 'an open, nonthreatening approach', or that interrogations began with the 'least coercive technique possible' and escalated to more coercive techniques only as necessary."

85. Conclusion 4 states that "the conditions of confinement for CIA detainees were harsher than the CIA had represented to the policymakers and others" and that "conditions at CIA detention sites were poor, and were especially bleak early in the programme". As regards conditions at later stages, the following findings were made:

> "Even after the conditions of confinement improved with the construction of new detention facilities, detainees were held in total isolation except when being interrogated or debriefed by CIA personnel.
>
> Throughout the program, multiple CIA detainees who were subjected to the CIA's enhanced interrogation techniques and extended isolation exhibited psychological and behavioral issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.
>
> Multiple psychologists identified the lack of human contact experienced by detainees as a cause of psychiatric problems."

86. Conclusion 8 states that "the CIA operation and management of the program complicated, and in some cases impeded, the national security missions of other Executive Branch Agencies", including the Federal Bureau of Investigation ("the FBI"), the State Department and the Office of the Director of National Intelligence ("the ODNI"). In particular, the CIA withheld or restricted information relevant to these agencies' missions and responsibilities, denied access to detainees, and provided inaccurate information on the HVD Programme to them.

87. The findings under Conclusion 8 also state that, while the US authorities' access to information about "black sites" was restricted or blocked, the local authorities in countries hosting CIA secret detention facilities were generally informed of their existence. In that respect, it is stated:

> "The CIA blocked State Department leadership from access to information crucial to foreign policy decision-making and diplomatic activities. The CIA did not inform two secretaries of state of locations of CIA detention facilities, despite the significant foreign policy implications related to the hosting of clandestine CIA detention sites and the fact that the political leaders of host countries were generally informed of their existence. Moreover, CIA officers told U.S. ambassadors not to discuss the CIA program with State Department officials, preventing the ambassadors from seeking guidance on the policy implications of establishing CIA detention facilities in the countries in which they served.
>
> In two countries, U.S. ambassadors were informed of plans to establish a CIA detention site in the countries where they were serving after the CIA had already entered into agreements with the countries to host the detention sites. In two other countries where negotiations on hosting new CIA detention facilities were taking place, the CIA told local government officials not to inform the U.S. ambassadors."

88. Conclusion 11 states that "the CIA was unprepared as it began operating its Detention and Interrogation Program more than six months after being granted detention authorities". The CIA was not prepared to take custody of its first detainee, Abu Zubaydah and lacked a plan for the

eventual disposition of its detainees. After taking custody of Abu Zubaydah, CIA officers concluded that he "should remain incommunicado for the remainder of his life", which "may preclude from [his] being turned over to another country". Also, as interrogations started, the CIA deployed persons who lacked relevant training and experience.

89. According to Conclusion 13, "two contract psychologists devised the CIA enhanced interrogation techniques and played a central role in the operation, assessment and management of the [programme]". It was confirmed that "neither psychologist had any experience as an interrogator. Nor did either have specialised knowledge of Al-Qa'ida, a background in counter-terrorism, or any relevant or cultural or linguistic expertise".

The contract psychologists developed theories of interrogation based on "learned helplessness" and developed the list of EITs approved for use against Abu Zubaydah and other detainees.

90. Conclusion 14 states that "CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorised by the CIA Headquarters".

It was confirmed that prior to mid-2004 the CIA routinely subjected detainees to nudity and dietary manipulation. The CIA also used abdominal slaps and cold water dousing on several detainees during that period. None of these techniques had been approved by the Department of Justice. At least seventeen detainees were subjected to the EITs without authorisation from CIA Headquarters.

91. Conclusion 15 states that "the CIA did not conduct a comprehensive or accurate accounting of the number of individuals it detained, and held individuals who did not meet the legal standard for detention". It was established that the CIA had never conducted a comprehensive audit or developed a complete and accurate list of the persons it had detained or subjected to the EITs. The CIA statements to the Committee and later to the public that the CIA detained fewer than 100 individuals, and that less than a third of those 100 detainees were subjected to the CIA's EITs, were inaccurate. The Committee's review of CIA records determined that the CIA detained at least 119 individuals, of whom at least thirty-nine were subjected to the CIA's enhanced interrogation techniques. Of the 119 known detainees, at least 26 were wrongfully held and did not meet the detention standard in the MON (see paragraph 25 above).

92. Conclusion 19 states that "the CIA's Detention and Interrogation Program was inherently unsustainable and had effectively ended by 2006 due to unauthorized press disclosures, reduced cooperation from other nations, and legal and oversight concerns".

93. It was established that the CIA required secrecy and cooperation from other nations in order to operate clandestine detention facilities.

According the 2014 US Senate Committee Report, both had eroded significantly before President Bush publicly disclosed the programme on

6 September 2006 (see also paragraph 60 above). From the beginning of the program, the CIA faced significant challenges in finding nations willing to host CIA clandestine detention sites. These challenges became increasingly difficult over time. With the exception of one country (name blackened) the CIA was forced to relocate detainees out of every country in which it established a detention facility because of pressure from the host government or public revelations about the programme.

Moreover, lack of access to adequate medical care for detainees in countries hosting the CIA's detention facilities caused recurring problems. The refusal of one host country to admit a severely ill detainee into a local hospital due to security concerns contributed to the closing of the CIA's detention facility in that country.

94. In early 2004, the anticipation of the US Supreme Court's decision to grant certiorari in the case of *Rasul v. Bush* (see also paragraph 62 above) prompted the CIA to move detainees out of a CIA detention facility at Guantánamo Bay, Cuba.

In mid-2004, the CIA temporarily suspended the use of the EITs after the CIA Inspector General recommended that the CIA seek an updated legal opinion from the Office of Legal Counsel.

In late 2005 and in 2006, the Detainee Treatment Act and then the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* (see also paragraph 73 above) caused the CIA to again temporarily suspend the use of the EITs.

95. According to the report, by 2006, press disclosures, the unwillingness of other countries to host existing or new detention sites, and legal and oversight concerns had largely ended the CIA's ability to operate clandestine detention facilities.

After detaining at least 113 individuals through 2004, subsequently the CIA brought only six additional detainees into its custody: four in 2005, one in 2006, and one in 2007.

By March 2006, the programme was operating in only one country. The CIA last used its EITs on 8 November 2007. The CIA did not hold any detainees after April 2008.

96. Conclusion 20 states that "the CIA's Detention and Interrogation Program damaged the United States' standing in the world, and resulted in other significant monetary and non-monetary costs".

It was confirmed that, as the CIA records indicated, the HVD Programme costed well over USD 300 million in non-personnel costs. This included funding for the CIA to construct and maintain detention facilities, including two facilities costing nearly [number redacted] million that were never used, in part due to the host country's political concerns.

97. Conclusion 20 further states that "to encourage governments to clandestinely host CIA detention sites, or to increase support for existing sites, the CIA provided millions of dollars in cash payments to foreign government officials. The CIA Headquarters encouraged CIA Stations to

construct 'wish lists' of proposed financial assistance to [phrase redacted] [entities of foreign governments] and to 'think big' in terms of that assistance".

IV. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicant's capture, transfer to the CIA's custody, his secret detention and transfers from mid-October 2002 to 6 June 2003, as established by the Court in *Al Nashiri v. Poland* and supplemented by the 2014 US Senate Committee Report

98. As regards the events preceding the applicant's secret detention in Poland, i.e. his capture in Dubai, United Arab Emirates, and initial detention from the end of October 2002 to 4 December 2002, in *Al Nashiri v. Poland* (§§ 401 and 404) the Court held as follows:

> "401. The Court notes that the CIA official documents clearly confirm that by November 2002 the Agency had the applicant and Mr Abu Zubaydah, both referred to as 'High-Value Detainees', in its custody and that they were interrogated at a CIA black site with the use of the EITs – the applicant immediately after his arrival at that place on 15 November 2002 ... .
>
> ...
>
> 404. In the light of the above first-hand CIA documentary evidence and clear and convincing expert evidence, the Court finds established beyond reasonable doubt that the applicant, following his capture, was detained in the CIA detention facility in Bangkok from 15 November 2002 to 4 December 2002, that Mr Abu Zubaydah was also held in the same facility at that time and that they were both moved together to 'another CIA black site' on 4 December 2002 (see *Husayn (Abu Zubaydah)*, cited above, § 404)."

The experts, Mr J.G.S and Senator Marty, heard by the Court at the fact-finding hearing in *Al Nashiri v. Poland*, identified the detention facility as the one known under the codename "Cat's Eye" or "Catseye" and located in Bangkok, Thailand (see *Al Nashiri v. Poland*, cited above, § 403).

At "Cat's Eye" the CIA subjected the applicant to the EITs, including waterboarding from 15 November to 4 December 2002 (ibid. §§ 86-88).

99. As regards the early period of the applicant's detention, the 2014 US Senate Committee Report includes the following information. It indicates the date of the applicant's capture as "mid-October 2002". According to the report, at that time "he provided information while in custody of a foreign government". On an unspecified date – i.e. redacted in the 2014 US Senate Committee Report – in November 2002 he was rendered by the CIA to a secret detention site code-named "Detention Site Cobalt". In *Al Nashiri v. Poland* that site is referred to as being code-named "Salt Pit" and located in Afghanistan (see *Al Nashiri v. Poland*, cited above, §§ 83-84). The report states that he was held at that site briefly, for a number of days (redacted in

the report), before being transferred to another detention site, identified in *Al Nashiri v. Poland* as "Cat's Eye" in Thailand (see paragraph 97 above). In the 2014 US Senate Committee Report that facility is referred to as "Detention Site Green". The report further states that:

> "In December 2002, when DETENTION SITE GREEN was closed, Al Nashiri and Abu Zubaydah were rendered to DETENTION SITE BLUE."

100. As regards the events after 4 December 2002, in *Al Nashiri v. Poland* (§ 417) the Court held:

> "417. Assessing all the above facts and evidence as a whole, the Court finds it established beyond reasonable doubt that:
>
> (1) on 5 December 2002 the applicant, together with Mr Abu Zubaydah, arrived in Szymany on board the CIA rendition aircraft N63MU;
>
> (2) from 5 December 2002 to 6 June 2003 the applicant was detained in the CIA detention facility in Poland identified as having the codename 'Quartz' and located in Stare Kiejkuty;
>
> (3) during his detention in Poland under the HVD Programme he was interrogated by the CIA and subjected to EITs and also to unauthorised interrogation techniques as described in the 2004 CIA Report, 2009 DOJ Report and the 2007 ICRC Report;
>
> 4) on 6 June 2003 the applicant was transferred by the CIA from Poland on the CIA rendition aircraft N379P."

101. The events that took place between 5 December 2002 and 6 June 2003 at the CIA detention facility identified in *Al Nashiri v. Poland* as being code-named "Quartz" and located in Poland, including the use of unauthorised interrogation techniques against the applicant, correspond to the events that the 2014 US Senate Committee Report relates as occurring at "Detention Site Blue".

B. The applicant's transfers and detention between his rendition from Poland on 6 June 2003 and his alleged rendition to Romania on 12 April 2004 as reconstructed on the basis of the 2014 US Senate Committee Report and other documents and as corroborated by experts heard by the Court

102. The 2014 US Senate Committee Report has established that "beginning in June 2003, the CIA transferred Al Nashiri to five different CIA detention facilities before he was transferred to US military custody on 5 September 2006".

103. On the basis of their investigations, research and various material in the public domain the experts heard by the Court at the fact-finding hearing reconstructed the chronology of the applicant's transfers and identified countries of his secret detention.

104. Mr J.G.S. stated that the applicant was transported from Poland first to Morocco, second to Guantánamo Bay, third to Romania, then to the

fourth site – which, according to him, was with a high degree of probability Lithuania – before being transferred to Afghanistan, the fifth "black site" and, finally back to Guantánamo Bay.
In particular, Mr J.G.S. testified as follows:

> "... [I]n respect of Mr Al Nashiri, it is stated explicitly and unredacted in the Senate Report that from June 2003 Al Nashiri was moved to five different detention facilities before his ultimate transfer to Guantánamo Bay in September 2006. This provides us with a precise timeframe, June 2003 to September 2006, and it provides us with a precise number of transfers which we then have to correlate with his interrogation schedule and the available flight data to determine where he was held. It is on that basis that we have been able to arrive at the conclusion that he was transported from Poland first to Morocco, then onwards to Guantánamo Bay, then onwards to Romania, to one further site, and with a high degree of probability, Lithuania, before being transferred back to Afghanistan as no. 5, and finally to Guantánamo Bay. There are very limited possibilities as to where the CIA could take its detainees because it always maintained a very small range of sites, and because the planes are the same, they operate upon systematic methodologies, notably dummy flight planning, switching of aircraft and all the other tactical elements described. One can narrow down that probability to a certitude, with the right rigour of investigation, and it is that which we have applied to arrive at these conclusions, which have subsequently been validated in the official record."

105. In the light of the material in the Court's possession the chronology of the applicant's detention can be described as follows.

1. Transfer from Poland to Morocco and detention in Morocco (from 6 June to 23 September 2003)

106. In *Al Nashiri v. Poland* the Court established, *inter alia,* that in the light of the accumulated evidence, "there [could] be no doubt that the N379P, also known as "Guantánamo Express", a Gulfstream V with capacity for eighteen passengers but usually configured for eight, arrived in Szymany on 5 June 2003 at 01:00 from Kabul, Afghanistan. It stayed on the runway for over two hours and then departed for Rabat, Morocco" (see *Al Nashiri v. Poland,* cited above, § 408).

It was also established that it had been one of the most notorious rendition aircraft used by the CIA for transportation of its prisoners. The plane N379P set off from Dulles Airport, Washington D.C. on Tuesday 3 June at 23:33 GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries including Germany, Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal back to Dulles Airport on 7 June 2003 (ibid. §§ 103-106 and 291-292).

107. Mr J.G.S. at the fact-finding hearing testified as follows:

> "As was established in the earlier proceedings, Al Nashiri was taken from Poland to Morocco, to the facility near Rabat in June of 2003, arriving there on 6 June 2003. And after detention there for a period of only 3 months, he was then transferred to the CIA secret facility at Guantánamo Bay. The declassified Senate Committee Report

provides extensive detail on the evolution of CIA operations in respect of Morocco and Guantánamo Bay, notably in this passage it refers specifically to Al Nashiri as having been transferred out of a country which is identifiable as Morocco, to the CIA detention facility at Guantánamo Bay, Cuba, after a period of five months beyond the original agreed timeframe. This passage resides within a section of the report which describes difficult and sometimes acrimonious relations between the CIA and its Moroccan counterparts, and it is evident that, in fact, the date, redacted in this passage, is September 2003, which is precisely the time at which our flight information demonstrates an aircraft arriving in Morocco and transporting detainees onwards to Guantánamo Bay."

108. According to Mr J.G.S., the plane N379P took the applicant, together with another CIA detainee, Ramzi bin al-Shibh, from Szymany, Poland to Rabat, Morocco, to a facility lent to the CIA by their Moroccan counterparts. He testified as follows:

"The starting point in assessing Al Nashiri's own chronology of secret detention in these proceedings should be Poland, because we have it confirmed, as a matter of judicial fact, that Al Nashiri was detained in Poland, having been transported there on the flight of N63MU from Bangkok to Szymany on 4 and 5 December 2002. So he found himself in Poland at the end of 2002, during which he was subjected to all the documented abuse, the enhanced interrogation techniques and the unauthorised techniques described in the earlier proceedings, into the calendar year 2003. In the earlier proceedings we presented a range of flights which brought detainees into Poland.

However, the first flight which took detainees out of Poland occurred on 5 and 6 June 2003. Based upon, now, the confirmations in the Senate Committee Report, we can see this outward flight from Poland as the starting point of Mr Nashiri's next chronology of detention. It is stated explicitly June 2003, from that point onwards, Mr Nashiri was detained in five further sites before ultimately being transferred to Guantánamo in September 2006. The flight on 5 June 2003 took Mr Nashiri, together with another CIA detainee, Ramzi bin al-Shibh, to Rabat, Morocco. Rabat, Morocco, at that time was a facility lent to the Agency, to CIA, by their Moroccan counterparts. It was a facility which resided within the Moroccan system, and it is described in explicit detail in the Senate Report. That facility was the same place to which some persons from Guantánamo would be later taken back, but I will explain why Mr Nashiri was not one of those, with reference to the same material. In 2003, according to the report, it was allowed to operate until September, at which point relations became acrimonious and certain conditions were placed upon it. The CIA collected its detainees who were housed there, which included Mr Al Nashiri, on 23 September 2003 in the rendition circuit I demonstrated. That is the date confirmed from the CIA's own reporting, and the flight confirmed through our investigations, the rendition circuit I demonstrated. So we are now taking Mr Nashiri from Poland to Morocco as number 1, Guantánamo as number 2."

109. The 2014 US Senate Committee Report's section entitled "Country [name redacted] Detains Individuals on the CIA's Behalf", in so far as relevant, reads as follows:

"Consideration of a detention facility in Country [name blackened] began in [month blackened] 2003, when the CIA sought to transfer Ramzi bin al-Shibh from the custody of a foreign government to CIA custody [blackened] which had not yet informed the country' political leadership of the CIA's request to establish a

clandestine detention facility in Country [blackened], surveyed potential sites for the facility, while the CIA set aside [USD] [number blackened] million for its construction.

In 2003, the CIA arranged for a 'temporary patch' involving placing two CIA detainees (Ramzi bin al-Shibh and Abd al-Rahim al-Nashiri) within an already existing Country [blackened] detention facility, until the CIA's own facility could be built.

...

By [day/month blackened] 2003, after an extension of five months beyond the originally agreed upon timeframe for concluding CIA detention activities in Country [blackened], both bin al-Shibh and al-Nashiri had been transferred out of Country [blackened]| to the CIA detention facility at Guantánamo Bay, Cuba."

2. Transfer from Morocco to Guantánamo and detention in Guantánamo (from 23 September 2003 to 12 April 2004)

110. According to Mr J.G.S, on 23 September 2003 the applicant was transported from Rabat to Guantánamo Bay on the plane N313P.

Mr J.G.S., in the course of the above mentioned PowerPoint presentation at the fact-finding hearing (see paragraphs 18 above and 367-376 below), gave the following details concerning N313P's circuit of 20-24 September 2003:

"Having departed from Washington, this aircraft, ... N313P, flew to Prague in the Czech Republic for a stopover before heading eastward to Tashkent, Uzbekistan, where dissident detainees, handed over to the CIA by local intelligence services, were rendered to secret detention in Kabul.

From Kabul, on 21 September 2003, the aircraft transported several detainees out of detention in Afghanistan towards detention in Europe. The first stop in Europe was the detention site at Szymany, in northern Poland, which was explicitly described in the [*Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*] proceedings, and this circuit is unprecedented and indeed unique because it is the only occasion on which a rendition flight carrying CIA detainees left one European site and flew directly to another European detention site, in this case in Bucharest, Romania. ...

From Bucharest, the rendition plane carried further detainees out to Rabat. These were persons who had boarded on earlier legs, not persons leaving Romania, and from Rabat to Guantánamo Bay, where for four months, in late 2003 and early 2004, the CIA operated a secret detention facility apart from the larger military facility at Guantánamo Bay."

111. As established in *Husayn (Abu Zubaydah) v. Poland,* the plane N313P landed in Szymany, Poland on 22 September 2003 en route from Kabul, Afghanistan. On that day Mr Abu Zubaydah was transferred by the CIA from Poland on board that plane.

The plane set off 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, as well as the U.S. Naval Base at Guantánamo Bay.

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 Guantánamo Bay on the night of 23 September 2003, landing there in the morning of 24 September 2003.

112. In *Husayn (Abu Zubaydah) v. Poland* (see § 312) Mr J.G.S. gave the following account of the "final rendition circuit" through Poland executed by the N313P plane, a Boeing 737, on 22 September 2003:

> "One flight circuit however is of particular significance and this is the final part of our presentation in which we would like to discuss how the detention operations in Poland were brought to an end.
>
> In September 2003 the CIA rendition and detention programme underwent another overhaul analogous to the one which had taken place in December 2002 when Mr Nashiri and Mr Zubaydah were transferred from Thailand to Poland. On this occasion, the CIA executed a rendition circuit which entailed visiting no fewer than five secret detention sites at which CIA detainees were held. These included, in sequence, Szymany in Poland, Bucharest in Romania, Rabat in Morocco and Guantánamo Bay, a secret CIA compartment of Guantánamo Bay, having initially commenced in Kabul, Afghanistan. On this particular flight route, it has been found that all of the detainees who remained in Poland at that date were transferred out of Poland and deposited into the successive detention facilities at the onward destinations: Bucharest, Rabat and Guantánamo. Among those persons was one of the applicants today, Mr Zubaydah, who was taken on that date from Poland to Guantánamo Bay. This particular flight circuit was again disguised by dummy flight planning although significantly not in respect of Poland. It was the sole official declaration of Szymany as a destination in the course of all the CIA's flights into Poland. The reason therefor being that no detainee was being dropped off in Szymany on the night of 22 September and the methodology of disguising flight planning pertained primarily to those renditions which dropped a detainee off at the destination. Since this visit to Szymany was comprised solely of a pick-up of the remaining detainees, the CIA declared Szymany as a destination openly and instead disguised its onward destinations of Bucharest and Rabat, hence demonstrating that the methodology of disguised flight planning continued for the second European site in Bucharest, Romania and indeed for other detention sites situated elsewhere in the world."

113. The Romanian Civil Aeronautical Authority (*Autoritatea Aeronautică Civilă Română* – "RCAA"), in its letter of 29 July 2009 ("RCAA letter") stated that N313P's itinerary was: Szczytno Airport (which is located in Szymany, Poland) – Constanţa Airport but the airport in Romania at which it landed was Băneasa Airport in Bucharest (see also paragraph 324 below).

114. The 2014 US Senate Committee Report, in the section entitled "US Supreme Court Action in the case of *Rasul v. Bush* Forces transfer of CIA detainees from Guantánamo to Bay to Country [name blackened]" (see also paragraph 61 above), states:

> "Beginning in September 2003, the CIA held a number of detainees at CIA facilities on the grounds of, but separate from, the U.S. military detention facilities at

Guantánamo Bay, Cuba. In early January 2004, the CIA and the Department of Justice began discussing the possibility that a pending U.S. Supreme Court case *Rasul v. Bush,* might grant *habeas corpus* rights to the five CIA detainees then being held at a CIA detention facility at Guantánamo Bay. Shortly after these discussions, CIA officers approached the [REDACTED] in Country [REDACTED] to determine if it would again be willing to host these CIA detainees, who would remain in CIA custody within an already existing Country [REDACTED] facility. By January [day REDACTED] 2004, the [REDACTED] in Country [REDACTED] had agreed to this arrangement for a limited period of time.

Meanwhile, CIA General Counsel Scott Muller asked the Department of Justice, the National Security Council, and the White House Counsel for advice on whether the five CIA detainees being held at Guantánamo Bay should remain in Guantánamo Bay or be moved pending the Supreme Court's decision. After consultation with the U.S. solicitor general in February 2004, the Department of Justice recommended that the CIA move four detainees out of a CIA detention facility at Guantánamo Bay pending the Supreme Court's resolution of the case. The Department of Justice concluded that a fifth detainee, Ibn Shaykh al-Libi, did not need to be transferred because he had originally been detained under military authority and had been declared to the ICRC. Nonetheless, by April [redacted two-digit number] 2004, all five CIA detainees were transferred from Guantánamo Bay to other CIA detention facilities."

C. The applicant's alleged secret detention at a CIA "black site" in Romania from 12 April 2004 to 6 October or 5 November 2005 as described by the applicant, reconstructed on the basis of the 2014 US Senate Committee Report and other documents and as corroborated by experts heard by the Court

1. The applicant's initial submissions

115. In his application lodged on 1 June 2012 the applicant submitted that sometime between 6 June 2003 and 6 September 2006 Romania had hosted a secret CIA prison, codenamed "Bright Light" and located in Bucharest. The applicant's rendition and secret detention were related as follows:

"Mr Al Nashiri was captured in Dubai in the United Arab Emirates in October 2002. By November 2002, he had been secretly transferred to the custody of the CIA. He was held in various secret locations before being detained in Romania. US agents first took him to a secret CIA prison in Afghanistan known as the 'Salt Pit'. In Afghanistan, interrogators subjected him to 'prolonged stress standing positions', during which his wrists were 'shackled to a bar or hook in the ceiling above the head' for 'at least two days'. US agents then took him to another secret CIA prison in Thailand, where he remained until 5 December 2002. According to a United Nations Report, on 5 December 2002, the CIA transported Mr Al Nashiri on a chartered flight with tail number N63MU from Bangkok to a secret CIA detention site in Poland. On or about 6 June 2003, Polish authorities assisted the CIA in secretly transferring Mr. al Nashiri from Poland. ...

After his transfer out of Poland, between 6 June 2003 and 6 September 2006 Mr Al Nashiri was held in various secret detention facilities abroad, including a CIA

prison in Bucharest, Romania. He was transferred to Guantánamo Bay by 6 September 2006."

As for the possible date of his rendition to Romania during the period between 6 June 2003 and 6 September 2006 the applicant mentioned 22 September 2003, i.e. the date on which the aircraft N313P executed its "final rendition circuit" through Poland, via Romania and Morocco (see paragraph 115 above). In that regard, he referred to the 2007 Marty Report (see also paragraphs 257-265 below), which had identified N313P as a "rendition plane" and which, according to the flight plans of 22 September 2003 and the Romanian officials, had had as its destination Constanţa and Bucharest.

116. In further observations filed by the applicant's representatives on 26 April 2013, it was stated that he had been transferred to a CIA "black site" in Romania on the plane N85VM from Guantánamo Bay to Bucharest on 12 April 2004. It was explained that that fact had emerged from a dossier submitted by Mr Hammarberg, the former Council of Europe's Commissioner for Human Rights, to the Prosecutor General of Romania (see also paragraphs 334-336 below). The dossier and new information about the applicant's transfers in CIA custody had not been publicly available earlier.

2. The applicant's alleged rendition to Romania on the plane N85VM on 12 April 2004

117. The above-mentioned dossier produced by Mr Hammarberg states that on 12 April 2004 the applicant was transferred to the CIA "black site" in Romania on the N85VM flight from Guantánamo Bay to Bucharest. It further states that N85VM landed at 21h47m GMT on the night of 12 April 2004 and was assessed to have been bringing in CIA detainee(s) from the US Naval Base, Guantánamo Bay via a technical stopover in Tenerife, with a false – "dummy" – flight plan filed featuring Constanţa instead of its real destination, which was Bucharest (see paragraphs 334-336 below).

118. The Romanian Government submitted a set of six documents originating from the Romanian Airport Services ("RAS") at Băneasa – Bucharest City Airport, described as "annex no. 8" to the 2007 Romanian Senate Report (see also paragraph 164 below), which were examined in the course of the Parliamentary inquiry in Romania. They initially asked that that the annex be treated as confidential. At the fact-finding hearing, the Government submitted that they no longer wished the Court to maintain its confidentiality (see paragraph 12 above).

The first document, invoice no. 386 dated 13 April 2004, was issued by the handling agent of the RAS for Richmor Aviation and indicated an amount charged of 1,255.00 euros (EUR) due for ground services (basic handling, landing fee, lighting fee and navigation services) relating to the N85VM landing.

The second document, ground handling note no. 0036904 dated 12 April 2004 indicated the same amount.

The third document was a copy of an Air Routing card issued for Richmor Aviation.

The fourth document, air navigation services sheet no. 906 dated 12 April 2004 included navigation services charges. It indicated that N85VM landed at Băneasa Airport at 21h50m on 12 April 2004 and departed at 22h45m on the same day.

The fifth document was a partly illegible table containing landing fees for several planes, including N85VM.

The sixth document – a control list of navigation records indicated, among other things, the N85VM landing on 12 April 2004 at 21h47m.

119. In the course of the PowerPoint presentation Mr J.G.S. testified as follows:

> "...[T]he transfer date of Al Nashiri to Romania was 12 April 2004. Our investigations have provided evidence that this transfer took place directly from Guantánamo Bay to the 'black site' in Bucharest, Romania. Again, the [US] Senate Committee Report, albeit using code names, coloured code names for the sites in question, describes explicitly where particular detainees were at particular times, and in this passage highlighted, in describing the closure of the Guantánamo Bay facility in the face of probable exposure due to a Supreme Court assessment of the legality of their detention, it states that '*by a date in April 2004, all five CIA detainees were transferred from Guantánamo Bay to other CIA detention facilities*'. The use of 'facilities' here in the plural is very important, because the principal destination for those held by the CIA at Guantánamo was in fact back to the facility in Morocco from whence they had come. However, as the Senate inquiry made clear, not all of those held at Guantánamo went back to Morocco, and indeed the date cited here, 12 April 2004, coincides with the flight of N85VM aircraft from Guantánamo to Băneasa, Bucharest, in Romania. This is the flight circuit, again it is backed up by a tranche of documentary evidence which I am prepared to provide to the Court, and in particular this graphic demonstrates that there were two distinct transfers out of Guantánamo. The first on 27 March 2004 carried detainees from Guantánamo back to Rabat, Morocco. The second of these, which is of our principal interest, transported one or more detainees, among them Al Nashiri, via a stopover in Tenerife onto Romania.
>
> I have put together a graphic to illustrate that, once again, the CIA had recourse to its systematic practice of disguised flight planning in respect of this flight. We reached a point in our investigations, Madam President, where evidence of dummy flight planning in fact became a tell-tale sign of rendition or detainee transfer activity on such flights. So it is significant, as I will demonstrate, that this was not a simple circuit. The aircraft embarked from Washington and flew to Guantánamo Bay, whereupon the blue line demonstrates the first part of the detainee transfer from Guantánamo to Tenerife, a flight planned and executed. From Tenerife, however, the aviation services provider, in this case Air Rutter International from Houston, Texas, filed a dummy flight plan to the alternative Romanian destination of Constanţa, on the Black Sea Coast. The aircraft, however, flew and landed at Bucharest Băneasa Airport, as documentation from the Romanian authorities demonstrates. It is this flight, depicted here with the blue line, that carried Al Nashiri to detention in Bucharest. From Bucharest, the aircraft flew back to Rabat, Morocco, and it is apparent premise that one or more detainees from the Romanian site, detained prior to

April 2004, was at that point taken from Bucharest back to detention in Morocco, after which the aircraft returned to its base at Washington D.C.

We have been able to uncover this and other flights planned through the network of private contractors, thanks to a large amount of documentation filed in court proceedings in civil courts in New York State, whereupon several US aviation service providers, contracted to the CIA, ended up in a financial dispute. The case in question, Sportsflight Inc. against [*sic*] Richmor Aviation, in fact concerns the CIA's chief aviation contractor, Computer Sciences Corporation, formerly DynCorp, its use of a prime aviation contractor known as Sportsflight Air, previously Capital Aviation, which in turn subcontracted its government mandates to a private company called Richmor Aviation, who were the owners and operators of the aircraft N85VM.

I appreciate that this web of corporate relations is quite difficult to understand on its face, but over several years, myself and other investigators have carefully unpicked these relationships to provide the direct link between the tasking of the United States Government on government contracts through the CIA's rendition group air branch, all the way down to the pilots, crew members and operators of the aircraft in question. It is unambiguously and categorically the case that these are rendition aircraft, operated for the sole purpose of transferring detainees between 'black sites' in the CIA's RDI programme. The flight of N85VM, on the dates in question, belongs in that category."

120. As regards the circumstances surrounding the applicant's transfer from Guantánamo to Romania, Mr J.G.S. testified at the fact-finding hearing as follows:

"The Guantánamo site operated only for a finite period. As I mentioned, it was due to the judicial scrutiny of the Supreme Court with a case pending in *Rasul v. Bush*, which was likely to expose CIA detainees to the same reporting obligations, but also the same rights, that detainees in other forms of federal custody would enjoy, and so the CIA deliberately took action to remove its detainees from such scrutiny in advance of the Supreme Court ruling. The Senate Committee Report describes this process, based upon cables and other classified material, and states that by April 2004, the date I assert, 12 April 2004, all of those detainees who were held in Guantánamo were moved out.

There were two flights, as I demonstrated, which formed part of this removal process, the first on 27 March 2004, the second on 12 April 2004. But the first of those only went to Rabat, Morocco, and if you recall, the Committee described, based upon its assessment of interrogation schedules, that Mr Nashiri had been to five different sites in that 3-year timeframe, and in order for him to be in five different sites, he, at that moment, could not have gone back to Morocco, because there are not sufficient documented instances of rendition which link the territories in question, Guantánamo, Rabat and Bucharest, in the timeframe in which the report confirms Mr Nashiri's tour of the sites.

The 12th April 2004 site was the sole outward flight linking Guantánamo to Romania. From the report, from the cables regarding Mr Nashiri's treatment and physical and psychological state, we know that he found himself in Romania in the 3rd quarter and 4th quarter of 2004, and in July 2005, there were specific notes made upon his state and status in those date frames. In order for him to have been in Romania at Detention Site Black or 'Britelite' by that time, he had to be brought to Romania on flight N85VM on 12 April 2004.

> It is a process of elimination, but it is also a process of correlation, which very clearly links to documents filed by contractors, corresponds with the international aviation data that we have analysed, corresponds with the tactics of dummy flight planning and disguise, and ultimately is validated in the public record by the Senate Report."

121. Mr Black, referring to the applicant's alleged rendition to Romania testified as follows:

> "I am aware of two possible flights that could have taken the applicant Al Nashiri into Romania, that [a flight with the tail number N85VM], is one of them. There is a potential other one that occurred in February 2005. We know for a fact that he was in Romania after February 2005, we know from cables referenced in the Senate Report that he was in Romania in June 2005. There are indications that he was held in Romania before that, in late 2004, which leads me, of the two possibilities, that leads me to prefer the April 2004 flight as being the more likely of the two. In terms of my own research, I would say that there is a small ambiguity on that point, I am not prepared to say that the data I have at my fingertips conclusively demonstrates that he was taken on the April flight in 2004 rather than the February one in 2005. I think the balance of probability does lie in favour of that. However, whichever of the two it is, there is no doubt that he was in Romania by the summer of 2005."

3. Detention and treatment to which the applicant was subjected

122. The applicant submitted that throughout his detention by the CIA he had been subjected to torture and other forms of ill-treatment prohibited by Article 3 of the Convention.

123. On 15 June 2016 the US authorities disclosed to the public a second, less redacted version of the transcript of the hearing held by the Combatant Status Review Tribunal in Guantánamo on 14 March 2007 (for the first, more extensively redacted version see *Al Nashiri v. Poland*, cited above, §§ 112-113; see also paragraphs 142-143 below). During that hearing the applicant described the treatment to which he had been subjected in CIA custody from his capture in November 2002 to his transfer to Guantánamo in September 2006. The relevant part of that transcript read, as follows:

> "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way.
>
> By hanging, head was up and legs were pointing downwards. I was hung for almost a month. You doing your things basically and you were hung upside down and drowning and hitting at the wall. There are many scars on my head if I shave my head. If I shave my hair the scars will become obvious.
>
> What else do I want to say? I was without clothes. I was sleeping on the floor for about a month. Many things happened. There were doing so many things. What else did they did?
>
> There a box half meter by half meter. It was two meters in height They used to put me inside the box. I was standing in that box for about a week and I couldn't do anything. My feet were swollen. My nails were about fall off because, I was standing

on my feet for long time. They do so many things. So so many things. What else did they did?

That thing lasted for about six month[s]. After that another method of torture began. They use to put something in the food that use to make the body tired. Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body. Swollen too. They used to ask me questions and the investigator after that used to laugh. And, I used to answer the answer that I knew. And, if I didn't reply what I heard, he used to put something in my food. And, after I ate it my body felt like, um, strange. After that he used to come back and talk to me. He told you he put anything in the food. He used to deny that but the camera was behind him. And; I would stand in front of the camera and he used to tell you that because camera was on. He could not deny anything. You have to acknowledge to what we are saying. And, I used to say acknowledge what? They used to ask even political questions. One is the solution to the American problem in Iraq. I'm not the American Foreign Minister to answer these questions. So they used to go and put some stuff in my food. These things happen for more than two years. That thing did not stop until here. So many things happened. I don't in summary, that's basically what happened.

Then, the President of the Combatant Status Review Tribunal says:

Alright. Let me ask. So then since the time of capture 2002 until you came to Guantánamo you experienced these types of events?

The applicant responds:

Yes."

124. At the fact-finding hearing Mr J.G.S. made the following statements concerning the treatment to which the applicant could be subjected during his alleged detention in Romania:

"I find myself somewhat more limited in my ability to describe specific forms of treatment or interrogation techniques to which Mr Nashiri was subjected in Romania than was the case in respect of Poland. And that is because of the natural evolution of the detention cycles to which CIA detainees were subjected. In pursuit of what was described as 'live actionable intelligence', the CIA developed its most stringent, harsh interrogation plans for the earliest days and weeks of a detainee's period in its detention system. Usually, within one to three days of being apprehended, the chief of base at the 'black site' in question would appeal to CIA headquarters for authorisation to practise EITs, so called 'enhanced interrogation techniques'. This was the case in respect of Abu Zubaydah, this was the case in respect of Al Nashiri, this was the case in respect of Khalid Sheikh Mohammed, this we know because of the Inspector General's reports. As soon as a detainee was in custody, in Abu Zubaydah's case, was fit enough to undergo interrogation, that plan would commence. We know that Al Nashiri underwent twelve days of harsh interrogation in Thailand including the waterboard, and we know that upon transfer to Poland, because he was assessed as having withheld information or not been compliant, he was then subjected to an intensive period of harsh interrogation during with multiple, unauthorised techniques were used. Those were documented in the earlier proceedings [*Al Nashiri v. Poland*]. But there arrives a juncture in a CIA detainee's detention at which his intelligence value is assessed as lower, at which no further approval or authorisation is sought or granted to practise these enhanced interrogation techniques, and in Al Nashiri's case we can only say that that point arrived sometime in 2003. Thereafter, it is, in my assessment and according to the documentary record, unlikely that the CIA practised

further unauthorised techniques or indeed concerted programmes of enhanced interrogation on Mr Nashiri.

However, that is not to say that he was not subjected to abuse or indeed that the conditions of his confinement did not amount to violations of the European Convention. In respect of those two latter points, I would aver quite clearly that the treatment did amount to violations of the Convention, purely by virtue of the conditions in which he was held and because of the regular interventions made by persons at the 'black site' to gratuitously abuse, punitively or otherwise, certain detainees in their custody. I can give you analogous examples of how detainees were treated in Romania. Hassan Ghul, for example: there is a lengthy description of his having endured 59 hours of sleep deprivation, having been shaved and barbered, stripped naked, placed in standing positions with his hands above his head. There are descriptions of how, notwithstanding medical and psychological problems diagnosed by professionals at the scene, he was subjected to further interrogation to the point of enduring hallucinations. I could also cite the example of Janat Gul, a detainee for whom the CIA sought authorisation to use the waterboard in Romania, an unprecedented move, and who was subsequently subjected to an intensive period of enhanced interrogation in the same site at which Al Nashiri was held. I could also cite the case of Abu Faraj al-Libi who was captured in 2005 and even at that point, three years and more into the programme, was subjected to the same litany of abusive techniques in interrogating him as Al Nashiri and others had been subjected to in 2002 and 2003. And I could also cite, too, some memoranda produced by the CIA General Counsel's office in the material period in which Al Nashiri was held in Romania, which described conditions of confinement, sensory deprivation as a matter of routine, denial of religious rights, physical and psychological oppression, sleep deprivation as a matter of course, notwithstanding whether a detainee is subject at that time, or not, to EITs.

So whilst I cannot give the same level of specificity as I was able to present in respect of Poland, I can aver with a high level of certainty that he endured ill-treatment whilst held in Romania because, in my view, every one of those detainees brought to Romania, held incommunicado, indefinitely, with no idea of their whereabouts or their fate, subjected to frequent renditions, shackled, drugged, often beaten in the process, every one of those persons would have a legitimate claim under our European Convention on Human Rights for violation of their personal integrity."

125. Mr Black testified as follows:

"The question of precise types of treatment is, I would not say it is my specific expertise. It is clear from the Senate Report and other sources that treatment in Romania included very extreme sleep deprivation, which apparently led some of those who suffered it to have very severe mental and physical problems, and it is clear also that the applicant, Mr Nashiri, in particular when he was in Romania, was experiencing serious, let's say, psychological problems as a result of the treatment that he had received. But my, and I should say also it is clear that around that time, between 2003 and 2005, it is firmly on the record that there were a range of treatments being applied to these people, that the enhanced interrogation techniques were being applied, I think this has all been quite well documented, but it is not really my topic of expertise, I would not say."

126. Citing as a source two CIA cables of 23 May 2004, the 2014 US Senate Committee Report states that "at one point Al Nashiri launched a

short-lived hunger strike that resulted in the CIA feeding him rectally" (see also paragraph 158 below).

Referring to an email to Detention Site Black dated 30 October 2004 on the subject "Interrogator Assessments/Request for Endgame Views", the report states that "an October 2004 psychological assessment of Al Nashiri was used by the CIA to advance its discussions with National Security Council officials on establishing an "endgame" for the [HVD] program"

127. The 2014 US Senate Committee Report further refers to the applicant's detention at Detention Site Black in June and July 2005 as follows:

> "In the final years of al-Nashiri's detention, most of the intelligence requirements for al-Nashiri involved showing al-Nashiri photographs. In June 2005, the DETENTION SITE BLACK chief of Base suspended even these debriefings because it was 'the very, very rare moment' that al-Nashiri would recognize a photograph, and because the debriefings often were the 'catalyst' for his outbursts."

It also states, with reference to a cable of 5 July 2005, that in July 2005 CIA Headquarters expressed concern regarding Al Nashiri's "continued state of depression and uncooperative attitude". Days later a CIA psychologist assessed that the applicant was on the "verge of a breakdown" (see also paragraph 158 below).

4. The applicant's alleged rendition from Romania on 6 October or 5 November 2005

128. In his initial submissions the applicant submitted that no later than 6 September 2006 the Romanian authorities had assisted the CIA in secretly transferring him from Bucharest to another CIA "black site".

129. The experts gave two possible dates for the applicant's rendition from Romania: 6 October 2005 and 5 November 2005. According to them, the latter date was the final closure of the CIA "black site" on Romania's territory, prompted by the publication of Dana Priest's article "CIA Holds Terror Suspects in Secret Prisons" suggesting that such prisons operated in Eastern European countries on 2 November 2005 (see also paragraph 236 below).

130. In the course of the PowerPoint presentation Mr J.G.S. testified as follows:

> "In terms of [the Black Site in Romania's] closure, it is stated in the [2014 US Senate Committee Report] that after the publication of the *Washington Post* article, that is the piece of reporting, the Pulitzer Prize-winning article by Dana Priest, ... dated 2 November 2005, the authorities of this country demanded the closure of Detention Site Black within a number of hours fewer than 100. We can see that from the redaction, it does not state exactly how many hours, but it is no more than four days. And in fact, as I described, 5 November 2005, using its practices of dummy flight planning and a further disguise which I will demonstrate shortly, the CIA transferred all of its remaining CIA detainees out of the facility within this time

period. Again, as stated, flights into and out of Romania correspond exactly with the narrative described in the report.

It might be pointed out, in relation to this specific package, that in order for the authorities of the host country to demand the closure of a detention facility, they must have known of its existence. Furthermore, in light of the report in *The Washington Post*, which went into intimate detail of the CIA's operations including the forms of ill-treatment and interrogation to which detainees therein were subjected, it follows that the authorities of the host country of Detention Site Black – and let me be clear – that is the authorities of Romania, must have known of the nature of operations occurring on their territory.

The question has often been posed to us, Honourable Judges, if there were detainees in Romania, how did they leave? There appeared to be no obvious direct flights out of Romania in the critical period, October, November 2005, to any other detention site we were aware of, and this was often put forward by representatives of the Romanian authorities as a reason for decrying, for rejecting, for refuting the content of our reporting [i.e. at the time of the publication of the 2006 and the 2007 Marty Reports].

We have, however, now ascertained how detainees were removed from Romania, and this occurred in two tranches in the months of October 2005 and, as stated, November 2005. I have chosen to illustrate the first of these transfers, which occurred between 5 and 6 of October 2005, because it provides a further segue into detention operations on the territory of another Council of Europe Member State, in this case Lithuania.

The CIA used two tactics of deceit in order to provide these flights with the maximum degree of cover, in order that they could not and would not be tracked, traced or held to account. The first of those was its conventional dummy flight planning, but the second of those was a novel tactic involving switching of aircraft. This graphic will demonstrate how this was deployed on 5 and 6 October 2005, involving two aircraft, namely N308AB and N787WH. The first of those aircraft is depicted by red lines, the second by blue, on the graphic, the other symbols follow the earlier pattern of drop-off, transfer and stopover points. The two planes arrived in Europe, the first [N308AB] from provenance of Teterboro, New Jersey, the second [N787WH] from provenance of Keflavik in Iceland on 5 October 2005. While the first flew to Bratislava, in Slovakia, the second flew directly to Tirana, Albania, which would become the staging point for these operations. The first dummy flight plan, filed by the CIA's aviation services provider, stated a path for N308AB from Bratislava to Constanţa airport, a route which it did not, nor did it intend, to fly. The aircraft instead flew directly to Bucharest Băneasa airport, the servicing airport for the 'black site' in Romania, whereupon it would collect detainees. Those detainees referred to in the Senate Committee Report who were cleared from Romania in these critical months were then taken from Bucharest to Tirana, to the staging point where the other CIA aircraft had been waiting for a day in advance. In this staging point, in an unprecedented manoeuvre, according to our investigations, detainees were transferred from the first aircraft onto the second, together with members of the CIA rendition crew. The second aircraft, N787WH, which is also a Boeing 737 business jet, used conventionally for wholesale transfers filed its own dummy flight plan, citing a destination of Tallinn, Estonia, a route which it did not, nor did it intend, to fly. Instead, this aircraft N787WH flew on 6 October 2005 carrying detainees from Romania to Vilnius, Lithuania, thereby providing a link between two detention sites on European territory. The aircraft then departed in their own respective directions, the rendition aircraft N787WH via Oslo, towards the north, and the first aircraft, N308AB from Tirana, via Shannon, back towards New Jersey. Therein the CIA had

innovated yet another means, another layer of cover to obstruct proper accounting for the illegal transfer of its detainees, but due to a process which Senator Marty referred to as '*la dynamique de la vérité'*, we have been able, methodically and carefully, to unpick these layers of secrecy and present to this Court what we believe is a truthful and accurate accounting of operations in respect of these 'black sites'."

131. In his further testimony, in response to questions from the Court, Mr J.G.S. added:

"There are two known and documented junctures at which CIA detainees at the 'black site' in Romania were removed from Romania. The first of those, I illustrated with my last set of graphics, on 5 and 6 October, which took detainees from Bucharest, Romania via switching of aircraft in Albania, to Vilnius, Lithuania. The second took place on 5 November 2005, within three to four days of the *Washington Post'*s report, and at the insistence of the Romanian authorities, which took detainees via Amman, Jordan to Kabul, Afghanistan. We know that at 1 January 2006 there were only two CIA detention sites in active operation, that much is stated in the Senate Report. Those were the sites known as 'Violet' and 'Orange': the former, 'Violet', in Lithuania, the latter, 'Orange', in Afghanistan. And so Al Nashiri, in all likelihood and without any other information to refer to, was taken to one of those two destinations on one of those two flights. Based upon my earlier rationale about the five different facilities in which he was held, I would aver that it is more likely than not that he was taken from Romania to Lithuania on 5 and 6 October 2005 and was held there until onwards transfer in March 2006 to Afghanistan and subsequently on to Guantánamo Bay. That would, logically, complete the number and nature of detention experiences chronicled in the Senate Committee Report and other documents released by the United States."

132. Mr Black testified as follows:

" ... [T]here are two possibilities, and I believe only two possibilities: one is that [the applicant] left [Romania] in October 2005, on 5 October 2005, and the other is that he left on the 5 November 2005. If the flight on 5 October 2005 was a dual flight, it was a kind of a two-plane switch that took prisoners from Romania into Lithuania, and the flight the following month in November 2005 was again a two-plane switch that took prisoners from Romania into Afghanistan. I think there is an indication in the data that we have, based on the Senate Report, that Mr Nashiri was taken to Lithuania, which should mean he was taken in October rather than November, but it is, I would not say it is a hundred per cent clear, unambiguous. I would say it is an indication that seems probable. There is no doubt that the flight in November signalled the end of the Romanian site, I mean it came, I do not know, 72 hours after the existence of the site had been revealed in *The Washington Post*, the government had demanded the site shut down, the Senate Report is very clear that at that point everyone who was remaining in Romania was shipped out to Afghanistan, so at that point, after the 5 November 2005, the CIA 'black site' programme was operating only in Lithuania and in Afghanistan."

133. The relevant section in the 2014 US Senate Committee Report reads as follows:

"After publication of the *Washington Post* article, [REDACTED] Country [REDACTED] demanded closure of DETENTION SITE BLACK within [two-digit number REDACTED] hours. The CIA transferred the [number REDACTED] remaining CIA detainees out of the facility shortly thereafter."

134. According to public Eurocontrol flight data based on, among other things, the flight data entered by the Romanian authorities into the Eurocontrol system, which was referred to by Mr J.G.S and Mr Black, the flight circuit of October 2005 involving planes N308AB and N787WH and the circuit of November 2005 involving planes N1HC and N248AB can be described as follows.

135. As regards the circuit of 1-7 October 2005, executed by planes N308AB and N787WH:

(a) Eurocontrol data shows N308AB filing a flight plan departing from Teterboro, USA at 13:31 on 4 October 2005 with scheduled arrival time at Bratislava, Slovakia at 22:58 the same day. On the following day it filed a flight plan departing from Bratislava at 19:06 with scheduled arrival time at Mihail Kogălniceanu International Airport, Constanţa, Romania at 20:41. It then filed a plan departing 40 minutes later, at 21:21, from Băneasa Bucharest City Airport. According to the experts, this indicated that the scheduled trip to Constanţa was in fact a false flight plan, and that the plane did not go to Constanţa, but rather to Băneasa. Leaving Băneasa it was scheduled to arrive in Tirana, Albania at 22:38. It filed its next flight plan from Tirana on 6 October at 01:08, with a scheduled arrival time in Shannon, Ireland, at 04:22 (all times are Zulu (i.e. GMT)).

(b) Eurocontrol data shows that on 5 October 2005 at 00:45 N787WH filed a flight plan departing from Keflavik, Iceland with scheduled arrival in Tirana International Airport on the same day at 05:52. It then filed a flight plan departing Tirana at 23:44 with scheduled arrival at Tallinn, Estonia the following day at 02:26. It then filed a flight plan leaving 30 minutes later, at 02:56, not from Tallinn but from Vilnius International Airport, Lithuania, with scheduled arrival in Oslo at 04:33 (all times are Zulu (GMT)). Documents from Vilnius airport show that the plane landed in Vilnius at 01:54 Zulu / 04:54 local time, however, indicating that the scheduled trip to Tallinn was in fact a false flight plan, and that the plane did not go to Tallinn, but rather directly from Tirana to Vilnius (see also *Abu Zubaydah v. Lithuania*, no. 46454/11, § 130, 31 May 2018).

As regards the circuit of 5-7 November 2005, executed by planes N1HC and N248AB:

(a) Eurocontrol data shows that N1HC filed a flight plan to leave Harrisburg International Airport, USA at 10:30 on 5 November 2005, with scheduled arrival in Porto, Portugal at 16:58 the same day. It then filed a flight plan to leave Porto at 17:59, with scheduled arrival at Mihail Kogălniceanu International Airport, Constanţa, Romania at 21:45. Its next flight plan shows it leaving Băneasa Bucharest City Airport 20 minutes later, at 22:05, with scheduled arrival at Amman, Jordan that night at 00:21 on 6 November. This, according to the experts, indicated that the scheduled trip to Constanţa was in fact a false flight plan, and that the plane did not go

to Constanţa, but rather to Băneasa. From Jordan it filed a flight plan to depart Amman at 01:20 with arrival at Keflavik scheduled at 08:25.

(b) Eurocontrol data shows that N248AB filed a flight plan to leave Malta International Airport on 5 November 2005 at 21:10 with scheduled arrival in Amman at 23:49. It then filed a flight plan to leave Amman 66 minutes later, at 00:55 on 6 November, with arrival in Kabul scheduled for 05:12. It filed a flight plan to leave Kabul 48 minutes later, at 06:00, with arrival in Athens scheduled at 11:32 the same day.

136. The findings of the Lithuanian Parliament (*Seimas*) made in the course of an inquiry concerning the alleged detention facilities in Lithuania in 2010-2011 concerned, among other things, the flight N787WH landing in Vilnius, en route from Tirana, on 6 October 2005 (see paragraph 332 below)

137. The list of 43 flights operated in 2001-2005 at the airports of Constanţa, Băneasa and Otopeni submitted by the Government (annex no. 11 to the 2007 Romanian Senate Report; see also paragraph 167 below) included that of N1HC, which departed from Băneasa airport on 5 November 2005.

138. The list of twenty one "suspicious flights", which was produced by the Government, included N1HC executing a circuit "Harrisburg –București Băneasa-Djibouti-Amman" that departed from Băneasa Airport on 5 November 2005 (see paragraph 327 below).

The invoice (no. 1692) for United States Aviation in respect of N1HC issued by RAS on 6 November 2005 included a handwritten note: "Middletown-Băneasa-Djibouti (?) (Amman?)"

D. The applicant's further transfers during CIA custody (until 5 September 2006) as reconstructed on the basis of the 2014 US Senate Committee Report and other documents and as corroborated by experts heard by the Court

139. According the 2014 US Senate Committee Report, in "early January 2006" the CIA was holding twenty-six detainees "in its two remaining facilities, Detention Site Violet, in Country [name REDACTED] and Detention Site Orange, in Country [name REDACTED]".

The applicant, according to the experts, was taken to one of those sites – Detention Site Violet located in Lithuania or Detention Site Orange located in Afghanistan on one of the above-described plane-switching flights circuits of, respectively, 1-7 October 2005 and 5-7 November 2005 (see paragraphs 129-135 above).

140. The 2014 US Senate Committee Report states that the applicant "was transferred to US military custody on September 5, 2006."

E. The applicant's detention in Guantánamo Bay and his trial before the military commission from 6 September 2006 to present

141. On 6 September 2006 President Bush publicly acknowledged that fourteen high-value detainees, including the applicant, had been transferred from the HVD Programme run by the CIA to the custody of the Department of Defense in the Guantánamo Bay Internment Facility (see also paragraph 60 above).

1. Hearing before the Combatant Status Review Tribunal

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

143. According to a partially redacted transcript of that hearing, the applicant stated that he "[had been] tortured into confession and once he [had] made a confession his captors [had been] happy and they [had] stopped torturing him". He also stated that he had made up stories during the torture in order to get it to stop (see also paragraph 123 above).

2. Trial before the military commission

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

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

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

147. Immediately after the referral of charges, the defence filed a motion with the military commission contesting the Government's method of transporting the applicant to legal proceedings in Guantánamo Bay on the

grounds that it was harmful to his health and violated his right to free and unhindered access to his counsel.

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

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

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

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

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

152. On 20 April 2011 United States military commission prosecutors brought capital charges against the applicant relating to his alleged role in the attack on the USS *Cole* in 2000 and the attack on the French civilian oil tanker MV *Limburg* in the Gulf of Aden in 2002. The charges against him included terrorism, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hazarding a vessel, using treachery or perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy to commit terrorism and murder in violation of the law of war, destruction of property in violation of the law of war and attempted destruction of property in violation of the law of war. The applicant was designated for trial by military commission despite the fact that the United States Government had previously indicted two of his alleged co-conspirators for the USS *Cole* bombing – Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso – in the US federal court. The relevant indictment, filed on 15 May 2003 while the applicant was secretly held in CIA custody in Poland, identified him as an unindicted co-conspirator in the USS *Cole* bombing.

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

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

On 28 September 2011 the capital charges against the applicant were approved.

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

156. The proceedings against the applicant before the military commission are pending.

According to a statement – "Remarks at Guantánamo Bay" issued by Chief Prosecutor Mark Martins on 17 March 2017, a day before the military commission convened to try Al Nashiri completed a pre-trial session to resolve disputes regarding "outstanding legal and evidentiary issues". During the session, the Military Judge directed that the military commission would be in session from 31 July to 4 August, from 11 to 29 September and from 6 to 17 November 2017. He also announced that he planned to issue soon a final discovery order as well as a trial order for 2018.

F. Psychological effects of the HVD Programme on the applicant

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

158. In the 2014 US Senate Committee Report, in the chapter "CIA Detainees Exhibit Psychological and Behavioral Issues", it is stated that psychological and behavioural problems experienced by CIA detainees, who had been held in austere conditions and in solitary confinement, had also posed "management challenges" for the CIA.

The section referring to the applicant reads as follows:

> "... Abd al-Rahim al-Nashiri's unpredictable and disruptive behavior in detention made him one of the most difficult detainees for the CIA to manage. Al-Nashiri engaged in repeated belligerent acts, including throwing his food tray, attempting to assault detention site personnel, and trying to damage items in his cell. Over a period of years, al-Nashiri accused the CIA staff of drugging or poisoning his food and complained of bodily pain and insomnia. As noted, at one point, al- Nashiri launched a short-lived hunger strike, and the CIA responded by force feeding him rectally.
>
> An October 2004 psychological assessment of al-Nashiri was used by the CIA to advance its discussions with National Security Council officials on establishing an 'endgame' for the program.
>
> In July 2005, CIA Headquarters expressed concern regarding al-Nashiri's 'continued state of depression and uncooperative attitude'. Days later a CIA psychologist assessed that al-Nashiri was on the 'verge of a breakdown'."

G. Identification of locations of the colour code-named CIA detention sites in the 2014 US Senate Committee Report by experts

159. The experts heard by the Court identified the locations of the eight colour code-named CIA detention sites (see paragraph 26 above) as follows: Detention Site Green was located in Thailand, Detention Site Cobalt in Afghanistan, Detention Site Blue in Poland, Detention Site Violet in Lithuania, Detention Site Orange in Afghanistan, Detention Site Brown in Afghanistan, Detention Site Gray in Afghanistan and Detention Site Black was identified as having been located in Romania (see also *Abu Zubaydah v. Lithuania*, cited above, § 166).

H. "Detention Site Black" in the 2014 US Senate Committee Report

160. The 2014 US Senate Committee Report refers to "Detention Site Black" in several sections concerning various events.

161. In chapter entitled "The CIA establishes 'DETENTION SITE BLACK' in Country [REDACTED] and DETENTION SITE VIOLET in Country [REDACTED]" the section referring to "Detention Site Black" reads as follows:

> "[REDACTED] The CIA entered into an agreement with the [REDACTED] in Country [REDACTED] to host a CIA detention facility in [month REDACTED] 2002.
>
> In [month REDACTED] 2003 CIA Headquarters invited the CIA Station in Country [REDACTED] to identify ways to support the [REDACTED] in Country [REDACTED] to 'demonstrate to [REDACTED] and the highest levels of the [Country [REDACTED] government that we deeply appreciate their cooperation and support' for the detention program. The Station responded with an $ [amount REDACTED] million 'wish list' [REDACTED]; CIA Headquarters provided the Station with $ [amount REDACTED] million more than was requested for the purposes of the [REDACTED] subsidy. CIA detainees were transferred to DETENTION SITE BLACK in Country [REDACTED] in the fall of 2003.
>
> In August 2003, the U.S. ambassador in Country [REDACTED] sought to contact State Department officials to ensure that the State Department was aware of the CIA detention facility and its 'potential impact on our policy *vis-a-vis* the Country [REDACTED] government'. The U.S. ambassador was told by the CIA Station that this was not possible, and that no one at the State Department, including the secretary of state, was informed about the CIA detention facility in Country [REDACTED].
>
> ...
>
> Nearly a year later, in May 2004, revelations about U.S. detainee abuses at the U.S. military prison in Abu Ghraib, Iraq, prompted the same U.S. ambassador in Country [REDACTED] to seek information on CIA detention standards and interrogation methods. In the fall of 2004, when [REDACTED] U.S. ambassador to Country [REDACTED] sought documents authorizing the program, the CIA again sought the intervention of Deputy Secretary Armitage, who once again made 'strong remarks' to

the CIA about how he and the secretary of state were 'cut out of the NSC [National Security Council] clearance/coordination process' with regard to the CIA program. ...

While it is unclear how the ambassador's concerns were resolved, he later joined the chief of Station in making a presentation to Country [REDACTED]'s [REDACTED] on the CIA's Detention and Interrogation Program. The presentation talking points did not describe the CIA's enhanced interrogation techniques, but represented that '[w]ithout the full range of these interrogation measures, we would not have succeeded in overcoming the resistance of [Khalid Shaykh Muhammad] and other equally resistant HVDs' The talking points included many of the same inaccurate representations made to U.S. policymakers and others, attributing to CIA detainees critical information on the 'Karachi Plot' the 'Heathrow Plot'. the 'Second Wave Plot', and the 'Guraba Cell'; as well as intelligence related to Issa al-Hindi, Abu Talha al-Pakistani, Hambali, Jose Padilla, Binyam Mohammed, Sajid Badat, and Jaffar al-Tayyar. ..."

162. In chapter entitled "CIA Detainees Exhibit Psychological and Behavioural Issues" reference is made to an email from an American authority (name redacted) to "Detention Site Black", dated 30 October 2004 on the subject: "Interrogator Assessments/Request for Endgame Views", which concerned Al Nashiri's psychological assessment (see also paragraph 158 above), which was used by the CIA in the framework of discussions on establishing an "endgame" for the HVD Programme.

163. Chapter "The Pace of CIA Operations Slows; Chief of Base Concerned About 'Inexperienced, Marginal, Underperforming' CIA Personnel; Inspector General Describes Lack of Debriefers As 'Ongoing Problem'" refers to the "Detention Site Black" as follows:

"In the fall of 2004, CIA officers began considering 'end games' or the final disposition of detainees in CIA custody.

...

[REDACTED] In 2004, CIA detainees were being held in three countries: at

DETENTION SITE BLACK in Country [REDACTED], at the [REDACTED] facility in Country [REDACTED], as well as at detention facilities in Country [REDACTED]. DETENTION SITE VIOLET in Country [REDACTED] opened in early 2005.

On April 15, 2005, the chief of Base at DETENTION SITE BLACK in Country [REDACTED] sent the management of RDG an email expressing his concerns about the detention site and the program in general. He commented that 'we have seen clear indications that various Headquarters elements are experiencing mission fatigue vis-a-vis their interaction with the program, resulting in a 'decline in the overall quality and level of experience of deployed personnel', and a decline in 'level and quality of requirements'. He wrote that because of the length of time most of the CIA detainees had been in detention, '[the] detainees have been all but drained of actionable intelligence', and their remaining value was in providing 'information that can be incorporated into strategic, analytical think pieces that deal with motivation, structure and goals'.

The chief of Base observed that, during the course of the year, the detention site transitioned from an intelligence production facility to a long-term detention facility, which raised 'a host of new challenges'. These challenges included the need to

address the 'natural and progressive effects of long-term solitary confinement on detainees' and ongoing behavioral problems."

164. According to the report, one of the high-value detainees, Abu-Faraj al-Libi, was transferred to Detention Site Black on an unspecified (redacted) date in May 2005 and was subjected to EITs starting from 28 May 2005.

The section concerning the closure of Detention Site Black after publication of the *Washington Post* article (see paragraph 236 below) is rendered in paragraph 133 above.

I. Parliamentary inquiry in Romania

165. On 21 December 2005, by virtue of the Decree of Romania's Senate of 21 December 2005 (published on 27 December 2005) the Romanian Parliament set up the Inquiry Committee for investigating statements regarding the existence of CIA detention facilities or of some flights of planes leased by the CIA on the territory of Romania (*Comisia de anchetă pentru investigarea afirmaţiilor cu privire la existenţa unor centre de detenţie ale CIA sau a unor zboruri ale avioanelor închiriate de CIA pe teritoriul României*) ("the Romanian Senate Inquiry Committee"). It comprised eleven members and was presided over by Ms N. Nicolai. The report of the Romanian Senate Inquiry Committee ("the 2007 Romanian Senate Report") was published in the Official Monitor on 7 May 2008. The annexes attached to the report remained classified.

166. The 2007 Romanian Senate Report explained that the committee had been established "following the request of Mr Rene van der Linden, the President of the Council of Europe Parliamentary Assembly (PACE), formulated in the speech held in the assembly of the united chambers of Romania's Parliament on 24 November 2005, to investigate the accusations published in the international press regarding the detention and illegal transfer of prisoners in some of the member states of the Council of Europe".

The terms of reference were defined as follows:

> "According to Article 1 of the Decree of Romania's Senate no. 29 of 21 December 2005, the Inquiry Committee was charged with investigating statements regarding the existence of some CIA detention facilities on the territory of Romania or of some flights of some planes leased by CIA, that would have allegedly transported persons accused of having performed terrorist acts".

The initial deadline for presenting a report by the committee was fixed for 15 February 2006 but, given the complexity of the issues involved, that term was eventually extended until 5 March 2007.

167. From January 2006 to January 2007 the Romanian Senate Inquiry Committee held periodic meetings, usually on a monthly basis and carried out some fact-finding missions. According to the 2007 Romanian Senate Report, the committee held twenty-one meetings "for documentation review

and analysis with the leaders of institutions and specialised structures" and over forty meetings with official delegations and members of the Council of Europe's inquiry body, other politicians and journalists. It heard over 200 persons and studied over 4,200 pages of documents. Its delegates also made six visits to the airports and military airbases susceptible to have been used for secret detentions and illegal prisoners' transfers, including Timişoara-Gearmata; Bucharest-Băneasa; Constanţa-Mihail Kogălniceanu; Tulcea-Cataloi and Feteşti-military.

Based on the *in situ* investigations, the Romanian Senate Inquiry Committee found no facility built at the material time (2003-2005) that might have been used as a detention facility, "be it *ad hoc*". Also, it concluded that no flight that had passed through Mihail Kogălniceanu airport would raise suspicions of the illegal transport, embarking or disembarking of any passenger.

168. As regards "suspicious flights" in respect of which Senator Marty asked the Romanian authorities for all available evidence in his letter on 7 November 2006, the findings read, in so far as relevant, as follows:

> "Regarding flight N313P of 25 January 2004, the Committee established that that flight landed on the Airport Bucharest-Băneasa for refuelling and ground services. No passenger embarked or disembarked the plane. There is all evidence that shows beyond this fact, but also the purpose of the stopover. ...
>
> Mr Dick Marty states that the declaration of the Inquiry Committee contradicts the information provided by the Romanian Civil Aeronautical Authority, according to which, on 25 January 2004, its destination airport was Timişoara, not Bucharest - Băneasa. Later, the plane took off from Timisoara, and Mr Marty declared that he verified this fact. ...
>
> We would like to mention that the initial information provided by the Romanian Civil Aeronautical Authority (RCAA), regarding the landing on the International Airport Timisoara of the flight N313P of 25 January 2004, is due to the fact that RCAA had access only to the flight plan sent by the operator of the aircraft. The flight plan was modified by the operator in the air, requesting the stop on the International Airport Bucharest-Băneasa.
>
> At that date, according to the Romanian legislation, the operators who performed private flights in the national airspace were not under any obligation to request from request from RCAA any overflight authorisation, since it was sufficient to submit the flight plan to the traffic body. ...
>
> For N313P of 22-23 September 2003 (classified appendix no. 4):
>
> - copy of the extract of the navigation chart ROMATSA associated with the Airport Băneasa, in which the real route of the flight is indicated;
>
> - copy of the invoices no. 665 and 666 of 23 September 2003, concerning the flight N313P, issued by the handling agent of the Romanian Airport Services.
>
> Flight N478GS of 6 December 2004, which had an accident while landing at the Airport Bucharest-Băneasa, is suspected of being involved in a circuit that would have transported prisoners, due to the fact that it was omitted from the list sent to Mr Dick Marty in April 2006.

The event had the following development: On 6 December 2004, at 1:29 PM, the aircraft of the company CENTURION AVIATION, type Gulfstream 4, which was performing a charter flight on the route Bagram/Afganistan-Bucharest/Băneasa, landed on the runway of the Airport Băneasa, passing the threshold of the runway 07, with a ground speed of approximately 287 km/h. While rolling, the aircraft exceeded the available speed for landing ... and the delayed threshold of the runway, in an area of the runway where the airport was carrying on maintenance works ... .The aircraft rolled with the main left jamb on an unpaved portion with a depth of approximately 15-20 cm and stopped on the edge of the runway. The crew reported massive leaks of fuel from the left wing. The aircraft experienced damages on the left jamb of the main landing train and on the fuel tank in the left plan(classified appendix no. 5). ...

Flight N379P of 25 October 2003 raises questions for Mr Dick Marty, thinking that the Romanian Civil Aeronautical Authority indicates the route Prague-Constanţa - Băneasa-Amman. In reality, the flight took place on the route Prague-Bucharest Băneasa-Amman, according to invoice no. 3.314 of 25 October 2003, issued by ROMATSA (classified appendix no. 6).

Flights N85VM of 26 January 2004 and 12 April 2004 did not operate in the Airport Mihail Kogălniceanu, but in Airport Bucharest–Băneasa (classified appendices no. 7 and 8); flights N227SV of 1 October, 2004 and N2189M of 13-14 June 2003 operated on the Airport Mihail Kogălniceanu (classified appendices no. 9 and 10).

The appendix to Mr. Dick Marty's letter of March 31, 2006 requests details regarding 43 flights. The Inquiry Committee presents them in classified appendix no. 11."

169. The final conclusions of the 2007 Romanian Senate Report were formulated as follows:

1. To the question whether there is or there were American secret detention sites in Romania, the answer is negative.

2. To the question whether in Romania, during the investigated period, there exist or existed facilities for detaining prisoners, other than penitentiary ones (real, secret, *ad-hoc*, buildings that were used for this purpose on an improvised basis, potentially in the proximity of airports Timişoara, Bucharest – Henri Coanda or Băneasa, and Constanţa, the Inquiry Committee's answer is negative.

3. To the question whether there are or there were detainees with or without records held in the Romanian penitentiary system, who could have been assimilated with prisoners, the Inquiry Committee's answer is negative.

4. To the question whether there could have been clefts in the complete control system of the civil or military traffic or whether some flights could have passed inadvertently without being monitored or unrecorded or if in their cases the ground procedures stipulated in the international conventions could have not been applied, the Inquiry Committee's answer is negative.

5. To the question whether it could have been possible that certain Romanian institutions in Romania would have participated knowingly or by omission or negligence in operations of illegal transport of detainees through the airspace or airports in Romania, the Inquiry Committee's answer is negative.

6. To the question whether civil American flights or other states' civil flights could have transported, dropped, or picked up persons that could be assimilated to the detainees on the Romanian territory or under the responsibility of Romanian

authorities, in compliance with international regulations, the Inquiry Committee's answer is negative.

7. To the question whether there existed an in-depth parliamentary investigation to determine the media allegations regarding the existence of some detention facilities or of some flights with illegal prisoners in Romania, the Investigation Committee's answer is positive.

8. To the question whether the purpose of the stopovers in Romania of the flights referred to in chapter 5, the Inquiry Committee has solid grounds to reply that they had nothing to do with potential illegal transports of prisoners on the territory of Romania."

170. On 13 October 2008, in reply to a letter by APADOR-CH concerning the purpose of the flights mentioned by the report cited above, the President of the Romanian Senate stated:

"... the Inquiry Committee was assigned to investigate the statements regarding the existence of CIA detention facilities or of some flights of planes leased by CIA on the territory of Romania.

Consequently, since its mandate was strictly limited to the aforementioned issue, the Inquiry Committee did not request data from appropriate institutions, did not perform any investigation, and does not hold any kind of information regarding the purpose of the flights with the indication mentioned in chapter 5, point 3. ..."

J. Criminal investigation in Romania

171. On 29 May 2012 the applicant's lawyer filed a criminal complaint (*plângere penală*) on his behalf with the Prosecutor General, asking for an investigation into circumstances surrounding the applicant's rendition, secret detention and ill-treatment in Romania to be opened. It was submitted that the Romanian authorities had allowed the CIA to subject the applicant to torture and unlawful, incommunicado detention on Romanian territory and to transfer him out of the country despite the risk of his facing further torture, unacknowledged detention and death penalty. He relied on Articles 2, 3, 5, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 6 and maintained that the conduct of the Romanian authorities constituted offences of, *inter alia*, aiding and abetting murder, torture and ill-treatment as defined in the Romanian Criminal Code.

172. On 20 July 2012 the Prosecutor General acknowledged that the complaint had been registered and assigned a file number, and that its review was at a preliminary stage.

Some time afterwards, on an unspecified date, the prosecution authorities opened an investigation concerning the applicant's allegations.

1. Submission by the Government of confidential documents from the investigation file

173. At the Court's request, the Government submitted various materials concerning the investigation asking, under Rule 33 § 2 of the Rules of Court, for public access to those documents to be restricted, in the interests of national security and also on the grounds of secrecy of the investigation (see also paragraph 12 above). Those materials included transcripts of witness evidence obtained in the investigation. They were produced in the Romanian language, with an English translation. The English version is rendered in paragraphs 299-325 below.

All these documents were available to the Court and the applicant in full, unredacted versions. The following description of the course of the investigation is based on a summary (redacted version) of annexes containing documents from the investigation file produced by the Government. That summary was prepared by the Government in the English language.

2. The course of the investigation according to documentary evidence produced by the Government

174. On 3 December 2012 the investigating prosecutor analysed the applicant's complaint and its context, including laws and arrangements regarding bilateral agreements between Romania and the United States and information in the public domain concerning the applicant's allegations. Also, an initial investigation plan was prepared on that date. The plan included a list of requests for information, clarifications, documents, audio and video recordings and flight data to be addressed to various domestic authorities – among others, the Civil Aviation Authority, Air Traffic Services Administration, Otopeni, Kogălniceanu and Băneasa airports, the Government and the relevant ministries.

175. On 27 December 2012 the Prosecutor's Office attached to the Court of Cassation (*Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie* – "PICCJ") asked the RCAA to provide, in connection with the investigation the following information concerning certain flights mentioned in an annex to the request (the annex has not been produced):

(a) any data, information, documents held with regard to the air traffic control in respect of the flights in question;

(b) any audio or video recordings concerning the flights in question (for example: air traffic control or directing);

(c) names of individuals who had carried out specific tasks on the dates when the flights in question had allegedly taken place;

(d) names of individuals directly involved in facilitating or operating those flights.

176. On 12 January 2013 the RCAA informed the PICCJ that, according to the relevant legislation in force at the relevant time (2003-2005), namely Government Decision no. 1172/2003, they had data concerning only a few flights – which they included in an annex (the annex has not been produced).

The RCAA stated that the available data did not clearly show that these flights had taken place and that they did not have any documents which attested that the flights had actually taken place. According to the legislation in force at the material time, information in the RCAA's possession showed only an intention to operate the flights, which had been planned and notified to them.

It further stated that Government Decision no. 1172/2003 had eliminated the need for the RCAA to approve flights which transited the national airspace with no commercial stop (and did not carry troops, military equipment, weapons, munitions, explosives, radioactive or other dangerous materials or did not fall in the category of technical flights) and, also, internal and international flights with civil aircraft registered abroad, landing and taking off from the Romanian territory, which were included in the category of civil air operations of general aviation. These flights were considered authorised if a flight plan on a published ATS (Air Traffic Service) route was submitted and the aircraft used were insured for damage caused to third parties on the ground.

As regards audio or video recordings and names of any individuals involved, the RCAA stated that they did not have any such information.

177. In addition, the Government produced copies of the following prosecutor's letters requesting information or documents from various authorities:

(1) letter of 27 December 2012 addressed to the Romanian Government, asking for the classified annexes to the 2007 Romanian Senate Report;

(2) letters of 27 December 2012 addressed to Timişoara Airport, Constanţa Mihail Kogălniceanu Airport and Bucharest Băneasa Airport, requesting information about the alleged suspicious flights, including audio or video recordings, and about the airport personnel who had worked on the relevant dates;

(3) letter of 3 March 2013 addressed to the Ministry of Transport and Infrastructure, requesting it to the transmit the National Programme of Aeronautical Security to the prosecutor;

(4) letters of 18 March 2013 addressed to the Civil Aviation Directorate and the Bucharest Airports National Company requesting information about flights N313P, N85VM, N379P, N478GS, N228KA, N308AB, N789DK, N227SV, N787WH, N1HC, N2189M and N860JB, including general flight data from 2003-2006, types and purposes of flights, type of journey, flight route, flight operator, flight organiser, aircraft type, aircraft capacity, aircraft registration, documents regarding insurance, information about the crew and

passengers, initial flight plans, subsequent flight documents, flight or overflight authorisations, specific requests for each flight and handling operator;

(5) letter of 24 April 2013 addressed to the Bucharest Airports National Company, requesting information about applications for authorisation of access of persons and vehicles to the airplanes, the relevant records, information about the security personnel and the handling agents who had worked on the relevant dates at Bucharest Băneasa Airport and at Constanţa Mihail Kogălniceanu Airport;

(6) letter of 24 April 2013 addressed to the General Inspectorate of the Border Police, requesting information about the personnel who had worked on the relevant dates and any persons who entered, exited or transited the national territory on those dates through Bucharest Băneasa Airport and Constanţa Mihail Kogălniceanu Airport;

(7) letter of 29 April 2013 addressed to the Romanian Airport Services ("RAS"), requesting information about the personnel who had worked on the relevant dates and the handling operations performed.

178. On an unspecified date, in response to the prosecutor's request, the Ministry of Transport-Civil Aviation Directorate provided the following documents:

- flight plans of N312ME on 24 April 2003, N175A on 5 May 2003, N58AS on 16 June 2003, N313P on 22 September 2003, N313P on 25 January 2004 and N227SV on 1 October 2004;
- control lists of the navigation records;
- tables containing handling fees;
- invoices issued by the RAS;
- ground handling charge notes;
- air navigation services sheets;
- address no. 6 293 of 4 November 2006 issued by Timişoara Airport informing that, after checking their records, there was no evidence of the landing of the flight N313P operated by Business Jet Solutions. It was also mentioned that the said aircraft had not carried out any flights on Traian Vuia Airport – Timişoara until 14 November 2006.
- list of flight plans;
- letter no. 239 of 25 March 2013 from the Bucharest Airports National Company, transmitting all relevant information identified in their archives and informing the prosecution that from 2004 to 2005 in Bucharest Băneasa Airport the RAS was in charge of the handling services. The letter also mentioned that the flights concerned had not been identified as having operated at Henri Coandă Airport.
- letter no. 2183 of 22 March 2013 from Constanţa Mihail Kogălniceanu Airport confirming, among other things, that N308AB had operated in that airport and that it had landed on 25 August 2004 at 00:03, and departed on 25 August 2004 at 01:33;

- letter no. 3461 of 13 June 2006 from Constanţa Mihail Kogălniceanu Airport, confirming that the aircraft Lockheed L382 registered as N2189M had operated at that airport, landing on 13 June 2003 at 09:57, departing on 14 June 2003 at 08:31 and that the aircraft Gulfstream IV registered as N227SV had operated in the airport, landing on 1 October 2004 at 20:39 and departing at 21:26 on the same date.

179. On 26 April 2013 the Bucharest Airports National Company replied to the prosecutor's request of 18 March 2013. The company stated that it did not have information about general flight data concerning the indicated aircraft in the period 2003-2006, the purpose of the flights, type of journey, flight organiser, aircraft capacity, any documents regarding insurance, information about the crew and passengers, initial flight plans, subsequent flight documents, flight or overflight authorisations or information about handling requests. It informed the prosecutor that the flight plans had been received through the AFTN terminal and had not been subject to archiving and that the RAS had been the handling operator in 2003-2006 at Bucharest Băneasa Airport. A table containing information about the relevant flights was transmitted to the prosecutor.

180. On 21 May 2013 the Bucharest Airports National Company replied to the prosecutor's request of 24 April 2013. The company transmitted the requested information about the applications for access authorisation to the planes and the relevant records. It also explained to the prosecutor that since the retention periods for the requested documents were from three to five years, it was impossible for it to produce any additional information about the requests for authorisations and the access records. The company also produced information concerning the security personnel who had worked on the relevant dates.

181. On 20 May 2013 the General Inspectorate of the Border Police replied to the prosecutor's request of 24 April 2013. It forwarded a list containing the names, personal data and the present workplace of the personnel who had worked on the relevant dates. It also informed the prosecutor that flight logs had automatically been erased after five years and that, as a consequence, they could not submit the requested information about the persons who had entered, exited or transited the national territory on those dates at Bucharest Băneasa Airport.

182. On 11 July 2013 the General Inspectorate of the Border Police supplied information concerning the personnel who had worked at Bucharest Băneasa Airport on 22 September 2003 and their personal data.

183. On 13 June 2013 the RAS replied to the prosecutor's request of 29 April 2013. The RAS informed the prosecutor about the personnel who had worked on the relevant dates and transmitted several tables containing handling fees. They also stated that information about the handling services performed had been retained only for three years.

184. In the meantime, on 24 April 2013, the prosecutor asked the Ministry of National Defence (*Ministerul Apărării Naţionale*) to produce, on an urgent basis, the following information concerning the period of 2003-2006:

(a) military flights carried out by US military aircraft or civilian flights carried out by the US air companies, which concerned "the transfer of individuals within the framework of the USA Special Rendition Program" and which had had as a point of transfer, transit or destination "airports on Romania's territory";

(b) existence or non-existence, on Romania's territory, of alleged detention facilities set up at the US authorities' or the US forces' request and their possible location, including names of legal persons hosting them;

(c) detention, interrogation, and subsequent transfer of individuals in the US forces' or the US authorities' custody from the alleged detention facilities to other locations;

d) names of persons who had been subjected to such treatment.

185. On 24 May 2013 the Ministry of National Defence replied that the requested materials were part of documents sent to the Romanian Senate Inquiry Committee by a note of 31 March 2006, which was classified as "confidential information". The Ministry stated that they did not have a copy of those documents, that the documents had been sent to the committee in a single copy (*exemplar unic*) and that they had not yet been returned to them. Moreover, the provision of information concerning civil aircraft which had operated in the Romanian airspace and in the Romanian international civilian airports fell within the competence and responsibility of the relevant departments attached to the Ministry of Transport.

The Ministry further stated that, by their letter of 9 May 2008, sent to M. Constantinescu, a State councillor attached to the Prime-Minister's office, they had agreed that documents classified "confidential information" be sent to the European Commission.

Moreover, the Air Force General Staff (*Statul Major al Forţelor Aeriene*) had stated that it had not had any records of flights operating in the airspace or in the military airports between 2003 and 2006 and transferring individuals in the framework of the US rendition programme; moreover, the representatives of the US authorities had not had access to buildings or air facilities belonging to air bases subordinate to the Air Force or exclusive access to certain areas.

Lastly, the Ministry stated that the General Information Agency of the Defence (*Direcţia Generală de Informaţii a Apărării*) had no information about the existence of secret US bases in Romania, about individuals allegedly detained illegally in Romanian prisons, their interrogation or transport to and from Romania by unmonitored or unauthorised flights.

186. On 24 January 2014 the PICCJ asked the Service for International Judicial Cooperation, Programs and International Relations to forward a

request for legal assistance (including 4 annexes) to the relevant US judicial authorities. In the letter of request, the prosecutor asked the US authorities to provide, in connection with the criminal investigation, information concerning, among other things, the period and circumstances of Mr Al-Nashiri's arrest and detention, the proceedings against him instituted by the US authorities; whether Mr Al-Nashiri had ever been brought to Romania in the context of his detention imposed by the US authorities under the CIA rendition programme and whether Romania had potentially been involved in that programme. The prosecutor also asked for the date of his arrival on Romanian territory, the means of transport used, the place of his detention on Romanian territory; the date of his departure from Romania, the means of transport used and the relevant documents and whether the Romanian authorities had been aware of his stay in the country.

187. On an unspecified date in March 2014 the US Department of Justice replied to the letter of request, stating that the US authorities were not able to provide the information requested.

188. In the meantime, on 27 February 2014, following the entry into force of the new Romanian Criminal Code and Code of Criminal Procedure (see also paragraph 196 below), the prosecutor had re-analysed the applicant's criminal complaint in the light of the new legislation and decided that the investigation should also include crimes of unlawful deprivation of liberty and torture.

189. In the course of the investigation, in 2013 and 2015, the prosecutor took evidence from witnesses, including some high-office holders. It also heard other officials, the Border Police officers and the airport staff, including the security personnel. The Government produced transcripts of evidence given by certain witnesses (see paragraphs 298-325 below).

190. The investigation, apparently still directed against persons unknown, is pending.

V. RELEVANT DOMESTIC LAW

A. Criminal Code

1. Territorial jurisdiction

191. Article 3 of the old Criminal Code, as applicable until 31 January 2014, read as follows:

> "Romanian criminal law shall apply to offences committed on the territory of Romania"

192. On 1 February 2014 the new Criminal Code entered into force. Article 8 § 1 of the new Criminal Code is phrased in the same terms.

2. Prohibition of torture and offence of unlawful deprivation of liberty

193. The prohibition of torture was set forth in Article 267 of the old Criminal Code and, since 1 February 2014 (with minor changes of the wording), has been included in Article 282 of the new Criminal Code. Penalties applicable remained the same. The crime of torture is liable to sentence of imprisonment from two to seven years. In cases where a bodily harm has been caused to the victim, the sentence ranges from three to ten years' imprisonment. If torture resulted in the victim's death, the sentence ranges from fifteen to twenty-five years' imprisonment.

194. The offence of unlawful deprivation of liberty was defined in Article 189 of the old Criminal Code and was liable to a sentence of imprisonment ranging from three to ten years' imprisonment. At present, it is defined in Article 205 of the new Criminal Code and is liable to a sentence ranging from one to seven years' imprisonment.

B. Code of Criminal Procedure

195. In general, an offence must be prosecuted by the authorities of their own motion. Exceptions include only a few offences which cannot be prosecuted without a prior request (*plângere prealabilă*) from a victim or from a specific authority (e.g. certain military offences). A criminal investigation may also be opened following a criminal complaint from the victim or notification of an offence by any physical or legal person who has become aware that such offence has been committed.

196. Article 221 of the old Code of Criminal Procedure ("old CCP") as applicable until 1 February 2014 read, in so far as relevant, as follows:

> "A criminal investigation authority [shall institute an investigation] if it has been informed of commission of an offence by a criminal complaint or notification of commission of an offence, or it shall [take action] of its own motion, when it has discovered by other means that an offence has been committed.
>
> Where, according to the law, a criminal investigation can only be opened following a prior complaint, notification or authorisation of an authority provided for by law, such investigation shall not be instituted in their absence. ..."

A criminal complaint was defined as a notification of the commission of an offence submitted by a person or institution having sustained damage as a result of an offence. Notification of an offence could be made by any person or institution.

197. Following the entry into force of the New Code of Criminal Procedure ("new CCP"), the Article 221 was repealed and replaced by current Article 292 which reads as follows:

> "A criminal investigation authority shall take action of its own motion if it learns (*afla*) about commission of a criminal offence from any source other than those referred to in Articles 289-291 [in particular, criminal complaint and notification of the commission of an offence] and shall draw up a report in this regard."

A criminal complaint is defined in Article 289 of the new CCP as "information laid by an individual or legal entity concerning damage sustained thereby as a result of a criminal offence". Notification of the commission of an offence is defined in Article 290 as a notification submitted by any individual or legal entity.

VI. RELEVANT INTERNATIONAL LAW

A. Vienna Convention on the Law of Treaties

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

Article 26
"Pacta sunt servanda"

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

Article 27
Internal law and observance of treaties

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

B. International Covenant on Civil and Political Rights

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

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

200. Article 10 § 1 of the ICCPR reads as follows:

"1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

C. The UN Torture Convention

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

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a

third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

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

Article 3 provides:

"1. No State Party shall expel, return *('refouler')* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

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

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

D. UN Geneva Conventions

1. Geneva (III) Convention

204. Article 4 of the Geneva (III) Convention relative to the Treatment of Prisoners of War of 12 August 1949 ("the Third 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.

..."

205. 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."

206. 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."

207. Article 21 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."

2. Geneva (IV) Convention

208. Article 3 of the Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ("the Fourth 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."

209. 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. ..."

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

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

Article l
Responsibility of a State for its internationally wrongful acts

"Every internationally wrongful act of a State entails the international responsibility of that State."

Article 2
Elements of an internationally wrongful act of a State

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

a. Is attributable to the State under international law; and

b. Constitutes a breach of an international obligation of the State."

Article 7
Excess of authority or contravention of instructions

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

..."

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

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

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

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

Article 15
Breach consisting of a composite act

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

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

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

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

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

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

F. UN General Assembly Resolution 60/147

211. 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".

VII. SELECTED PUBLIC SOURCES CONCERNING GENERAL KNOWLEDGE OF THE HVD PROGRAMME IN 2002-2005 AND HIGHLIGHTING CONCERNS AS TO HUMAN RIGHTS VIOLATIONS ALLEGEDLY OCCURRING IN US-RUN DETENTION FACILITIES IN THE AFTERMATH OF 11 SEPTEMBER 2001

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

A. United Nations

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

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

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

2. Statement of the International Rehabilitation Council for Torture

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

importance of redress for victims. The Commission on Human Rights communicated this document to the United Nations General Assembly on 8 August 2003.

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

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

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

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

"1. The Parliamentary Assembly:

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

...

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

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

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

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

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

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

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

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

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

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

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

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

...

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

C. International non-governmental organisations

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

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

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

218. This report included the following passage:

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

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

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

It further stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

225. The ICRC expressed its position as follows:

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

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

226. On 6 November 2005 the Human Rights Watch issued a "Statement on US Secret Detention Facilities in Europe" ("the 2005 HRW Statement"), which indicated Romania's and Poland's complicity in the CIA rendition programme. It was given two days after *The Washington Post* had published Dana Priest's article revealing information of secret detention facilities designated for suspected terrorists run by the CIA outside the US, including "Eastern European countries" (see also paragraph 234 below).

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

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

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

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

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

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

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

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

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

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

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

The current location of these prisoners is unknown.

List, as of December 1, 2005:

...

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

...

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

VIII. SELECTED MEDIA REPORTS AND ARTICLES

229. The applicant and third-party interveners submitted a considerable number of articles and reports published in international and Romanian media, which raised concerns about alleged rendition, secret detentions and ill-treatment in US-run detention facilities for terrorist-suspects captured in the context of the "war on terror". They also submitted materials concerning allegations of the CIA having a secret detention facility in Romania and rendition flights operating on Romanian territory. A summary of most relevant sources is given below.

A. International media

230. On 11 March 2002 *The Washington Post* published an article by R. Chandrasekaran and P. Finn entitled "US Behind Secret Transfer of Terror Suspects" which read, in so far as relevant, as follows:

"Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics Including torture and threats to families – that are

illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

After September 11, these sorts of movements have been occurring all the time', a US diplomat told the *Washington Post*. 'It allows us to get information from terrorists in a way we can't do on US soil'. ...

U.S. involvement in seizing terrorism suspects in third countries and shipping them with few or no legal proceedings to the United States or other countries – known as 'rendition' – is not new. In recent years, U.S. agents, working with Egyptian intelligence and local authorities in Africa, Central Asia and the Balkans, have sent dozens of suspected Islamic extremists to Cairo or taken them to the United States, according to U.S. officials, Egyptian lawyers and human rights groups. ..."

231. On 12 March 2002 *The Guardian* published an article written by D. Campbell, entitled "US sends suspects to face torture" which was to an extent based on the above article in *The Washington Post.* It read, in so far as relevant, as follows:

"The US has been secretly sending prisoners suspected of al-Qaida connections to countries where torture during interrogation is legal, according to US diplomatic and intelligence sources. Prisoners moved to such countries as Egypt and Jordan can be subjected to torture and threats to their families to extract information sought by the US in the wake of the September 11 attacks.

The normal extradition procedures have been bypassed in the transportation of dozens of prisoners suspected of terrorist connections, according to a report in the Washington Post. The suspects have been taken to countries where the CIA has close ties with the local intelligence services and where torture is permitted.

According to the report, US intelligence agents have been involved in a number of interrogations. A CIA spokesman yesterday said the agency had no comment on the allegations. A state department spokesman said the US had been 'working very closely with other countries' – it's a global fight against terrorism'. ...

The seizing of suspects and taking them to a third country without due process of law is known as 'rendition'. The reason for sending a suspect to a third country rather than to the US, according to the diplomats, is an attempt to avoid highly publicised cases that could lead to a further backlash from Islamist extremists. ...

The US has been criticised by some of its European allies over the detention of prisoners at Camp X-Ray in Guantánamo Bay, Cuba. After the Pentagon released pictures of blindfolded prisoners kneeling on the ground, the defence secretary, Donald Rumsfeld, was forced to defend the conditions in which they were being held. Unsuccessful attempts have been made by civil rights lawyers based in Los Angeles to have the Camp X-Ray prisoners either charged in US courts or treated as prisoners of war. The US administration has resisted such moves, arguing that those detained, both Taliban fighters and members of al-Qaida, were not entitled to be regarded as prisoners of war because they were terrorists rather than soldiers and were not part of a recognised, uniformed army."

232. 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 Guantánamo 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."

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

"Zubaydah is in US custody, but it's unclear whether he remains in Pakistan, is among 20 al Qaeda suspects to be sent to the US naval station at Guantánamo 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 Guantánamo Bay, Cuba, or transferred to a third country."

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

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

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

The article also noted that

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

The Washington Post also gave details on the rendition process:

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

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

235. On 28 February 2005 the *Newsweek* published an article by M. Hirsch, M. Hosenball and J. Barry, entitled "Aboard Air CIA", stating that the CIA ran a secret charter service, shuttling detainees to interrogation facilities worldwide. While the article mainly gave an account of Mr El-Masri capture, rendition, secret detention and further plight in CIA hands, Romania was for the first time mentioned as a transit country for the CIA planes suspected of transporting terrorist-suspects in the context of the flight N313P, Boeing 737, its rendition mission of 16-28 January 2004 and landing in Romania (see also paragraphs 326-328 below). It also stated:

"...NEWSWEEK has obtained previously unpublished flight plans indicating the agency has been operating a Boeing 737 as part of a top-secret global charter servicing clandestine interrogation facilities used in the war on terror. And the Boeing's flight information, detailed to the day, seems to confirm Masri's tale of abduction. ...

The evidence backing up Masri's account of being 'snatched' by American operatives is only the latest blow to the CIA in the ongoing detention-abuse scandal. Together with previously disclosed flight plans of a smaller Gulfstream V jet, the Boeing 737's travels are further evidence that a global 'ghost' prison system, where terror suspects are secretly interrogated, is being operated by the CIA. Several of the Gulfstream flights allegedly correlate with other 'renditions', the controversial practice of secretly spiriting suspects to other countries without due process. ..."

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

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

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

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

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

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

...

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

The *Washington Post* is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued

that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.

...

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

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

...

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

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

The detainees break down roughly into two classes, the sources said.

About 30 are considered major terrorism suspects and have been held under the highest level of secrecy at black sites financed by the CIA and managed by agency personnel, including those in Eastern Europe and elsewhere, according to current and former intelligence officers and two other U.S. government officials. Two locations in this category – in Thailand and on the grounds of the military prison at Guantánamo Bay – were closed in 2003 and 2004, respectively.

A second tier – which these sources believe includes more than 70 detainees – is a group considered less important, with less direct involvement in terrorism and having limited intelligence value. These prisoners, some of whom were originally taken to black sites, are delivered to intelligence services in Egypt, Jordan, Morocco, Afghanistan and other countries, a process sometimes known as 'rendition'. While the first-tier black sites are run by CIA officers, the jails in these countries are operated by the host nations, with CIA financial assistance and, sometimes, direction.

...

The top 30 al Qaeda prisoners exist in complete isolation from the outside world. Kept in dark, sometimes underground cells, they have no recognized legal rights, and no one outside the CIA is allowed to talk with or even see them, or to otherwise verify their well-being, said current and former and U.S. and foreign government and intelligence officials.

...

> The Eastern European countries that the CIA has persuaded to hide al Qaeda captives are democracies that have embraced the rule of law and individual rights after decades of Soviet domination. Each has been trying to cleanse its intelligence services of operatives who have worked on behalf of others – mainly Russia and organized crime.
>
> ...
>
> By mid-2002, the CIA had worked out secret black-site deals with two countries, including Thailand and one Eastern European nation, current and former officials said. An estimated $100 million was tucked inside the classified annex of the first supplemental Afghanistan appropriation. ..."

237. On 5 December 2005, *ABC News* published a report, by Brian Ross and Richard Esposito, entitled "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons – 10 Out of 11 High-Value Terror Leaders Subjected to 'Enhanced Interrogation Techniques'" and listing the names of top al-Qaeda terrorist suspects held in Poland and Romania, including the applicant and Mr Abu Zubaydah. This report was available on the Internet for only a very short time; it was withdrawn from *ABC*'s webpage shortly thereafter following the intervention of lawyers on behalf of the network's owners. At present, the content is again publicly available and reads, in so far as relevant, as follows:

> "Two CIA secret prisons were operating in Eastern Europe until last month when they were shut down following Human Rights Watch reports of their existence in Poland and Romania.
>
> Current and former CIA officers speaking to *ABC News* on the condition of confidentiality say the United States scrambled to get all the suspects off European soil before Secretary of State Condoleezza Rice arrived there today. The officers say 11 top al Qaeda suspects have now been moved to a new CIA facility in the North African desert.
>
> CIA officials asked *ABC News* not to name the specific countries where the prisons were located, citing security concerns.
>
> The CIA declines to comment, but current and former intelligence officials tell *ABC News* that 11 top al Qaeda figures were all held at one point on a former Soviet air base in one Eastern European country. Several of them were later moved to a second Eastern European country.
>
> All but one of these 11 high-value al Qaeda prisoners were subjected to the harshest interrogation techniques in the CIA's secret arsenal, the so-called 'enhanced interrogation techniques' authorized for use by about 14 CIA officers and first reported by *ABC News* on Nov. 18.
>
> Rice today avoided directly answering the question of secret prisons in remarks made on her departure for Europe, where the issue of secret prisons and secret flights has caused a furor.
>
> Without mentioning any country by name, Rice acknowledged special handling for certain terrorists. '*The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have had to adapt'*, Rice said.

The CIA has used a small fleet of private jets to move top al Qaeda suspects from Afghanistan and the Middle East to Eastern Europe, where Human Rights Watch has identified Poland and Romania as the countries that housed secret sites.

But Polish Defense Minister Radosław Sikorski told ABC Chief Investigative Correspondent Brian Ross today: '*My president has said there is no truth in these reports*.'

Ross asked: '*Do you know otherwise, sir, are you aware of these sites being shut down in the last few weeks, operating on a base under your direct control?'* Sikorski answered, '*I think this is as much as I can tell you about this*'.

In Romania, where the secret prison was possibly at a military base visited last year by Defense Secretary Donald Rumsfeld, the new Romanian prime minister said today there is no evidence of a CIA site but that he will investigate.

Sources tell *ABC* that the CIA's secret prisons have existed since March 2002 when one was established in Thailand to house the first important al Qaeda target captured. Sources tell ABC that the approval for another secret prison was granted last year by a North African nation.

Sources tell *ABC News* that the CIA has a related system of secretly returning other prisoners to their home country when they have outlived their usefulness to the United States.

These same sources also tell *ABC News* that U.S. intelligence also ships some 'unlawful combatants' to countries that use interrogation techniques harsher than any authorized for use by U.S. intelligence officers. They say that Jordan, Syria, Morocco and Egypt were among the nations used in order to extract confessions quickly using techniques harsher than those authorized for use by U.S. intelligence officers. These prisoners were not necessarily citizens of those nations.

According to sources directly involved in setting up the CIA secret prison system, it began with the capture of Abu Zabayda in Pakistan. After treatment there for gunshot wounds, he was whisked by the CIA to Thailand where he was housed in a small, disused warehouse on an active airbase. There, his cell was kept under 24-hour closed circuit TV surveillance and his life-threatening wounds were tended to by a CIA doctor specially sent from Langley headquarters to assure Abu Zubaydah was given proper care, sources said. Once healthy, he was slapped, grabbed, made to stand long hours in a cold cell, and finally handcuffed and strapped feet up to a water board until after 0.31 seconds he begged for mercy and began to cooperate. ..."

238. On 8 December 2011 *The Independent* published an article written by A. Goldman and M. Apuzzo, entitled "Inside Romania's secret CIA prison". The article suggested that the building used by the National Registry Office for Classified Information (*Oficiul Registrului Naţional al Informaţiilor Secrete de Stat* – "ORNISS") had hosted the CIA secret detention site in Romania. The relevant parts read:

"In northern Bucharest, in a busy residential neighbourhood minutes from the heart of the capital city, is a secret the Romanian government has long tried to protect.

For years, the CIA used a government building — codenamed 'Bright Light' — as a makeshift prison for its most valuable detainees. ...

The existence of a CIA prison in Romania has been widely reported, but its location has never been made public. The Associated Press and German public television ARD

located the former prison and learned details of the facility where harsh interrogation tactics were used. ARD's programme on the CIA prison is set to air today.

The Romanian prison was part of a network of so-called black sites that the CIA operated and controlled overseas in Thailand, Lithuania and Poland. All the prisons were closed by May 2006, and the CIA's detention and interrogation programme ended in 2009.

Unlike the CIA's facility in Lithuania's countryside or the one hidden in a Polish military installation, the CIA's prison in Romania was not in a remote location. It was hidden in plain sight, a couple blocks off a major boulevard on a street lined with trees and homes, along busy train tracks.

The building is used as the National Registry Office for Classified Information, which is also known as ORNISS. Classified information from NATO and the European Union is stored there. Former intelligence officials both described the location of the prison and identified pictures of the building.

In an interview at the building in November [2011], senior ORNISS official Adrian Camarasan said the basement is one of the most secure rooms in all of Romania. But he said Americans never ran a prison there.

'*No, no. Impossible, impossible*,' he said in an ARD interview for its 'Panorama news broadcast, as a security official monitored the interview.

The CIA prison opened for business in the autumn of 2003, after the CIA decided to empty the black site in Poland, according to former US officials.

Shuttling detainees into the facility without being seen was relatively easy. After flying into Bucharest, the detainees were brought to the site in vans. CIA operatives then drove down a side road and entered the compound through a rear gate that led to the actual prison.

The detainees could then be unloaded and whisked into the ground floor of the prison and into the basement.

The basement consisted of six prefabricated cells, each with a clock and arrow pointing to Mecca, the officials said. The cells were on springs, keeping them slightly off balance and causing disorientation among some detainees.

The CIA declined to comment on the prison. ...

Former US officials said that because the building was a government installation, it provided excellent cover. The prison didn't need heavy security because area residents knew it was owned by the government. People wouldn't be inclined to snoop in post-communist Romania, with its extensive security apparatus known for spying on the country's own citizens.

Human rights activists have urged the Eastern European countries to investigate the roles their governments played in hosting the prisons in which interrogation techniques such as waterboarding were used. Officials from these countries continue to deny these prisons ever existed.

'We know of the criticism, but we have no knowledge of this subject', Romanian President Traian Băsescu said in a September [2011] interview with AP. ...

The Romanian and Lithuanian sites were eventually closed in the first half of 2006 before CIA Director Porter Goss left the job. Some of the detainees were taken to Kabul, where the CIA could legally hold them before they were sent to Guantánamo. Others were sent back to their native countries."

B. Romanian media

239. On 22 January 2002 *Adevărul*, a Romanian daily newspaper based in Bucharest, published an article entitled "Treatment applied to hostages in Afghanistan – 'inhuman' which read, in so far as relevant, as follows:

> "British officials who made a visit to the prison at Guantánamo at the end of last week presented a report to the British government on the manner in which Taliban and Al-Qaida prisoners are treated. The authorities in London are going to study it in detail given that criticism towards Americans has grown in recent days about the treatment applied to prisoners at Guantánamo. Films depicting prisoners blindfolded and chained by their hands and feet, with masks covering their mouth and nose and kneeling before their guards, have led to public concern and condemnation in many countries of the world. Great Britain, the main ally of the USA, was among the first countries in which politicians referred to the images as 'shocking' and the manner in which prisoners were treated as 'monstrous'.
>
> Following pressure from public opinion, the British Foreign Secretary, Jack Straw has asked the Americans to treat hostages from Afghanistan 'humanely'. The USA stated that the images presented depicted prisoners at their time of arrival at Guantánamo and are not representative of how they are treated in prison on a daily basis. For now, the officials from London who visited the prison at Guantánamo stated that the three Britons being held there have not formulated 'any complaint' in relation to the manner in which they are treated.
>
> Disputes between the Americans and British on this topic are the first visible sign of dissent between the two allies since the start of the anti-terrorist campaign. According to British officials, the 144 prisoners who have already arrived at Guantánamo are housed in spaces that look like cages, separated by wire. London is of the view that this kind of 'degrading' treatment" is 'counterproductive', and diminishes the chances of the secret services of obtaining information on potential terrorists from the Muslim community. ..."

240. On 5 February 2002 *Adevărul* published an article "The treatment of prisoners at Guantánamo Bay attracts hundreds of new recruits to our ranks", which read, in so far as relevant, as follows:

> "The treatment of Taliban and Al-Qaida detainees by American troops at the X-Ray detention centre of the Guantánamo Bay American military base, Cuba 'will lead to a considerable increase in the number of recruits' that will join Islamic terrorist groups, stated Hassan Yousef on Sunday, the leader of Hamas, the extremist organization found on the list of targets in the war on terrorism drawn up by the United States. ... 'The Mirror', after the international press published a photograph at the end of last week of a detainee taken to interrogation strapped to a stretcher. ...Questioned even from the beginning by European allies, the treatment applied to prisoners captured by US forces in Afghanistan, creates new waves these days both in Europe and overseas. After the former American Secretary of State, Madeline Albright criticized the manner in which the Bush administration decided to treat Guantánamo Bay prisoners (Washington does not consider that the status of prisoner of war applies to Al-Qaida mercenaries). The latest spark to rekindle the controversy about the X-Ray detention center, the picture shown here, caused a powerful storm in Great Britain. On Sunday, Prime Minister Tony Blair made a fierce attack on the weekly newspaper 'The Mail on Sunday' accusing it of undermining the war on terrorism after this newspaper

published an article on its first page in which it suggested that American investigators had interrogated detainees who were unconscious, or in other words, under the influence of drugs. According to experts however, the fact that the photographed detainee had his knees bent is proof that he was conscious at the time that he was photographed. ...”

241. On 25 March 2002 *Adevărul* published an article entitled “‘American Taliban’ mistreated by authorities” which read, in so far as relevant, as follows:

“The ‘American Taliban’ John Walker Lindh has been mistreated by American authorities during the time he has been in detention, stated his lawyers in a document sent to the judge, reported newspaper ‘The Los Angeles Times’. ‘The American Taliban’, John Walker Lindh, stated in a document submitted to the Court that he had been mistreated by American Authorities during the time he has spent in detention. John Walker Lindh, aged 21 years of age, was captured in the North of Afghanistan. Lindh ‘was blindfolded, and his handcuffs were so tight that they stopped his blood circulation’, his lawyers added, who claimed that American soldiers ‘threatened him with death and torture’. He was given very little food and did not have the right to receive medical care. The defense claimed that ‘The American Taliban’ had his clothes cut up and remained ‘completely naked’ and was transported ‘in a metal transport container’ where there was no source of heat or lighting.”

242. On 27 December 2002 *Evenimentul Zilei*, a Romanian newspaper based in Bucharestm published an article entitled “Torture at the CIA?” which read, in so far as relevant:

“Investigators from the Central Intelligence Agency of the United States (CIA) used stressful and violent interrogation techniques against enemies captured in Afghanistan, that came somewhere between the ‘boundary of legal and inhuman’ writes The Washington Post newspaper. The prestigious American newspaper describes metal containers which it says were secret CIA interrogation centers at the Bagram airbase which was the Headquarters of the American forces involved in operations to capture members of al-Qaeda and Taliban leaders.

Prisoners who refused to cooperate were kept kneeling for several hours with their eyes covered with black cloth or by tinted glasses. On other occasions, prisoners were forced to adopt strange or painful positions and being also deprived of rest – ‘were subject to a process known by the technical name ‘stress and endurance’. ... The CIA refrained from commenting on the article that appeared in The Washington Post.

According to the figures begrudgingly provided by the American authorities, approximately 3000 members have al-Qaeda have been arrested until now, of which 625 are being held at Guantánamo Bay and approximately 100 more have been ‘transferred’ to other countries. A few thousand prisoners were arrested and imprisoned with assistance from the United States in countries known and recognized for their brutal treatment of prisoners. The Washington Post adds the fact that the Bush administration applied this kind of policy which was contrary to publicly expressed values, because it had doubts that the American public would support its position.”

243. On 20 May 2003 *Evenimentul Zilei* published an article entitled "American torture using heavy metal" which read, in so far as relevant, as follows:

> "American troops in Iraq used a refined form of torture to break the resistance of prisoners and make them talk, according to American magazine *Newsweek*. Stubborn prisoners were 'bombarded' with heavy metal music played at maximum volume over long periods of time until their nerves gave out. ... The idea is to break a person's resistance by upsetting him with music that an Iraqi considers to be offensive from a cultural point of view, explained Sergeant Mark Hadsell. 'These people never listened to heavy metal in their life and they can't stand it', he added. ...
>
> Iraqis tortured in war camps
>
> These revelations come two days after Amnesty International representatives returning from Iraq stated that many former prisoners, the majority of them civilians, complained that they have been tortured during their detention in camps set up by British and American troops. At least 20 prisoners stated that they were beaten hours on end, and another, a Saudi citizen, said that he was subjected to electric shocks. The Amnesty International Investigation is continuing, with a manager from the organization claiming that we are certainly talking about cases of torture. At the time that the report is completed, Amnesty International will ask American and British authorities to reply to the accusations made by prisoners."

C. *Der Spiegel's* publications in 2014 and 2015

244. On 13 December 2014 *Spiegel Online* published an article entitled "Black Site in Romania: Former spy chief admits existence of CIA camp" which read as follows:

> "There was at least one CIA prison in Romania – that is what the US torture report says. Politicians of that country had always denied this. Now the former Romanian spy chief speaks about a 'transit centre' of the US secret service.
>
> Romanian politicians denied it for almost a decade – but now there is, for the first time, a confession: there were CIA centres in Romania, in which captives were held and possibly also tortured.
>
> The former Romanian spy chief Ioan Talpeş told SPIEGEL ONLINE that there were one or two locations in Romania, at which the CIA 'probably held persons, who were subjected to inhuman treatment'. This was the case in the period from 2003 to 2006. Talpeş had previously confirmed the existence of 'CIA transit camp', as he calls them, in the Bucharest daily '*Adevărul*'.
>
> Talpeş is 70 years old now. From 1992 to 1997 he led the Romanian secret service abroad, SIE, and from 2000 to 2004 he served as the Chief of the Presidential Administration as well as the head of the National Security Department.
>
> Talpeş told SPIEGEL ONLINE that he had, from 2003 onwards, continued discussions with officials of the CIA and the US military about a more intense cooperation. In the context of these discussions it was agreed that the CIA could carry out its own activities in certain locations.
>
> *'It was up to the Americans what they did in these places'*

He did not know where this was and Romania was, expressly, not interested in what the CIA was doing there. The country wanted to prove its readiness to cooperate, Talpeş said, because it sought NATO-membership. 'It was up to the Americans what they did in these places', he said. First and foremost thanks to US advocacy, Romania was admitted into NATO in 2004.

Dick Marty, the Council of Europe special investigator concerning the secret CIA prisons, had accused Romania in 2005/2006 of hosting illegal CIA prisons for terrorism suspects on its territory. Amnesty International had previously made similar allegations. Among others, the key planner of 9/11, Khalid Sheikh Mohammed, is said to have been held there.

Romanian politicians, including Presidents Ion Iliescu (in office from 2000 to 2004) and Traian Băsescu (in office from 2004 to 2014) had always denied this. A commission of inquiry of the Romanian parliament reported in 2006: there were no CIA prisons in the country and no CIA captives were held there or transferred to other countries on transit flights via Romania.

Since 2001, the US army has had an air base close to Kogălniceanu in the South East of Romania. Apart from that base, the airports in Craiova in Southern Romania and in Temeswar in Western Romania are reported to have been used for the transport of CIA captives. Already in 2002 Romania signed an agreement with the USA, according to which the country would not extradite US soldiers to the International Criminal Court.

Even after the publication of the CIA torture report, in which a Romanian CIA prison is mentioned as a 'black site', Romanian politicians denied its existence. Victor Ponta, the head of the government, declined to comment on the CIA report.

The former Head-of-State Iliescu said on Wednesday that he had had no knowledge of a CIA prison. However, Ioan Talpeş told SPIEGEL ONLINE that he had informed President Iliescu in 2003 and 2004 that the CIA carried out 'certain activities' on Romanian territory. At that time, Talpeş continued, he himself did not think that the CIA could possibly torture captives. Therefore, 'no major significance' was attributed to information about the activities of the US secret service in Romania.

In response to the question why he had not shared his knowledge when the Council of Europe special investigator, Dick Marty, presented his report, Talpeş stated that he had been unable to speak for as long as the competent US authorities had not expressed themselves on the matter. In this respect he blamed Romanian politicians for denying the existence of the transit camps."

245. On 22 April 2015 *Spiegel Online* published an article entitled "Torture in Romania: Former Head-of-State Iliescu admits existence of CIA prison" which read:

"The CIA tortured in Romania – that is an open secret. Only the country's officials never wanted to acknowledge that. Now former Head-of-State Iliescu states in SPIEGEL ONLINE: he left a location to the secret service.

It is hardly disputed any longer that the CIA entertained one or more secret prisons in Romania following the attacks of 11 September 2001. The CIA report on torture of last December speaks, in a somewhat cryptic way, of 'Detention Site Black'. Several of the most important CIA captives, among them the key planner of 9/11, Khalid Sheikh Mohammed, are said to have been held and tortured in Romania between 2002 and 2006.

Despite numerous indications, Romanian officials for years vehemently denied that there had been secret CIA prisons on the country's territory. Now, the late confession concerning the Romanian 'Detention Site' comes from nobody less than the former Head-of-State Ion Iliescu, who was in office from 2000 to 2004.

In an interview with SPIEGEL ONLINE, Iliescu stated that around the turn of the year 2002/2003, 'our US allies asked us for a site'. He, as Head-of-State, did, in principle, grant this request. The details were taken care of by Ioan Talpeş , who, at the time, was the head of the National Security Department and the chief of the Presidential Administration.

By virtue of this statement, the 85 year-old Iliescu becomes the second Head-of-State - following the former Polish Head-of-State Aleksander Kwaśniewski – to admit the former existence of a CIA prison on behalf of his country.

Iliescu explicitly wants to speak of a location/site ('*Standort*') – he claims not to have known of a prison. 'It was about a gesture of courtesy ahead of our accession to NATO', Iliescu told SPIEGEL ONLINE.

'We did not interfere with the activities of the USA on this site. This request seemed like a minor issue to me as the Head-of-State. We were allies, we went to war together in Afghanistan and in the Middle East. Therefore, I did not go into detail when our allies requested a specific site in Romania'.

Had he known more at that time, Iliescu continued, the request would 'of course not' have been responded to positively. 'We learned from this experience to be more attentive in relation to such requests in the future and to ponder more scrupulously'.

Iliescu gave the CIA 'plenty of rope'

Talpeş, the former chief of Iliescu's Presidential Administration, had previously led the Romanian secret service abroad, SIE. *Vis-à-vis* SPIEGEL ONLINE he admitted already last year, as the first Romanian official, the existence of 'CIA transit centres'. Talpeş also confirmed Iliescu's statements now.

He had received a request from a representative of the CIA in Romania at the turn of the year 2002/2003 for premises, which the US secret service needed for its own activities. Iliescu gave him 'plenty of rope' to take care of this request. He arranged for a building in Bucharest to be given to the CIA. This building was used by the CIA from 2003 to 2006. It did no longer exist. He would not reveal where exactly this building was located.

Talpeş thereby corrected his earlier statement that he did not know the location of the CIA transit centres. He now states that the only thing he did not know, was whether the CIA also used the US air base in Kogălniceanu in South East Romania. Also, he never visited any of the 'CIA sites' personally. With regard to the premises in Bucharest, he was aware that 'the matter [could] become dangerous'. Therefore, he explicitly told the CIA representatives that Romania did not want to know anything about the activities on these premises. At the time, he wanted to prove Romania's loyalty to the alliance in the period of the NATO accession through this measure.

The statements by Iliescu and Talpeş confirm the 2006/2007 reports by former special investigator of the Council of Europe concerning the secret CIA prisons, Dick Marty. Marty had, already at that time, accused Romania of hosting secret CIA prisons on its territory. Romanian officials and politicians, among them Iliescu, had disputed the allegations. According to Marty's 2007 report, at least five high-ranking Romanian officials were informed about the existence of the secret CIA prisons. Besides Iliescu and Talpeş this included the former Head of State Traian Băsescu,

who was in office from 2004 to 2014. Băsescu did not want to comment on the matter following a query from SPIEGEL ONLINE.

'*We did not have any clues back then*'

In 2008 a commission of inquiry of the Romanian parliament had concluded that there had not been any secret CIA prisons in Romania and that there was no information on CIA-flights or transports of captives. The former head of this commission, the politician of the Liberals and current Member of the European Parliament, Norica Nicolai, adheres to this statement to the present day. 'We did not have any clues back then', Nicolai told SPIEGEL ONLINE.

However, the chairperson of the Romanian human rights organisation APADOR-CH, Maria Nicoleta Andreescu, describes the work of the commission as 'totally inefficient and frivolous'. APADOR-CH, *inter alia*, represents the former CIA captive Abd al-Rahim al-Nashiri in Romania. He is said to have planned the attack on the destroyer U.S.S. '*Cole*' in Yemen in October 2000. He was supposedly kept and tortured in Romania between 2003 and 2006. In 2012 Al-Nashiri took legal action against the State of Romania, which is still pending.

The APADOR-CH chairperson Andreescu describes Iliescu's present confession on CIA prisons in Romania as a 'very important and significant statement'. 'If the Romanian State is willing to clarify the question of CIA prisons, then the public prosecutor must open criminal investigations following this statement', Andreescu said."

IX. INTERNATIONAL INQUIRIES RELATING TO THE CIA SECRET DETENTION AND RENDITION OF SUSPECTED TERRORISTS IN EUROPE, INCLUDING ROMANIA

A. Council of Europe

1. Procedure under Article 52 of the Convention

246. In November 2005, the Secretary General of the Council of Europe, Mr Terry Davis, acting under Article 52 of the Convention and in connection with reports of European collusion in secret rendition flights, sent a questionnaire to – at that time 45 – States Parties to the Convention, including Romania.

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

of detainees; whether any official investigation was under way or had been completed.

247. The Romanian Government replied on an unspecified date denying that any unacknowledged deprivation of liberty or illegal transport of prisoners had taken place on Romanian territory.

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

2. Parliamentary Assembly's inquiry - the Marty Inquiry

249. On 1 November 2005 the PACE 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.

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

(a) The 2006 Marty Report

250. On 7 June 2006 Senator Dick Marty presented to the PACE his first report prepared in the framework of the investigation launched on 1 November 2005 (see paragraph 249 above), revealing what he called a global "spider's web" of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe member states, including Romania. The document, as published by the PACE, was 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".

251. Chapter 1.3 of the 2006 Marty Report, entitled "Secret CIA prisons in Europe?" read, 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.
>
> 8. 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. ..."

252. Chapter 1.8, in paragraph 22, stated:

"22. There is no formal evidence at this stage of the existence of secret CIA detention centres in Poland, Romania or other Council of Europe member states, even though serious indications continue to exist and grow stronger. Nevertheless, it is clear that an unspecified number of persons, deemed to be members or accomplices of terrorist movements, were arbitrarily and unlawfully arrested and/or detained and transported under the supervision of services acting in the name, or on behalf, of the American authorities. These incidents took place in airports and in European airspace, and were made possible either by seriously negligent monitoring or by the more or less active participation of one or more government departments of Council of Europe member states."

253. Chapter 2.6.1 referred to Romania. It stated, in so far as relevant, as follows:

"56. Romania is thus far the only Council of Europe member State to be located on one of the rendition circuits we believe we have identified and which bears all the characteristics of a detainee transfer or drop-off point. The N313P rendition plane landed in Timişoara at 11.51 pm on 25 January 2004 and departed just 72 minutes later, at 1.03 am on 26 January 2004. I am grateful to the Romanian Civil Aeronautic Authority for confirming these flight movements.

...

58. We can likewise affirm that the plane was not carrying prisoners to further detention when it *left* Timişoara. Its next destination, after all, was Palma de Mallorca, a well-established "staging point", also used for recuperation purposes in the midst of rendition circuits.

59. There is documentation in this instance that the passengers of the N313P plane, using US Government passports and apparently false identities, stayed in a hotel in Palma de Mallorca for two nights before returning to the United States. One can deduce that these passengers, in addition to the crew of the plane, comprised a CIA rendition team, the same team performing all renditions on this circuit.

60. The N313P plane stayed on the runway at Timişoara on the night of 25 January 2004 for barely one hour. Based on analysis of the flight capacity of N313P, a Boeing 737 jet, in line with typical flight behaviours of CIA planes, it is highly unlikely that the purpose of heading to Romania was to refuel. The plane had the capacity to reach Palma de Mallorca, just over 7 hours away, directly from Kabul that night – twice previously on the same circuit, it had already flown longer distances of 7 hours 53 minutes (Rabat to Kabul) and 7 hours 45 minutes (Kabul to Algiers).

61. It should be recalled that the rendition team stayed about 30 hours in Kabul after having 'rendered' Khaled El-Masri. Then, it flew to Romania on the same plane. Having eliminated other explanations – including that of a simple logistics flight, as the trip is a part of a well-established renditions circuit – the most likely hypothesis is that the purpose of this flight was to transport one or several detainees from Kabul to Romania.

62. We consider that while all these factual elements do not provide definitive evidence of secret detention centres, they do justify on their own a positive obligation to carry out a serious investigation, which the Romanian authorities do not seem to have done to date."

254. Chapter 6, entitled "Attitude of governments", stated, 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."

255. In Chapter 8.2 concerning parliamentary investigations undertaken in certain member states, the report referred to Romania under the title "Romania and "the former Yugoslav Republic of Macedonia" stating "no parliamentary inquiry":

"253. To my knowledge, no parliamentary inquiry whatsoever has taken place in either country, despite the particularly serious and concrete nature of the allegations made against both. ..."

256. Chapter 11 contained conclusions. It stated, *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):

- Sweden, in the cases of Ahmed Agiza and Mohamed Alzery;

- Bosnia-Herzegovina, in the cases of Lakhdar Boumediene, Mohamed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir and Saber Lahmar (the 'Algerian six');

- The United Kingdom in the cases of Bisher Al-Rawi, Jamil El-Banna and Binyam Mohamed;

- Italy, in the cases of Abu Omar and Maher Arar;

- 'The former Yugoslav Republic of Macedonia', in the case of Khaled El-Masri;

- Germany, in the cases of Abu Omar, of the 'Algerian six', and Khaled El-Masri;

- Turkey, in the case of the 'Algerian six'.

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;

- Germany, Turkey, Spain and Cyprus for being 'staging points' for flights involving the unlawful transfer of detainees."

(b) The 2007 Marty Report

257. On 11 June 2007 the PACE (Committee on Legal Affairs and Human Rights) adopted the second report prepared by Senator Marty ("the 2007 Marty Report") (doc. 11302.rev.), revealing that high-value detainees had been held in Romania and in Poland in secret CIA detention centres during the period from 2002 to 2005.

The report relied, *inter alia*, on the cross-referenced testimonies of over thirty 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.

258. The introductory remarks referring to the establishment of facts and evidence gathered, 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. ..."

259. 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 paragraphs 75 and 83 it was added that:

"75. The need for unprecedented permissions, according to our sources, arose directly from the CIA's resolve to lay greater emphasis on the paramilitary activities of its Counterterrorism Center in the pursuit of high-value targets, or HVTs. The US Government therefore had to seek means of forging intergovernmental partnerships with well-developed military components, rather than simply relying upon the existing liaison networks through which CIA agents had been working for decades.

...

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

...."

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

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

...

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

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

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."

261. Paragraphs 128-133 explained the US's choice of European partners. This part of the report read, in so far as relevant, as follows:

"128. For reasons of both security and capacity, the CIA determined that the Polish strand of the HVD programme should remain limited in size. Thus a 'second European site' was sought to which the CIA could transfer its detainees with 'no major logistical overhaul'. Romania, used extensively by United States forces during Operation Iraqi Freedom in early 2003, had distinct benefits in this regard: as a member of the CIA's Counterterrorist Centre remarked about the location of the proposed detention facility, 'our guys were familiar with the area'.

...

130. Romania was developed into a site to which more detainees were transferred only as the HVD programme expanded. I understand that the Romanian 'black site' was incorporated into the programme in 2003, attained its greatest significance in 2004 and operated until the second half of 2005. The detainees who were held in Romania belonged to a category of HVDs whose intelligence value had been assessed as lower but in respect of whom the Agency still considered it worthwhile pursuing further investigations."

262. Paragraphs 211-218 contained conclusions as to who were the Romanian State officials responsible for authorising Romania's role in the CIA's HVD programme. These conclusions read, in so far as relevant, as follows:

"211. During several months of investigations, our team has held discussions with numerous Romanian sources, including civilian and military intelligence operatives, representatives of state and municipal authorities, and high-ranking officials who hold first-hand knowledge of CIA operations on the territory of Romania. Based upon these discussions, my inquiry has concluded that the following individual office-holders knew about, authorised and stand accountable for Romania's role in the CIA's

operation of 'out-of-theatre' secret detention facilities on Romanian territory, from 2003 to 2005: the former President of Romania (up to 20 December 2004), Ion ILIESCU, the current President of Romania (20 December 2004 onwards), Traian BASESCU, the Presidential Advisor on National Security (until 20 December 2004), Ioan TALPEŞ , the Minister of National Defence (Ministerial oversight up to 20 December 2004), Ioan Mircea PASCU, and the Head of Directorate for Military Intelligence, Sergiu Tudor MEDAR.

212. Collaborating with the CIA in this very small circle of trust, Romania's leadership in the fields of national security and military intelligence effectively short-circuited the classic mechanisms of democratic accountability. Both of the political principals, President Iliescu and National Security Advisor Talpeş , sat on (and most often chaired) the CSAT - the Supreme Council of National Defence – throughout this period, yet they withheld the CIA 'partnership' from the other members of that body who did not have a 'need to know'. This criterion excluded the majority of civilian office-holders in the Romanian Government from complicity at the time. Similarly, the Directors of the respective civilian intelligence agencies, the SRI and the SIE, were not briefed about the operational details and were thus granted 'plausible deniability'.

213. We were told that the confidants on the military side, Defence Minister Pascu and General-Lieutenant Medar, had concealed important operational activities from senior figures in the Army and powerful structures to which they were subordinated. According to our sources, 'co-operation with America in the context of the NATO framework' was used as a general smokescreen behind which to hide the operations of the CIA programme.

...

216. Ioan Talpeş , the then Presidential Advisor on National Security (*Consilierul prezidenţial pentru securitate naţională*), was also an instrumental figure in the CIA programme from its inception. According to our sources, Talpeş guided President Iliescu's every decision on issues of NATO harmonisation and bilateral relations with the United States; it has even been suggested that Talpeş was the one who initiated the idea of making facilities on Romanian soil available to US agencies for activities in pursuit of its 'war on terror'. After December 2004, although Talpeş no longer acted as the Presidential Advisor on National Security, he quickly become Chair of the Senate Committee on Defence, Public Order and National Security, which meant that he exercised at least a theoretical degree of 'parliamentary oversight' over his own successor in the Advisor role.

217. Several of our Romanian sources commented that they felt proud to have been able to assist the United States in detaining 'high-value' terrorists – not only as a gesture of pro-American sentiment, but also because they thought it was 'in the best interests of Romania'."

263. In paragraphs 219-226 the 2007 Marty Report described "The anatomy of CIA secret transfers and detention in Romania". Those paragraphs read, in so far as relevant, as follows:

"*a. Creating a secure area for CIA transfers and detentions*

219. When the United States Government made its approach for the establishment of a 'black site' in Romania – offering formidable US support for Romania's full accession into the NATO Alliance as the 'biggest prize' in exchange – it relied heavily upon its key liaisons in the country to make the case to then President Iliescu.

As one high-level Romanian official who was actually involved in the negotiations told us, it was 'proposed to the President that we should provide full protection for the United States from an intelligence angle. Nobody from the Romanian side should interfere in these [CIA] activities'.

220. In line with its staunch support under the NATO framework, Romania entered a bilateral 'technical agreement' with the intention of giving the US the full extent of the permissions and protections it sought. According to one of our sources with knowledge of the arrangement, there was an '*... order [given] to our [military] intelligence services, on behalf of the President, to provide the CIA with all the facilities they required and to protect their operations in whichever way they requested ...*'.

...

222. The precise location and character of the 'black site' were not, to the best of my knowledge, stipulated in the original classified bilateral arrangements between Romania and the United States. Our team discussed those questions with multiple sources and we believe that to name a location explicitly would go beyond what it is possible to confirm from the Romanian side. One senior source in military intelligence objected to the notion that anyone but the Americans would 'need to know' this information: '*But I tell you that our Romanian officers do not know what happened inside those areas, because we sealed it off and we had control. There were Americans operating there free from interference – only they saw, only they heard – about the prisoners. ...*' "

264. Paragraphs 227-230 referred to the persistent cover-up with regard to the transfer of detainees into Romania:

"227. Our efforts to obtain accurate actual flight records pertaining to the movements of aircraft associated with the CIA in Romania were characterised by obfuscation, inconsistency and genuine confusion. ...

228. Specifically I hold three principal concerns with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania, and towards my inquiry in particular. In summary, my concerns are: far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources.

229. First I was confounded by the clear **inconsistencies in the flight data** provided to my inquiry from multiple different Romanian sources. In my analysis I have considered data submitted directly from the Romanian Civil Aeronautical Authority (RCAA), data provided by the Romanian Senate Committee, and data gathered independently by our team in the course of its investigations. I have compared the data from these Romanian sources with the records maintained by Eurocontrol, comprehensive aeronautical 'data strings' generated by the international flight planning system, and my complete Marty Database. The disagreement between these sources is too fundamental and widespread to be explained away by simple administrative glitches, or even by in-flight changes of destination by Pilots-in-Command, which were communicated to one authority but not to another. There presently exists **no truthful account of detainee transfer flights into Romania**, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out.

230. I found it especially disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called 'serious accusations against our country, based solely on "indications", "opinions", "probabilities", "extrapolations" [and] "logical deductions"'. In particular, the Committee's conclusions are not framed as coherent findings based on objective fact-finding, but rather as 'clear responses to the specific questions raised by Mr Dick Marty', referring to both my 2006 report and subsequent correspondence. Accordingly the categorical nature of the Committee's 'General Conclusions', 'Conclusions based on field investigations and site visits' and 'Final Conclusions' cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in the light of the material and testimony I have received from sources in Romania, the Committee does not appear to have engaged in a credible and comprehensive inquiry."

265. By a letter of 15 June 2007 the Delegation of Romania to the PACE submitted a dissenting opinion to the 2007 Marty Report stating, among other things, that "in full transparency, in 2005, the Romanian authorities have also decided to allow and encourage investigations at all the locations suspected to have hosted CIA centres, on the territory of Romania. Therefore, the airports Mihail Kogălniceanu of Constanţa (including the military airbase) were inspected by representatives of international NGOs, as well as by Romanian and foreign journalists".

(c) The 2011 Marty Report

266. On 16 September 2011 the PACE (Committee on Legal Affairs and Human Rights) 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 described the effects of, and progress in, national inquiries into CIA secret detention facilities in some of the Council of Europe's member states.

Paragraph 41 related to Romania. Its relevant part read:

"41. In Romania, parliament has also conducted no more than a superficial inquiry, of which a critical presentation was already given in my 2007 report. Unfortunately, there has been nothing to add since then."

267. On 6 October 2011, following the 2011 Marty Report, the PACE adopted its Resolution 1838 (2011) which, in part relating to Romania, read:

"11. With regard to judicial inquiries, the Assembly:

...

11.4. calls on the judicial authorities of Romania and of 'the former Yugoslav Republic of Macedonia' to finally initiate serious investigations following the detailed allegations of abductions and secret detentions in respect of those two countries, and on the American authorities to provide without further delay the judicial assistance requested by the prosecuting authorities of the European countries concerned.

...

12. With regard to parliamentary inquiries, the Assembly:

...

12.4. deplores the fact that the Polish and Romanian Parliaments confined themselves to inquiries whose main purpose seems to have been to defend the official position of the national authorities ...”

B. European Parliament

1. The Fava Inquiry

268. On 18 January 2006 the European Parliament set up a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (“TDIP”) and appointed Mr Giovanni 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.

269. In the course of its work, the TDIP analysed specific cases of extraordinary rendition. According to the Fava Report, these cases “involved the illegal transport of a prisoner by the secret services, or other specialist services, of a third country (including, but not exclusively, the CIA and other American security services) to various locations, outside any judicial oversight, where the prisoners have neither fundamental rights nor those guaranteed by various international conventions, such as *all habeas corpus procedures*, the right of the defence to be assisted by a lawyer, the right to due process within a reasonable time, etc.”

The TDIP studied in detail the following cases of extraordinary rendition: Abu Omar (Hassan Mustafa Osama Nasr); Khaled El-Masri; Maher Arar; Mohammed El-Zari; Ahmed Agiza; the “Six Algerians” from Bosnia-Herzegovina; Murat Kurnaz; Mohammed Zammar; Abou Elkassim Britel; Binyam Mohammed; Bisher Al-Rawi; Jamil El-Banna; and Martin Mubanga.

The TDIP met the victims themselves, their lawyers, the heads of national judicial or parliamentary bodies responsible for specific cases of extraordinary rendition, representatives of European and international organisations or institutions, journalists who followed these cases, representatives of non-governmental organisations, experts in this area either during committee meetings or during official delegation visits.

270. The TDIP delegation visited Bucharest from 17 to 19 October 2006 and held meetings with a number of Romanian’s high-office holders, including Ms N. Nicolai, the chairman of the Romanian Senate’s Special Committee of Inquiry, Mr T. Meleșcanu, Vice-President of the Senate and

member of the Special Committee of Inquiry, Mr A.C. Vierița, Secretary of State for EU Affairs at the Ministry of Foreign Affairs, Mr G. Maior, current Head of the Romanian Intelligence Service, Mr R. Timofte, former Head of the Romanian Intelligence Service, representatives of the Ministerial Department of Civil Aviation as well as representatives of various non-governmental organisations, including the Open Society Foundation and APADOR-CH and journalists.

271. As regards Romania, the Fava Report expressed, in paragraph 162, "serious concern" about the 21 stopovers made by the CIA-operated aircraft at Romanian airports, which on most occasions had come or were bound for "countries linked with extraordinary rendition circuits and the transfer of detainees".

It further concluded, in paragraph 164, that based only on the statements made by Romanian authorities to the TDIP delegation to Romania, the possibility that the US secret services operated in Romania on a clandestine basis could not be excluded and that no definitive evidence had been provided to contradict any of the allegations concerning the running of a secret detention facility on Romanian soil.

272. Detailed information gathered during the Fava Inquiry was also included in working documents produced together with the Fava Report.

Working document no. 8 on the companies linked to the CIA, aircraft used by the CIA and the European countries in which CIA aircraft have made stopovers prepared during the work of the TDIP (PE 380.984v02-00) contained an analysis of CIA flights having stopped over in Romania in 2003-2005. It named five airports involved and listed the stopovers and landings as filed in flight plans:

(a) Bucharest – Otopeni and Băneasa airports, 13 stopovers and 5 take-offs;

(b) Timişoara: 1 landing;

(c) Constanţa – Kogălniceanu airport: 2 stopovers and 4 landings;

(d) Bacău: 1 stopover.

The stopovers involved 14 different CIA aircraft, which were identified as follows: N313P; N85VM; N379; N2189M; N8213G; N157A; N173S; N187D; N312ME; N4009L; N4456A; N478GS and N4466A.

It was noted, however, that according to Eurocontrol data flight logs concerning Romania had been filed with some inconsistencies; flight plans indicated a landing airport which did not correspond with the following taking off airport. The flight plans that were found to have been inconsistent concerned the following flights:

plane N313P

flight on 25-26 January 2004, from Kabul with the destination filed for Timişoara but the following take off from Bucharest to Palma de Mallorca

plane N85VM

(1) flight on 26-27 January 2004 from Amman with the destination filed for Constanţa but the following take off from Bucharest to Barcelona;

(2) flight on 12 April 2004 from Tenerife with the destination filed for Constanţa but the following take off from Bucharest to Casablanca;

plane N379

flight on 25 October 2003 from Prague with the destination filed for Constanţa but the following take off from Bucharest to Amman;

plane N1HC

flight on 5 November 2005 from Porto with the destination filed for Constanţa but the following take off from Bucharest to Amman.

273. Working document no. 8 further listed the total number of stopovers for each aircraft and identified three aircraft that were known to have been involved in the CIA rendition operations: N313P (two stopovers), used for the extraordinary rendition of Khaled El Masri (Skopje via Baghdad-Kabul on 24 January 2004) and Benyam Mohammad (Rabat-Kabul 22 January 2004); N85VM (three stopovers), used for the extraordinary rendition of Osama Mustafa Nasr aka Abu Omar (Ramstein-Cairo 17 February 2003; see also *Nasr and Ghali*, cited above, §§ 39, 112 and 231) and N379P (one stopover), used for the extraordinary renditions of Ahmed Agiza and Mohammed al-Zari (Stockholm-Cairo 18 December 2001), Abu Al Kassem Britel (Islamabad-Rabat 25 May 2002), Benyamin Mohammed (Islamabad-Rabat 21 July 2002), Bisher Al Rawi and Jamil El Manna (Banjul-Kabul 9 December 2002).

It also listed flights from suspicious locations that stopped over in Romania in 2003-2005, with the first flight N313P on 22 September 2003 and the last flight N1HC on 5 November 2005. That list, in so far as relevant, read as follows:

> "**Afghanistan, Kabul + Bagram US Air Base: 5 flights**
>
> N313P: Kabul– via Szymany, Poland – Bucharest, 22.09.2003
>
> N313P: Kabul– Timişoara, 25.01.2004
>
> N739P: Bucharest – via Amman, Jordan – Kabul, 25.10.2003
>
> N478GS: Bucharest – Bagram US Air Base, 05.12.2004
>
> N478GS: Bagram US Air Base - Bucharest, 06.12.2004
>
> **Jordan, Amman: 8 flights**
>
> N58VM: Amman – Constanţa , 26.01.2004
>
> N58VM: Amman – Constanţa , 01.10.2004
>
> N739P: Bucharest - Amman, 25.10.2003
>
> N2189M: Amman – Constanţa , 13.06.2003
>
> N2189M: Constanţa - Amman, 14.06.2003
>
> N1HC: Bucharest – Amman, 05.11.2005

N187D: Bucharest – Amman, 27.08.2004

N4456A: Bucharest – via Athens, Greece – Amman, 25.08.2004

Morocco, Rabat + Casablanca: 2 flights

N313P: Bucharest – Rabat, 22.09.2003

N58VM: Bucharest – Casablanca, 12.04.2004

Cuba, Guantánamo:

N313P: Bucharest – via Rabat, Morocco – Guantánamo , 23.09.2003

N85VM: Guantánamo – via Tenerife, Spain – Constanţa , 12.04.2004."

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

"A) ALLEGED EXISTENCE OF DETENTION CENTRES

Suspected airports supposed to host secret detention centres have been mentioned in mass-media, in some NGOs' reports, in Council of Europe's report and have also been inferred from Eurocontrol data, as well as from pictures taken via satellite. These airports are:

Timişoara - Gearmata

Bucureşti - Băneasa

Constanţa - Kogălniceanu

Cataloi - Tulcea

Feteşti - military"

As regards the parliamentary inquiry conducted in Romania (see also paragraphs 165-169 above), the document read, in so far as relevant, as follows:

"B) NATIONAL OFFICIAL INQUIRIES

Parliament

A Temporary Inquiry Committee in the Romanian Senate on the Allegations Regarding the Existence of CIA Detention Centres or Flights over Romania's Territory was set up on 21st December 2005.

On 16 June 2006, Ms Norica Nicolai, president of the Special Inquiry Committee presented during a press conference the conclusions of the preliminary report. At that stage, only the chapter 7 of the report was made public and the rest of the report remained classified.

...

The Committee's term of office has been extended by a Senate's decision on 21 June 2006 following a number of incidents, such as the investigation of the accident involving the Gulfstream aircraft N478GS on 6 December 2004 and the televised statements made by a young Afghan claiming to have been detained in Romania. The Committee's activity is ongoing and during the Senate sittings of

22 November 2006 a new deadline for submitting the final report has been settled: 05 March 2007."

275. Referring to the alleged involvement of the Romanian authorities in the CIA secret detentions, the document stated:

"C) ROLE OR ATTITUDE OF ROMANIAN BODIES

Since the publication of the first news about alleged existence of the CIA prisons and illegal transportation of prisoners, Romanian official position has moved from a first categorical denial that CIA secret prisons could be hosted in Romania and that CIA flights could have landed in this country to a less firm and more doubtful attitude, which confirms that something clandestine, not supposed to be known by Romanian authorities, could have happened either on the planes or in the areas controlled by the American authorities.

Cooperation of official authorities with the Temporary Committee's delegation was very high.

They claimed that nobody could have thought that human rights violations could have been taking place on Romanian territory and they confirmed that individuals, goods and other equipment circulating on Romanian territory were subject to checks by Romanian officials or military personnel.

On 10th November 2005, President Băsescu denied during his visit in Bratislava, the existence of CIA detention centres on Romanian territory. One week after, he declared to be at the disposal of any institution that would like to verify the existence of CIA secret detention sites in Romania. In the same line with the declaration of Mr Băsescu were also the declarations of former minister for external affairs, Mr. Mircea Geoană and of the spokesperson of Romanian Secret Service (SRI), Mr. Marius Beraru.

On 20th November 2005, former Romanian minister for defence, Mr Ioan Mircea Pascu, stated in an interview for Associated Press that the Romanian authorities did not have access to certain sites used by U.S. services in Romania. He came back to this declaration, later on, saying that his comments were taken out of the context.

Regarding the accident involving the Gulfstream aircraft N478GS on 6 December 2004 the position of the Romanian authorities differed in some extent: Ms Norica Nicolai, chairperson of the Romanian Senate's Special Committee of Inquiry pretended not being able to make available to the delegation the report drawn up by the frontier police on the mentioned accident by invocating the law on data protection. On the other hand, Mr. Anghel Andreescu, Secretary of State for Public Order and Security at the Ministry of Interior and Public Administration, willingly agreed after meeting the TDIP delegation to forward this report and only the following day after receiving it Mr Coelho, chairman of the delegation, was informed that this document has to remain confidential."

276. The document also identified certain flights landing in Romania, which were associated with the CIA rendition operations:

"D) FLIGHTS

Total Flights Number since 2001: 21

Principal airports: Kogălniceanu, Timişoara, Otopeni, Băneasa

Suspicious destinations and origins: Guantánamo, Cuba; Amman, Jordan; Kabul, Bagram US airbase, Afghanistan; Rabat, Morocco; Baghdad, Iraq.

Stopovers of planes transited through Romania and used in other occasions for extraordinary renditions:

N379P, used for the extraordinary renditions of: Al Rawi and El Banna; Benyam Mohammed; Kassim Britel and the expulsion of Agiza and El Zari: 1 stopover in Romania

N313P, used for the extraordinary renditions of Khalid El Masri and Benyamin Mohamed: 2 stopovers in Romania

N85VM, used for the rendition of Abu Omar: 3 stopovers in Romania."

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

2. The 2007 European Parliament Resolution

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

"*The European Parliament,*

...

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

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

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

279. The passages regarding the EU member states read, in so far as relevant:

"9. Deplores the fact that the governments of European countries did not feel the need to ask the US Government for clarifications regarding the existence of secret prisons outside US territory;

...

13. Denounces the lack of cooperation of many Member States, and of the Council of the European Union towards the Temporary Committee; stresses that the behaviour of Member States, and in particular the Council and its Presidencies, has fallen far below the standard that Parliament is entitled to expect;

...

39. Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the condoning and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries;

...

43. Regrets that European countries have been relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees, and recalls their positive obligations arising out of the case law of the European Court of Human Rights, as reiterated by the European Commission for Democracy through Law (Venice Commission);

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

...

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

..."

280. In respect of Romania, the resolution stated:

"ROMANIA

[*The European Parliament*]

159. Welcomes the excellent hospitality and good cooperation extended by the Romanian authorities to the Temporary Committee, including meetings with members of the Romanian Government, as well as the establishment of an ad hoc inquiry committee of the Romanian Senate;

160. Notes, however, the reluctance on the part of the competent Romanian authorities to investigate thoroughly the existence of secret detention facilities on its territory;

161. Regrets that the report issued by the Romanian inquiry committee was entirely secret except for its conclusions, included in Chapter 7, categorically denying the possibility that secret detention facilities could be hosted on Romanian soil; regrets that the Romanian inquiry committee heard no testimony from journalists, NGOs, or officials working at airports, and has not yet provided the Temporary Committee with the report contrary to its commitment to do so; regrets that taking these elements into consideration, the conclusions drawn in the Romanian inquiry committee's report appear premature and superficial; takes note, however, of the intention expressed by the Chairwoman of the inquiry committee to the Temporary Committee delegation to consider the conclusions provisional;

162. Regrets the lack of control of the Gulfstream aircraft with Registration Number N478GS that suffered an accident on 6 December 2004 when landing in Bucharest; recalls that the aircraft took off from Bagram Air Base in Afghanistan, and

that its seven passengers disappeared following the accident; appreciates, however, the good cooperation of the Romanian authorities in handing over the accident report to the Temporary Committee;

163. Is deeply concerned to see that the Romanian authorities did not initiate an official investigation process into the case of a passenger on the aircraft Gulfstream N478GS, who was found carrying a Beretta 9 mm Parabellum pistol with ammunition;

164. Notes the 21 stopovers made by CIA-operated aircraft at Romanian 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 Romania 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, Binyam Mohammed and Abu Omar and for the expulsion of Ahmed Agiza and Mohammed El Zari; is particularly concerned that, of the flights referred to, two originated from or were destined for Guantánamo; strongly encourages the Romanian authorities further to investigate those flights;

165. Is concerned about the doubts expressed in regard to the control exercised by the Romanian authorities over US activities at Kogălniceanu airport;

166. Cannot exclude, based only on the statements made by Romanian authorities to the Temporary Committee delegation to Romania, the possibility that US secret services operated in Romania on a clandestine basis and that no definitive evidence has been provided to contradict any of the allegations concerning the running of a secret detention facility on Romanian soil;"

3. The 2011 European Parliament Resolution

281. On 9 June 2011 the European Parliament adopted its resolution on Guantánamo: imminent death penalty decision (doc. B70375/2011) relating to Mr Al Nashiri.

The European Parliament, while recognising that the applicant was accused of serious crimes, expressed its deep concern that the US authorities in his case had violated international law "for the last 9 years". It called on the US Convening Authority not to apply the death penalty on him, "on the grounds that the military commission trials do not meet the standards internationally required for the application of the death sentence".

The European Parliament further appealed to "the particular responsibility of the Polish and Romanian Governments to make thoroughly inquiries into all indications relating to secret prisons and cases of extraordinary rendition on Polish soil and to insist with the US Government that the death penalty should on no account be applied to Mr Al Nashiri".

4. The Flautre Report and the 2012 European Parliament Resolution

282. On 11 September 2012 the European Union Parliament adopted a report prepared by Hélène Flautre within the Committee on Civil Liberties, Justice and Home Affairs ("LIBE") – "the Flautre Report", highlighting new evidence of secret detention centres and extraordinary renditions by the

CIA in European Union member states. The report, which came five years after the Fava Inquiry, highlighted new abuses – notably in Romania, Poland and Lithuania, but also in the United Kingdom and other countries – and made recommendations to ensure proper accountability. The report included the Committee on Foreign Affairs' opinion and recommendations.

In the course of its work, on 27 March 2012, LIBE held a hearing on "What is new on the alleged CIA illegal detention and transfers of prisoners in Europe". At that hearing Mr Crofton Black from the Bureau of Investigative Journalism was heard as an expert.

283. Following the examination of the Report the European Union Parliament adopted, on 11 September 2012, the Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)) ("the 2012 EP Resolution").

284. Paragraph 13 of the 2012 EP Resolution, which refers to the criminal investigation in Romania, read:

> *"[The European Parliament*,]
>
> "12. Notes that the parliamentary inquiry carried out in Romania concluded that no evidence could be found to demonstrate the existence of a secret CIA detention site on Romanian territory; calls on the judicial authorities to open an independent inquiry into alleged CIA secret detention sites in Romania, in particular in the light of the new evidence on flight connections between Romania and Lithuania;"

285. Paragraph 45, which concerns the applicant, read:

> "*"[The European Parliament*,]
>
> 45. Is particularly concerned by the procedure conducted by a US military commission in respect of Abd al-Rahim al-Nashiri, who could be sentenced to death if convicted; calls on the US authorities to rule out the possibility of imposing the death penalty on Mr al-Nashiri and reiterates its long-standing opposition to the death penalty in all cases and under all circumstances; notes that Mr al-Nashiri's case has been before the European Court of Human Rights since 6 May 2011; calls on the authorities of any country in which Mr al-Nashiri was held to use all available means to ensure that he is not subjected to the death penalty; urges the VP/HR to raise the case of Mr al-Nashiri with the US as a matter of priority, in application of the EU Guidelines on the Death Penalty;"

5. The 2013 European Parliament Resolution

286. Having regard to the lack of response to the recommendations in the 2012 EP Resolution on the part of the European Commission, on 10 October 2013 the EU Parliament adopted the Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP) ("the 2013 EP Resolution").

Its general part read, in so far as relevant, as follows:

> "[*The European Parliament]*,
>
> ...

G. whereas the in-depth investigative work broadcast on the Antena 1 television channel in April 2013 provided further indications of Romania's central role in the prison network; whereas former national security advisor Ioan Talpeş stated that Romania provided logistical support for the CIA; whereas a former Romanian senator admitted the limitations of the previous parliamentary inquiry and called for prosecutors to initiate judicial proceedings;"

Paragraph 5, which concerned Romania, read:

"[*The European Parliament*,]

5. Urges the Romanian authorities to swiftly open an independent, impartial, thorough and effective investigation, to locate missing parliamentary inquiry documents and to cooperate fully with the ECtHR in the case of *Al Nashiri v Romania*; calls on Romania to comply fully with its fundamental rights obligations."

6. The 2015 European Parliament Resolution

287. Following the publication of the 2014 US Senate Committee Report (see paragraphs 77-96), on 11 February 2015 the European Parliament adopted the Resolution on the US Senate Committee Report on the use of torture by the CIA (2014/2997(RSP)) ("the 2015 EP Resolution").

The European Parliament, while noting that the applicant's application was pending before the ECHR, reiterated its calls on Member States to "investigate the allegations that there were secret prisons on their territory where people were held under the CIA programme, and to prosecute those involved in these operations, taking into account all the new evidence that has come to light".

The European Parliament further expressed concern regarding the "obstacles encountered by national parliamentary and judicial investigations into some Member States' involvement in the CIA programme".

7. LIBE delegation's visit to Romania (24-25 September 2015)

288. As a follow up to the 2015 EP Resolution, a delegation from the LIBE visited Bucharest from 24 to 25 September 2015. The delegation was headed by Ms Tanja Fajon and comprised three other members (Ms Eva Joly, Ms Laura Ferrara and Mr Jeroen Lenaers and an accompanying member – Ms Ramona Mănescu). The delegation met with representatives of the Ministry of Foreign Affairs, the Prosecutor General, several members of the Romanian Parliament as well as representatives of civil society and investigative journalists.

In connection with the visit, Mr Crofton Black prepared a briefing of 15 September 2015 on "CIA Detention in Romania and the Senate Intelligence Committee Report ("the 2015 LIBE Briefing"). The briefing described correlations between the 2014 US Senate Committee Report and other public data sources. It included a summary of flights through Romania

and their links to the rendition programme, as well as of summary of data in the 2014 US Senate Committee Report relating to Romania (see also paragraphs 355-358 below).

8. Follow-up to the visit

289. On 13 October 2015 the LIBE held a hearing on "Investigation of alleged transportation and illegal detention of prisoners in European Countries by the CIA". The aim of the hearing was to analyse all past and ongoing parliamentary and judicial inquiries relating to Member States' involvement in the CIA programme. During the hearing a research paper was presented by the Policy Department C on the latest developments on Member States investigations into the CIA programme titled: "A quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme".

The Committee also heard a summary overview by Mr Crofton Black on what had been achieved with reference to CIA operated secret prisons in Europe. In particular, Mr Black stated that since the adoption of the 2012 EP Resolution and the publication of the US Senate's report the evidence had been conclusive that the CIA had operated a prison in Romania from September 2003 to November 2005.

At a 13 October 2015 European Parliament hearing, Eva Joly, member of a European Parliament delegation that visited Romania to investigate its role in CIA secret detention operation observed:

> "The next morning we met with the Prosecutor General of Romania. He is called Mr. Tiberiu, Mihail Nitu. And he did hide behind the secrecy of the inquiry. But he was able to tell us that he had no proof whatsoever that Mr al Nashiri, who has an ongoing case in the European Court of Human Rights, that he has been detained in Romania. He was denying that, saying that no proof whatsoever. I am not optimistic as to what will come out of this inquiry. To my question on how many witnesses he had heard, how many hotels were in some kilometres around the supposed detention centre, I got the impression that no real inquiry was being carried out. And nobody wanted to help us to get access to the ORNISS centre. We really insisted meeting with the Secretary of State but there was clear instructions to deny us, and no argumentation whatsoever was received."

9. The 2016 European Parliament Resolution

290. On 8 June 2016 the European Parliament adopted a follow-up resolution to the 2015 EP Resolution (2016/2573(RSP)) ("the 2016 EP Resolution").

Its general part read, in so far as relevant, as follows:

> *"[The European Parliament,]*
>
> "N. whereas it is regrettable that the members of the fact-finding mission to Bucharest of Parliament's Committee on Civil Liberties, Justice and Home Affairs were not able to visit the National Registry Office for Classified Information (ORNISS) building, reported to have been used as a secret CIA detention site; ..."

In respect of Romania, the resolution further stated:

"[The European Parliament,]

11. Urges Lithuania, Romania and Poland to conduct, as a matter of urgency, transparent, thorough and effective criminal investigations into CIA secret detention facilities on their respective territories, having taken into full consideration all the factual evidence that has been disclosed, to bring perpetrators of human rights violations to justice, to allow the investigators to carry out a comprehensive examination of the renditions flight network and of contact people publicly known to have organised or participated in the flights in question, to carry out forensic examination of the prison sites and the provision of medical care to detainees held at these sites, to analyse phone records and transfers of money, to consider applications for status/participation in the investigation from possible victims, and to ensure that all relevant crimes are considered, including in connection with the transfer of detainees, or to release the conclusions of any investigations undertaken to date;

...

13. Recalls that the former director of the Romanian secret services, Ioan Talpeş, admitted on record to the European Parliament delegation that he had been fully aware of the CIA's presence on Romanian territory, acknowledging that he had given permission to 'lease' a government building to the CIA;

...

16. Welcomes the efforts made so far by Romania, and calls on the Romanian Senate to declassify the remaining classified parts of its 2007 report, namely the annexes on which the conclusions of the Romanian Senate inquiry were based; reiterates its call on Romania to investigate the allegations that there was a secret prison, to prosecute those involved in these operations, taking into account all the new evidence that has come to light, and to conclude the investigation as a matter of urgency;

...

18. Express its disappointment that, despite several requests (a letter to the Minister of Foreign Affairs of Romania from the Chair of Parliament's Committee on Civil Liberties, Justice and Home Affairs, and another request at the time of the fact-finding mission to the Secretary of State), the members of the fact-finding mission were not able to visit 'Bright Light', a building repeatedly – and officially – reported to have been used as a detention site;"

C. The 2007 ICRC Report

291. The ICRC made its first written interventions to the US authorities in 2002, requesting information on the whereabouts of persons allegedly held under US authority in the context of the fight against terrorism. It prepared two reports on undisclosed detention on 18 November 2004 and 18 April 2006. These reports still remain classified.

After the US President publicly confirmed on 6 September 2006 that 14 terrorist suspects ("high-value detainees") – including the applicant – detained under the CIA detention programme had been transferred to the military authorities in the US Guantánamo Bay Naval Base (see

paragraph 60 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.

292. Extracts from the 2007 ICRC Report giving a more detailed account of the applicant's and other HVDs' treatment in CIA custody can be found in *Al Nashiri v. Poland* (cited above, § 282).

293. The sections relating to main elements of the HVD Programme, routine procedures for the detainees' transfers and their detention regime read, in so far as relevant, 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 in combination, in addition to the deprivation of other basic material requirements.
>
> ...
>
> 2. ARREST AND TRANSFER
>
> ... Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in several different countries. The number of locations reported by the detainees varied, however ranged from three to ten locations prior to their arrival in Guantánamo in September 2006.
>
> The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.
>
> The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He

would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort.

In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment described below.

...[T]hese 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. ...

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. ...

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.

...

1.4. FURTHER ELEMENTS OF THE DETENTION REGIME

The conditions of detention under which the fourteen were held, particularly during the earlier period of their detention, formed an integral part of the interrogation process as well as an integral part of the overall treatment to which they were subjected as part of the CIA detention program. This report has already drawn attention to certain aspects associated with basic conditions of detention, which were clearly manipulated in order to exert pressure on the detainees concerned.

In particular, the use of continuous solitary confinement and incommunicado detention, lack of contact with family members and third parties, prolonged nudity, deprivation/restricted provision of solid food and prolonged shackling have already been described above.

The situation was further exacerbated by the following aspects of the detention regime:

- Deprivation of access to the open air
- Deprivation of exercise
- Deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation
- Restricted access to the Koran linked with interrogation.

These aspects cannot be considered individually, but must be understood as forming part of the whole picture. As such, they also form part of the ill-treatment to which the fourteen were subjected. ..."

D. United Nations

1. The 2010 UN Joint Study

294. 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).

295. 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."

296. In relation to Romania, the report (in paragraphs 116-124) stated, among other things, the following:

"116. ... In [the 2004 CIA 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'.

117. Using a similar analysis of complex aeronautical data, including data strings, research was also able to demonstrate that a Boeing 737 aircraft, registered with the Federal Aviation Administration as N313P, flew to Romania in September 2003. The aircraft took off from Dulles Airport in Washington, D.C. on Saturday 20 September 2003, and undertook a four-day flight 'circuit', during which it landed in and departed from six different foreign territories - the Czech Republic, Uzbekistan, Afghanistan, Poland, Romania and Morocco - as well as Guantánamo Bay, Cuba. Focus was also placed on a flight between the two listed European 'black site' locations - namely from Szymany (Poland) to Bucharest - on the night of 22 September 2003, although it was conceivable that as many as five consecutive individual routes on this circuit - beginning in Tashkent, concluding in Guantánamo - may have involved transfers of detainees in the custody of the CIA. The experts were not able to identify any definitive evidence of a detainee transfer into Romania taking place prior to the flight circuit.

119. In its response to the questionnaire sent by the experts, Romania provided a copy of the report of the Committee of Enquiry of Parliament concerning the investigation of the statements on the existence of CIA imprisonment centres or of flights of aircraft hired by the CIA on the territory of Romania.

...

124. According to two high-ranking Government officials at the time, revelations about the existence of detention facilities in Eastern Europe in late 2005 by The Washington Post and ABC news led the CIA to close its facilities in Lithuania and Romania and move the Al-Qaida detainees out of Europe. It is not known where these persons were transferred; they could have been moved into 'war zone facilities' in Iraq and Afghanistan or to another black site, potentially in Africa. The experts were not able to find the exact destination of the 16 high-value detainees between

December 2005 and their move to Guantánamo in September 2006. No other explanation has been provided for the whereabouts of the detainees before they were moved to Guantánamo in September 2006."

2. The 2015 UN Committee against Torture's Observations

297. The UN Committee against Torture ("CAT"), in its Concluding observations on the second periodic report of Romania adopted on 7 May 2015 – "the 2015 UN CAT Observations" – referred to the CIA HVD Programme's operation in Romania in the following terms:

"Secret detention centres and rendition flights

15. The Committee is concerned at persistent allegations of illegal detention of persons in secret detention facilities of the Central Intelligence Agency and of extraordinary rendition flights into and out of Romania in the context of the country's international cooperation in countering terrorism. It is also concerned that, in his application filed in 2012 with the European Court of Human Rights, Abd al-Rahim Hussayn Muhammad Al-Nashiri claimed that he had been illegally detained and tortured in an Agency detention facility in Romania; this is currently being investigated by the Romanian Prosecutor General. The Committee is also concerned at the discrepancy between the information provided by the State party, and the statements made in December 2014 by the former head of the Romanian intelligence service which indicated that the authorities had allowed the Agency to operate detention facilities between 2003 and 2006 where inmates allegedly suffered inhumane treatment (arts. 2, 3, 12 and 16).

The Committee encourages the State party to continue its investigations into the allegations of its involvement in a programme of secret detention centres, and of the use of its airports and airspace by aeroplanes involved in 'extraordinary rendition', and to inform the Committee of their outcome. The Committee requests the State party to provide it with information about the outcome of any ongoing investigations regarding the case of Abd al-Rahim Hussayn Muhammad Al-Nashiri."

X. TRANSCRIPTS OF WITNESS EVIDENCE PRODUCED BY THE GOVERNMENT

298. The respondent Government produced transcripts of the statements and testimony of witnesses heard by the prosecutor in the context of the criminal investigation concerning the alleged existence of CIA secret detention facilities in Romania, together with an English translation. At the Government's request, confidentiality was imposed on this material, in accordance with Rule 33 § 2 of the Rules of Court (see also paragraph 12 above)

The Court and the applicant had access to the full versions of these documents. In the English version[1], reproduced below, the names, job titles, functions and other details that might lead to witnesses' identities being

1. The material has been edited by the Registry and certain editorial corrections made. The review does not affect the content of the documents.

revealed to the public have been removed. The names of the witnesses have been anonymised by a single letter of the alphabet[2].

A. Transcript of witness X's statement made on 18 September 2013

299. Witness X made the following statement to the prosecutor:

"During the period 2003-2005, I was [REDACTED] and the duties attached to the post that I held included specific aspects concerning the security of civil aviation airports.

The [REDACTED], had partnerships with various similar institutions from other States, including equivalent structures in the United States of America. In the framework of these bilateral relations, civil aviation aircraft hired by the partner services on which their representatives travelled and landed at Bucharest Băneasa airport. My presence at the airport was aimed at ensuring protocol relations during processing as well as bilateral courtesy-setting according to diplomatic norms and international rules."

B. Transcript of testimony given by witness Y on 4 May 2015

300. The testimony given by witness Y to the prosecutor on 4 May 2015 reads, in so far as relevant, as follows:

"I have been informed that I will be heard as a witness concerning: the existence on the Romanian territory, after 2001, of some secret detention and interrogation centres of the United States of America's Central Intelligence Agency.

...

I declare the following:

I have been informed of the object of this criminal investigation, namely of the fact that a Saudi national, Abd Al Rahim Hussein Muhammad Al Nashiri, complained that he had allegedly been brought on the Romanian territory and held in illegal detention centre, administrated by officers of the Central Intelligence Agency (CIA) with help from the Romanian authorities.

It is for the first time that I have heard about such a criminal complaint by this citizen against the Romanian State. As a [REDACTED], I had never been asked by the authorities of the United States of America to allow, to approve, or to facilitate the hosting on the national territory of a location aimed at serving as a detention and interrogation centre of individual suspected of participating in, initiating or organising terrorist acts directed against the USA or its allies.

I do remember that, in the aftermath of the terrorist attacks of 11 September 2001 in the USA, myself and other officials of the Romanian State, at that time, went to the USA Embassy in Bucharest and we expressed our grief for what had happened and condolences for the loss of human lives; in the course of the same year, I visited UN headquarters, and on that occasion, I also visited the so-called 'Ground Zero'. I do not remember any express request addressed to me, to the [REDACTED], to the Head of the [REDACTED], to the Head of [REDACTED], nor the Ministry [REDACTED], to

[2] Redaction of the transcripts has been done by the Registry.

intensify the cooperation with the American partners from the intelligence services in the sense of facilitating [the creation] of detention centres on the territory of Romania.

I must say that I consider to be an invention this accusation according to which Romania hosted CIA detention centres on its territory and also being a denigration against the Romanian State, because in the [REDACTED] meetings such request from the Americans had never been discussed. If such centres had existed, I would certainly have known about their existence on the national territory, for as long as I was [REDACTED]. Therefore, I restate that [REDACTED] never received such requests from the USA's then Presidents, George Bush Jr. and Bill Clinton, nor from the three US ambassadors to Bucharest, during [REDACTED] and the impugned period [REDACTED].

Concerning my statement [REDACTED], I state that I did not maintain in that [REDACTED] that Romania had hosted CIA detention centres, but I only referred to the overflight permission (*drept de survol*) to [and from] the Mihail Kogălniceanu airport of Constanţa for the US military aircraft, in the context of Middle East operations, in which we cooperated (troops and equipment transport or others).

In the context of Romania's strategic objective of integration into the North Atlantic Alliance and into the European Union, the exchange of information and the cooperation between the national intelligence services and their American counterparts was done in a natural way, as a necessity. In this context, it is possible that CIA offices were run on the national territory, but I cannot with certainty state it, nor deny it, because I never personally gave such authorisation. I see no reason for the Americans to request the setting-up of such facilities on Romanian territory.

I wish to state that the initiative of [REDACTED] was not mine; it was the initiative of that [REDACTED] citizen that [REDACTED] asked me to have a discussion on the general subject of the 25th anniversary of the Revolution; at least, it was that which I was expecting, but it was never mentioned as such to me. I did not expect to be questioned on the issue of the supposed existence of the CIA prisons in Romania.

I certainly consider that the heads of the main [REDACTED] services would have consulted [REDACTED], should we have been asked to approve such detention facilities on the Romanian territory, also given the fact that both of them, [REDACTED] were members of the [REDACTED].

I heard about the statements publicly made by [REDACTED], and I intend to have a discussion with him, to clarify things on this issue, but because he had gone on holiday, I could not get in touch with him until now.

I have no other additional statements to make with regard to the object of this case.

..."

C. Transcript of witness Z's statement made on 17 September 2013

301. The statement made by witness Z to the prosecutor on 17 September 2013 reads, in so far as relevant, as follows:

"I, the undersigned, [Z] ..., declare the following:

Between December 2000 and March 2004 I was the [REDACTED]. In this capacity I was appointed by the [REDACTED] to participate in the negotiations for the accession of Romania to NATO. From [REDACTED] 2004, I held the office of [REDACTED].

In this capacity, I had several meetings following which the first steps were taken towards setting up the military and intelligence agreements in order to fulfil the accession criteria. This was the co-called pre-accession phase, launched after the Prague meeting of 2 November 2002 during which the NATO Member States had decided that Romania was one of the next candidates for accession to NATO.

In this wide negotiation process, I was designated to prepare and negotiate those documents aimed at making Romania ready for its accession to the system, by adopting those necessary operative agreements that had to be effective by the time Romania was declared a NATO member. Concretely, I/we addressed various issues concerning the pre-accession, in the area of defence and intelligence cooperation.

Among those discussions, some developments or agreements took place in relation to the American flights to be operated by the CIA which had permission to fly over and land on Romanian territory. It was one of the steps that Romania had to take in order to become a NATO member and it meant fulfilling one of the conditions imposed on all partners of NATO members. From about 2003 onwards, several contacts had taken place in that direction and they resulted in concrete agreements that made possible the operation of the special American flights on Romanian territory, in different conditions from those provided for by international customs. It should be understood that those flights had a special character and they were not under an obligation to obey the usual rules imposed on civil flights.

I state that according to the information I had at that time, such practice of [special] flights was current and particular to all NATO Member States.

Concerning the issue of some locations that were to be provided for exclusive use by our American partners, I state that I/we insisted, and it was agreed, that in all those locations the Romanian State should have no participation and all activities were to be undertaken exclusively by the American partners under their exclusive responsibility. This way of doing it was the natural outcome of complying with the condition of attitude between allies. All the discussions in which I participated only concerned the status of the [REDACTED].

I have no knowledge about any detention centre or prisoners taken and located on Romanian territory or about any special treatment applied to such prisoners.

I only heard about this issue, and especially about prisoners taken on Romanian territory and detained here, from the press, when the international scandal exploded. I considered that those scandals were aimed at discrediting Romania's accession to NATO and its capacity as a NATO member and as an ally of the United States.

I appreciate that by continuing those scandals someone mostly wants to generate disputes at a high political level in the Eastern European Countries that were accepted during the last NATO accession wave.

[signature] [REDACTED]"

D. Transcript of testimony given by witness Z on 18 June 2015

302. The testimony given by witness Z to the prosecutor on 18 June 2015 reads, in so far as relevant, as follows:

> "I have been informed that I will be heard as a witness concerning: the existence on Romanian territory, after 2001, of some secret detention and interrogation centres of the United States of America's Central Intelligence Agency. ...
>
> I declare the following:
>
> I have been informed of the object of this criminal investigation, namely of the fact that a Saudi national, Abd Al Rahid Husseyn Mohammad Al Nashiri, complained to the Romanian judicial authorities about the fact that he, as well as other individuals suspected of being members of a terrorist organisation, had been brought to Romanian territory and held in illegal detention facilities, administered by officers of the Central Intelligence Agency (CIA) and subjected to physical and psychological torture in order for them to obtain information concerning terrorist organisations.
>
> I do not know anything about the facts this complaint refers to and, as can be easily observed, it seems that the Saudi national himself does not know any factual elements that might substantiate his complaint.
>
> I only heard about him when his complaint became a matter of public knowledge.
>
> By virtue of the public offices of [REDACTED] that I previously held, among which the public office of [REDACTED] and that of [REDACTED], and that of [REDACTED], I firmly maintain that the allegations publicly spread concerning the supposed existence, on the territory of Romania, of illegal detention centres administered by the United States of America, through the CIA, centres in which several individuals suspected of being members of a terrorist organisation or of having committed terrorist acts have been held, are nothing but simple allegations or suppositions of some persons that have nothing to do with the realities of the Romanian State.
>
> At the time of the terrorist attack of 11 September 2001 in New York, I held, as mentioned before, the office of [REDACTED]. On the day of the attack, the then [REDACTED], publicly expressed by means of an official statement the commitment of the Romanian authorities to support the USA in their fight against terrorism, by means that were to be subsequently established by common agreement, upon the request of US officials. Immediately after the terrorist attack, in the following 48 hours, [REDACTED] called for a meeting of the [REDACTED], which endorsed the official statement of the [REDACTED]; following which Parliament also approved the [REDACTED] document.
>
> Immediately after those terrorist attacks, our contacts with the representatives of the US diplomatic mission in Romania and other Western diplomatic missions increased and the steps taken by Romania in order to become a NATO member were accelerated.
>
> Consequently, in November 2002, at the Prague conference of the NATO Member States, taking into account the progress made, the Heads of State and Government of the NATO Member States invited Romania to join the Alliance.
>
> It is true that US Government officials asked the Romanian authorities to offer some locations, on Romanian territory, to be used for actions of combating international terrorist threats, by the representatives of the CIA, on the same pattern as that used in

the other NATO Member States. This discussion was one of principle, and finally one single location was offered, without specifying the nature of that location, whether it should have been an office or an office building or land for building some facilities, or some other form. It was understood, at that stage, in 2003, that it should be an office building in Bucharest.

The requested site was to be identified and made available by the [REDACTED].

I would make clear that I was directly in charge of these negotiations, having the coordinating role, while the person designated from the Ministry of [REDACTED], in charge of the discussions with the American partners, was the then [REDACTED].

As far as I know, [REDACTED] made available to the CIA, in Bucharest, one site which afterwards was converted into [REDACTED] in Romania; this is a method common to the relationships with other NATO Member States.

I maintain that I never publicly admitted that, in Romania, CIA illegal detention centres had existed, with the support of the Romanian governmental authorities, in which various persons had been illegally detained, during the US-initiated State detention programme.

I only stated that the Romanian authorities cooperated in the anti-terrorist war on an exchange of information basis with the American intelligence services, including the CIA, also by offering a site for the CIA activities.

I do not wish to comment on the information given by the mass-media in relation to the persons that were supposed to have been illegally detained on Romanian territory in CIA-run detention centres, the source of this information being the partially published US Senate Report on the detention and interrogation of terrorism suspects programme; I consider that it is the responsibility of the USA to clarify this issue, as long as I have no knowledge of such operations on Romanian territory and I do not know anyone in connection with such a matter.

The name of Abu Faraj Al-Libi, Hassan Gul, Janat Gul does not sound familiar to me, given the fact that, as stated before, I did not approve, I did not know and I was not informed of any operation for the transfer or detention of a foreign national by the CIA.

Concerning the public debate on the existence of CIA directly or indirectly controlled flights with a special destination on Romanian territory, I would like to say that such flights were operated also in German, English, Italian and other territories, and that they did not represent a Romanian particularity.

I have nothing else to state about the facts in this file. ...”

E. Transcripts of statements from other witnesses

303. The Government produced twenty-four transcripts of statements from twenty-three witnesses obtained during the criminal investigation, together with an English translation (see also paragraphs 12 and 173 above). These statements were obtained at various dates at the end of July and beginning of August 2013 and, subsequently, in September 2015.

304. Five witnesses said that in 2003-2005 they “[did] not know anything about the aircraft with American registration”, “[were not] informed about special flights”, “[had] no knowledge regarding the flights

that came or went" or "[did] not know any details regarding the private flights".

305. The statements of the remaining eighteen witnesses, in so far as relevant, read as follows.

1. Witness A

306. The transcript of witness A's statement of 30 July 2013 read:

"... I, the undersigned [A] [personal data], state that I work for the [REDACTED], as a [REDACTED].

From 2003 to 2005, I worked for the [REDACTED] at Bucharest Băneasa Airport, as [REDACTED]. As such, I worked mainly at the [REDACTED] and at other specific departments. In all the departments, my work was governed by the provisions of the [REDACTED] and by the working methodologies. For example, at [REDACTED], I worked in the booths placed on the entry or exit corridor, also I assisted the passengers at the boarding gate and I escorted them to the regular aircraft.

Being asked about the ... planes, I don't recall having heard about the mentioned aspects, namely about the disembarkation of clandestine passengers and, implicitly, I did not go to the planes referred to in the questions.

There were some cases when private aircraft, according to flight plans, parked in front of the protocol lounge, where we went, together with customs officials, for the checking of documents. There were cases when, together with a RAS employee, we went to the protocol lounge for the checking of the passengers' documents – various officials. I declare that I do not recall cases of disembarkation of clandestine passengers."

2. Witness B

307. The transcript of witness B's statement of 30 July 2013 read:

"... I, the undersigned [B], state as follows:

[REDACTED] founded [REDACTED] in 1994 with the purpose of providing handling services for the business aviation at Băneasa Airport. Together with the Airport, I promoted this type of traffic at Băneasa taking into consideration that there was hardly any traffic at the airport as the domestic Tarom flights had just moved to Otopeni. We provide handling services specific to business aviation, which means everything that is connected to the embarkation/disembarkation of passenger/cargo/mail aircraft.

For the business aviation there were some specific requests different from the regular commercial aviation, meaning that, usually, business flights' operators sent in advance a request for services which was confirmed by our operating agents.

At the specified time (2003-2005), [REDACTED] operating agents met the aircraft upon arrival and accompanied it upon departure together with the border guard and a customs official.

For the business aircraft, our operating agents accompanied the crew and undertook the embarkation/disembarkation of the passengers/luggage.

As for the transiting aircraft with American registrations, our personnel were joking about them saying that they were spies.

The majority of passengers on these aircraft were men.

Usually, our personnel servicing these aircraft did not enter the planes. Those responsible for the handling papers and for receiving the payment for the handling services and the airport taxes went to the aircraft and then, together with a member of the crew, came back to our office in the airport where the final handling sheet was drawn up and the payment was made. At the specified time, I was sometimes present at the airport making unannounced checks. As I did not have a uniform, I personally did not go to the aircraft.

In the airport I did not notice any illicit movements in relation to the embarkation/disembarkation of passengers unknown to us or of passengers that did not go through the normal process.

During the boom in private and commercial aviation, planes were parked according to their weight (the term 'the heavy ones' was used).

To the question whether it was possible for a passenger to be brought in outside the legal arrival process, I do not believe that such a thing is possible. The airport had a fixed and mobile security service.

I have not heard rumours about detainees being flown on the transiting aircraft with American registrations.

I indicate that I was asked to provide documents about the handling of these aircraft by a parliamentary commission and that I forwarded all kind of documents, but I did not testify.

Also, I would make mention of the fact that, unlike in the case of commercial aviation where the cargo is documented (by way of Pax Manifest, General Declaration, Cargo Manifest), for business aviation there are generally no documents drawn up concerning the identity of the cargo."

3. Witness C

308. The transcript of Witness C's statement of 30 July 2013 read:

"... I, the undersigned [C] [personal data], state as follows:

From 2003 to 2005, I was employed by the Romanian Airport Services as [REDACTED]. It was a [REDACTED] job and I was responsible for the documents necessary for take-off without going to the aircraft because I do not have a driving licence. Access to the aircraft is possible only by way of a vehicle.

After the landing of an aircraft, the practice began with the movement of the Border Police, the custom agents and the airport security agents and of the RAS operating agent.

With the crew's approval, border police entered the aircraft and took the passports and the custom agents were present for the checking of the documents, if necessary. If the aircraft was inspected, the pilots were accompanied by the operating agent by car to the firm's office. If need be, hotel reservations were made or, if they already had reservations, the agent accompanied them to the hotel without passing through the office.

For vehicles from outside the airport, access was permitted only after being checked by the security agents. Also, if such a vehicle had to enter the airport premises, access was allowed only accompanied by an agent of the airport security department.

I have no knowledge of any aircraft or transport of detainees undertaken by the American authorities on Romanian territory."

4. Witness D

309. The transcript of Witness D's statement of 30 July 2013 read:

"I, the undersigned [D] [personal data], state as follows: From 2003 to 2005 I worked at Bucharest Băneasa International Airport in the [REDACTED] as [REDACTED]. In this position, I was responsible for the access to airport premises of authorised persons and vehicles.

During that time, several private aircraft landed, but they did not come within my responsibility as I was working at a fixed point, without patrolling, and as such I had no contact with incoming/outgoing aircraft or passengers. I declare that during that time there was no patrol service in the proximity of the aircraft, the airport being guarded by the gendarmes and afterwards by a security firm.

I had no knowledge about the fact that these private flights were used for the transport in/out of Romania of detainees, finding out about these things many years later in the press. ..."

5. Witness E

310. The Government produced transcripts of two statements given by Witness E; the first of 31 July 2013, the second one of an unspecified date.

311. The transcript of the statement given on 31 July 2013 read:

"... I, the undersigned [E] [personal data], state as follows:

From 2003 to 2005, I was [REDACTED] in the airport [REDACTED] department at International Băneasa Aurel Vlaicu Airport and, at present, I am [REDACTED].

During that time, I had personal knowledge of some private flights that landed at night time at Bucharest-Băneasa airport as being flights with a special status.

These flights were parked on the airport platform for about 10-15 minutes, after which they took off.

I personally have knowledge of 3-4 such flights. The only person approaching these flights was [REDACTED] [X], who went to the aircraft in the SRI working van-type vehicle. Other persons on duty were informed early on about the arrival of these flights and did not have access to these planes.

I do not know exactly whether [X] entered the planes or just stayed by them. I did not see anyone embarking onto or disembarking from these aircraft.

The head of the security department at that time was [REDACTED], and the head of the control tower and air traffic navigation was [REDACTED]. ... ."

312. The transcript of Witness E's statement of an unspecified date read:

"... I, the undersigned E [personal data], state as follows:

From 2003 to 2005, I was [REDACTED] in the airport [REDACTED] department at International Băneasa Aurel Vlaicu Airport and, at present, I am [REDACTED].

During that time, I had personal knowledge of some private flights that landed at night time on Băneasa airport as being flights with a special status."

6. Witness F

313. The transcript of Witness F's statement of 31 July 2013 read:

"... I, the undersigned [F] [personal data], state as follows:

From October 2001 to January 2007, I was employed by [REDACTED] (Băneasa Airport) as [REDACTED].

In this capacity, according to my job description, I was responsible for the access control of persons, in the airport area, access control of vehicles in the movement area and access control to the [REDACTED].

With regard to the access of vehicles on the airport premises, the access of vehicles had to be authorised, all the vehicles and also their drivers were registered, had a special tag and an access permit, so that access was permitted only to the person designated to drive the vehicle, on the basis of a special permit of access to the airport premises, the identification tag where the access areas were indicated, the driving licence and a personal identification document, and for the vehicle on the basis of the vehicle's identification tag and the access permit for the movement area.

After the checking of the vehicle, it was necessary to obtain the authorisation of the deputy commander of the airport for access by the vehicle. After the deputy commander had given his approval, the vehicle was noted in a table, mentioning the time of entry, the number of the access permit, the identification number, and the destination within the airport's premises.

After the access of the vehicles or of the vehicle a second check was operated by the SRI.

It follows that the access of the vehicles, as well as the access of the persons who were accompanied to the access areas of the airport for identification control, etc., was carried out according to the strict rules of the airport security."

7. Witness G

314. The transcript of Witness G's statement of 1 August 2013 read:

"... I, the undersigned [G] [personal data], state as follows: From 2003 to 2005 I worked at Bucharest Băneasa Airport in the [REDACTED] Department as [REDACTED], receiving knowledge relating to the flights with the 'N' call sign, that were announced as special flights to which we were not requested.

Generally, these were night flights that arrived for refuelling, and to this effect the operator handling the refuelling would go to the plane. If there was a request for a handling agent, somebody from RAS would go. ..."

8. Witness H

315. The transcript of Witness H's statement of 1 August 2013 read:

"... I, the undersigned [H] [personal data], state the following:

Starting in 2003 and up to February 2004 I worked for the [REDACTED] of Băneasa International Airport as [REDACTED]. I handled the security checks of foreign and Romanian citizens entering/exiting Romania and who were in transit across the Romanian border, in compliance with the orders given by the shift chief and the flight plan established for each workday.

I processed according to the flight plan all the flights with the 'N' call sign, without them having a stop in Bucharest. All the passengers from the flights were processed pursuant to the law.

I did not see amongst the passengers of the planes individuals with special status, wanted at national or international level. ..."

9. Witness I

316. The transcript of Witness I's statement of 1 August 2013 read:

"... I, the undersigned [I] [personal data], state the following:

From 2003 to 2005 I worked for the Romanian Airport Services as [REDACTED]. I handled the servicing of planes that landed at or departed from Bucharest Airport. As part of my job assignment I also handled refuelling, catering, and receiving payments for handling services.

It is worth mentioning that a file exists with all the flight details for all the planes that landed or departed. If there is such a file, it means that that flight landed at or departed from Băneasa Airport.

Regarding the American flights with the 'N' call sign, as in the case of planes flying under other flags, my duty was to provide refuelling, crew transport from the airport to the hotel, catering services, weather reports.

Usually, when a technical stop was involved, I would go to the plane alone, accompanied only by the driver of the refuelling vehicle.

I declare that I never saw a detainee – passenger, especially of Arab origin, being boarded or disembarked onto/from a plane, American or otherwise. ..."

10. Witness J

317. The transcript of Witness J's statement of 2 August 2013 read:

"... I, the undersigned [J] [personal data], state the following:

From 2003 to 2005 I worked as [REDACTED] at [REDACTED] handling the checking of documents needed to cross the State border, in both directions. Regarding the private flights that landed in or departed from Romania, these were processed at the Protocol Lounge of the airport; the individuals were taken from the plane by an RAS car and were brought to the reception area and processed according to the work procedure.

I also declare that there was no need for an operational team to go to the plane, as the passengers were brought to the reception area. Likewise it is not possible for the passengers to be taken into unauthorised vehicles and leave the airport premises without passing through the specially designated checkpoints.

Personally, I did not see any individual who was boarded onto or disembarked from the American planes, other than the crew and the passengers that we checked. ..."

11. Witness K

318. The transcript of Witness K's statement of 2 August 2013 read:

"... I, the undersigned [K] [personal data], state the following:

From 2003 to 2005 I was employed at [REDACTED] and I handled the services being provided by the airport to planes that were arriving at or departing from Băneasa International Airport. The services included refuelling the planes, cleaning, handling crew transfer to and from the airport. In practice, communication was established with the crew who made the request for services and then we organised the teams, according to the request. Regarding the flights under the American flag, these were flights with a technical stop at Băneasa Airport (refuelling). I did not see any passengers disembarking from or boarding these planes. Also, in order for a car to have access to the parking platform outside the airport, they would require an authorisation issued by the airport administration. ..."

12. Witness L

319. The transcript of Witness L's statement of 2 August 2013 read:

"... I, the undersigned [L] [personal data], state the following:

– Between 2003 and 2005 I was an employee of Băneasa Airport [REDACTED].

– As part of my job description, I handled the access of employees and vehicles that entered the secure area of the airport.

– Regarding the private flights under the US flag, I declare that nothing suspicious caught my attention.

– I did not see any individuals that might have detainee status who were handcuffed and who were boarded onto or disembarked from the private flights that landed at the airport. ..."

13. Witness M

320. The transcript of Witness M's statement of 2 August 2013 read:

"... I, the undersigned [M] [personal data], state the following:

Between 2003 and 2005 I worked as [REDACTED] for Băneasa Airport [REDACTED] and I handled security inside the airport at personnel access and vehicle and personnel checkpoints; it was not part of my job description [illegible] activities with the planes that entered or exited the platform.

We were [not] informed about the special flights not even by the shift manager. They were handled by the deputy commander, the border police, transport police, customs and RIS. ..."

14. Witness N

321. The transcript of Witness N's statement of 5 August 2013 read:

"... I, the undersigned [N] [personal data], state the following:

From 2003 to 2005 I worked for the Ministry of [REDACTED] at Băneasa Airport, as [REDACTED].

I declare that in 2006 I worked at REDACTED] and until that date I had processed documents alongside [petty –sic!] officers with more work experience as I had arrived in Bucharest from the [REDACTED].

I have knowledge of private planes landing at Băneasa Airport but I did not note anything out of the ordinary when they landed.

When private planes landed, RAS employees would go by bus, pick up the pilots and bring them to the Border for travel documents processing."

15. Witness O

322. The transcript of Witness O's statement of 5 August 2013 read:

"... I, the undersigned [O] [personal data], state the following:

Between 2003 and 2005 I worked for [REDACTED] as [REDACTED]; as part of my job I provided services to planes that landed at Băneasa International Airport, private and charter flights.

During that time, several private flights with US-registered aircraft were operated. These flights went according to plan, carrying business people. One evening, after dawn, a plane landed that was treated differently, as officials from the airport and from the Counter-terrorism squad asked us to stay in the office and not go out to the plane that was about to land. We complied with the request.

I cannot recall the date of the flight or the call sign.

I never saw a similar case in my time working for [REDACTED].

At that time I did not know the nature of those flights, and I also did not know whether similar flights were operated at Băneasa Airport.

After being asked, I can confirm that on the airport's platform vehicles cannot gain access without prior approval/permission. ..."

16. Witness P

323. The transcript of Witness P's statement of 5 August 2013 read:

"... I, the undersigned [P] [personal data], state the following:

Between 2003 and 2005 I worked at [*Government Editor's note*: Bucharest - Băneasa International Airport – Aurel Vlaicu] in [REDACTED].

I know that special flights were operated at night and in the time frame noted above I saw a plane without a call sign that was positioned in the middle lane of AIBB – AU platform, on the north side.

I saw the following activity going on at the side of the plane:

- Activities carried out by RAS handling operators;

- A passenger disembarking accompanied by a dog, pit bull or Amstaff, and they walked around the plane and after approximately 10 minutes they boarded the plane.

I note that the procedure for transporting pets was violated. Pets can be transported in cages that are stored in the plane's hold, in the plane only ... can travel.

The plane parked on the AIBB - AV was a GOLF that did not require a mobile stairway, the plane being equipped with an airstair on the plane's door.

The individual who disembarked with the dog was dressed in dark overalls with military boots. ..."

17. Witness Q

324. The transcript of Witness Q's statement of 6 August 2013 read:

"... I, the undersigned [Q] [personal data], state the following:

Between 2003-2005 I worked for [REDACTED] as [REDACTED], being subsequently promoted to [REDACTED].

In this position, I serviced flights that operated at Băneasa Airport, namely check-in procedures, boarding/disembarking, luggage transport and passenger transport from the plane to the terminal and vice-versa and also providing the services requested by the crew (cesspool emptying, drinking water, catering, etc.).

Several flights under the US flag arrived during this time and there were no other special services provided that were different from those provided to any other flight that arrived at Bucharest Băneasa Airport.

I do not have any knowledge of any special activity that was provided for these flights. ..."

18. Witness R

325. The transcript of Witness R's statement of 8 September 2015 read:

"... I am [REDACTED], from the founding of this institution in [REDACTED] 2002 to the present day. The offices of the institution are found in Bucharest, [REDACTED]. From the setting up of the institution to the present day we have always had the same location (with an adjacent location, similar to an interior garden, plus 1 meter of ground all around). Since the time this building was assigned to its present purpose, there have been no major modifications, such as the building of annexes, of other buildings, interior redecoration, etc. From the analysis of the annual budgetary execution of the institution, one can observe that there were no major funds allocated that may be suspected of being used for the setting up of spaces that could be used as secret detention centres, as some media outlets absurdly assert.

In other words, since the founding of the institution, which was already mentioned, to the present, our headquarters have never been used as a detention centre for persons suspected of terrorist acts by the CIA or by other governmental institutions, national or foreign, and no activities in relation to this subject have taken place.

By its nature, the building [where the ORNISS is located] cannot be used for such a purpose.

I am aware of the information circulating in the public space, national or international, about the fact that the [ORNISS] building has been used as a location for the detention of persons suspected of terrorism by the CIA and I strongly affirm that these are merely fallacies.

I declare that the institution [REDACTED], including its location, is regularly subject to checks by the competent institutions within NATO and the European Union. During these checks, no indications regarding the involvement of the [ORNISS] in the detention of persons suspected of terrorism, from the setting up of the institution and afterwards, have been identified.

The activity of the institution is governed by the [REDACTED]. Anyone [REDACTED] will notice that the [ORNISS] is not a part of the national system of preventing and countering terrorism or of the national system of public order and national security even though, due to the specific nature of its activity, it collaborates with institutions involved in the said systems.

Neither personally, nor institutionally, do I/we have relevant information about this subject (the prevention and fight against terrorism). I declare that, after the September 11 2001 attacks, we were never asked to participate in the activities meant to establish the type of help that Romania was to offer the United States of America to help with the prevention and fight against terrorism. ...”

XI. OTHER DOCUMENTARY EVIDENCE BEFORE THE COURT

A. RCAA letter of 29 July 2009

326. The applicant produced the RCAA letter to the APADOR-CH, dated 29 July 2009 (see also paragraph 113 above), which read, in so far as relevant, as follows:

“The Romanian Civil Aeronautical Authority located in ... represented by ... in compliance with the stipulations of the court decision no. 3580 of 15 December 2008 pronounced by Bucharest District Court, we hereby present in the annex to this document the answers to your inquiries included in address no. 261/07.08.2008.

Annex to the address no. 19602 of 29.07.2009

General specification:

The data provided below do not indicate with certainty that these flights were carried out. According to the regulations in effect and applicable on the respective dates, AACR does not have any document that would identify the actual performance of these flights. The information represents planned intentions that AACR was notified about.

...

01.01.2003 – 31.12.2003

N313P – 2 flights

N478GS – 1 flight

N379P – 1 flight

N85VM – we do not have any records of the requested information

N227SV – we do not have any records of the requested information

N2189M – 2 flights

01.01.2004 – 31.12.2004

N313P – 2 flights

N478GS – we do not have any records of the requested information

N379P – we do not have any records of the requested information

N85VM – we do not have any records of the requested information

N227SV – we do not have any records of the requested information

N2189M – we do not have any records of the requested information

Answer for point 3:

01.01.2003 – 31.12.2003

N313P – 2 flights

1. Flight itinerary (departure sites, stop sites, destination place): Constanţa - Rabat

Airport(s) in Romania where it landed: Băneasa

The date of landing and the date on take-off: 23.09.2003; we do not hold any recordings of the date when it took off

Flight purpose: private non-commercial

Number of people present on board of the aircraft at landing and the number of people present on board of the aircraft at take-off:

- in Romania, it is not mandatory to report the number of people (crew and passengers)
- Crew –
- Passengers: 9 (according to the date provided by the applicant).

2. Flight itinerary (departure sites, stop sites, destination place): Szczytno – Constanţa

Airport(s) in Romania where it landed: Băneasa

The date of landing and the date of take-off: 22.09.2003; we do not hold any recordings of the date when it took off

Flight purpose: private non-commercial

Number of people present on board of the aircraft at landing and the number of people present on board of the aircraft at take-off:

- in Romania, it is not mandatory to report the number of people (crew and passengers)
- Crew –
- Passengers: 9 (according to the date provided by the applicant)

...

01.01.2004 – 31.12.2004

N313P – 2 flights

Flight itinerary (departure sites, stop sites, destination place): we do not hold any records of the departure site – Timişoara

Airport(s) in Romania where it landed: Timişoara

The date of landing and the date on take-off: 25.01.2004; we do not hold any recordings of the date when it took off

Flight purpose: maintenance refuelling stop

Number of people present on board of the aircraft at landing and the number of people present on board of the aircraft at take-off:

- Crew – we do not hold any records of the requested information
- Passengers – we do not hold any records of

..."

B. List of twenty-one "suspicious flights" produced by the Government

327. As part of documents included in the investigation file, the Government produced tables containing details of twenty flights labelled as "suspicious". The tables, which included such data as flight numbers, dates, types and purposes of flights, type of journey, final routes, flights operators, organisers, aircraft, crew, passengers as well as names of the Romanian handling personnel and the Border Police and airport security personnel were available to the Court and the applicant in a full, unredacted version.

For the purposes of the non-confidential part of the procedure before the Court, the flight data can be summarised as follows.

(a) Four out of twenty-one flights occurred before 23 September 2003. The three landings en route from or to Baku took place in Bucharest Băneasa Airport on 24 April, 9 May and 16 June 2003, respectively. One landing, en route from Amman occurred in Constanţa Mihail Kogălniceanu Airport on 13 June 2003.

(b) The remaining seventeen flights took place between 23 September 2003 and 5 November 2005.

(c) The fifteen flights into in Bucharest Băneasa Airport took place on the following dates:

- 23 September 2003, flight N313P
- 26 October 2003, flight N379P
- 25 January 2004, flight N313P
- 27 January 2004, flight N85VM
- 12/13 April 2004, flight N85VM
- 1 August 2004, flight N288KA
- 5 December 2004, flight N478GS
- 6 December 2004, flight N478GS
- 18 February 2005, flight N787WH
- 23 July 2005, flight M308AB
- 28 July 2005, flight N308 AB
- 21 August 2005, flight N860JB
- 6 October 2005, flight N308AB
- 20 October 2004, flight N789DK
- 5 November 2005, flight N1HC

(d) The two flights into Constanţa Mihail Kogălniceanu Airport took place on the following dates:

- 1 February 2004, flight N227SV
- 25 August 2004, flight N308AB

C. Documents concerning the N313P rendition mission on 16-28 January 2004 produced by Senator Marty and Mr J.G.S. in the course of the PowerPoint presentation

328. In the course of their PowerPoint presentation (see also paragraphs 367-376 below), Senator Marty and Mr J.G.S. produced a number of documents, including flight logs for the N313P rendition circuit on 16-28 January 2004, as well as a ground handling note and air navigation sheet filed by the Romanian authorities in connection with the N313P's landing in Băneasa Bucharest City Airport on 26 January 2004.

According to the flight logs records, N313P departed from Washington on 16 January 2004 flying to Shannon, Ireland. On 17 January 2004 it left Shannon for Larnaca, Cyprus where it stayed for four days, until 21 January 2004. On the latter date, at 18:39 it took off for Rabat Morocco, arriving there at 23:48. It departed from Rabat to Kabul, Afghanistan on 22 January 2004 at 02:05, arriving there at 9:58 and then left Kabul for on the same day in the late afternoon for Alger, Algeria. After staying around one and a half hours in Alger, the plane left at 21.36 for Palma de Mallorca, Spain, landing there late in the evening. The next day, i.e. 23 January 2004 the plane left for Skopje, Macedonia, landing there at 19:51. On 24 January 2004 at 01:30 N313P departed from Skopje to Baghdad, Iraq and, after a stopover lasting some one hour, left for Kabul at 07:15. On 25 January 2004 it departed from Kabul at 18:23 and arrived at Băneasa Bucharest Airport on the same day at 23:51.

The plane stayed in Bucharest for slightly over one hour and took off from there to Palma de Mallorca on 26 January 2004 at 01:03. It stayed in Palma de Mallorca until 28 January 2004 and left for Washington at 10:08 on that day. The flight was operated by Stevens Express Leasing Inc..

329. The ground handling charge note (no. 00077/04) was issued for N313P (airline: "Business Jet Solutions") by the RAS in Băneasa-Bucharest City Airport on 26 January 2004 and included landing, lighting and navigation services fees amounting in total to EUR 2,678/3,416 US dollars (USD). It indicated the actual arrival date/time as "26.01.04 01:22" and an identical date and time as the "estimated departure date/time".

330. The air navigation sheet (no. 174) was issued by the Romanian Air Traffic Services Administration ("ROMATSA") on 26 January 2004 for N313P (airline: "Business Jet Solutions"). It included navigation services amounting to USD 631.40.

It indicated the landing time as 23:35 on 25 January and the take-off time as 00:40 on 26 January 2004.

D. The 2010 Findings of the Lithuanian *Seimas* Committee on National Security and Defence (extracts)

331. The applicant produced a copy of the Lithuanian Parliament – Seimas – document setting out the Seimas Committee on National Security and Defence ("CNSD") findings concerning the possible transportation of persons to and incarceration in the territory of the Republic of Lithuania by the CIA ("the CNSD Findings"). The document included findings made in the course of a parliamentary investigation conducted by the CNSD in connection with publicly voiced allegations concerning the CIA detention facilities in Lithuania, and those findings were endorsed by the Seimas in its resolution No. XI-459 adopted on 19 January 2010 (for further details see *Abu Zubaydah v. Lithuania,* cited above, § 174).

332. Sections relating to the CIA rendition aircraft relevant to the present case read as follows:

> "In the course of the investigation, the Committee established that three occasions of crossing of Lithuania's airspace were omitted in the mentioned reply to Dick Marty, ..., and in the data provided by the state enterprise *Oro navigacija*:
>
> ...
>
> (3) 'Boeing 737' no N787WH, landed in Vilnius on 6 October 2005;
>
> ... When comparing the submitted data with the material of the Temporary Committee of the European Parliament, it was established that:
>
> Two CIA-related aircraft landed at Vilnius International Airport:
>
> ...
>
> (2) 'Boeing 737', registration no N787WH (6 October 2005, route Antalya-Tallinn-Vilnius-Oslo. A letter of Vilnius International Airport dated 7 December 2009 states that this aircraft arrived from Tirana at 4.54 am and departed at 5.59 am. According to the documents of the SBGS [the State Border Guard Service], this aircraft arrived from Antalya and departed for Oslo).
>
> ...
>
> During the investigation, three occasions were established on which, according to the testimony of the SSD [the State Security Department] officers, they received the aircraft and escorted what was brought by them with the knowledge of the heads of the SSD:
>
> ...
>
> (2) 'Boeing 737', registration No. N787WH, which landed in Vilnius on 6 October 2005. According to the data submitted by the SBGS, its officers were prevented from inspecting the aircraft; therefore, it is impossible to establish whether any passengers were on board the aircraft. No customs inspection of the aircraft was carried out;
>
> ..."

E. Mr Hammarberg's affidavit of 17 April 2013

333. The applicant produced an affidavit made by Mr Hammarberg on 17 April 2013. That document read as follows:

Affidavit of Thomas Hammarberg

"1. I, Thomas Hammarberg, served as Council of Europe's Commissioner for Human Rights during 2006-2012. I now work on specific human rights projects for the United Nations and the European Union.

2. During my tenure as the Council of Europe's Commissioner for Human Rights, I obtained information on methods used in the efforts to respond to terrorist activities and to prevent further terrorist violence. I had to conclude that some of the governmental measures during these efforts contradicted agreed standards of human rights. I summarised my concerns in two 'Human Rights Comments', published in September 2011 ... (The two comments are submitted as Attachments A and B to this affidavit).

3. My office assembled a considerable amount of data and other information relating to CIA secret detention and extraordinary rendition in Europe through our contacts with credible confidential sources, investigative journalists, expert non-governmental organisations, and lawyers acting on behalf of prisoners. Information on flights associated with extraordinary rendition was obtained from the relevant flight control agency in Europe and could be compared with similar local airport data. I was assisted in the compiling of all of this data and information by an expert colleague, [Mr J.G.S.].

4. In the case of Romania, I became convinced that the information that we had obtained showed that the U.S. Central Intelligence Agency had kept suspects detained in a location in Bucharest for the purpose of interrogation. I raised this issue several times with Romanian diplomats asking for a serious investigation into this matter, to no avail.

5. On 30 March 2012, I delivered a dossier to the Romanian diplomatic mission in Strasbourg for the General Prosecutor in Bucharest. The purpose was to encourage the General Prosecutor to initiate such an investigation.

6. I had previously submitted information of a similar kind to the General Prosecutor in Warsaw which became part of its investigation into the CIA detention facility in Poland.

7. In the communication to the General Prosecutor in Bucharest, I had recommended that 'this important matter be subjected to judicial scrutiny, by means of opening a prosecutorial investigation, at the earliest possible juncture'.

8. Neither myself nor my successor as Human Rights Commissioner received any formal response to the dossier.

9. The dossier submitted to the General Prosecutor at a minimum contains sufficient material to justify a serious investigation into serious human rights abuses associated with CIA secret detention and rendition operations in Romania.

10. I am of course aware that confidentiality is protected by governments on aspects of methods used in countering terrorism. This should be respected when relevant but not accepted as a justification for not addressing well substantiated requests for

investigations into serious human rights violations, including torture. Such a policy will promote impunity.

11. I hereby officially submit the dossier I provided to the Romanian General Prosecutor, which was kept confidential until recently. (The dossier is submitted as Attachment C to this affidavit).

Tbilisi, 17 April 2013

Signed Thomas Hammarberg"

F. Dossier (Memorandum) of 30 March 2012 provided by Mr Hammarberg to the Romanian Prosecutor General (extracts)

334. An introductory part of the dossier (attached as Attachment C to the above-mentioned affidavit), read, in so far as relevant, as follows:

"Introduction

1. My Office has prepared the present submission pursuant to some discussions with the Permanent Representative of Romania to the Council of Europe, which followed my publication of two Human Rights Comments in September 2011. I have assumed that it is in our common interest to establish the truth and secure accountability in respect of detention and interrogation activities reported to have been earned out at a secret prison facility ('Black Site') operated by the US Central Intelligence Agency ('CIA') on the territory of Romania in the context of the 'war on terror'.

2. Within the terms of my mandate, I have attempted to assemble as much credible factual material as possible regarding the operations of the CIA Black Site in Romania Towards this end I have drawn upon original investigation and analysis undertaken by my Office during the six years of my mandate as Commissioner, as well as the work and findings of other Council of Europe bodies in the same period, notably the inquiries led by the Parliamentary Assembly and its former Rapporteur, Senator Dick Marty, as reflected in his reports published in 2006 and 2007.

3. The sources for our submission include official US Government documents describing CIA operations (many of which have been declassified as a result of litigation under the Freedom of Information Act, or emerged from other court proceedings), flight records and aeronautical data amassed from diverse entities across the global aviation sector (and especially in the countries that hosted CIA operations), and excerpts of interviews with former CIA detainees earned out by delegates of the International Committee of the Red Cross (ICRC). Reports produced by investigative journalists, notably as a result of a collaboration between the Associated Press and German public television *ARD Panorama*, have also enabled specific elements of the CIA operations in Romania to be verified and corroborated. ...

4. It is my view that sufficient evidence has now been amassed to allow us to consider the existence of a CIA Black Site in Romania as a proven fact, and to affirm that serious human rights abuses took place there. Nonetheless, it remains the role and responsibility of the Romanian authorities to establish the full circumstances of what happened, including the extent and nature of any crimes that occurred. In order to fulfil Romania's positive obligations under the European Convention on Human Rights, I believe it is now imperative that the Romanian authorities conduct a

prosecutorial investigation capable of leading to the identification and punishment of those responsible, whoever they might be. ...”

335. The dossier described “The Anatomy of detention operations at the CIA Black Site in Romania”.

The section relating the opening of the “black site” read, in so far as relevant as follows:

“6. The opening of the CIA Base codenamed ‘Bright Light’, and the start of detention operations at the CIA Black Site in Romania, was marked by a flight into Bucharest Băneasa Airport (LRBS) on the night of 22 September 2003. Flight records show that the Boeing 737 aircraft, registered with the FAA as N313P, arrived at Băneasa at 21h31m GMT that night in the course of a four-day flight ‘circuit’, during which it landed in and departed from a total of six different foreign territories, as well as the US naval installation at Guantánamo Bay, Cuba. ...

9. In particular, though, the highlighted route flown between Szymany, Poland - the airfield closest to the location of the CIA’s first European Black Site - and Bucharest, Romania was significant because it was the first time in the history of the CIA Rendition and Detention Program that the CIA engaged in its trademark practice of ‘dummy’ flight planning for its routes into and out of Romania. ...”

336. It further referred to false flight plans made for N313P for the above circuit including Băneasa Airport on 23 September 2003:

“11. False flight plans in respect of Romania - customarily filed on behalf of the CIA by its well-known aviation services contractor Jeppesen International Trip Planning (‘Jeppesen’) – consistently featured an airport of departure (ADEP) and / or an airport of destination (ADES) that the aircraft never actually intended to visit. The CIA’s deliberate trend, which it began on 22 September 2003 and continued for more than two years, was to avoid listing Bucharest (LRBS) as its express destination. If Bucharest was mentioned at all in these flight plans, then it was usually only as an alternate, or back-up airport, on a route involving Constanţa (LRCK) or Timişoara (LRTR), for example. ...

13. It is noteworthy that in the penultimate line of this plan (highlighted yellow), Jeppesen invoked a very important ‘special status’, or STS, designation that is supposed to be used only in strictly limited circumstances: ‘STS/STATE’. In filing this designation, Jeppesen claimed an official status for N313P as a diplomatic or state aircraft, only one notch below the aircraft that carry Heads of State [STS/HEAD] The flight plan therefore confirms that the mission of N313P, as well as its cover-up, was known about and authorized in the highest echelons of the US Government, as well as in the authorities of the receiving state, Romania. N313P shares this STS designation with the majority of CIA detainee transfer flights into Europe we have analysed.”

337. The dossier also listed further detainee renditions into the CIA ”black site” in Romania, with sources of evidence being explained as follows:

“Based on having unpicked the practice of ‘dummy’ flight planning and, in respect of several key landings of CIA rendition aircraft, having obtained original documentary records from agencies inside Romania, we have been able to compile a substantial, albeit non-exhaustive list of disguised rendition flights into Bucharest, all of which bore the character of ‘detainee drop-offs’. Beginning with the landing of

N313P that marked the opening of the CIA Black Site in Romania, the most significant of these flights can be summarised as follows. ...”

The list of rendition flights included:

“i. **N313P** landing at 21h31m GMT on the night of 22 September 2003, assessed to have been bringing in at least two CIA detainees from Szymany. POLAND, ‘dummy’ flight plans filed featuring Constanţa (LRCK);

ii. **N313P** landing at 23h51m GMT on the night of 25 January 2004 (assessed to have been bringing in CIA detainee(s) from Kabul. AFGHANISTAN, ‘dummy’ flight plans filed featuring Timisoara (LRTR);

iii. **N85VM** landing at 23h14m GMT on the night of 26 January 2004 (assessed to have been bringing in CIA detainee(s) from Amman. JORDAN, ‘dummy’ flight plans filed featuring Constanţa (LRCK);

iv. **N85VM** landing at 21h47m GMT on the night of 12 April 2004 (assessed to have been bringing in CIA detainee(s) from US Naval Base, GUANTÁNAMO BAY, via a technical stopover in Tenerife, ‘dummy’ flight plans filed featuring Constanţa (LRCK);

v. **N288KA** landing at 21h24m GMT on the night of 31 July 2004 (assessed to have been bringing in CIA detainee(s) from Kabul, AFGHANISTAN and from Amman, JORDAN, ‘dummy’ flight plans filed featuring an unspecified destination;

vi. **N787WH** landing at 09h45m GMT on 18 February 2005 (assessed to have been bringing in CIA detainee(s) from Rabat, MOROCCO, ‘dummy’ flight plans filed featuring Constanţa (LRCK);

vii. **N308AB** landing at circa 21h00 GMT on 26 May 2005 (assessed to have been bringing in CIA detainee(s) from Amman, JORDAN, ‘dummy flight plans filed featuring an unspecified destination);

viii. **N860JB** landing at 19h34m GMT on 21 August 2005 (assessed to have been bringing in CIA detainee(s) from Kabul. AFGHANISTAN, ‘dummy’ flight plans filed featuring Constanţa (LRCK).”

338. The life-cycle of the CIA ”black site” in Romania was described as follows:

“15. Our investigations into the CIA’s Black Sites in Europe have enabled us to understand the underlying transience of the CIA’s individual detention facilities. Simply put, we have found that each CIA Black Site had a unique individual life-cycle.

16. The timing of operations on each host territory of a CIA Black Site was highly sensitive and sometimes resulted from abrupt changes in conditions. Factors influencing not only the choice of location for a Black Site, but also the length of its life-cycle, included the CIA’s relationships with foreign liaison services/operational partners in the respective host territories, and the CIA’s determination to evade detection or exposure of any aspect of its RDI Program.

17. Such was the cyclical nature of the CIA’s Program, the mantle of most significant venue for detention and interrogation operations shifted from one host territory to another in periods measured by months. Thailand hosted ‘Black Site No 1’ near Bangkok and was the sole ‘Customized HVD Facility’ for just under nine months (27 March to 4 December 2002). Poland, host of ‘Black Site No 2’ at Stare Kiejkuty,

followed immediately and remained in operation for just under ten months (5 December 2002 until 22 September 2003).

18. Such was the expansion of the CIA's HVD Program in the course of 2003, it is not possible to say thereafter that one single site remained predominant for the entirety of its existence However, for a period of at least one year, beginning with its opening on 22 September 2003, the mantle of most significant site passed to Romania, which hosted 'Black Site No. 3' in Bucharest.

19. Information otherwise gathered regarding the life-cycle of the CIA Black Site in Romania includes the following:

The CoE Marty Inquiry found that *'Romania was developed into a site to which more detainees were transferred only as the HVD Program expanded', and that 'the Romanian Black Site was incorporated into the Program in 2003, attained its greatest significance in 2004. and operated [at least] until the second half of 2005.'*

The Associated Press has reported that *'The Romanian and Lithuanian sites were eventually closed in the first half of 2006 before CIA Director Porter Goss left the job. Some of the detainees were taken to Kabul, where the CIA could legally hold them before they were sent to Guantánamo. Others were sent back to their native countries. All the prisons were closed by May 2006, and the CIA's detention and interrogation program ended m 2009';* and

ABC News reported on December 5, 2005 that *'two CIA secret prisons operat[ed] in Eastern Europe until [November 2005]' - presumed to have been in Romania and one* other country - *and that 'the United States scrambled to get all the [detained al-Qaeda] suspects off European soil before Secretary of State Condoleezza Rice arrived there today."*

339. The description of the operating conditions for the CIA "black site" in Romania and of its physical location, capacity and layout read, in so far as relevant, as follows:

"20. As a result of the aforementioned AP/ARD collaboration, the exact whereabouts, capacity and layout of the CIA Black Site in Romania have been established for the first time. The prison facility was operated in an underground basement that forms part of the building complex housing the National Registry Office for Classified Information (ORNISS), at No 4 Strada Mures, Sector 1, Bucharest.

21. It is significant that the facility was found to have been located in the northern part of downtown Bucharest, as this accords with the CIA methodology of maintaining only a short drive between the rendition airfield, Băneasa Airport, and the detention site."

340. Operating agreements and authorisations on the part of the Romanian authorities were related, in so far as relevant, as follows:

"23. Recent reporting appears to offer more information than was previously known about the proprietary character of the building(s) in which the CIA Black Site in Romania was housed, and the means by which the premises was appropriated and renovated. There is a precedent in this regard the equivalent CIA Black Site in Poland was a constituent part of an existing state facility that was 'loaned' to the CIA – situated inside the Polish military intelligence base at Stare Kiejkuty.

24. In the case of Romania, the creation and operation of the National Registry Office for Classified information (ORNISS), as a result of Romanian Government Emergency Ordinance No 153 of 7 November 2002, coincided with an important development in the operations of the CIA Rendition, Detention and Interrogation Program, as follows:

• *The New York Times has reported that Kyle 'Dusty' Foggo, the then serving Chief of CIA Logistics in Europe (stationed in Frankfurt), agreed in March 2003 to an assignment to 'oversee construction' of CIA Black Sites in Romania and two other locations.*

25. It is clear that there exists a set of official documents according to which the basis for the CIA's operation of a secret detention facility on Romanian territory was agreed, and its operational permissions and protections were authorised. The Council of Europe's understanding on this issue was contained in the Marty Report of 2007 in the following terms:

• *'that the most important documents at issue have the character of 'bilaterals', derived from the application of the wider NATO framework to US-Romanian counterterrorism cooperation m the course of the 'war on terror'*."

341. Section relating to treatment of detainees held in Romania reads, in so far as relevant:

"33. Notwithstanding the individual interrogation regimes designed specifically for individual detainees, the CIA reported to the US Department of Justice in 2005 that a set of six Standard Conditions of CIA Detention were being applied routinely to detainees held in the CIA's detention facilities – including at the CIA Black Site in Romania. These conditions included forms of treatment that might in themselves have ramifications for compliance with the ECHR, including the use of blindfolding or hooding, forced shaving of hair, indefinite periods of incommunicado solitary confinement, continuous white noise, continuous illumination using powerful light bulbs, and continuous use of leg shackles (in some instances for 24 hours a day)."

342. According to the dossier HVDs were brought to Romania either to be interrogated using EITs or after a prior interrogation at other "black sites". The first category of the HVDs included Janat Gul and Mustafah Faraj Al-Azibi (Abu Faraj Al-Libi). The second included Khalid Sheikh Mohammed, Walid Bin Attash (aka "Khallad"), Ramzi Binalshibh and Abd Al Rahim Al-Nashiri. It was added that the list of detainees included in the dossier was not exhaustive and that, according to some reports, there had been between two and four further detainees held in Romania at various junctures between 2003 and 2006. The section concerning the applicant read as follows:

"**Abd al-Rahim Al-Nashiri**

•Arrested: October 2002 Dubai, UAE

•Previously held: Dubai, Afghanistan, Thailand, Poland, Morocco, Guantánamo Bay

•Subjected in Poland to several 'unauthorised techniques', including incidents described by the CIA Inspector General as the 'most significant abuses' in the CIA Program

Transferred to CIA Black Site in ROMANIA 12 April 2004 N85VM flight Guantánamo Bay (MUGM) – Bucharest (LRBS)

•Debriefing subsided considerably beyond February 2004 and is not known to have been subjected to EITs in Romania."

G. Mr Hammarberg's replies to questions put to him in writing by the Court and the parties

343. The Court decided to hear evidence from Mr Hammarberg at the fact-finding hearing. However, since Mr Hammarberg was not available on the hearing date, the Court and the parties addressed questions to him in writing. Mr Hammarberg's written replies were received at the Court's Registry on 9 June 2016.

1. The Court's questions

344. The Court's questions started form the following introduction:

"In your

(a) 'Human Rights Comments - Europeans must account for their complicity in CIA secret detention and torture', published on 5 September 2011;

(b) Memorandum, entitled 'Advancing accountability in respect of the CIA Black Site in Romania' ('the Memorandum') of 30 March 2012; and

(c) affidavit ('the Affidavit') of 17 April 2013, produced by Mr Al Nashiri,

you refer, among other things, to Romania's complicity in CIA secret detention, the operation of the CIA detention facility in Bucharest from 22 September 2003 to an unspecified date in the second half of 2005, presumably November 2005 and Mr Al Nashiri's rendition to Romania on 12 April 2004."

Question 1:

"On the basis of evidence known to you and, in particular, collected in 2006-2012, i.e. during your term as the Council of Europe's Commissioner for Human Rights, can it be said that at the material time (22 September 2003- unspecified date in the second half of 2005, presumably November 2005) Romania knew, or ought to have known of the operation of the CIA rendition programme on its territory and was aware of the existence of the CIA detention facility in Bucharest, designed for interrogation of terrorist-suspects in CIA custody?"

Answer:

"As I stated in my Memorandum of 30 March 2012, it was my view in 2012 that sufficient evidence had been amassed to allow me to consider the existence of a CIA Black Site in Romania as a proven fact, and to affirm that serious human rights abuses took place there (§ 4 of the Memorandum). These operations were, of course, conducted under extreme secrecy. In the case of Poland and Lithuania, it has been established that only a very few high level decision makers were at all informed and had given their confidential consent to the establishment of the interrogation centres. The operation of the centres was totally in hands of CIA officials. It is likely that the situation in Romania was similar.

The point I sought to make, at the time of transmitting the Memorandum to the Romanian Prosecutor, was that there was enough prima facie evidence to make it necessary to start a thorough investigation. My aim was to demonstrate the compelling need for a judicial investigation and to assist such procedure through sharing our information."

345. Question 2:

"In the Memorandum you stated that Mr Al Nashiri was transferred to the 'black site' in Romania on 12 April 2004 on the CIA rendition plane N85VM.

On what kind of evidence was that finding based and how was it possible to establish that this particular individual was transferred to Romania on this specific date?"

Answer:

"The assertion that Mr Al Nashiri was transferred to the 'Black Site' in Romania on 12 April 2004 on the CIA rendition plane N85VM was made as a result of original investigation work and analysis which was carried out by Mr. J.G.S, an adviser in my Office from 2010 – 2012 (see the case of *Al-Nashiri v Poland*, application no. 28761/11, 24 July, § 324). The assertion was based on a number of different sources which were cross-referenced and not one piece of evidence in isolation. These sources included: official US Government documents describing CIA operations; flight records and aeronautical data amassed from diverse entities across the global aviation sector (current and former employees of national civil aviation authorities, airports, pilots, private charter companies, US government contractors and sub-contractors, and international organisations such as Eurocontrol); and excerpts of interviews with former CIA detainees carried out by delegates of the International Committee of the Red Cross. Media reports produced by investigative journalists, in particular by the Associated Press and German public television, ARD Panorama, have also enabled specific elements of the CIA's operations in Romania to be verified and corroborated. The work and findings of other Council of Europe bodies in the same period, notably the inquiries led by the Parliamentary Assembly and its former Rapporteur, Senator Dick Marty, as reflected in his reports published in 2006 and 2007 also informed my work, as well as original documentary records from agencies inside Romania which assisted enabled me to compile a substantial list of disguised rendition flights into Bucharest.

From the combination of these sources, we managed to draw the conclusion that the CIA opened an interrogation centre in Bucharest in September 2003 and that Mr. Al Nashiri was transferred there on 12 April 2004."

346. Question 3:

"Why was no date, even approximate, of Mr Al Nashiri's transfer from Romania, indicated in the Memorandum?"

Answer:

"The reason why no date, even approximate of Mr Al Nashiri's transfer from Romania was indicated in the Memorandum was that our research did not manage to establish the precise dates for the closure of the centre in Bucharest nor for Mr. Al Nashiri's departure from there."

347. Question 4:

" In the Affidavit (§§ 4-5) you mentioned that – on several occasions but to no avail – you had raised with the Romanian diplomats the issue of the CIA black sites in Romania and you had informed them that materials in your possession had showed that the CIA had kept suspects detained in a location in Bucharest for the purpose of interrogation.

Could you specify, at least approximate, dates on which you raised that issue before delivering your dossier to the Romanian diplomatic mission and what was the authorities' response?"

Answer:

"I raised the issues reflected in the Memorandum in meetings with the Romanian Ambassador (Permanent Representative) to the Council of Europe on 5 September 2011, 30 January 2012 and 29 March 2012. These were confidential meetings held between myself as Commissioner for Human Rights and the Ambassador, as representative of the Romanian authorities. I do not feel in a position to disclose the precise contents of those discussions, save to underline that during the meeting on 29 March 2012, I handed over my Memorandum, which was addressed to the Prosecutor General in Bucharest. The Memorandum was then published a number of months later on 18 December 2012."

348. Question 5:

"In the Affidavit (§§ 7-9) you mentioned that you had received no 'formal response' to the dossier that you had prepared for the Romanian Prosecutor General.

Did you receive any other response, even informal? Did you have an opportunity to discuss the question of instituting an investigation with the Romanian authorities at any further stage? If so, how did the authorities react to the information of the CIA 'black sites' on their territory which they had received from you?"

Answer:

"I received no response from the Romanian authorities, not even an informal one."

2. The Romanian Government's questions

349. Question 1:

"Having regard to the fact that the change of flight plans after being submitted represents a unilateral action of the flight operator and to the fact that the route changes are reflected in the documents issued by the Romanian authorities, which is the evidence that led to the conclusion that a simple change of flight plans (allowed by the relevant domestic and international regulations such as the IFPS Users Manual) represented a cover-up with the complicity of the Romanian authorities?"

Question 2:

"Having regard to the IFPS Users Manual provisions concerning the STS/STATE indicator, which were the domestic or international legislation or the relevant elements of fact that led to the conclusion that the flights with the STS/STATE indicator analysed in the Memorandum that landed on Romanian territory benefited from certain privileges and which were these privileges?"

Answers to questions 1 and 2:

"The changing of flight routes was systematic with the obvious purpose of protecting the secrecy of the operations. In our investigation work we were able to unpick the practice of such 'dummy' flight planning. In respect of several key landings of the CIA rendition aircraft we did obtain original documentary records from agencies inside Romania. We were also able to compile a substantial, albeit non-exhaustive list of disguised rendition flights into Bucharest, all of which bore the character of 'detainee drop-offs'.

Though the operations were conducted under extreme secrecy, it is obvious that the CIA plane could not land with its cargo and depart without agreement from high-level Romanian decision makers. This is further underlined by the fact that the flights had been given the very important 'special status' - STS/STATE - a designation that is supposed to be used only in strictly limited circumstances: in attributing this designation, the CIA company claimed an official status for the plane, N313P, as a diplomatic or state aircraft, only one notch below the aircraft that carries Heads of State [STS/HEAD]."

350. Question 3:

"Having regard to the fact that the Memorandum quotes the 2007 Marty report as a reliable source for many of its conclusions, which were the reasons that determined the author to dismiss Senator's Marty supposition that a secret detention site was located in the area of the Mihail Kogălniceanu Airport (§§ 222-226 of the 2007 Marty Report)? What led the author of the 2012 Memorandum to conclude that the information provided by Senator's Marty sources on this subject is less believable than the information provided on other aspects cited in the Memorandum?"

Question 4:

"Having regard to the fact that certain reports put forward several dates as the possible date of entry of the applicant on Romanian territory, which are the elements that justify the Memorandum's conclusion that the applicant entered Romania on the 12th of April 2004?"

Answers to questions 3 and 4:

"The reports from 2006 and 2007 by Senator Dick Marty to the Parliamentary Assembly of the Council of Europe provided important background information to the Office of Commissioner for Human Rights as well as non-governmental human rights organizations and serious investigative media outfits to put together further information on this issue.

However, the Commissioner's Office used multiple sources in its research. I refer back to my answer to Question 2 in response to the Court's questions."

3. The applicant's questions

351. Question 1:

"Would Mr. Hammarberg like to supply further information relating to Romania's participation in the CIA's secret detention and extraordinary rendition programme, including its hosting of a secret CIA prison where the applicant was secretly detained?"

Answer:

"One aspect which should be mentioned is that the CIA rendition and interrogation programme was conducted behind a wall of extreme secrecy. Even after the closure of the programme it has been very difficult to establish facts about these activities. It is no secret that US authorities have taken extraordinary steps to prevent basic facts to be known, even in relation to judicial actors in other countries."

352. Question 2:

"Given that the European Court of Human Rights has now made findings of fact that multiple European countries participated in a secret CIA rendition programme, does that have an impact on his assessment of the evidence and his conclusion that Romania was also a participant in that programme?"

Answer:

"2. It is true that it is now established that multiple European countries participated in the secret CIA rendition program. Knowledge about the political relationship at the time between Washington and Bucharest may make it seem more likely that Romania was one of these countries. However, that in itself does not prove that that was the case. It does, however, underline the importance of an effective, independent investigation of evidence about such Romanian participation."

353. Question 3:

"Would Mr. Hammarberg like to supply further information relating to Romania's failure to conduct an effective investigation into its role in the CIA's secret detention and extraordinary rendition programme?"

Answer:

"The human rights violations committed during the CIA rendition and interrogation activities at the time included illegal, secret detention and torture. Data presented by various sources, some of them mentioned in my Memorandum, indicate that an interrogation centre was indeed established in Bucharest. An official policy of total denial and non-response to the quest for a serious investigation appears contrary to the very spirit of internationally agreed human rights. The implied message might be understood as basic human rights – including the avoidance of impunity – is less important that than good cooperation between security agencies."

H. Senator Marty's affidavit of 24 April 2013

354. The applicant produced an affidavit made by Senator Marty and dated 24 April 2013. That document read as follows:

"Affidavit of Dr. Dick F. MARTY

1. I, Dick MARTY, served as a Senator in the Council of States of Switzerland for 16 years, from 1995 until 2011. For 14 of those years, I represented Switzerland as a delegate to the Parliamentary Assembly of the Council of Europe ('PACE'). I held several leadership positions during my political career, including in Switzerland as Chairman of the Senate Foreign Affairs Committee, and in Strasbourg as Chairman of the PACE Committee on Legal Affairs & Human Rights and of the PACE Monitoring Committee.

2. Between 2005 and 2007 1 was the PACE Rapporteur on ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states’. In this capacity, prepared two reports, both of which were adopted with resounding majorities in PACE Plenary Sessions: ‘Alleged secret detentions and unlawful interstate transfers of detainees involving Council of Europe member states’, dated 12 June 2006 (the ‘2006 PACE Report’); and ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, dated 7 June 2007 (the ‘2007 PACE Report’).

These two reports focused on the secret detention and rendition operations carried out by the United States Central Intelligence Agency (‘CIA’) in its ‘war on terror’ and the extent to which European states were complicit in the resultant abuses of human rights.

3. In compiling my 2006 and 2007 PACE Reports, 1 spent considerable time investigating the existence of a CIA secret prison, or ‘Black Site’, on the territory of Romania. My findings in each Report were carefully considered and contained the factual elements that were supported by the information available to mc at the relevant time.

4. In my 2006 PACE Report, I included Romania (represented, notably, by a landing point at Băneasa Airport in Bucharest) as a key component of the ‘global spider’s web’ of secret detentions and renditions, having found it to be ‘thus far the only Council of Europe member State to be located on one of the rendition circuits... and which bears all the characteristics of a detainee transferor drop-off point’.

5. In my 2007 PACE Report, after several further months of inquiry including fieldwork in the countries concerned, I was able to present much more detailed and categorical findings regarding the operations of the CIA’s High-Value Detainee (‘HVD’) Programme in Europe. I concluded that there was, by that stage, ‘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’.

6. In a section of my 2007 PACE Report entitled ‘Secret detention operations in Romania’, I described at some length the means by which Romanian and American officials at various levels had colluded on the operations of the CIA ‘Black Site’. I also identified and named five senior office-holders in successive Romanian Governments who ‘knew about, authorised and stand accountable for Romania’s role’ and in doing so had ‘short-circuited the classic mechanisms of democratic accountability’.

7. By the end of my mandate as PACE Rapporteur on the subject, in 2007, my convictions regarding Romania’s participation in the CIA’s HVD Programme were unambiguous and unwavering. My key findings were stated in the strongest terms possible, supported by the most comprehensive information available to me at the time. Based on my 2007 Report, the PACE Committee on Legal Affairs & Human Rights considered it ‘factually established’ that Romania was one of the European countries that had hosted a CIA secret prison. The caveat I had previously inserted in my 2006 PACE Report, when I had surmised that there was ‘[a]t this stage [in June 2006] ... no formal evidence, was rendered redundant by June 2007’. There is no such caveat in my 2007 PACE Report.

8. Up to the present day, I stand by every one of the factual findings I delivered in my 2006 and 2007 PACE Reports. Indeed my certitude that a CIA ‘Black Site’ existed in Romania has only increased since that time. Subsequent international investigations – notably by investigative journalists – into various aspects of the

CIA's HVD Programme have independently vindicated the conclusions of my PACE Reports, and / or have developed certain lines of inquiry regarding Romania even further than I was able to. My belief in the 'dynamics of truth' has remained firm.

9. I am duly informed about the Application in the case of *Al-Nashiri v. Romania*, filed on 12 August 2012 and currently pending before this Court. I am familiar with the applicant's claims and with much of the evidentiary material on which he relies.

10. In addition I have read carefully the Romanian Government's Written Observations ('Romanian Government Response', or 'RGR') in response to the Application, filed on 11 December 2012 and made available to me by the Applicant's legal representatives.

11. I note that the Romanian Government has chosen to attack the veracity, credibility and consistency of my PACE Reports at numerous points in its Written Observations. This strategy is disappointing, albeit unsurprising to me. In fact, it is entirely typical of the 'responsive and defensive posturing... stop[ping] short of genuine inquisitiveness', which I highlighted in my 2007 PACE Report as one of my 'three principal concerns' with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania, and towards my inquiry in particular.

12. I regret that the Romanian authorities continue to prefer attacking me than addressing their own wilful failure to carry out a full and thorough judicial investigation. In any case, the Romanian authorities' attacks on my PACE Reports are misguided, as I shall demonstrate point–by–point in the paragraphs that follow.

13. First, the Romanian Government repeatedly asserts, wrongly, that I based my PACE Reports on 'newspaper articles' or on 'feeble indications'. On the contrary, my 2006 and 2007 PACE Reports were the products of one of the most intensive and far-reaching inquiries I have ever led - including in my 20-year career as a state prosecutor.

14. My inquiry team gathered and analysed information in a manner more analogous to law enforcement investigation or, as I wrote in my 2007 PACE Report, 'real "intelligence" work' – notwithstanding our modest means. The information we compiled was, with hindsight, more voluminous and more compelling in character than even that which serious Prosecutors, at national level, had been able to assemble. It bears mentioning that several such Prosecutors, in different countries, have gone on to regard our information as evidence, and to tender it as such in judicial proceedings.

15. A key strand of our information came from testimonial sources whom we identified, screened, located, approached and built relationships with during our in-country missions across Europe and in the United States. We made field visits to capital cities, to the vicinities of suspected detention sites and to repositories of official information; we met representatives of both political and intelligence structures and developed them as our sources, often working patiently over a period of months to hold multiple conversations of incrementally increasing value. We ultimately spoke with, and in many cases interviewed, 'over 30 one-time members (serving, retired or having carried out contract work) of intelligence services', the majority of whom were from the US, Poland or Romania.

16. With regard to the basis for my findings on Romania, I ensured in my 2007 PACE Report that I was as specific and explicit as possible about the nature of my sources: 'During several months of investigations, our team has held discussions with numerous Romanian sources, including civilian and military intelligence operatives,

representatives of state and municipal authorities, and high-ranking officials who hold first-hand knowledge of CIA operations on the territory of Romania.

17. I hereby affirm that our sources in Romania included persons who knew about the means by which the CIA HVD Programme was authorised and executed in their country precisely because they had a 'need-to-know', in accordance with the CIA's strict secrecy and compartmentalisation policies. What the Romanian Government seeks to dismiss as a 'contradiction' is actually an inconvenient truth: I received confirmation of Romania's role from the same persons who belonged to the 'very small circle of trust' inside the responsible Romanian authorities.

18. I further note that the Romanian Government has attempted to impugn my integrity by characterising my methodology as subjective and even 'pretended', and by attacking my conclusions, variously, as 'erroneous'', 'unsubstantiated' and containing 'a lot of contradictions'. In my defence, I need only restate my professional credentials and reiterate that the methodology I employed was as rigorous as any I am aware of under an inquiry mechanism of this nature. In the introduction to my 2007 PACE Report, I explained in detail my policies on corroboration, as well as the strictly limited basis on which I was able to guarantee confidentiality to certain sources. I might only reflect, again with regret, that these parameters were 'imposed upon us because of the lack of collaboration from the states concerned'.

19. Finally the Romanian Government seeks to attribute to my PACE Reports certain assertions on disputed points of fact that I never made. The first such instance regards the physical location of the CIA 'Black Site' in Romania, for which the Romanian Government states that 'the alleged sources changed their assumptions each time it was established that no secret detention facility ever existed in the indicated place. For my part, I explained in 2007 that I was not prepared to pronounce categorically on the precise location of the CIA 'Black Site' in Romania because I believed that 'to name a location explicitly would go beyond what it is possible to confirm from the Romanian side'.

20. The second instance is where the Romanian Government states that 'according to the 2007 Marty's Report, the applicant was delivered to detention in Romania on 22 September 2003, on board the aircraft N313P. This is plainly a misattribution; in my 2007 PACE Report, I stated that I was unable to place any particular detainee onto a given CIA rendition flight into Romania, on the basis that '[t]here presently exists no truthful account of detainee transfer flights into Romania, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out.

21. Thus, notwithstanding the strength of the information on which I relied, I maintain that in several areas of my Reports I understated my findings and – notably with regard to which detainees were held in Romania between which dates, and on which rendition flights they were transported – I stopped short of conclusions that could have been even more grave for Romania in the context of the present proceedings.

22. The reason for my restraint was my overriding concern for objectivity, which meant that every item of information in my PACE Reports had to be verified, validated and corroborated, not least in light of the potential legal ramifications. In short I was guided, as I am today, by a deep-rooted personal commitment to the values the Council of Europe has always worked to uphold.

I declare that the information I provide herein is true to the best of my knowledge and belief.

Signature: Dr Dick F. Marty Date: 24 April 2013"

I. The 2015 LIBE Briefing

355. The 2015 LIBE Briefing of 15 September 2015, prepared by Mr Crofton Black was produced by the Bureau of Investigative Journalism and the Rendition Project ("the TBIJ/TRP") for the EU Parliament LIBE Committee Delegation to Romania (see paragraph 288 above), in connection with their continuing inquiry into the alleged transportation and illegal detention of prisoners in Europe committed by the CIA (see also paragraphs 268-290 above).

The document described correlations between the 2014 US Senate Committee Report and other public data sources and consisted of two parts: a summary of flights with links to the rendition programme through Romania and a summary of data in that report which could be related to Romania. It stated that the 2014 US Senate Committee Report confirmed previous accounts of the CIA secret detention in Romania and the existing public source data on transfer dates of prisoners into and out of Romania, named some HVDs held in Romania and described torture inflicted on some prisoners held in Romania. In its appendices it contained recorded flight plan data for each trip of rendition flights concerned and main contracting documents relating to rendition missions executed by air companies for the CIA.

356. The 2015 LIBE Briefing stated that it was established beyond reasonable doubt that:

(a) a facility in Romania had been used by the CIA to hold prisoners;

(b) prisoners had been first transferred to this facility in September 2003;

(c) prisoners had last been transferred out of this facility in November 2005;

(d) other transfers of CIA prisoners between Romania and other countries had occurred between these dates;

(e) the 2014 US Senate Committee Report named five prisoners held in Romania. Several others had been named in other reporting.

(f) some transfers were carried out by planes operated by Aero Contractors/Stevens Express, two shell companies with strong links to the rendition programme (see also paragraphs 69-70 above);

(g) other transfers were carried out by a network of aviation companies working alongside prime contractor Computer Sciences Corporation, operating through a linked group of contracts;

(h) while in Romania, some prisoners had been tortured.

357. As regards the flights operated by Aero Contractors/Stevens Express, according to the 2015 LIBE Briefing two aircraft registered as N379P and N313P were active in the rendition programme between 2001 and 2004. Investigations by journalists, lawyers, NGOs and international bodies linked them to at least fifteen rendition missions. Three missions by these two aircraft related to prisoner transfers through Romania. The flights took place, respectively, on 22-23 September 2003, 25-26 October 2003 and 25 January 2004.

The relevant passages from the 2015 LIBE Briefing read:

> "On 22-23 September 2003, N313P flew from Afghanistan to Poland, Romania, Morocco and Guantánamo Bay. Authoritative sources summarized in the European Court of Human Rights' judgement in *Husayn (Abu Zubaydah) v. Poland* show that this was a rendition mission. Media reporting has suggested that, at various points, this mission transported Mustafa al-Hawsawi, Walid bin Attash, Abu Zubaydah, Abd al-Rahim al-Nashiri, Ramzi bin al-Shibh and Khaled Sheikh Mohamed. Research by TBIJ/TRP indicates that it also carried Samr al-Barq and possibly others. Of these, research indicates that Walid bin Attash, Khaled Sheikh Mohamed and Samr al-Barq were moved from Poland to Romania on this date.
>
> On 25-26 October 2003, N379P flew from Romania to Jordan, Afghanistan and Iraq. As part of this mission, Mohamed Bashmilah was transferred from Jordan to Afghanistan. Research by TBIJ/TRP indicates that this flight also coincides with the transfer from Romania to Jordan of Samr al-Barq, and that after Bashmilah was brought into Afghanistan the plane took Hiwa Abdul Rahman Rashul and Aso Hawleri to Iraq.
>
> On 25 January 2004, N313P flew from Afghanistan to Romania in the course of a long mission that also took it to Morocco, Algeria, Macedonia and Iraq. Research by TBIJ/TRP indicates that Hassan Ghul was transferred from Afghanistan to Romania on this flight. NGO reports and legal filings show that as part of the same mission Binyam Mohamed was transferred from Morocco to Kabul (22 January), Khaled el-Masri from Skopje to Kabul (24 January) and Khaled al-Maqtari from Baghdad to Kabul (24 January). Research by TBIJ/TRP also shows that this mission coincided with the rendition of Jamal Eldin Boudraa from Afghanistan to Algeria (22 January)."

358. As regards flights operated by Computer Sciences Corporation, according to the 2015 LIBE Briefing between 2002 and 2006 they carried out rendition flights via an interlinked series of contracts. That network was revealed in the *Richmor Aviation v. Sportsflight Air* case, during which both parties discussed, in written pleadings and sworn testimony, the use of flights operated under this group of contracts to transport prisoners (see also paragraphs 67-70 above).

Research by TBIJ/TRP identified twelve key missions carried out in 2004 and 2005 by planes connected to this contracting network, linking Romania to other CIA prison host countries and/or known or suspected prisoner transfers. In the light of that research, contractual documentation showed decisively that most of these twelve missions took place under Computer Sciences Corporation's renditions contract. The list of the trips, in so far as relevant, read as follows:

"[D] Between 25 and 28 January 2004, N85VM flew from Saudi Arabia to Jordan and on to Romania. Research by TBIJ/TRP shows that this mission coincides closely to the entry into the detention programme of Muhammad Qurban Sayyid Ibrahim, and more approximately to that of Saud Memon.

[E] On 12-13 April 2004, N85VM flew from Guantánamo Bay to Romania and Morocco.

[F] On 29 July-1 August 2004, N288KA flew from Afghanistan to Jordan and Romania. Research by TBIJ/TRP indicates that Janat Gul was transferred on this flight.

[G] On 24 August 2004, N308AB flew from Romania to Morocco. After pausing in Dubai it then went from Afghanistan to Algeria on 26 August. In the second stage of the mission it transferred prisoner Laid Saidi to Algeria. No clear evidence exists as to who might have been transferred from Romania to Morocco at this time, although research by TBIJ/TRP indicates that this flight might coincide with the removal of Sayed Habib from CIA detention.

[H] On 1 October 2004, N227SV flew from Morocco to Jordan and Romania.

[I] On 18-20 October 2004, N789DK flew from Romania to Jordan and Afghanistan.

[J] On 18 February 2005, N787WH flew from Morocco to Romania and Lithuania. This coincided with another mission from Morocco to Jordan and Lithuania by N724CL. Lawyers for Abu Zubaydah have stated in his application to the European Court of Human Rights that he was transported on one of these two planes from Morocco to Lithuania.

[K] On 26 May 2005 two planes, N450DR and N308AB, carried out a joint mission between a) Afghanistan and Jordan and b) Tunisia, Jordan and Romania. Research by TBIJ/TRP indicates that these planes were used to transport Abu Faraj al-Libi and Abu Munthiral-Maghrebi from Afghanistan and Tunisia, respectively, to Romania.

[L] On 27 July 2005, N308AB flew from Romania to Egypt.

[M] On 21 August 2005, N860JB flew from Afghanistan to Romania.

[N] On 5-6 October 2005 two planes, N308AB and N787VWH, flew from a) Romania to Albania and b) Albania to Lithuania. Research by TBIJ/TRP indicates that Khaled Sheikh Mohamed was transferred from Romania to Lithuania on these planes.

[O] On 5-6 November 2005, two planes, NIHC and N248AB, flew from a) Romania to Jordan and b) Jordan to Afghanistan."

XII. EXTRACTS FROM TESTIMONY OF EXPERTS HEARD BY THE COURT

359. On 28 June 2016 the Court took evidence from Mr Fava, Senator Marty, Mr J.G.S and Mr Black (see also paragraphs 12 and 18 above). The extracts from their testimony as reproduced below have been taken from the verbatim record of the fact-finding hearing. They are presented in the order in which evidence was taken.

A. Mr Fava

360. In 2006 and 2007 Mr Fava was the Rapporteur of the TDIP in the framework of the inquiry initiated by the European Parliament into the allegations concerning the existence of CIA secret detention facilities in Europe. In this connection, he prepared the Report of the TDIP, the so-called "Fava Report", on whose basis the European Parliament adopted the Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/22009INI) ("the 2007 EP Resolution") on 14 February 2007 (see paragraphs 276-278 below).

On 2 December 2013 Mr Fava testified before the Court at the fact-finding hearing held in *Al Nashiri v. Poland* (cited above, §§ 305-310).

Mr Fava responded to a number of questions from the Court and the parties.

361. He first replied to the judges' questions concerning records of the informal transatlantic meeting of the European Union and the North Atlantic Treaty Organisation foreign ministers, including Condoleezza Rice, of 7 December 2005, referred to in paragraph "L" of the 2007 EP Resolution (see paragraph 278 above) and "confirming that Member States had knowledge of the programme of extraordinary rendition". This document was also described in *Al Nashiri v. Poland* as a "debriefing" and so referred to in the judgment (ibid., § 306). In his reply he stated, among other things, as follows.

> "I do not remember the debriefing in detail, but I remember the subject matter of the [transatlantic] meeting, namely, the need for the US Secretary of State, Condoleezza Rice, to discuss with the ministers of all the EU Member States the issue of renditions, and to somehow share with each government the choices made by the US Government, which they had entrusted to their services, and in particular to the CIA, for operational reasons.
>
> I do not remember the statements in detail, but two things emerged from the debriefing: firstly, at that stage, all the governments knew that this operational means had been chosen by the CIA and that the extraordinary renditions were a tool in the war against terrorism. The second point that emerged was a difference in views of the various governments: those that felt that they should support the policy of the US Government and the choice of extraordinary renditions, and then others that felt that the matter of protecting human rights and providing all necessary legal guarantees to terrorist suspects should continue to prevail, namely in accordance with the international treaties.
>
> We never had doubts, both for the precision of the notes, and because, in our opinion, this affair had further confirmation in the course of our work. When, in the framework of our activity, we went on mission to Washington, we met Ms Rice's legal advisor, Mr Bellinger, and Mr Bellinger said *'we never violated the sovereignty of any EU Member States or indeed any other associated States or any States in the process of accession to the EU'*, – because everything that was done, which President Bush had somehow claimed in those months, in September 2006, and Bush's confirmation of the extraordinary renditions –, '*everything that we did was done by always informing and asking for the cooperation, and never trying to prevail over the*

will of the governments of the Member States'. So, the circumstance that there was a broad knowledge about it, was confirmed by the way in which the US Government told us '*we had always acted in broad daylight, so to speak, not in relation to public opinion, but in relation to the EU Member States'*."

362. The next question from the judges concerned paragraph 162 of the Fava Report and the 2007 EP Resolution where "a serious concern" had been expressed about 21 stopovers made by the CIA operated aircraft shown to have been used by the CIA on other occasions for extraordinary renditions of several specific persons" and, also, Working documents nos. 8 and 9 attached to the Fava Report (see paragraphs 271-277 and 279 above), listing flights from or to suspicious locations such as for example Kabul, Guantánamo and Amman that stopped over in Romania in 2003-2005.

In that context, they asked Mr Fava "whether, having regard to the Fava Report's and the 2007 EP Resolution's conclusions as to the member States' knowledge of the rendition programme and evidence known to [him] through the Fava Inquiry, [could] it be said that Romania knew, or ought to have known, of the CIA rendition programme and its nature when it allegedly operated on its territory, that is to say already in 2003-2003" and "if so, was this knowledge such as to enable Romania to be aware of the purposes of the 21 CIA aircraft stopovers on its territory?

Mr Fava responded as follows:

"In the course of our investigations, we did not reach certainty, but we felt, within reasonable doubt, that the Romanian authorities were aware of the fact that there were unauthorised detention centres and that five Romanian airports were used for the transit of planes which were also transporting detainees. In particular, there was a statement by Pascu, the former Minister of Defence, who said shortly before our mission to Romania, that the Romanian authorities, as far as he knew in his position of Minister of Defence, did not have access to certain sites, which were under the control of the Army or the United States intelligence security forces in Romania. Subsequently, when we asked him to account for and if it was possible to go into more depth relating to that statement, the former Minister decided to partly deny it and said he had been misunderstood. The impression we had was that he had actually told the truth, also because Romania chose to undertake a rather superficial investigation of the accusations received.

These were very detailed accusations because, before the European Parliament Inquiry Committee had started its work, *The Washington Post* and *ABC News* had produced quite detailed reports where they talked about the existence of detention sites in certain European countries; in certain cases Poland and Romania were actually named. Brian Ross, the *ABC* journalist, during an audition in Washington, confirmed having received enormous pressure directly from the White House to remove the names of the countries from their programme and that the TV programme should only say 'there are unauthorised detention sites'. But for national security reasons it was requested not to cite explicitly Poland and Romania, and that was the choice made by the TV network. In Romania, we realised that, when confronted with these facts, the attitude of the Committee of Inquiry, set up by the Senate, was acting opaquely, not least because only one chapter of all the conclusions, chapter 7, was actually made public, where every question, every doubt received a negative answer. We thought it was unusual, given the serious nature of the concerns, that the NGOs which had raised

those complaints and the journalists who had written about it, had not been not heard. The feeling we had, within a courtesy of institutional relation, was that the matter was closed far too quickly, particularly given the evidence, as you recalled, of these 21 aircraft stopovers relating to all the CIA flights operated by front companies and out of these 21 stopovers, out of these 21 flights, 18 are considered suspicious because of either the destination or the country of origin.

In three cases, these planes were used for a number of extraordinary renditions. Eight victims of extraordinary renditions, among those we ascertained, were transported on planes which had landed in Romania in the course of their transport. Some of these stopovers had no technical justification. The N313P, for example, a Boeing 737, which was used to transport Binyam Mohamed, a British citizen, and El-Masri, a German citizen, was collected in Skopje, and those flights could well have flown the whole distance without needing to make a stopover in Bucharest. From Kabul to Palma de Mallorca, the flight had full autonomy to reach its destination, the stopover was not technically necessary. Likewise, the plane from Rabat to Poland did not require a stopover in Bucharest. We did not get an answer to that, in that the data we provided the authorities with, in order for them to give us a clarification whether an evaluation on these flights had been made, received very vague replies."

In that context, Mr Fava referred in particular to the plane N478GS (see paragraphs 168 and 275 above):

"There was one specific case where the Romanian authorities had had to intervene. It was a plane which had a technical problem on landing, N478GS, which landed on the 6th of December [2004], coming from Bagram in Afghanistan, a city where it was known that the Americans were detaining terrorist suspects. Initially they said they knew nothing about that flight, only that there was just this incident, there was no trace of a crew or of passengers. Only at a later stage, after we had insisted, they gave us a list of passengers, seven US citizens, all with a service passport. One had a Beretta gun and ammunitions. None of them was questioned about the purpose of the trip from Bagram, they returned home on an Air France flight the following day, and it seems that the plane was later transported by a Hercules to another European airport to be repaired. And also on that point – on which many newspapers were raising questions about a plane landing, carrying passengers, with a very special profile, without there being any request for explanations from the Romanian authorities – that point also remained unanswered in our opinion."

363. In response to the judges' question – referring, in particular, to paragraph 164 of the 2007 EP Resolution stating that "[it] cannot exclude, based on the statements of the Romanian authorities to the Temporary Committee delegation to Romania, the possibility that US secret services operated in Romania on a clandestine basis and that no definite evidence has been provided to contradict any of the allegations concerning the running of a secret detention facility on Romanian soil" (see also paragraph 280 above) – whether the TDIP considered that in 2003-2005 a CIA detention facility had or had not existed in Romania, Mr Fava stated:

"The conclusion we reached was a very strong suspicion that it existed, not the certainty – there was no smoking gun – but a very strong suspicion concerning the points I reported, because of what we were told by Pascu, the former Ministry of Defence, because of the attitude, the rather superficial attitude of the Committee of Inquiry. And also because of a number of considerations that we heard during the

interviews: we heard many journalists, many non-governmental organisations. At that time, it was impossible to have any certainty, except if there was an admission by the Romanian Government. In that case however, the Romanian Government could not prove the opposite, either because of the approximate work of its Committee of Inquiry, or because of the acknowledgments that emerged between the lines by those who basically said – also people that we interviewed at the airport - '*we were not in a position to know what was happening*'.

An example I found in my notes is the testimony of the chief investigator for the incidents on behalf of the Ministry of Transport, Vulcan, who explained that, for example, in the case of the plane that had landed and had been damaged on landing, when it reached the airport there was no sign of the passengers who had been on that plane. All this was, let us say, outside the procedures and rules. This was a civilian air flight, it was not a State flight, it was not a police flight. Under the Chicago Convention, it was normal that the passengers be identified. The identification was eventually transmitted to us, but only after a considerable insistence on our side. What we were told was: 'we did not meet anyone, we don't know anything'. So, everything, all the information we received, gave us the impression that this matter was handled in a very opaque way and the conclusion we reached is that we could certainly not exclude the fact that a secret detention centre had existed in Romania."

364. In his replies to the Government's questions as to how, in his view, the Government could "prove that there had been no buildings on its soil ever used as 'black sites'", Mr Fava stated, among other things:

"[By means of] an inquiry which was deep enough to match the seriousness of the charges, well, such an inquiry, according to practice and, let us say experience, which we had, and the work we were doing, could not limit itself to coming to a conclusion without hearing all those who could have produced further elements. The circumstance that this inquiry chose not to disclose its conclusion and its work, with the exception of a chapter, and not to hear, during the work, NGOs or airport staff or journalists, appeared to us to be a rather ambiguous attitude. An Inquiry Committee has the duty to ascertain the truth and use all possible means to get to that truth. It appeared to us, and that was confirmed by the President of the Committee, that it was chosen not to check all [emphasis while speaking] the facts and hear all the people who could have provided further elements. This obviously doesn't give any certainty about the fact that there has been a secret detention centre, but it did not help excluding any suspicions about that."

He further added:

"When we went to Bucharest to meet the Inquiry Committee, we were told that neither journalists nor NGOs nor airport officials had been heard. They didn't mention the fact-finding missions on airport sites to us, but they did confirm the fact that a large part of those who could have provided a different point of view were not heard. Also the time during which the Committee worked, if I remember correctly well, we are talking about facts of ten years ago, was quite quick. Our Inquiry Committee worked for two full years to come to this final report, but it appears that the Senate Committee worked for far less time and that the conclusion was rather quickly reached, once the working session was set up."

365. In response to the Government's question regarding the twenty one "stopover flights" (see also paragraphs 271 and 280 above), Mr Fava stated:

> "The evidence we have, through the information provided by the US Control Center and from Eurocontrol, concerns the stopover of 21 flights. But we do know also that in two cases the route of the flight registering the stopover in Bucharest coincided with the extraordinary rendition of two victims. This is the case of the N313P which, in September 2003, from the 21st to the 23rd of September, flew from Washington to Prague, Tashkent, Kabul, Szymany, Bucharest, Rabat, Guantánamo. And during that route, one of the passengers in that plane was Benjamin Mohamed, who was then detained in Guantánamo. Another flight with the same aircraft, in January 2004 from Skopje, in Macedonia, to Baghdad, Kabul, Bucharest and then Palma de Mallorca, tallies with the period in which, on that plane, El Masri, German citizen, was transported, so in at least two cases we are not dealing with stopovers only but rather with an operational cycle of these planes within which, no doubt, these planes were carrying two rendition victims, and these are totally ascertained cases, not only during the judicial phase but also in the conclusions to which our Committee came to, namely that during those days, those persons were being illegally transported in that airplane."

366. In relation to the 2014 US Senate Committee Report and a question from the applicant's lawyers, Mr Fava responded:

> "I testified before the American Senate's Inquiry Committee, although in previous years, and I do recall that there was a strong determination to get to the truth as to what had happened and also a great determination to condemn a practice which, if ascertained, would have been considered to be totally illegal and, furthermore, totally inappropriate for combating terrorism. About this point, we realised in the years immediately following our mission of inquiry under the new administration of the White House that there was a global revision, a very different evaluation on the way they had operated until those years. Extraordinary renditions were very negatively assessed, and this evaluation has also been confirmed by certain CIA officials. We met Vincent Cannistraro, who was a former agent, the Head of Counter-Terrorism in the CIA, who told us that when they had chosen to proceed to extraordinary renditions within the agency, many people realised that this was a mistake because, as actually happened, not only would it create a climate of even greater hostility but it would also have led to the risk of terrible judicial errors, as actually happened subsequently, because often they were led to decide to abduct a suspected terrorist on the basis of information that the local services in Pakistan, Afghanistan, Syria, Morocco and Egypt were prepared to give to CIA colleagues. In certain cases, those were forms of mere manipulation.
>
> We heard four victims of extraordinary rendition – we are the only international organisation that had the possibility to speak with them – and one of them told us about his 11 months spent in a secret prison in Syria, being tortured every day until they had to release him, because it was understood that a great judicial error had been committed. And we also know that we dealt with several cases, however only the cases of the more fortunate people, namely of those who were European citizens or people abducted in Europe, therefore with public evidence that could not be hushed up. But aside the many cases we dealt with, we fear that there are many other cases of citizens less protected, let's say, by their nationality and we have no figures here. So, this was very much in the awareness of the American Senate's Inquiry Committee, as a very heated discussion that developed within the CIA itself during those years, and

of which we heard recollected traces, thanks to the availability of some former CIA officers to speak with our Committee."

B. Presentation by Senator Marty and Mr J.G.S. "Distillation of available documentary evidence, including flight data, in respect of Romania and the case of *Al Nashiri*"

367. On 2 December 2013 Senator Marty and Mr J.G.S. gave a similar presentation before the Court in *Al Nashiri v. Poland* (cited above, §§ 311-318) and *Husayn (Abu Zubaydah) v. Poland* (cited above, §§ 305-312).

368. Their oral presentation in the present case was recorded in its entirety and included in the verbatim record of the fact-finding hearing. The passages cited below are taken from the verbatim record.

369. The aim of the presentation was explained by the experts as follows:

> "The firm intention of our presentation today is not to reveal anything new or revolutionary, but rather to offer a cogent distillation of the available data and documentation in a manner which might allow the construction of a more coherent chronology of the CIA's rendition, detention and interrogation programme. In particular, it is a chronology in which the applicant in today's proceedings features prominently, and indeed one in which the territory of Romania, the High Contracting Party to today's proceedings, also holds a prominent status.
>
> The Court will recall, Madam President, the testimony provided by Senator Marty and myself in the cases before Section IV of the Court in December of 2013, in which today's applicant, Abd al Rahim Al Nashiri, was joined by Abu Zubaydah in alleging violations of the Convention by the Republic of Poland. The 'black site' situated on the territory of the Republic of Poland will also be mentioned in today's presentation, but I should like to request that the Court take note of the material presented on that earlier occasion, and indeed the judgments of the Court in those two applications, as a foundation to the material which I will present today."

370. This was followed by the presentation of the map showing a network of interconnected various locations, which was referred to as a "global spider's web" in the 2006 and 2007 Marty Reports (see paragraph 250 above; see also and *Al Nashiri v. Poland*, cited above, §§ 321 et seq.):

> "It is important to understand the system in which this chronology resides, and it is for that reason that we commence our presentation by explaining the so-called 'global spider's web' which was presented as part of the reports of the Marty Inquiry of the Council of Europe in 2006 and 2007. These are movements not only of military aircraft or conventional aircraft used in the pursuit of counter-terrorism or military operations, but also importantly charter aircraft, private aircraft, operated under the cover of business or private citizens' operations through a complex shell game, in which prime contractors, aviation subcontractors, flight planners and indeed the national authorities of Council of Europe Member States are complicit, ensuring that flight movements are impossible to track or record in real time and indeed extremely

difficult to account for in retrospect. I shall use a graphic map to illustrate this system."

He further explained:

"On this map, there are four categories of airports in which aircraft in this system landed. The first is described as 'stopover points'. These are places at which aircraft would conventionally stop for a short period, usually several hours, in order to refuel en route to another location.

The second category, 'staging points', describes locations at which two or more aircraft often converged, crews convened and indeed rendition operations were planned.

The third category, 'pickup points' represent the outcomes of our investigation into specific rendition operations. In each of these places, a detainee was picked up by a rendition crew and rendered to a secret detention facility, usually in the Middle East or North Africa, by the CIA. Several of these, as situated in Europe, have already been accounted for by this Court in cases such as *El Masri v 'the Former Yugoslav Republic of Macedonia'*, which is depicted here by Skopje, and most recently the case of Abu Omar, the cleric who was rendered after having been picked up on the street in Milan, Italy.

The final category on this list, however, is the most important. These are described as 'detainee transfer or drop-off points'. They were, in short, the destinations of CIA rendition aircraft, places to which detainees were brought for the purpose of being detained secretly, interrogated and, in the majority of cases, ill-treated at the hands of CIA interrogation teams in a manner which, prima facie, would violate the European Convention on Human Rights.

The material interest of our inquiry was to establish in particular which sites in this category were situated on the territory of Council of Europe Member States, and as you can see from the graphic, there are ... two countries initially, implicated in Senator Marty's inquiries. The first of those, Poland, was the subject of the earlier case of *Al Nashiri* and *Abu Zubaydah v. Poland*. The second country, which is depicted here by two airports, Timişoara and Bucharest, is the respondent in today's proceedings, Romania. The motif of a global spider's web derived from our efforts to track the movements of aircraft across this system, and I will demonstrate two specific rendition circuits in order to show how that picture is built up."

371. The presentation then focused on two rendition circuits, described in the order chosen by the experts, which were carried out by plane N313P on 16-28 January 2004 and 20-24 September 2003 (see also paragraphs 272, 276, 327-330 and 336-337 above; and *Husayn (Abu Zubaydah)*, cited above, §§ 108-116 and 285).

The 16-28 January 2004 circuit was related as follows:

"The first of these [circuits] occurred in January 2004 and has become notorious because of the sheer number of detainees who were rendered, in the course of a 12-day period, between multiple different detention sites across the Middle East, North Africa and, indeed, Europe. The aircraft in question, N313P, was operated by the CIA's own aviation services provider, Aero Contractors. Having departed from Washington, it stopped over in Shannon, before flying to a staging point in Larnaca, Cyprus. From there, its first detainee pickup occurred at the detention site in Rabat where, on 22 January 2004, the British resident Binyam Mohamed, was rendered from

secret detention in Morocco to secret detention in Kabul. From Kabul the plane flew back in the direction of North Africa to Algiers, carrying with it a recently-released Algerian national from a US military detention site in Kabul. From Algiers it travelled to a second staging point in Europe, in Palma de Mallorca, whereupon the crew embarked on the rendition of Khaled El-Masri. He was picked up on the night of 23 to 24 January in Skopje in 'the Former Yugoslav Republic of Macedonia' and transported via Baghdad to four months of secret detention in Kabul. The same crew, the same aircraft, departed Kabul on the night of 24 January and flew in the direction of Europe to a landing in Romania. I shall explore this particular leg of this flight in extensive detail, later in my presentation. From Romania, the crew and the plane returned to a staging point in Palma de Mallorca, for further rest before returning to Washington. All of the flights depicted on this graphic, Madam President, occurred within the space of 12 days, in January 2004."

The 20-24 September 2003 circuit was related as follows:

"A second rendition circuit, which occurred in September 2003, also implicates the territories of two Council of Europe's Member States. Having departed from Washington, this aircraft, again N313P, flew to Prague in the Czech Republic for a stopover before heading eastward to Tashkent, Uzbekistan, where dissident detainees, handed over to the CIA by local intelligence services, were rendered to secret detention in Kabul. From Kabul, on 21 September 2003, the aircraft transported several detainees out of detention in Afghanistan towards detention in Europe.

The first stop in Europe was the detention site at Szymany, in northern Poland, which was explicitly described in the [*Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*] proceedings, and this circuit is unprecedented and indeed unique because it is the only occasion on which a rendition flight carrying CIA detainees left one European site and flew directly to another European detention site, in this case in Bucharest, Romania. Again, that particular leg will be the subject of further explanation later in the presentation. From Bucharest, the rendition plane carried further detainees out to Rabat. These were persons who had boarded on earlier legs, not persons leaving Romania, and from Rabat to Guantánamo Bay, where for four months, in late 2003 and early 2004, the CIA operated a secret detention facility apart from the larger military facility at Guantánamo Bay."

The following explanation was added:

"In illustrating those two rendition circuits, I am displaying a small fraction of the rendition flights and circuits that Senator Marty's Inquiry uncovered in 2006 and 2007. The totality of these operations was to create this motif: that of the global spider's web, a system in which rendition aircraft, criss-crossing across the globe, created an almost untraceable and unaccountable system of unlawful detainee transfers."

372. Using the above two rendition circuits as examples, the expert-witnesses further explained the practice of the so-called "dummy flight planning", a process of intentional disguise of flight plans for rendition planes (see also paragraph 264 above; and *Al Nashiri v. Poland*, cited above, §§ 316 and 318):

"One of the key discoveries of our inquiry in 2007 was that rendition aircraft had been very difficult to trace because of deliberate acts of disguise and deceit employed by the CIA and its partners in planning and executing their detainee transfer operations. In 2007, through months of rigorous analysis of aeronautical data, we

were able to present evidence of the practice of dummy flight planning by the CIA in conjunction with partners in Polish air navigation services. Since the report of 2007 came out, and this work has been extended and indeed deepened, we are now in a position to demonstrate how the similar practice of dummy flight planning was used in respect of Bucharest Băneasa airport in Romania."

373. As regards the 16-28 January 2004 circuit:

"This is the flight circuit of January 2004, which I demonstrated earlier in the presentation. In particular, we focus on the leg from Kabul, Afghanistan, towards Bucharest, Romania, and in this process I am using specific elements of a data strings analysis which was conducted using four data sources, including those of Eurocontrol and indeed Romanian authorities. At step 1, the first flight plan is filed. A company by the name of Jeppesen, which was the subject of a prominent case before the United States Supreme Court, brought by the American Civil Liberties Union, habitually filed false flight plans in order to disguise the routes of rendition aircraft. In this case, the first flight plan for 24 January 2004 was filed to Timişoara, Romania. But N313P, the aircraft in question, did not fly that route. Jeppesen filed a second dummy flight plan out of the same airport, Timişoara, to Palma de Mallorca in Spain. Again, this was a route which N313P had no honest intention to fly. Furthermore, a third and contradictory dummy flight plan was filed, this time in respect of Timişoara to Prague, and Romanian authorities, in their own efforts to understand the stated intentions of this aircraft, also made references to both legs 2 and 3 in their own filings on the aeronautical fixed telecommunications network. The aircraft did then embark on the evening of 24 January 2004. On board was a CIA detainee by the name of Hassan Ghul who had been handed to the CIA by United States military authorities. He was rendered out of a 'black site' in Kabul to the Romanian 'black site' situated in Bucharest. This landing in Bucharest was an undeclared landing, at no point had a valid flight plan for this route been filed in the international AFTN system. At this point, Romanian authorities, specifically the NOTAM office at Bucharest Băneasa Airport, began to file plans in respect of this aircraft. A plan was filed for the first time citing Bucharest airport, by the Romanian authorities, from Bucharest to Palma de Mallorca and indeed, that evening, having dropped off the detainee, the CIA aircraft flew the route filed by their Romania counterparts. Finally, Jeppesen, the CIA's flight planner, resumed its duties of flight planning and carried the aircraft and its crew back in the direction of the United States. What this graphic represents, honourable judges, is not a one-off occasion. It is rather a systematic practice deployed by the CIA and its aviation service providers to disguise CIA flights into and out of its most sensitive operational locations. In our reporting in 2006 and 2007 we were often confounded by the apparently contradictory and inconsistent information provided to us by multiple sources of data, including those inside of Romania in the Senate Inquiry Committee and indeed among the various aviation authorities whose filings did not appear to add up. We now know that the reason for these inconsistencies and contradictions was the deliberate practice of dummy flight planning employed by the CIA. But they cannot execute this tactic alone. They depend upon, however discrete, a role played by the national counterpart authority, and just as in the case of Poland, demonstrated in the earlier proceedings, here the Romanian air navigation services filed plans in respect of an aircraft which was on its territory for the sole purpose of transporting detainees into secret detention.

Romanian documentary records demonstrate the landing of this aircraft at Băneasa Airport on 25 January, despite the absence of a valid flight plan. This document refers to the 'flown' flight path, the actual flight path, from Kabul to Bucharest, to Palma de Mallorca, but that was a route for which no flight plan existed in the international

system of control. Further similar documents illustrate the ground handling and other services provided to this aircraft whilst it was on the ground for a short period on that night at Băneasa Airport, and through our investigations we have established that this disguised flight forms part of a recognised CIA rendition circuit. These are the individual routes which I have already demonstrated with the graphic, I shall provide the full detail to the Court in written form after the presentation. But as I stated, this was not a one-off, this was part of a systematic practice, and through our investigations we have generated numerous, up to twelve, individual instances on which CIA rendition aircraft have transferred detainees into, and out of, Bucharest, Romania"

374. As regards the 20-24 September 2003 circuit:

"This set of flight logs pertains to the unprecedented transfer I described earlier, in which detainees from Poland, including the presumed architect of the 9/11 attacks, Khalid Sheikh Mohammed, were transferred directly to Romania on the night of 22 September 2003, the opening of the Romanian site. This particular set of logs depicts an instance in which a detainee was transferred out of Bucharest and taken to further secret detention here in Amman, Jordan, and that practice again was prevalent because detainees did not tend to stay in one secret detention site for lengthy periods, counted in years; they were rather rotated and recycled through multiple different CIA secret detention sites, on periods averaging between six and twelve months. Here, a detainee brought to Romania in September was taken out in October and transferred to further secret detention in Jordan. I will provide all the flight logs and the evidence that supports them to the Court upon request."

375. The time-frame for the alleged operation of the CIA "black site" in Romania and its colour code-name assigned in the 2014 US Senate Committee Report were identified as follows:

"The [2014] Senate Committee Report also provides extensive insight into the timeframe, the life span for which the 'black site' in Romania was operated. It is important at this point to state that the word 'Romania', the country name, does not appear openly in the declassified version of the report. Rather, as with all the sites in question, it is referred to by a colour code name.

The code name Detention Site Black corresponds in such precise and extensive detail with every one of the operations I have described in today's presentation, from the first flight into Romania in September 2003 through the transfers of individual detainees, including Hassan Ghul, Khalid Sheikh Mohammed, Abu Faraj al-Libi, into Romania on specific dates in accordance with their interrogation schedules that Romania, its territory, its airspace, its detention facility, is inseparable from 'Detention Site Black'. It is my premise, categorically, that it is the case that Romania is the site referred to as 'Detention Site Black'. From that point of departure, we are able to find several specific references. Here is one, in a section which describes Detention Site Black and another CIA site, which states that '*CIA detainees were transferred to Detention Site Black in this country in the fall of 2003'*. It goes on to state that this coincided with the closure of the predecessor 'Quartz' base, which is referred to in the report as Detention Site Blue. In terms of its closure, it is stated in the report that after the publication of the *Washington Post* article, that is the piece of reporting, the Pulitzer Prize-winning article by Dana Priest, to which Senator Marty referred, dated 2 November 2005, the authorities of this country demanded the closure of Detention Site Black within a number of hours fewer than 100. We can see that from the redaction, it does not state exactly how many hours, but it is no more than four days. And in fact, as I described, 5 November 2005, using its practices of dummy

flight planning and a further disguise which I will demonstrate shortly, the CIA transferred all of its remaining CIA detainees out of the facility within this time period."

376. In conclusion, referring to the Romanian authorities' knowledge of the operation of Detention Site Black, the experts added:

"Again, as stated, flights into and out of Romania correspond exactly with the narrative described in the [2014 US Senate Committee Report]. It might be pointed out, in relation to this specific package, that in order for the authorities of the host country to demand the closure of a detention facility, they must have known of its existence. Furthermore, in light of the report in the *Washington Post*, which went into intimate detail of the CIA's operations including the forms of ill-treatment and interrogation to which detainees therein were subjected, it follows that the authorities of the host country of Detention Site Black – and let me be clear – that is the authorities of Romania, must have known of the nature of operations occurring on their territory."

C. Senator Marty

377. Senator Marty was a member of PACE from 1998 until the beginning of 2012. He chaired the Legal Affairs and Human Rights Committee and, subsequently, the Monitoring Committee.

At the end of 2005 he was appointed Rapporteur in the investigation into the allegations of secret detentions and illegal transfers of detainees involving Council of Europe member States launched by the PACE (see also paragraphs 249-267 above)

On 2 December 2013 Senator Marty testified before the Court at the fact-finding hearing held in *Al Nashiri v. Poland* (cited above, §§ 319-323) and *Husayn (Abu Zubaydah) v. Poland* (cited above, §§ 305-317).

378. In the present case, in response to the questions from the Court and the parties, Senator Marty testified as follows.

379. In respect of sources of information that was collected during the Marty Inquiry and evidence on which findings of the 2006 and 2007 Marty Reports were based, Senator Marty stated:

"We were fortunate enough to find sources, and this must be stated clearly, firstly in the United States, of a very high level. It is important to know that within the American administration and the intelligence services, especially those of the CIA, there were a lot of people who were not at all in agreement with what Rumsfeld and Dick Cheney had imposed upon the CIA. And I, who had already had many contacts as a prosecutor with American services, was thus able to obtain this information. What is important to say is that we devised a working methodology, we never relied on one source alone, but when you get important information from once source, it is much easier to activate and to receive further information given in confidence from other sources. In the end we had about thirty sources, if I recall, that are in different countries and notably in Romania, and there too at a rather surprising level. And in 2006 ... we were above all able to concentrate on the movements of rendition flights and we were able to trace this famous spider web, this spider's web. This triggered off all sorts of other information that hailed from people who agreed to talk, of course,

under the most rigorous confidentiality. Let me point out that many of these people risked a lot, several decades of imprisonment; they could have been accused of high treason in their countries. ...

The seriousness of the sources that provided us with information was strikingly confirmed by the Feinstein report, the report of the American Senate which was published some 10 years after my first report. In the Feinstein report there are absolutely extraordinary confirmations of what we had already described, in part at least, or in the essential parts. The Feinstein report sought to cover up the countries by giving them a colour. If we know a little about the events that are described, it is child's play to see which countries lie behind these colours. ...

We focused our initial research on the United States because it seemed obvious to us that the leaks had occurred in the United States and knowing how serious the *Washington Post* is, in particular the journalist Dana Priest, who is one of the major US journalists, who we knew had contacts with certain highly placed people in the US administration and the secret services, we thought we ought to start digging in that direction. And the fact that Human Rights Watch, which is also a very serious NGO, had published the names of Poland and Romania, meant that they too had important sources of information. Our research ... enabled us to encounter not second-level agents but very important people in the US services. ...

When we were able to obtain that information, not just from one American source but from several, we tried to make contacts in other countries in Europe and when the people we had contacted understood that we already knew a lot and that we had got this information from the US secret services, those people were far more prepared to speak out. I think you need to understand the dynamic in this way: it was possible to obtain very high-level intelligence. I will not name the countries, but in some countries we were even up to the level of ministers who spoke to us. Of course, one of the fundamental aspects for my part was that I gave all possible guarantees of protecting our sources. So we took every possible precaution to protect our sources, to make it impossible for people to trace back to our sources. ..."

380. As regards the Romanian high-office holders mentioned in paragraphs 211-218 of the 2007 Marty Report (see paragraph 262 above) as "holding first-hand knowledge of CIA operations on the territory of Romania", including the former President of Romania, Mr Iliescu, and the Presidential Advisor on National Security, Mr Talpeş, and the question whether the Romanian authorities "knew or ought to have known" of the CIA rendition operations and purposes of the CIA aircraft landings on Romanian territory in 2003-2005, Senator Marty testified:

"... I would also like to point out that in the framework of the NATO system, for all these operations, NATO had applied the very highest degree of secrecy under the NATO code. This highest secrecy code can be summed up as the 'need to know' principle; it is only people who strictly need to know who should be aware of what is going on and they must only be aware in as far as it is necessary. So I do not think that the Romanian authorities knew that there was waterboarding, that there was torture, and so on. But the people [the high-office holders] I referred to, and this is based on extremely precise testimony, must have known that the CIA had used their territory for transfers of prisoners in the context of the war on terror. We never said that the Poles or the Romanians had run those prisons, we always said those prisons were exclusively managed by the CIA. And the CIA would not accept any intrusions, not even by any other American services. What we do say is that those people – probably

> the majority of the government – knew nothing about it but those people must of necessity have been aware that something very unusual was going on: planes were landing, people were being disembarked, and the like. Or in any event they did everything to see nothing, hear nothing and say nothing, and that is a classic approach which we have in all countries where there have been renditions or secret prisons."

381. In response to the question whether in the Marty Inquiry an exact physical location of the alleged CIA "black site" had been established, Senator Marty said:

> "No, because we did not have a specific indication. The site was, however, the most protected element secrecy-wise, even people who knew that this anti-terrorist operation was going on did not perforce know where the site was precisely located. For Poland, it was easier. We were even able to go *in situ* and were able to obtain information *in situ*. So, for [Romania], it was far more complicated."

In response to the Government's questions concerning indications of such a location, he added:

> "I say it is true that at the time we were not in a position to indicate the place of detention, but that Romania participated in these CIA programmes, there is no shadow of a doubt in my mind about that."

D. Mr J.G.S.

382. Mr J.G.S. is a lawyer and investigator. He worked on multiple investigations under the mandate of the Council of Europe, including as advisor to the PACE's Rapporteur Senator Marty (2006-2007) and as advisor to the former Commissioner for Human Rights, Mr Thomas Hammarberg (2010-2012). In 2008-2010 he served on the United Nations' international expert panel on protecting human rights while countering terrorism. He is presently engaged in official investigations into war crimes and organised crime cases.

On 28 March 2011, in *El- Masri,* Mr J.G.S. submitted an expert report detailing the factual findings of his investigations into the applicant's case (see *El-Masri*, cited above, § 75). On 2 December 2013 Mr J.G.S. testified before the Court at the fact-finding hearing held in *Al Nashiri v. Poland* (cited above, §§ 324-331) and *Husayn (Abu Zubaydah) v. Poland* (cited above, §§ 305-312 and 318-325).

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

384. In response to the judges' question whether on the basis of the evidence known to him, Romania "knew or ought to have known" of the nature of the CIA extraordinary rendition programme and that the programme operated on its territory, Mr J.G.S. stated:

> "It is quite clear to me that the Romanian authorities not only should have known, but in fact did know of the nature and purpose of the CIA's secret operations on its territory. In our report of 2007, for the Marty Inquiry, we inferred this conclusion already then, 9 years ago, based upon excellent source information that we had

procured from both sides of the Atlantic, multiply corroborated, validated and verified by documentary records, and rooted in our understanding of a conceptual framework, and a practical implementation of bilateral agreements struck between the CIA and its counterpart agency in Romania.

But I can say to the Court today that this is no longer an inference, it is no longer simply a collation of disparate sources, because the [US] Senate Committee of Inquiry, and I refer the Court to page 97 of that 499-page executive summary, has explicitly stated that the host authorities of the country in which Detention Site Black was located, provided co-operation and support for those activities, and indeed that the CIA, through its station in Romania, was able to provide a substantial sum of money, in the region of ten million United States dollars, as a 'subsidy' to its Romanian counterparts in recognition of their active participation.

In the report in 2007, we talked about the extraordinary permissions and protections that Romania provided. We talked notably about secure zones, of which there were several on Romanian territory, and of which we knew of the existence of at least one. We characterised this as being a level of cooperation that depended on authorisation from the highest levels of the Romanian state authorities. That aspect too, Your Honour, is confirmed by the US Senate Committee Inquiry. It talks about, explicitly in that same paragraph, on that same page, the highest levels of the country's government. So what we heard from our sources who, incidentally, have remained credible upon our assessment, has now been formalised in the form of the reporting by the Senate Committee which, incidentally, had access to a vast array of classified information, which we did not have access to.

And so we wish to state, quite clearly, categorically, that the Romanian authorities, at the highest level, did know about the existence of secret detention on their territory and furthermore that they were aware of the precise purpose of the rendition flights entering and exiting the country, and the conditions, or roughly the conditions, under which detainees were held in between their arrivals and their departures."

385. In response to the judges' question as to how a specific detainee could be linked with a specific flight and how it was possible to identify which specific person or persons had been transported on a specific rendition plane, the expert-witness stated:

"I can confirm that I participated closely in the inquiry under Commissioner Hammarberg which led to the production of the memorandum in March 2012 and I can also confirm that, at that point, almost five years after the conclusion of our second Marty Report, we were in possession of substantially more information, notably through the declassification of reports from the United States, but also through an evolving process of developing sources, developing new relationships, filing requests for information with different authorities, and indeed benefiting from a wide range of partnerships and alliances in some of the countries in question and indeed in the United States.

The process of linking a specific detainee to a specific flight was, indeed, for a long time elusive. In order to make this connection, one requires both authoritative information about the planning and execution of the flight and furthermore, from the CIA itself, authoritative information as to the interrogation schedule, the process of debriefing or interrogating the detainee, and specific junctures in that detainee's detention which constitute a move or a change or a development or a transition in that detainee's treatment. As I demonstrated in my presentation with reference to the CIA Inspector General's Report, there are occasions in the declassified documents on

which moves are referred to explicitly, and indeed are given dates. When that move links a particular named individual, such as Al Nashiri, with a point of provenance, such as Thailand, and a point of destination, such as Poland, it is then possible, within a very small margin of error, to go looking for a flight that corresponds with those dates.

This example was indeed the breakthrough in that regard, this methodology, because for the first time in the Inspector General's Report [in the present judgment referred to as 'the 2004 CIA Report'], we were told that an interrogation schedule concluded on 4 December [2002]. The reason for its conclusion was a move, and furthermore that Al Nashiri, together with Abu Zubaydah, was taken to another 'black site'. The only means of transportation that the CIA used to move detainees was rendition aircraft, and through our assessment and investigation of rendition aircraft over multiple years, we have been able to crack that system and to trace those movements using contractor documentation, international aeronautical services information, and all the other logs that I have used in the presentation. So the linking depends on a specific correlation of information from both the aviation side and the operational side in the CIA's 'black sites' themselves. I would direct you, Your Honours, to the [US] Senate Committee Inquiry for multiple further specific date references and specific references to individuals being moved between different sites."

386. Replying to the judges' question as to how could Mr Al Nashiri could be differentiated as being rendered to Romania on 12 April 2004 from other detainees known to have been held in Guantánamo and rendered by the CIA from there at approximately the same time, Mr J.G.S. stated:

"I can give you two specific examples. Ramzi bin al-Shibh, who had been in Morocco with Al Nashiri initially, in 2003, was taken back to Morocco, as was Ibn al-Shaykh al-Libi, who was the source of the now notorious intelligence on Iraq, which led Secretary of State Powell to make a case for war. He was held in Guantánamo Bay at the same time as Al Nashiri, but he was taken to Morocco. How do we know? Because he features in the further descriptive narrative regarding Morocco in the [US] Senate Committee Report, as does Bin al-Shibh. These two individuals are cited as having gone back to Morocco and having found the conditions of their detention there to be impossible to sustain because of abuse or cries of abuse they could hear taking place in adjacent cells, part of the Moroccan system. This again was a source of some acrimony, some misunderstanding, some difficult relations between the CIA and the Moroccan counterparts and as such features prominently in the Senate Committee's Inquiry. There is no mention whatsoever of Al Nashiri there, and I maintain that is because he was in Romania."

387. Replying to the Government's question as to which evidence had led him to the conclusion that a simple change in flight plans or in the use of ultimate destination represented a cover-up with the complicity of the national authorities, Mr J.G.S. stated:

"Thank you for your question, Madam. This allows me to introduce to the Court some very important insights gleaned from the flight planning process at its point of origin in the United States and the documents of which are included in the materials before the Court by virtue of the docket in the New York State Court litigation between Sportsflight Air Inc. and Richmor Aviation.

In particular, there are documents within this docket which refer specifically and in advance to deliberate attempts to file false destinations for rendition aircraft. There is,

for example, a differentiation between points of departure, points of destination, as Madam Agent rightly said, 'alternates', and then, what the CIA describes as 'hard arrival points'. 'Hard arrival' were the real destinations, the real timings that the CIA demanded its contractors to fulfil. Everything else in the flight planning process, as was delegated to Jeppesen, Air Rutter International and other contractors, was allowed to have a veneer of compliance with international civil aviation rules, but was in fact nothing more than a cover, a shell, behind which these unlawful operations actually took place.

I shall address directly, Madam, your question: how can I differentiate between a simple in-flight change of plan? I could countenance such an alternative explanation if it were to have happened but once, perhaps twice or occasionally in a sequence of rendition flights. But in respect of Romania alone, this systematic practice was deployed up to twelve times, using every time the same methodology. Specifically the points of departure would be fixed because they were physically where the plane took off from, but points of destination, ADES, as they are called in the AFTN system, were never stated as the actual airport to which the rendition aircraft was destined. If at all Bucharest Băneasa appeared, it appeared only as an alternate, and on several occasions it did not appear at all in any flight plan, either as destination-in-chief or as alternate, despite the fact that trip sheets, government contracts, even pre-emptive billing invoices had been prepared in the United States by the CIA's contractors, stating explicitly what the hard arrival airport and time was, and on each occasion Bucharest – Baneaşa was that hard arrival point. It cannot be put down to mere innocent coincidence, in-flight change of plan, when it is conceived of in advance, when there is only one purpose for which these rendition flights are being deployed, and when the only site that corresponds with the cables, the contracts, the flight plans, the instructions, the billing invoices and, indeed, the multiplicity of source testimony, is the 'black site' hosted on Romanian territory in Bucharest. So an alternative explanation does not fit in these circumstances; there is one clear and categorical truth, and that is, this was a deliberate act of deceit to disguise unlawful detainee transfer activity."

He further added:

"... [I]n the process of executing these renditions, the CIA did file flight plans for every aircraft in which dummy destinations were inserted into the planning text in order to provide the aircraft with a premise upon which to enter the airspace of the country in question. So, for example, as the Court heard in the proceedings against Poland, on multiple occasions, aircraft filed for destinations such as Prague in order to have a premise to enter Polish airspace, after which the Polish air navigation services would navigate them to a landing at Szymany. When the Polish authorities produced records of landings at Szymany, they stated explicitly in their own documentation that several of these landings had occurred '*brak FPL*' ('without a flight plan'), precisely the point that you have just suggested would be impossible. It happened. In Romania, as I demonstrated in my presentation today, flight plans were filed for alternative destinations which included other Romanian airports, Timişoara, Constanţa, but only in order to give that aircraft a premise upon which to enter Romanian airspace. From entering airspace, Romatsa and the counterparts in the Romanian authorities, navigated those aircraft to undeclared landings at Bucharest, Băneasa. I have this upon the first-hand authority of persons involved in the execution of those rendition flights. I also have Romanian documentation demonstrating these landings at Bucharest, Baneaşa, indisputably because a plane is physically on the ground in Bucharest and yet, for the same flights, having trawled all the multiple sources of aviation data in my possession, I have not found any flight plan valid for a landing at Băneasa. Hence, the

same systematic practice, deliberate disguise and deceit, used by the CIA but dependent upon the complicity and cooperation of Romanian counterparts."

Lastly, in relation to the Government's question relating to the "STS" special status designation accorded to some CIA rendition aircraft, Mr J.G.S. stated:

"...[T]hose aircraft used by the CIA in conjunction with its in-house aviation services provider, Aero Contractors, more often than not cited this special designation in their flight plans. There were two aircraft in particular, both of which travelled to Romania, N313P and N379P, which fall under this designation. It is explicitly stated and cited in the flight plans filed by Jeppesen Dataplan, the aviation services provider used for these aircraft, that STS or state indicator is averred as a special privilege vis-à-vis all authorities whose territories the aircraft will traverse or land in, in the course of its circuit.

What that status affords the flight is a different characterisation in the flight plans, but that is not to suggest that upon landing in Romania there would be any diplomatic reception or any form of special treatment, in fact. On the contrary, most of these aircraft landed without being subjected to basic border guard controls, basic customs inspections. They were not granted special treatment in the sense of a state designation, they were in fact granted special treatment of an entirely different sort, of a sort which indicates permission to perform unlawful detainee transfers. So you ask me, why did they invoke the STS indicator, or on what basis does it change the status? What it does, is that it creates a further layer of deceit as to the real purpose of these aircraft, it creates the impression that these aircraft are somehow untouchable and it creates the impression that they ought not to be scrutinised by their receptor authorities. But does it change how they are received on the ground? In itself, no, it does not."

E. Mr Black

388. Mr Black is an investigator with the Bureau of Investigative Journalism and with Reprieve, having extensive experience in the field of the CIA extraordinary rendition programme. On two occasions, in 2012 and 2015, he was heard as an expert in the LIBE inquiry into the alleged transportation and illegal detention of prisoners in European countries by the CIA. He was involved in the preparation of the 2015 LIBE Briefing (see also paragraphs 282, 289 and 355-358 above). Since 2010 he has continuously carried out research on the CIA Eastern European "black sites".

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

390. In response to the judges' question whether, on evidence that he had accumulated in the course of his research and had been known to him, it could be established beyond reasonable doubt that a CIA detention facility had indeed existed in Romania in 2003-2005, Mr Black stated:

"I believe it is clear, beyond reasonable doubt, that there was a CIA detention facility in Romania. I am convinced on a wide array of different types of evidence that

it operated from September 2003 until November 2005. I believe it is clear beyond reasonable doubt that, among others, Khalid Sheikh Mohammed was held in it, Hassan Ghul was held in it, Janat Gul was held in it, Abu Faraj Al-Libi was held in it, Al Nashiri was held in it, Walid Bin Attash was held in it, on two occasions in fact, Samr al-Barq was held in it, Abu Munthir al Maghrebi was held in it. I believe there are indications that others, including Hambali, Lilie, Mohammed Qurban Ibrahim, were held in it. All of these statements are backed by, if you will, an array of evidence which includes aviation data that can be categorically related to the US Government's rendition programme. It includes statements made by the [US] Senate Committee Report that was declassified in 2014, it includes new material that has just recently been declassified by the government, by the US Government earlier this month.

My findings in which I discuss the evidential basis for these statements were most recently formulated in a briefing that I wrote for the LIBE Committee in September last year. I am not sure if the Court has seen that document, I understood that the LIBE Committee was going to publish it last year, but in fact I found that perhaps they did not. If the Court has not seen that document, then of course I would be happy to provide it. Since I wrote that, as I say, there have been some new developments in the last few months where further research on the basis of the [US] Senate Committee Report and newly declassified documents from the CIA that came out a few weeks ago, have further confirmed the findings that I made in the original briefing and have also added some new names and some new information to the list. But I mean, you know, I can give you, if you wish, I could give you the dates of when each of those specific individuals were held in Romania to the best of my knowledge and findings, but I mean the fact that those individuals were held in Romania at various points between 2003 and 2005 is absolutely beyond reasonable doubt, there cannot be any alternative narrative to that that makes any sense.

In terms of your question as to where precisely the facility was where they were held, this is not something that really I have exhaustively researched because it is not really something that the methodologies I use are particularly able to build up a picture of. I mean I would go so far as to say that it is likely, on the basis of all the evidence I have seen, that the facility was in Bucharest. We are all aware of the publication by Associated Press and others a few years ago that it was in the basement of the ORNISS building. I mean I cannot say that my researches would confirm that or deny that, certainly I have not seen anything that would tend to deny it."

391. Replying to the judges' question whether Romania "knew or ought to have known" of the nature of the CIA rendition programme, that it had operated on its territory and whether their knowledge had been such as to enable the Romanian authorities to be aware of the purposes of the CIA aircraft landings in Romania in 2003-2005, Mr Black stated:

"I think it is clear that the authorities were aware of it because, among other things, they received money for it. They received more than eight million dollars, we can determine from a reading of the [US] Senate Committee Report, how much more than eight million dollars I do not know. And I think it is also clear from a reading of that report that they demanded its closure at a certain point in November 2005. And I believe it is normally common practice, as far as we can tell from the Senate Report which I take in this instance to be authoritative, that the host country's officials were in the know about these facilities and the purposes of them. I think that it is clear, in the case of Romania, that there were officials who were aware that they had been paid money by the CIA to house prisoners and that the prisoners were being transported in by covert means."

392. Mr Black further identified the alleged CIA detention facility in Romania as the one referred to as "Detention Site Black" in the 2014 US Senate Committee Report:

> "I have gone into it in more detail in the briefing that I prepared for the LIBE Committee, but to kind of give a brief summary, Detention Site Black is the site that fulfils, in terms of its operating times, the flight paths that we know to have been connected to prisoner movements and to the CIA's rendition programme. Detention Site Black is the one that correlates precisely with those flight paths that our research has discovered, has reconstructed, if you will. There are, there are other indicators which include cables that are sent from Detention Site Black that correspond to prisoners who were flown into Romania on flights that are connected via their contracts and invoice numbers to the CIA rendition programme, cables that specifically reference the behaviour of certain prisoners. For example, the Senate Report makes reference to a number of prisoners who were held at site 'Black' whose movements have been correlated with flights moving into Romania or out of Romania within the timeframe that makes sense."

393. Answering the Government's question as to what differentiated – assuming that the flights in question were indeed rendition flights – "stopover" landing points from prisoners' transfers, Mr Black responded:

> "...[T]here are a series of characteristics which, I mean, which prisoner transfers, as in the point of pick-up and the point of drop-off, they occur on specific days, on specific times that can be cross-correlated with documents relating to the movements of prisoners. They occur in specific destinations, which consistently match other accounts of the movements of prisoners. It is when you look at the totality of the evidence, it is clear, for example, that some destinations are commonly used as rest and recuperation. There are places where crews go before they carry out a transfer or after they have carried out a transfer, so those are destinations like Mallorca, Dubai, there are others, and there are destinations that are commonly technical refuelling destinations which tend to be in the Atlantic because they occur when the planes are moving from Washington D.C. to North Africa, the Middle East or Europe to carry out rendition flights, so those are typically places like the Azores or Ireland, Scotland. Now, in a sense, to answer that question fully we would have to go through each of these flights in sequence and say why it does not make sense that in any one of them Romania is the refuelling destination rather than the prisoner movement destination, but I mean rather than do that, I would say in summary that, when you take the totality of the evidence, the consistency with which the points of transit through Romania match the points of transit that we know apply to the movement of prisoners, is such that it does not really allow any alternative narrative."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS TO THE ADMISSIBILITY OF THE APPLICATION

A. Romania's lack of jurisdiction and responsibility under the Convention in respect of the applicant's alleged rendition to Romania, detention and ill-treatment in a CIA detention facility in Romania and transfer out of Romania

394. Article 1 of the Convention states:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. The Government

395. The Government, in their written and oral pleadings, asserted that the applicant had not demonstrated that at any time during his detention under the HVD programme he had fallen under Romania's jurisdiction within the meaning of Article 1 of the Convention.

In that regard, they referred to the general standards for State responsibility set by international law, stressing that for an act to be characterised as an internationally wrongful act engaging State responsibility, it must be attributable to the State. In the light of the International Law Commission's Draft Articles (see paragraph 210 above), there must be either direct knowledge and involvement in an internationally wrongful act on the part of the State, or indirect knowledge, inferred from the assumption that a State exercising its jurisdiction over its territory should not ignore the commission of an internationally wrongful act within its territorial jurisdiction.

In their view, for a better understanding of the responsibility that would have been engaged had there been a secret detention facility in Romania, it was still necessary to distinguish between different scenarios of the State's attitude and conduct: its potential agreement to put a facility at the disposal of another State, its knowledge of the exact purpose of the operation of a secret detention facility, the exercise of the State's authority over that facility, and whether it knowingly permitted the use of its territory for activities entailing human rights violations.

396. Accordingly, Convention responsibility could be attributed to Romania only if it had knowingly permitted its territory to be used by another State for activities entailing human rights violations.

In that scenario, the question to be resolved was whether, in view of the public awareness regarding the secret detention programme, the authorities should have become aware of the fact that the flights operating on the

territory of Romania had been CIA-operated flights and whether, on this basis, they should have inferred that there had been a secret detention facility in Romania and have acted in accordance with their obligation of due diligence.

However, on the evidence before the Court, including the reports of the international inquiries or non-governmental sources, there was no indication that the Romanian authorities – autonomously or in cooperation with a third State – had put in place or run a secret detention facility. No evidence showed that the Romanian authorities had knowingly and expressly agreed, after being informed of the purpose or nature of activities to be performed in that facility, to put such a location at the disposal of third parties.

In support of their arguments, the Government relied on the Court's case-law, in particular *Ilascu and Others v. Moldova and Russia* (no. 48787/99, 8 July 2004), *Loizidou v. Turkey* (no. 15318/89, 18 December 1996), and *Soering v. the United Kingdom* (no. 14038/88, 7 July 1989). They also cited the International Court of Justice's ruling in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*, judgment of 27 February 2007).

397. The Government also considered that the International Court of Justice's judgment in the *Corfu Channel* case (*United Kingdom v. Albania*, judgment of 9 April 1949, *ICJ Reports* 1949, p. 17) was particularly relevant to State responsibility since it had established the threshold required for circumstantial evidence. In particular, the International Court of Justice had held that a "charge of such exceptional gravity against a State" – and the charge laid by the applicant in the present case was one of such gravity – would require a "degree of certainty" that had not been reached in that case. Moreover, it had stated that (ibid., p. 18) "it [could not] be concluded from the mere fact of the control exercised by a State over its territory and waters, that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact by itself and apart from other circumstances, neither involve[d] prima facie responsibility nor shift[ed] the burden of proof".

398. It was the Government's firm position that the applicant had not produced any prima facie evidence capable of establishing a direct or indirect link between his rendition and detention under the CIA HVD Programme and any act or omission on the part of the Romanian authorities.

They asserted that the applicant had not entered Romanian territory, had not been held in a "secret" detention facility there and had never been transferred to or removed from Romania. No action concerning his transfer or detention had ever been taken jointly by the Romanian authorities and other foreign authorities.

This assertion, the Government added, was not meant to prevent the Romanian investigating authorities from reaching a different conclusion on the closure of the criminal investigation instituted in connection with the applicant's allegations if any new convincing evidence had subsequently emerged. However, in the light of the evidence as it currently stood and the domestic authorities' findings so far, the applicant had never been on Romania's territory or under the jurisdiction of the Romanian authorities.

399. In the Government's submission, the applicant's account of the facts amounted to mere suppositions because evidence presented by him mostly consisted of various excerpts from media news, international reports and non-governmental organisations' allegations. In fact, the so-called "sources" on which the applicant relied simply reiterated in different terms the same information as the article published in *The Washington Post* in November 2005. Such materials could not make up for the absence of official documents confirming his claims.

In this connection, the Government also contested the credibility of the 2006 and 2007 Marty Reports, Mr Hammarberg's findings and memorandum, materials collected by Reprieve in the context of its rendition research activities, and the CIA sources (see also paragraphs 430-435 below).

400. The Government did not dispute the existence of the HVD Programme and the fact that the applicant had been subjected to secret detention and ill-treatment under that programme. These were objectively established factual elements proven by several international inquiries and acknowledged by US officials. Nevertheless, in the present case there was no evidence and not even a mere presumption of fact indicating that the Romanian State had been an accessory to violations of human rights occurring during the CIA's rendition operations. Nor was there any direct or indirect connection between the Romanian authorities and the HVD Programme.

401. At the oral hearing, following the taking of evidence from experts at the fact-finding hearing, the Government maintained their position. They considered that the experts had found arguments supporting their theories with surprising ease, without analysing contradictions and choosing from previous reports or inquiries only the convenient elements. In the Government's view, no proof had yet emerged to confirm that the facts complained of had occurred under Romania's jurisdiction.

In that context, they underlined that the negative conclusion as to the existence of suspicious flights or secret detention facilities in Romania had been reached by the national authorities after an inquiry conducted in a spirit of cooperation – cooperation that had not always been recognised by the bodies conducting international investigations.

402. In sum, the so-called "evidence" in the case was ambiguous and dubious and in reality constituted mere assumptions drawn from the

fragmentation and interposition of various publicly accessible pieces of information disseminated by the media.

Accordingly, the Government invited the Court to declare the application inadmissible pursuant to Article 35 § 3(a) in conjunction with Article 1 of the Convention.

2. The applicant

403. The applicant replied that the Government's arguments were without merit.

In his written submissions, he stated that Romania's knowing and intentional participation in the CIA's operations and its failure to act on its positive obligations had resulted in the applicant's secret detention and ill-treatment on Romanian territory. Citing the *Ilascu and Others v. Moldova and Russia* judgment, the applicant stressed that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate[d] the Convention rights of other individuals within its jurisdiction" engaged the State's responsibility under the Convention. Also, under Article 1 of the Convention, in addition to its duty to refrain from interfering with the enjoyment of the Convention rights and freedoms, the Romanian State had positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory.

404. In the applicant's view, he had established more than a prima facie case that he had been detained and tortured in Romania under the CIA secret detention and extraordinary rendition programme. The burden now shifted to the Government to provide a "satisfactory and convincing explanation" as to whether he had been detained and ill-treated.

405. Notwithstanding the wealth of evidence confirming that Romania had hosted a secret CIA prison where he had been detained, the Romanian Government had not only categorically denied that they had hosted a CIA prison but also attempted to discredit findings issued by reputable officials such as the Council of Europe's Commissioner for Human Rights and Senator Dick Marty, as well as evidence produced before the Court in general.

406. In that regard, the applicant emphasised that, as confirmed in the *El-Masri* judgment (cited above), while the Court generally applied the "beyond reasonable doubt" standard of proof in assessing evidence, there were no procedural barriers to the admissibility of evidence or pre-determined formulae for its evaluation. The Court could rely on evidence of any kind and make its free assessment.

For instance, in *El-Masri,* a case where the applicant had likewise been subjected to rendition, secret detention and torture under the CIA HVD Programme, the Court had considered a variety of evidential sources, including the 2006 and 2007 Marty Reports, the 2007 Fava Report, a report by the Council of Europe's Commissioner for Human Rights, Wikileaks

cables, reports of the ICRC and non-governmental organisations such as Amnesty International and Human Rights Watch, and declassified CIA documents. The Court had specifically referred to a "large amount of indirect evidence" obtained during international inquiries, including aviation and flight logs, among many other materials that had corroborated Mr El-Masri's claims. The Court had been satisfied that there had been prima facie evidence in favour of the applicant's version of events, that the burden of proof should shift to the respondent Government, and that the Government had failed to demonstrate conclusively why the evidence could not corroborate the applicant's allegations. It had ultimately found "the applicant's allegations sufficiently convincing and established beyond reasonable doubt". The Court had adopted the same approach in *Al Nashiri v. Poland.*

407. The applicant considered that the Court's findings of fact in *Al Nashiri v. Poland* were valid in the present case. He referred to the publicly available verbatim record of the fact-finding hearing in that case and the testimony of Senator Marty and Mr J.G.S. who had stated that there had been a secret CIA detention site in Bucharest. He further relied on the documents that had become public after the delivery of the *Al Nashiri v. Poland* judgment, in particular the 2014 US Senate Committee Report and materials collected by the European Parliament in connection with its LIBE Committee's inquiry into allegations about the CIA secret detention facility in Romania.

408. At the oral hearing, in response to the Government's submissions (see paragraphs 395-402 above), the applicant stated that, in the light of evidence gathered in the case, it was established beyond reasonable doubt that Romania had hosted a secret CIA prison from September 2003 to November 2005 and that he had been secretly detained in that prison. The 2014 US Senate Committee Report and other documentary exhibits before this Court, as well as cogent and credible expert testimony, confirmed these facts.

The applicant's torture and secret detention, together with his transfer from Romania in the face of real risks of further torture and undisclosed detention could be attributed to the Romanian State because these acts had occurred on Romanian territory with the acquiescence and connivance of the Romanian authorities and because Romania had failed to fulfil its positive obligations to prevent these acts, despite being on notice that they would occur.

409. In conclusion, the applicant asked the Court to reject the Government's preliminary objection.

3. The Court's assessment

410. The Court observes that in contrast to cases where objections that a State had no jurisdiction were based on the alleged lack of the respondent

State's effective control over the "seceded" territory on which the events complained of had taken place (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 300-304, ECHR 2004-VII) or an alleged lack of attributability on the grounds that the events complained of had occurred outside the respondent State's territory and were attributable to another entity (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, §§ 47 and 56 Series A no. 310; and *Cyprus v. Turkey* [GC], no. 25781/94, §§ 69-70 ECHR 2001-IV), in the present case the Government's objection in effect amounts to denying that the facts adduced by the applicant in respect of Romania had actually ever taken place and to challenging the credibility of the evidence produced and relied on by the applicant before the Court (see paragraphs 395-402 above).

The issue of the Romanian's State responsibility under the Convention is therefore inherently connected with the establishment of the facts of the case and assessment of evidence. Consequently, in order to determine whether the facts alleged by the applicant are capable of falling within the jurisdiction of Romania under Article 1 of the Convention, the Court is required first to establish, in the light of the evidence in its possession, whether the events complained of indeed occurred on Romanian territory and, if so, whether they are attributable to the Romanian State. The Court will therefore rule on the Government's objection in the light of its findings regarding the facts of the case (see paragraphs 600-602 below).

B. Non-compliance with the rule of exhaustion of domestic remedies and the six-month rule

411. Article 35 § 1 of the Convention states:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

1. The Government

(a) Non-exhaustion of domestic remedies

412. In the Government's submission, the applicant had made only a formal and superficial attempt to exhaust domestic remedies.

In their written pleadings they maintained that, pursuant to Article 222 of the CCP, the applicant should first have applied to the domestic authorities to obtain redress for a violation of his rights on account of the commission of any alleged offences. In that connection, they drew the Court's attention to the fact that the applicant had lodged a criminal complaint on 29 May 2012 and merely two days later – on 1 June 2012 – had brought his application to the Court.

In the Government's view, the applicant's personal opinion that any attempt to exhaust domestic remedies would have been futile because the Romanian authorities had constantly denied the existence of "secret detention facilities" had not entitled him to address his grievances directly to the Court, thereby depriving Romania of the opportunity to pursue a criminal investigation into his allegations. As demonstrated by a number of examples from the Court's judgments in Romanian cases, a criminal complaint was an effective remedy for the purposes of Article 35 § 1 and the Government saw no reason why it should not be effective in the applicant's case. Given the complexity of the case, he could not realistically expect that his criminal complaint would immediately bring results.

413. At the oral hearing, the Government added that while in some cases the passage of time from the date of lodging the application could make a non-exhaustion objection obsolete, this was not so in the applicant's case. The criminal investigation in Romania was still pending and a number of important actions had in the meantime been taken by the prosecution. However, the applicant's representatives had so far displayed no more than a limited interest in the investigation. For two and a half years they had taken no step to participate in the proceedings and when they had finally had done so, they had asked only for information about the case-file number.

In the circumstances, the application had been and remained premature.

(b) Non-compliance with the six-month term

414. The Government next argued that the applicant had also failed to comply with the six-month rule in Article 35 § 1 of the Convention. If, as he claimed, a criminal complaint that he had filed on 29 May 2012 had not been an effective remedy for the purposes of this provision, according to the Court's case-law he should have lodged his application within six months from the time when he had become aware of the fact that he had been detained in Romania.

In their view, that time-limit had begun to run on 6 May 2011, the date on which he had lodged his application with the Court against Poland. In that application, based on the same documents as his application against Romania, he had stated that after his detention in Poland "he [had been] moved from Guantánamo Bay to Rabat and then to another CIA prison in Bucharest, Romania, sometime after 27 March 2004".

Accordingly, his present application, being submitted on 1 June 2012, i.e. more than a year later, had been lodged out of time and should be rejected.

2. The applicant

415. The applicant asked the Court to dismiss the Government's objections.

(a) Non-exhaustion of domestic remedies

416. As regards the exhaustion of domestic remedies, the applicant stressed that the national authorities had been on notice of a CIA secret prison on their territory at least since November 2005, when public records of such a prison had first resurfaced. The prosecution had shown a complete lack of interest in the matter. In addition, as set out in Mr Hammarberg's affidavit, they had ignored his repeated requests for an investigation to be opened and had not responded to the dossier of evidence relating to the secret CIA prison that he had submitted to the Romanian Prosecutor General.

Viewed in the context of the Romanian authorities' pattern and practice of obfuscation and denial, it was apparent that the criminal investigation was plainly ineffective. As such, there was no merit to the Romanian Government's claim that the application should be deemed inadmissible for non-exhaustion of domestic remedies.

(b) Non-compliance with the six-month rule

417. The applicant acknowledged that it was true that in his application against Poland he had summarily mentioned that he had been held in a secret detention facility in Bucharest. But at that time the facts relating to the precise location of the secret CIA prison in Romania and the treatment of detainees held there was still unknown and, consequently, there had not yet been sufficient information to file an application with the Court. Given the complexity of the case and the nature of the alleged human rights violations at stake, he was entitled to build an arguable case, which included obtaining critical information as to the location of the detention facility. It was not until 8 December 2011 that this location had become publicly known and named via news report in *The Independent* that cited former US intelligence officials familiar with the location. It had been the first time that the location of the prison, i.e. the building used by the National Registry Office for Classified Information, known as "ORNISS", together with a description of its interior and details of ill-treatment of prisoners held there – including the applicant – had been publicly disclosed.

3. The Court's assessment

418. The Court observes that the Government's objections raise issues concerning the effectiveness of the applicant's criminal complaint and the subsequent investigation into his allegations of torture and secret detention on Romanian territory and are thus closely linked to his complaint under the procedural limb of Article 3 of the Convention (see paragraph 3 above and paragraphs 602-604 below). That being so, the Court is of the view that the objections should be joined to the merits of that complaint and examined at a later stage (see, *mutatis mutandis, Al Nashiri v. Poland,* cited above, § 343

and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 337, both with further references to the Court's case-law).

II. THE COURT'S ESTABLISHMENT OF THE FACTS AND ASSESSMENT OF EVIDENCE

A. The parties' positions on the facts and evidence

1. The Government

419. As noted above in respect of the Government's arguments as to Romania's lack of jurisdiction and responsibility under the Convention, they denied on all accounts the applicant's allegations as being unsupported by any evidence and, consequently, having no factual basis. They also challenged the credibility of most part of the evidence gathered in the case and denied Romania's knowledge of, and complicity in, the operation of the CIA HVD Programme on its territory at the material time (see paragraphs 395-402 above).

The Government's conclusions on the facts and evidence were as follows.

(a) Lack of evidence demonstrating that a CIA "black site" operated in Romania

420. First of all, the Government maintained that there had been no evidence demonstrating that a CIA secret detention facility had ever existed in Romania. They maintained that all the applicant's allegations to that effect were based on inconsistent and contradictory speculations.

(i) Contradictory statements as to the "life cycle" of the alleged CIA "black site" in Romania

421. The sources relied on by the applicant had given contradictory indications regarding the period during which a "secret" detention facility had allegedly operated in Romania. The 2007 Marty Report affirmed that that facility had been opened in 2003 and had become highly important in 2004. It mentioned that it had been closed in November or December 2005 following the *Washington Post*'s revelations. This contradicted the media sources indicating that the "secret prison" had been closed in the first part of 2006.

According to the article published in *The Independent* on 8 December 2011, secret detention centres in Romania had been closed by May 2006. Reprieve had taken an approach differing from that of *ABC News*, stating that the detainees had been moved out of identified European "secret" locations prior to Secretary of State Condoleezza Rice's visit to Romania on 5 December 2005. On the other hand, the Council of Europe's

Commissioner for Human Rights, in his dossier, had described the "life-cycle" of the site as a "period of at least one year, beginning with its opening on 22 September 2003".

Accordingly, the reliability and veracity of information concerning the period during which the alleged "secret" detention site had operated was extremely doubtful.

(ii) Contradictory statements as to the location of the alleged CIA "black site" in Romania

422. As regards the location of the alleged CIA detention facility in Romania, at first there had been suppositions that it might have been located near Timişoara Airport, Mihail Kogălniceanu Airport or Băneasa Airport. These locations had been mentioned in succession, each for several years.

The sources cited by the applicant had changed their assumptions each time it had been established that no "secret" detention facility had ever existed in the indicated place. Thus, a new location had subsequently been discovered.

423. In 2007 the Romanian Senate, following on-site inspections of the locations and after hearing witnesses, had established in its report that there had been no "secret" detention site near Mihail Kogălniceanu Airport in Constanţa, including the military airbase. Despite that fact, in 2011 some journalists had come up with another hypothesis, indicating the basement of the building used by the ORNISS, a public institution, as a secret prison. To justify their speculations, they had not, however, supplied any solid evidence, or even any credible indications.

424. In 2007 Senator Marty had seemed convinced, quoting "reliable sources" within the CIA, that a secure area for the CIA transfers and detentions had been created near Mihail Kogălniceanu Airport. In 2009, the *New York Times* had quoted "officials" as saying that "one jail was a renovated building on a busy street in Bucharest". In 2011, other "reliable sources" indicated the ORNISS building – which, the Government added, was located in a residential area and not on a busy street – as the location of the secret CIA detention site in Bucharest.

425. Lastly, in the pending criminal investigation there had so far emerged no evidence that any location in Romania or, especially, in Bucharest as suggested by the applicant's sources, could have been used by the CIA as a secret prison. In contrast, the prosecution had obtained a statement from an official working for the ORNISS – which had been produced before the Court – confirming that their building could never be, and had never been, used as a detention facility.

(b) Inconsistencies in the applicant's account regarding the dates of his alleged rendition to and from Romania, and his secret detention in Romania

426. The Government next argued that the applicant's account regarding the dates, circumstances and period of his alleged detention in Romania was inconsistent and therefore unreliable.

In his application, the applicant had stated that he had been arrested in 2002 in Dubai. Then he had been held in Afghanistan and Thailand and moved to Poland on 5 December 2002. On 6 June 2003 he had been moved from Poland to Rabat, Morocco and, subsequently, on 22 September 2003 to Guantánamo Bay where he had been detained until 2004. On 27 March 2004 he had been transferred to Morocco and afterwards, to Romania. In 2006, the applicant had again been moved to Guantánamo Bay. Finally, he alleged that he had been "secretly" detained on Romanian territory from 6 June 2003 until 6 September 2006.

427. Other sources advanced the idea that the applicant had been transferred to Romania in September 2003 but then Reprieve had indicated 12 April 2004 as the date of his transfer to Romania. According to the 2007 Marty Report, the applicant had been brought to the CIA "black site" in Bucharest on the flight N313P on 23 September 2003. Mr Hammarberg, for his part, had maintained that the opening of the CIA prison code-named "Bright Light" and the start of the CIA operations at the Romanian "black site" had been marked by the N313P flight on the night of 22 September 2003. However, in his opinion, the applicant had been transferred to Romania on the N85VM flight directly from Guantánamo to Bucharest on 12 April 2004.

428. The Government emphasised that the applicant had indicated no precise date of the flight on which he had allegedly been transferred out of Romania. He only mentioned that he had remained in Romania until around 6 September 2006, when he had been moved to Guantánamo. Nor had the experts heard at the fact-finding hearing been able to give a precise date for his transfer out of Romania.

429. It was therefore clear that there was no conclusive evidence in support of any of the above versions of the possible dates, circumstances or period of the applicant's alleged detention in Romania.

(c) Lack of credibility of evidence adduced by the applicant, in particular the Marty 2006 and 2007 Reports, findings made by the Council of Europe's Commissioner for Human Rights in 2009-2012, Reprieve research and CIA declassified documents

430. In the Government's opinion, there was a particular circuit of information concerning the alleged existence on Romanian territory of "secret" detention facilities. To begin with, mass media had launched accusations against certain States. Later on, this information had been

reiterated as genuine by non-governmental organisations protecting human rights. These organisations had presented as evidence data extracted from records, invoices, and flight plans of planes allegedly used for transferring detainees. At the same time, these organisations had deliberately ignored the verifications performed by some European countries regarding the flights allegedly connected to the rendition programme. As a consequence, the information contained in official documents was not based on strong evidence, but on the sum of the data given by the mass media based on non-verifiable sources.

431. The Government contested the credibility of sources relied on by Senator Marty in his reports of 2006 and 2007. They said that the Marty Reports included many inconsistencies and contradictions. For instance, even though the reports had stated that the materials analysed, i.e. satellite photographs, aircraft movements and witness accounts, had not constituted evidence in the formal sense of the term, the authors had nevertheless found that these elements had been sufficiently serious to assume that a CIA secret detention facility existed in Romania. In the Government's opinion, Senator Marty had displayed reluctance to reveal his alleged sources of evidence and protected them under the plea of a strict policy of confidentiality. Statements given by anonymous witnesses were not challengeable and this impeded the Government in properly contesting their reliability and defending themselves against the accusations made in the Marty Reports.

432. Referring to the 2007 Marty Report, the Government saw inconsistencies in many respects. For instance, it was mentioned that the evidence had been obtained through alleged discussions with "well-placed persons from the Government and the intelligence services". It was also stated that information had been classified by the Americans into "tiny pieces of information" in order to prevent any single foreign official from seeing a "big picture". But it was further said that only the highly placed officials had been aware of the HVD Programme. In these circumstances, those "well-placed persons" had been in no position to offer any information.

The 2007 Marty Report spoke of the alleged "operating agreements" between the CIA and Romania to hold detainees. However, in the next paragraph Senator Marty had admitted that he had not seen the text of any such agreement.

Furthermore, statements of Romanian politicians had been taken out of context to support the report's erroneous conclusions. Even a declaration of the Romanian President had been distorted into a "formal approval" of the agreement for the cooperation in the HVD Programme.

In sum, the 2007 Marty Report's categorical conclusion that it "[had been] finally established that secret detention centres [had] existed for some years in Romania" seemed to have gone beyond the scant indications on which it had been based.

433. As regards Mr Hammarberg's findings of 2009-2012, in particular those referred to in his affidavit and included in the dossier prepared for the Romanian Prosecutor General, the Government pointed out that they were – like Senator Marty's conclusions – based on newspaper articles and sources that could not be verified. They were accordingly no more than unsubstantiated allegations. Also, in the same fashion as other experts before the Court, Mr Hammarberg had based his theories on selective materials, without analysing the existing contradictions. For instance, he had found support for his assertions as to the alleged use of the ORNISS building by the CIA in the fact that in Poland a State facility had hosted a secret detention site. This was concluded without having regard to obvious differences between a remote location and a building used on a daily basis by Government officials in a European capital.

434. Referring to Reprieve's research and findings, the Government said that this non-governmental organisation represented the interests of some of the detainees held in Guantánamo and carried out a humanitarian project concerning persons who had been subjected to extraordinary rendition in the HVD Programme. Reprieve's current case work involved representing fifteen prisoners from Guantánamo, assisting over seventy prisoners facing the death penalty around the world and conducting ongoing investigations into the rendition and the secret detention of "ghost prisoners" in the so-called "war on terror". In these circumstances, Reprieve could not objectively state the facts in their documents and respective articles.

435. Lastly, the Government pointed out that the reliability of the CIA sources cited by the experts and various inquiries or media reports was open to doubt because even the 2014 US Senate Committee Report concluded that the CIA had leaked inaccurate information regarding the operation of the HVD Programme.

(d) Lack of evidence demonstrating that certain planes landing in Romania between 22 September 2003 and 5 November 2005 carried out the CIA extraordinary rendition missions

436. The Government did not deny that several – allegedly "suspicious" – planes had landed at and taken off from Romanian airports; these flights had at least partly been documented by the 2007 Romanian Senate Report. Also, publicly available evidence confirmed their stopovers on Romanian soil. However, the impugned flights had been of a private and non-commercial nature and had been treated accordingly. In all cases invoices, air navigation service sheets or ground handling charge notes had been issued for all the services provided. The flights had been included in the control lists of the navigation records. The declassified annexes to the 2007 Romanian Senate Report supported the conclusion that the purpose of the "N" flights' stops at Băneasa Airport had been mainly technical in nature.

For instance, as regards the alleged "rendition flight" N85VM of 12 April 2004, the available documents attested that the flight had been recorded in the table containing handling fees and in the control list of navigation records, that an invoice had been issued and that the payment had been made by card; a copy of the air routing card having been attached to the relevant documents.

437. Moreover, several witnesses who had worked in Băneasa Airport at the material time and who had made statements in the investigation had identified these flights as having had a technical stop for refuelling at the airport. The vast majority of the witnesses had stated that the "N" flights had been serviced by a civil handling agent as any normal flight. Even the witnesses who had noted aspects that would suggest that the US flights had gone through a different procedure had completed their declarations by stating that they had not seen any persons disembarking from these aircraft. It should be stressed that not all the witnesses had serviced the same flights and that, therefore, their declarations should not be seen as contradictory.

438. In contrast to the circumstances surrounding the CIA planes' landings as established by the Court in *Al Nashiri v. Poland*, in Romania there had been no special procedure for receiving the impugned flights. As the documents in the investigation file showed, all the "N" flights had gone through the standard procedure. The procedure, as described in the witnesses' statements, had been entirely different from what had happened in Szymany in Poland. No foreign vehicles had been seen entering the premises of Băneasa Airport, there had been no military intervention in order to secure the airport perimeter and, most certainly, US officials had not assumed control of the airport on the dates in question. Nor had any HVDs been seen entering the country, as witnesses quoted in the 2007 Marty Report had stated with regard to the aircraft landings in Szymany.

439. As regards the importance attached by the international inquiries, media and experts heard by the Court to changes of flight plans, in the Government's view this by itself could not suggest any involvement of the State in the applicant's detention and ill-treatment.

The Government did not deny that the initial flight plans for the N313P flight on 22 September 2003 and the N85VM flight on 12 April 2004 indicating Constanţa as their destination had been changed and the planes had eventually landed at Băneasa Airport in Bucharest. Yet this could not be a proof of any consistent practice of the so-called "dummy" flight planning referred to in the Marty 2006 and 2007 Reports and the findings of the Council of Europe's Commissioner for Human Rights.

In accordance with the relevant domestic and international regulations, every flight must have a flight plan, except for emergency issues. Each flight plan must indicate, in addition to the plane's destination, an alternative destination. The flight plans had been established by the aircraft's operators. The only potential involvement of the authorities had

been limited to their assistance in transmitting the flight plan to the entity managing the integrated initial flight plan processing system. The decision to use the alternative destination or a change in flight plan had been a unilateral action by the flight operator. The acceptance of these changes in the flight plans was not indicative of any complicity of the Romanian authorities since such acceptance had in fact been automatic.

440. Similarly, the alleged STS/STATE indicators for the impugned flights could not be considered meaningful, even though various reports had emphasised their exceptional relevance. According to the applicable rules, that indicator should not automatically qualify for an exemption from any relevant flow regulations. Even Mr J.G.S. they added, although repeatedly asked, could not indicate any special privileges that the STS/STATE designation would entail.

(e) Lack of evidence demonstrating that the Romanian authorities entered into "secret cooperation agreements" with the CIA and cooperated in the execution of the HVD Programme

441. In the Government's submission, the allegations regarding Romanian's complicity in the HVD Programme, in particular by means of "secret cooperation agreements" were completely baseless. No such agreements existed.

In that context, the Government referred to the Romanian high-office holders' statements, in particular those made by former President of Romania, Ion Iliescu and his former security adviser, Ioan Talpeş in *Der Spiegel* in 2014 and 2015. Both of them had said that specific agreements had been concluded with the American authorities after 11 September 2001, including the Romanian support at the level of intelligence services – which had actually been very fruitful. This did not mean cooperation in running a secret prison. Furthermore, in the course of the criminal investigation their initially ambiguous statements had later been clarified to the effect that there had been no cooperation and no complicity in the CIA rendition and secret detention operations on the part of Romania.

(f) Lack of evidence demonstrating that the Romanian high-office holders agreed to the running of a secret detention facility by the CIA on Romanian territory, provided premises and knew of the purposes of the impugned flights

442. Nor could it be said that the Romanian authorities had otherwise agreed – explicitly or implicitly – to the running of a secret detention facility by the CIA in Romania and that they had made available to them premises for that purpose. These were simply groundless assumptions unsupported by any evidence.

Referring again to the statements of Mr Iliescu and Mr Talpeş statements in *Der Spiegel,* the Government stressed that they had both clearly

confirmed that they had had no knowledge of any CIA-run detention facility on Romanian territory.

(g) Lack of evidence of Romania's knowledge of the CIA HVD Programme at the material time

443. No evidence had been produced to show the slightest degree of knowledge on the part of the Romanian authorities as to the alleged hidden purpose of the flights landing at and taking off from Romanian airports.

As attested by Mr J.G.S. at the fact-finding hearing, only at the beginning of November 2005 had there emerged the first information about the alleged existence in some "Eastern European countries" of secret detention facilities designated for suspected terrorists and run by the CIA. Before that time the only information available had concerned the detention facilities in Guantánamo Bay, Afghanistan, Egypt or Jordan and a specific case concerning the surrender of six Algerian men by Bosnian Federal Police into US custody. While information on the setting-up of military commissions for trying persons accused of terrorist acts had been in the public domain, the identities of those persons had been unknown. Nor had it been known what the US authorities' decision would be as to which of them would actually be tried before military commissions rather than before federal courts.

In sum, at the relevant time, from 2003 to 2005, there had been no information that would have allowed the European States to suspect that some of the US flights that had landed in Europe had been used for the transfer of prisoners.

2. The applicant

444. The applicant maintained that the international inquiries, the CIA declassified documents, the 2014 US Senate Committee Report, other abundant materials compiling most recent research on the operation of the HVD Programme and expert testimony obtained by the Court provided a wealth of compelling evidence supporting his allegations and rejecting the Government's arguments as utterly untenable.

In his view, it was established beyond reasonable doubt that Romania had hosted a secret CIA prison in 2003-2005 and that he had been detained in that prison.

(a) As regards the existence of a CIA secret detention facility in Romania and the applicant's secret detention in Romania

445. The 2014 US Senate Committee Report and other documentary exhibits before the Court, as well as cogent and credible expert testimony confirmed that the CIA detention site code-named "Bright Light" or "Detention Site Black" had been located in Romania. The fact that a CIA secret prison had been located in Romania had already been confirmed in

the 2007 Marty Report. In the *Al Nashiri v. Poland* judgment the Court had quoted verbatim from the expert testimony of Senator Marty and Mr J.G.S. stating that there had been a secret CIA detention site in Bucharest.

446. As regards evidence that had emerged after the above judgment, the applicant attached particular importance to the 2014 US Senate Committee Report, adding that it fully confirmed the Court's factual findings in *Al Nashiri v. Poland,* including those based on expert testimony and documentary evidence.

Although the report did not refer to Romania by name, it was established that publicly available information, when cross-referenced with references to Detention Site Black confirmed that this site was "Bright Light", a secret CIA prison that had operated in Bucharest in 2003-2005. For example, the 2014 US Senate Committee Report stated that detainees had begun arriving at Detention Site Black "in the fall of 2003". It also stated that after publication on 2 November 2005 of the *Washington Post* article by Dana Priest disclosing that Eastern European countries had hosted CIA "black sites", the country concerned had demanded the closure of Detention Site Black within hours and that the CIA had transferred the remaining CIA detainees out of the facility shortly thereafter.

447. Furthermore, the 2015 LIBE Briefing stated that it had been established beyond reasonable doubt that the CIA had used a facility in Romania to hold prisoners, that the first of them had been transferred to this facility on 22 September 2003 and that the last ones had been transferred out of the facility in November 2005.

448. Lastly, the applicant relied on expert testimony at the fact-finding hearing. Senator Marty had stated that there had been no shadow of doubt that Romania had participated in the CIA programme. Mr J.G.S. had testified that with the exception of the "black site" in Afghanistan, the Romanian "black site" had operated for the longest period and held more detainees than any other CIA "black site". Mr J.G.S. and Mr Black had confirmed that the applicant had been secretly detained in Romania. They had also confirmed that the wealth of details about "Detention Site Black" in the 2014 US Senate Committee Report all corresponded to details about the Bucharest prison that the CIA code-named "Bright Light", where the applicant had been detained. As such, the report by itself, offered by no less than the United States' own Senate Intelligence Committee, based on exhaustive review of US Government documents, rendered untenable the Romanian Government's claim that there was no evidence of a CIA prison on Romanian territory.

(b) As regards the alleged inconsistencies in the applicant's account regarding the dates of his rendition to and from Romania and his secret detention in Romania

449. In response to the Government's arguments (see paragraphs 426-429 above), the applicant said that contrary to their assertions the application had not stated that he had been detained in Romania for the entire period between 6 June 2003 and 6 September 2006. Rather, it stated that he had been detained in Romania for some time during that period. Moreover, after the subsequent disclosure of the dossier submitted by Thomas Hammarberg, the precise date on which the applicant was transferred to a CIA "black site" in Romania had become clear – it had been 12 April 2004, on flight N85VM from Guantánamo Bay to Bucharest.

450. The applicant further emphasised that, as regards the location of the secret prison, it had become known only on 8 December 2011 when a news report had identified for the first time the precise location of the CIA prison in Romania, while at the same time confirming the applicant's detention there, and providing details of the ill-treatment of detainees. The report had cited US intelligence officials familiar with the location and inner working of the prison.

(c) As regards the planes landing in Romania between 22 September 2003 and 5 November 2005

451. The applicant maintained that it had been established beyond reasonable doubt that planes associated with the CIA rendition operations had landed and taken off from Romania at the material time. The annex to the 2007 Romanian Senate Report listed forty-three flights that had been considered suspicious by the Romanian authorities.

452. The Fava Report had "[e]xpresse[d] serious concern about the 21 stopovers made by CIA-operated aircraft at Romanian airports" which on many occasions had come from or had been bound for countries linked with extraordinary rendition circuits and the transfer of detainees. The list of rendition planes included flight N85VM of 12 April 2004 on which the applicant had been transferred to and from Romania.

The Fava Report further noted that a flight with registration number N478GS had suffered an accident on 6 December 2004 when landing in Bucharest. The aircraft had reportedly taken off from Bagram Air Base in Afghanistan, and its seven passengers had disappeared following the accident. The report expressed deep concern "that Romanian authorities [had] not initiate[d] an official investigation process ... into the case of a passenger on the aircraft Gulfstream N478G5, who [had been] found carrying a Beretta 9 mm Parabellum pistol with ammunition".

453. Furthermore, the applicant pointed out that the international inquiries and the experts heard by the Court had identified the rendition flights on which he had been transferred to and from Romania.

The finding in Mr Hammarberg's dossier for the Romanian Prosecutor General that the applicant had been transferred to Romania on 12 April 2004 on board N85VM, a flight clearly and consistently associated with the rendition operations, had been confirmed by multiple reliable sources, including the 2014 US Senate Committee Report and the reconstruction by those experts of the applicant's transfers in CIA custody.

454. As regards his possible transfer from Romania, the experts had given two dates, agreeing on the most probable date, which constituted sufficient evidence.

(d) As regards the Government's allegation of a lack of credibility of sources of information and evidence

455. The applicant submitted that the Government's arguments contesting the evidential value of the material before the Court should be rejected in their entirety.

In his view, the Government's submissions simply constituted an attempt to discredit the findings of reputable officials like the Council of Europe's Commissioner for Human Rights and Senator Dick Marty, by arguing that these findings were based solely on newspaper articles. In doing so, they failed to take into account the fact that Mr Hammarberg and Senator Marty had engaged in independent investigations and analysis of their own.

Indeed, Commissioner Hammarberg's dossier for the Romanian Prosecutor General had expressly drawn on the "original investigation and the analysis undertaken by [his] Office during the six of years of [his] mandate as Commissioner, among other sources of information". Similarly, the 2007 Marty Report had engaged in "analysis of thousands of international flight records – and a network of sources established in numerous countries".

Further, as regards the statement in the 2007 Marty Report that Romania had entered into a bilateral agreement with the US authorities, the applicant pointed out that, contrary to the Government's assertion, the fact that Senator Marty had not seen the actual document did not undermine the credibility of his claim that such an agreement had in fact existed, because its existence had been verified by credible sources, some of whom had been directly involved in negotiations that had led to this agreement. The fact that such an agreement had been brokered had recently been corroborated by the 2014 US Senate Committee Report.

(e) As regards Romania's' cooperation with the CIA and its complicity in the HVD Programme

456. For the applicant, there was no doubt that the Romanian authorities had cooperated with the CIA in the HVD Programme. They had granted licences and overflight permissions to facilitate the CIA rendition flights. The AACR's officials had collaborated with Jeppesen (and, by extension,

with Jeppesen's client, the CIA) by accepting the task of navigating disguised flights into Romanian airports.

457. As set forth in the 2007 Marty Report, Romania had entered into a bilateral agreement with the United States. The report had named individual office-holders who had known about, authorised and stood accountable for Romania's role in the CIA's operation of secret detention facilities on Romanian territory from 2003 to 2005 as follows: the former President of Romania (up to 20 December 2004), Ion Iliescu; the then President of Romania (20 December 2004 onwards), Traian Băsescu; the Presidential Advisor on National Security (until 20 December 2004). Ioan Talpeş; the Minister of National Defence (ministerial oversight up to 20 December 2004), Ioan Mircea Pascu; and the Head of the Directorate for Military Intelligence, Sergiu Tudor Medar.

458. Romania had therefore participated in the applicant's ill-treatment and incommunicado detention by entering into that agreement and giving the US the "full extent of permissions and protections it sought" for conducting secret detention and rendition operations on Romanian territory; issuing an order to Romanian military intelligence services on behalf of the President to provide the CIA with all the facilities they had required and to protect their operations in whichever way they had requested; providing the use of a Romanian Government building for hosting the secret prison where Al Nashiri had been detained; actively assisting the landing, departures and stopovers of secret CIA rendition flights including flights which had transported Al Nashiri in and out of Romania; and failing to disclose the truth and effectively investigate the existence of a secret CIA prison and rendition flights in Romania.

459. Consequently, the applicant's torture and secret detention, as well as his transfer from Romania in the face of real risks of further torture, secret detention and the death penalty could be attributed to the Romanian State because these acts had occurred on Romanian territory with the acquiescence and connivance of the Romanian authorities and because Romania had failed to fulfil its positive obligations to prevent these acts, despite being on notice that they would occur.

460. Lastly, citing *Al Nashiri v. Poland* the applicant emphasised that in that case the Court had found that CIA rendition operations had "largely depended on cooperation, assistance and active involvement of the countries which put at the USA's disposal their airspace, airports for the landing of aircraft transporting CIA prisoners and, last but not least, premises on which the prisoners could be securely detained and interrogated" and that "the cooperation and various forms of assistance of those authorities, such as for instance customising the premises for the CIA's needs, ensuring security and providing the logistics [had been] the necessary condition for the effective operation of the CIA secret detention facilities". This was true with respect to Romania. Just as the Court had found it inconceivable that Poland

had not known about the secret detention of prisoners on its territory, it was simply inconceivable that Romania had not known that it had been hosting a secret prison.

(f) As regards Romania's knowledge of the HVD Programme at the material time

461. The applicant contended that Romania had knowingly, intentionally, and actively collaborated and colluded with the CIA's extraordinary rendition programme, thereby enabling the CIA to subject him to secret detention and ill-treatment in Romania.

462. The Romanian authorities should have known that high-value detainees would be tortured and ill-treated. Their close degree of cooperation with the CIA's secret detention operations in Romania must have put Romanian authorities on notice of the prisoners being at risk of secret detention and ill-treatment.

In addition, Romania had had notice of the secret detention, torture and mistreatment of prisoners because of international and Romanian news reports, reports of the UN and human rights organisations and European legal cases that had documented US mistreatment of detainees suspected of terrorism at the material time. The Romanian Government were also presumed to have known of the CIA's secret detention, torture, and ill-treatment of terrorism suspects through its diplomatic missions.

463. As the 2007 Marty Report had concluded, Romania had been "knowingly complicit in the CIA's secret detention programme" and senior Romanian officials had "[known] about, authorised, and [stood] accountable for Romania's role" in the CIA's secret detention and rendition operations on Romanian territory".

464. Furthermore, the 2014 US Senate Committee Report had confirmed that the Romanian authorities had known that they had been hosting a secret prison and had attempted to cover up this fact. Indeed, the report observed that the Romanian authorities had "entered into an agreement" in 2002 with the US to host the prison, and that the US had paid the Romanian authorities "millions of dollars to host the prison". It also confirmed that within hours of *The Washington Post* reporting in November 2005 that Eastern European countries had hosted secret CIA prisons, the Romanian authorities had insisted on closing the CIA prison on their territory.

465. In the applicant's submission, the evidence before the Court demonstrated that it was the Romanian authorities which had given the CIA permission to run a secret prison in Bucharest, it was the Romanian authorities who had given the CIA permission to use dummy flight plans to secretly land rendition planes carrying prisoners in and out of the country, and it was Romanian authorities who had given the CIA extraordinary security cover for their operations in Romania.

As expert J.G.S had said at the fact-finding hearing: "it [was] quite clear that the Romanian authorities not only should have known but did know of the nature and purpose of the CIA's secret operations on their territory". He had also testified that this level of cooperation had depended on authorisation by the highest levels in the Romanian Government. The 2014 US Senate Committee Report had confirmed this. Mr J.G.S and Mr Black had testified that the Romanian authorities had known the nature and purpose of the CIA activities on Romanian territory because the CIA had paid Romania millions of dollars as a subsidy to host the prisoners. Moreover, the 2014 US Senate Committee Report had also established that it had been at the insistence of the Romanian Government that Detention Site Black had been ultimately closed. The Romanian Government had demanded closure of the CIA prison within hours from the publication of the November 2005 *Washington Post* article disclosing that CIA "black sites" had existed in Eastern Europe. This clearly confirmed that for as long as the CIA prison had existed on Romanian territory, it had been there with the Romanian Government's consent.

466. The applicant referred to the Court's finding in *Al Nashiri v. Poland* (cited above) that by June 2003 it was widely known that the US rendition programme had involved secret detention in overseas locations. It stood to reason that Romania, which had hosted a secret CIA prison after Poland and had enabled the applicant's transfers from its territory well after June 2003, indeed in 2005, had known by then that there had been substantial grounds for believing that the applicant had faced all of these risks.

467. As regards the statements of Mr Iliescu's and Mr Talpeş, the applicant maintained that the Government's submission was yet another example of their consistent refusal to acknowledge the truth about their hosting of a secret CIA prison on Romanian territory. In particular, the Government had quoted selectively from the statement of witness Z, denying that Romania had hosted a secret CIA prison. But a closer look at that statement revealed that Z had actually admitted that the Romanian authorities had supplied a "location" to the CIA.

468. In this connection, the applicant further referred to testimony given by witnesses X, Y and Z, saying that their statements expressly conceded that CIA flights had landed in Bucharest. In particular, X had said that Romania had partnership relations with similar institutions from other States, including equivalent structures in the United States of America. He also stated that in the framework of these bilateral relations, civil aircraft hired by the partner services on which their representatives travelled had landed at Bucharest Băneasa Airport. Witness Z had confirmed that US government officials had asked the Romanian authorities to provide some locations on Romania's territory for the deployment of actions meant to fight the dangers of international terrorism and which were to be used by the

CIA and that the authorities had "offer[ed] a location for CIA activities"'. In his September 2013 statement Z had acknowledged that there had been "concrete agreements" that had made possible the operation of the special US flights in Romania and that those flights had not been "under any obligation to obey usual rules imposed on civil flights".

Moreover, Y testified that, in the context of Romania's strategic objective of "NATO and European Union integration", it had been possible that CIA offices had been run on Romanian territory.

469. Lastly, the applicant reiterated that all the experts heard by the Court at the fact-finding hearing had stated, in unambiguous terms, that Romania not only ought to have known but must have known and had known of the nature and the purpose of the CIA's secret operations occurring on its territory.

B. Joint submissions by Amnesty International (AI) and the International Commission of Jurists (ICJ) on public knowledge of the US practices in respect of captured terrorist suspects

470. Referring to any knowledge of the US authorities' practices in respect of suspected terrorist attributable to any Contracting State to the Convention at the relevant time, AI/ICJ pointed to, among other things, to the following facts that had been a matter of public knowledge.

471. The interveners first emphasised that they had shown in their submissions in *El-Masri* and *Al Nashiri v. Poland* (both cited above) that, at least by June 2003, there had been substantial credible evidence in the public domain that in the context of what the USA called the global "war on terror", US forces had been engaging in enforced disappearances, secret detentions, arbitrary detentions, secret detainee transfers, and torture or other ill-treatment. Further, the submissions showed that, by presidential military order, the USA had established military commissions – executive tribunals with the power to hand down death sentences – for the prosecution of selected non-US nationals accused of involvement in terrorism in proceedings that would not comply with international fair trial standards.

472. A February 2004 confidential report of the ICRC on Coalition abuses in Iraq, leaked in 2004 and published in the media at that time, found that detainees labelled by the USA as "high-value" were at particular risk of torture and other ill-treatment and "high value detainees" had been held for months in a facility at Baghdad International Airport in conditions that violated international law.

473. In its annual reports covering the years 2004 and 2005, distributed widely to governments and the media, AI had reported on the growing body of evidence of human rights violations committed by US forces in the counter- terrorism context and stated that these violations, including secret detention and rendition, were continuing. In addition to individual country

entries, the global overview pages of both reports addressed US abuses in the "war on terror". For example, in the report covering 2005 this overview showed how during the year, it had become "increasingly clear how many countries had colluded or participated in supporting US abusive policies and practices in the 'war on terror', including torture, ill-treatment secret and unlimited detentions, and unlawful cross-border transfers".

474. In June 2004 *The Washington Post* published a leaked 1 August 2002 memorandum written in the US Department of Justice's Office of Legal Counsel at the request of the CIA. The memo advised*, inter alia*, that "under the circumstances of the current war against al Qaeda and its allies", presidential authority could override the US anti-torture law, that even if an interrogation method did violate that law "necessity or self-defense could provide justifications that would eliminate any criminal liability", and that there was a "significant range of acts" that, while constituting cruel, inhuman or degrading treatment or punishment, "fail to rise to the level of torture" and need not be criminalised.

475. In October 2004 AI published a 200-page long analysis of US violations in the "war on terror" and of the US Government documents that had come into the public domain, and including case details of secret transfers of detainees, the alleged existence of secret detention facilities and torture and other ill treatment.

476. In May 2005, AI published a 150-page long report on US abuses in the "war on terror", which included cases of alleged torture or other ill-treatment, deaths in custody, military commission proceedings, rendition flights, and the cases of "high-value detainees" allegedly held in CIA custody in secret locations in Afghanistan and elsewhere and being subjected to enforced disappearance. The cases described included those of Tanzanian national Ahmed Khalfan Ghailani and German national Khaled El-Masri.

477. In sum, as the Court held in *Al Nashiri v. Poland* (cited above), already by June 2003 it had been clear that States had known or should have known about the USA's rendition and secret detention programme and about the grave human rights violations it entailed as well as allegations of torture and other ill-treatment by US personnel, the indefinite detention regime at Guantánamo and the prospect of unfair trials by the military commission. As detailed above, the body of evidence regarding the USA's rendition and secret detention programme had only grown between June 2003 and September 2006. The USA's use of the death penalty remained well-known during this period and the US administration pursued the death penalty from 2002 to 2006 in the high-profile federal prosecution of Zacarias Moussaoui for terrorism offences, as well as moving ahead with a military commission system with the power to hand down death sentences.

C. The parties' positions on the standard and burden of proof

478. The parties expressed opposing views on the issues concerning the standard and burden of proof to be applied in the present case.

1. The Government

479. The Government once again reiterated that there was no conclusive evidence that the Romanian authorities had in any way participated in the CIA rendition programme by hosting a secret prison for high-value detainees or by any other means.

They agreed with the applicant (see paragraph 488 below) that the Court had accepted that in its establishment of facts and assessment of evidence the co-existence of sufficiently strong, clear and coherent inferences might be considered a proof. Yet in the applicant's case no such inferences existed.

480. In the Government's view, the applicant had adopted a strategy of persuading the Court that the Romanian authorities, including the intelligence services and army, had shared the responsibility for gross violations of human rights during the so-called "rendition programme" based on the idea of, in his view, striking similarities between the present case and *El-Masri* (cited above).

However, in order for the Court to shift the burden of proof, the applicant was required to establish a prima facie case in favour of his version of events. In the *El-Masri* case, that applicant's presence on Macedonian territory at the material time had not been disputed. His detention and interrogation in "the former Yugoslav Republic of Macedonia", together with his surrender to the US authorities, had not been refuted either. In contrast, in the instant case no detention facility had been established with certainty, there was no certainty as to the flights on which the applicant had allegedly been transferred to and from Romania, and the exact period of the applicant's alleged detention in Romania had remained unclear.

481. Furthermore, Mr El-Masri's description of the circumstances of his detention and torture had been, as the Court held, "very detailed, specific and consistent". Conversely, in the present case the Court was confronted with the applicant's incoherent allegations.

As opposed to *El-Masri*, where a significant amount of evidence had corroborated the applicant's allegations and had given rise to concordant inferences, in the present case no evidence had been put forward, save for the reports which relied on one another. It was true that the Court had held in the *El-Masri* judgment that it might examine a case by "drawing inferences from the available material and the authorities' conduct" and had concluded that the applicant had prevailed in his claims. Yet in the instant case there was no such material and the authorities' conduct had been, if not beyond any criticism, proactive and had demonstrated good faith. Without

any intention to attack and discredit the reports of reputable officials or non-governmental organisations, the Government insisted that the truth emerged at the end of a process of gathering evidence, failing which all the allegations remained simple claims.

482. The Government further said that they were fully aware of the Court's standards of proof in cases involving injuries, death or disappearances that occurred in detention in an area within the exclusive control of the authorities of the respondent State, if there was prima facie evidence that the State might be involved. Nevertheless, they contended that a serious explanation, even if not a final one, had already been provided by the Romanian authorities since a serious and independent investigation was still pending before the national authorities.

483. In view of the foregoing, the Government invited the Court to hold that there was no prima facie evidence in favour of the applicant's version of events and that, therefore, the burden of proof could not be shifted.

They added, however, that they could not give a final version of the facts since the domestic investigation had not yet been completed.

2. The applicant

484. The applicant maintained that he had adduced strong, clear and concordant facts in support of his claims. In contrast, the Romanian Government had continued to cover up the truth. The Government had an unprecedented advantage over the applicant. They had all the relevant facts in their possession because they had entered into an agreement to host the secret CIA prison, because they had operationalised that agreement, and because they had covered it all up. In contrast, the applicant, still detained at the remote location of Guantánamo Bay, was gagged from speaking of his treatment in Romania.

485. The applicant reiterated that he had established more than a prima facie case that he had been detained and tortured in Romania under the HVD Programme (see paragraphs 404-405 above). According to the Court's case-law, the burden of proof now shifted to Romania, particularly because Romania had "exclusive access to information" and witnesses who could corroborate or refute the applicant's case. However, the Government had failed to provide any such explanation; instead, they engaged in a pattern and practice of obfuscation and denial with respect to the events complained of. They had done so in the context of unprecedented secrecy maintained by the United States and its partner governments with respect to secret detention and extraordinary rendition operations.

486. Where, as in the present case, the events at issue lay wholly or in large part within the exclusive knowledge of the authorities, the burden of proof could be regarded as resting on the authorities to provide a satisfactory and convincing explanation. Where, as in this case, the authorities had failed to provide a convincing explanation and failed to

conduct an effective investigation, despite being on notice, at least since November 2005, of the fact that Romania had hosted a secret CIA prison, the Court was entitled to draw inferences adverse to the authorities.

487. The applicant emphasised that the Court had consistently applied these principles in cases involving injuries, death or disappearances that occurred in detention, including cases where, as here, the Government denied that the individual had been in Government custody at the time of the events at issue. It had also applied these principles where persons had been found dead or injured, or had disappeared, in an area within the exclusive control of the authorities of the State and there had been prima facie evidence that the State might be involved. As the Grand Chamber reiterated in *El-Masri*, prima facie evidence could itself be provided by proof in the form of concordant inferences, based on which the burden of proof was shifted to the respondent Government.

488. Furthermore, in *Al Nashiri v. Poland* (cited above) the Court had established that it was appropriate to adopt a flexible approach towards the evaluation of evidence. The Court had observed that although it had adopted the "beyond reasonable doubt" standard of proof, it also "adopt[ed] the conclusions that [were], in its view, supported by the free evaluation of all evidence, including such inferences as [might] flow from the facts and the parties submissions". Proof could thus "follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact". In addition, in assessing the evidence, the Court had also taken note of the unique set of constraints on the applicant which had precluded him from testifying about his detention before the Court and of "the very nature and extreme secrecy of the CIA operations in the course of the 'war on terror'".

489. The applicant argued that the same constraints applied in his case against Romania. Indeed, he had been virtually isolated in Guantánamo and unable to talk publicly about his torture and ill-treatment or even submit a statement to the Court because the US authorities had taken the position that his thoughts and memories about his experiences under torture were classified information. Accordingly, they had prohibited him from sharing these experiences with anyone other than his US lawyers, who were prevented from revealing what they had been told by their client on pain of criminal sanction.

Despite the extreme secrecy associated with CIA operations and his inability to address the Court directly, the applicant considered that he had submitted ample evidence in support of his factual claims. Indeed, the documentary and expert evidence offered by him and heard by the Court in the present case was, in his view, akin to the evidence that had been given credence by the Court in *Al Nashiri v. Poland*.

D. The Court's assessment of the facts and evidence

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

490. The Court is sensitive to the subsidiary nature of its role and has consistently recognised that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Imakayeva v. Russia*, no. 7615/02, § 113, ECHR 2006-XIII (extracts); *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 96, 18 December 2012; *El-Masri,* cited above, § 154; *Al Nashiri v. Poland*, cited above, § 393; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 393).

Nonetheless, in cases where there are conflicting accounts of events, the Court's examination necessarily involves the task of establishing facts on which the parties disagree. In such situations the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court (see *El-Masri,* cited above, § 151; and *Imakayeva*, cited above, §§ 111-112).

491. In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems which use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions.

According to the Court's established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see, among other examples, *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII; *Creangă v. Romania* [GC], no. 29226/03, § 88, 23 February 2012; *El-Masri*, cited above, § 151; *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 93-94, ECHR 2014 (extracts); *Al Nashiri v. Poland*, cited

above, § 394; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 394; and *Nasr and Ghali*, cited above, § 119).

492. While it is for the applicant to make a prima facie case and adduce appropriate evidence, if the respondent Government in their response to his allegations fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred, strong inferences can be drawn (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 184, ECHR 2009, with further references; *Kadirova and Others v. Russia*, no. 5432/07, § 94, 27 March 2012; *Aslakhanova and Others,* cited above, § 97; *Al Nashiri v. Poland*, cited above, § 395; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 395).

493. Furthermore, the Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. According to the Court's case-law under Articles 2 and 3 of the Convention, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, for instance as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Imakayeva,* cited above, §§ 114-115; *El-Masri,* cited above, § 152; *Al Nashiri v. Poland*, cited above, § 396; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 396; and *Nasr and Ghali,* cited above, § 220).

In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government (see *El-Masri*, cited above, § 152).

2. Preliminary considerations concerning the establishment of the facts and assessment of evidence in the present case

494. The Court has already noted that it is not in a position to receive a direct account of the events complained of from the applicant (see paragraph 16 above; also, compare and contrast with other previous cases involving complaints about torture, ill-treatment in custody or unlawful detention, for example, *El-Masri,* cited above, §§ 16-36 and 156-167; *Selmouni v. France* [GC], no. 25803/94, §§ 13-24, ECHR 1999-V; *Jalloh v. Germany* [GC], no. 54810/00, §§ 16-18, ECHR 2006-IX; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 188-211, ECHR 2004-VII).

495. The regime applied to high-value detainees such as the applicant is described in detail in the CIA declassified documents, the 2014 US Senate

Committee Report and also, on the basis, *inter alia*, of the applicant's own account, in the 2007 ICRC Report. That regime included transfers of detainees to multiple locations and involved holding them incommunicado in continuous solitary confinement throughout the entire period of their undisclosed detention. The transfers to unknown locations and unpredictable conditions of detention were specifically designed to deepen their sense of disorientation and isolation. The detainees were usually unaware of their exact location (see *Al Nashiri v. Poland,* cited above, §§ 397-398; *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 397-398; and paragraphs 48-58, 85 and 293 above).

496. As held in *Al Nashiri v. Poland* (cited above, § 399) and as can be seen from the material cited above (see paragraphs 98-140 above), since an unknown date in mid-October 2002 the applicant has not had contact with the outside world, save the ICRC team in October and December 2006, the military commission's members and his US counsel. It has also been submitted that the applicant's communications with the outside world are virtually non-existent and that his communications with his US counsel and his account of experiences in CIA custody are presumptively classified (see paragraph 482 above).

497. The above difficulties involved in gathering and producing evidence in the present case caused by the restrictions on the applicant's contact with the outside world and the extreme secrecy surrounding the US rendition operations have inevitably had an impact on his ability to plead his case before this Court. Indeed, in his application and further written pleadings the events complained of were to a considerable extent reconstructed from threads of information gleaned from numerous public sources.

Consequently, the Court's establishment of the facts of the case is to a great extent based on circumstantial evidence, including a large amount of evidence obtained through the international inquiries, considerably redacted documents released by the CIA, the declassified 2014 US Senate Committee Report, other public sources and the testimony of the experts heard by the Court (see also *Al Nashiri v. Poland,* cited above, § 400, and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 400).

498. It is also to be noted that while the Government have firmly denied the applicant's allegations in so far as they concerned Romania and contested the credibility of various parts of the evidence before the Court, they have not disputed the fact that he was subjected to secret detention and ill-treatment under the HVD Programme. Nor have they disputed his version of the circumstances preceding his alleged rendition to Romania on 12 April 2004 (see paragraphs 395-402 and 419-443 above).

However, the facts complained of in the present case are part of a chain of events lasting from mid-October 2002 to 5 September 2006 and concerning various countries. The examination of the case necessarily

involves the establishment of links between the dates and periods relevant to the applicant's detention and a sequence of alleged rendition flights to the countries concerned. As a result, the Court's establishment of the facts and assessment of evidence cannot be limited to the events that according to the applicant allegedly took place in Romania but must, in so far as it is necessary and relevant for the findings in the present case, take into account the circumstances occurring before and after his alleged detention in Romania (see *Al Nashiri v*. Poland, cited above, §§ 401-417, and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 401-419).

3. As regards the establishment of the facts and assessment of evidence relevant to the applicant's allegations concerning his transfers and secret detention by the CIA before his rendition to Romania (mid-October 2002-April 2004)

(a) Period from mid-October 2002 to 6 June 2003

499. The Court has already established beyond reasonable doubt the facts concerning the applicant's capture, rendition and secret detention until 6 June 2003, the date of his rendition on plane N379P from Poland to another CIA secret detention facility (see *Al Nashiri v. Poland ,* cited above, §§ 401-417). The relevant passages from *Al Nashiri v. Poland* containing the Court's findings of fact are cited above (see paragraph 98 above). Some additional elements, which are all fully consistent with the Court's establishment of the facts in that case, can also be found in the 2014 US Senate Committee Report (see paragraphs 99-101 above).

(b) Whether the applicant's allegations concerning his secret detention and transfers in CIA custody from 6 June 2003 (transfer out of Poland) to an unspecified two-digit date in April 2004 (transfer out of Guantánamo) were proved before the Court

500. It is alleged that before being rendered by the CIA on 12 April 2004 from Guantánamo to Romania on board N85VM the applicant had been detained in other CIA secret detention facilities abroad (see paragraphs 115-116 above).

501. In *Al Nashiri v. Poland* (cited above, §§ 408 and 417) the Court held as follows:

> "408. In the light of that accumulated evidence, there can be no doubt that:
>
> ...
>
> 2) the N379P, also known as "Guantánamo Express", a Gulfstream V with capacity for eighteen passengers but usually configured for eight, arrived in Szymany on 5 June 2003 at 01:00 from Kabul, Afghanistan. It stayed on the runway for over two hours and then departed for Rabat, Morocco.
>
> ...

417. Assessing all the above facts and evidence as a whole, the Court finds it established beyond reasonable doubt that:

...

4) on 6 June 2003 the applicant was transferred by the CIA from Poland on the CIA rendition aircraft N379P."

502. Referring to this point in time, the 2014 US Senate Committee Report states that from June 2003 onwards "the CIA transferred Al Nashiri to five different CIA detention facilities before he was transferred to US military custody on 5 September 2006" (see paragraph 102 above). It further states that in 2003 the CIA arranged for a "temporary patch", which meant placing the applicant and another detainee – Ramzi bin al-Shibh – in a country whose name was redacted and that by an unspecified – redacted – date in 2003 both of them were transferred out of that country to Guantánamo (see paragraph 109 above).

There can therefore be no doubt that between his transfer from Poland on 6 June 2003 and his transfer to Guantánamo on an unspecified later date in 2003 the applicant was for some time held by the CIA in another country – the first one out of five in which he would be secretly detained between 6 June 2003 and 5 September 2006.

503. Mr J.G.S. testified that the country in question was identifiable as Morocco and that on 6 June 2003 the plane N379P had taken the applicant and Ramzi bin al-Shibh from Poland to Rabat, Morocco to a facility that at that time had been let to the CIA by their Moroccan counterparts. He stated that the applicant had remained there until 23 September 2003, the date on which he had been transported on plane N313P from Rabat to Guantánamo (see paragraphs 107-108 and 110 above).

504. The N313P rendition circuit of 20-24 September 2003 was analysed in detail in *Husayn (Abu Zubaydah) v. Poland*, where the Court held that on 22 September 2003 Mr Abu Zubaydah had been transferred by the CIA from Poland on board that plane to another CIA secret detention facility elsewhere. It also held that this flight had marked the end of CIA-associated aircraft landings in Poland and the closure of the CIA "black site" codenamed "Quartz" in that country (see *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 414 and 419). The collation of data from multiple sources shows that the plane left Washington D.C. on 20 September 2003 and undertook a four-day flight circuit during which it landed in six countries. It flew from Rabat to Guantánamo on the night of 23 September 2003, landing there in the morning of 24 September 2003 (see paragraphs 111-112, 274, 326, 337, 356 and 374 above).

According to the RCAA letter of 29 July 2009, N379P's itinerary was Szczytno airport in Szymany, Poland-Constanţa-Rabat but the airport at which it landed in Romania was Băneasa Airport in Bucharest (see paragraphs 113 and 326 above). This information is consistent with evidence heard from Mr J.G.S., who in *Husayn (Abu Zubaydah) v. Poland*

testified that "this particular flight circuit was again disguised by dummy flight planning although significantly not in respect of Poland" and that "since this visit to Szymany was comprised solely of a pick-up of the remaining detainees, the CIA declared Szymany as a destination openly and instead disguised its onward destinations of Bucharest and Rabat, hence demonstrating that the methodology of disguised flight planning continued for the second European site in Bucharest, Romania" (see *Husayn (Abu Zubaydah) v. Poland*, cited above, § 312; and paragraph 112 above).

505. The 2014 US Senate Committee Report confirms that "beginning in September 2003" the CIA held its detainees at CIA facilities in Guantánamo and that by a – redacted but clearly two-digit – date in April 2004 "all five CIA detainees were transferred from Guantánamo to other CIA detention facilities" pending the US Supreme Court's ruling in *Rasul v. Bush* which, as the US authorities expected, "might grant *habeas corpus* rights to the five CIA detainees". The transfer was preceded by consultations among the US authorities in February 2004. It was recommended by the US Department of Justice (see paragraphs 62 and 114 above).

506. In the light of the material in its possession, the Court finds no counter evidence capable of casting doubt on the accuracy of the expert's conclusions regarding the above sequence of events, the places of the applicant's secret detention and the dates of his transfers during the relevant period.

507. Accordingly, the Court finds it established beyond reasonable doubt that:

(1) on 6 June 2003 on board the rendition plane N379P the applicant was transferred by the CIA from Szymany, Poland to Rabat, Morocco;

(2) from 6 June to 23 September 2003 the applicant was detained in Morocco at a facility used by the CIA;

(3) on 23 September 2003 on board the rendition plane N313P the applicant was transferred by the CIA from Rabat to Guantánamo; and

(4) the applicant was detained in Guantánamo until a two-digit date in April 2004 (redacted in the 2014 US Senate Committee Report), then transferred by the CIA to another detention facility elsewhere.

4. As regards the establishments of the facts and assessment of evidence relevant to the applicant's allegations concerning his rendition by the CIA to Romania, secret detention in Romania and transfer by the CIA out of Romania (12 April 2004 to 6 October or 5 November 2005)

(a) Whether a CIA detention facility existed in Romania at the time alleged by the applicant (22 September 2003 – beginning of November 2005)

508. It is alleged that a CIA secret detention facility operated in Romania from 22 September 2003 to the first days of November 2005,

when it was closed following the publication of Dana Priest's report on CIA overseas clandestine prisons in Eastern Europe in *The Washington Pos*t on 2 November 2005 (see, in particular, paragraphs 445-448 above). The Government denied that a CIA detention facility had ever existed on Romania's territory (see, in particular, paragraphs 420-425 above).

509. The Court notes at the outset that the following facts are either uncontested or have been confirmed by the Court's findings in *Husayn (Abu Zubaydah) v. Poland* and flight data from numerous sources, including the documents produced by the respondent Government:

(a) On 22 September 2003 plane N313P arrived in Szymany, Poland en route from Kabul, left on the same day for Romania and, having indicated in its flight plan Constanţa as its destination, in fact landed at Bucharest Băneasa Airport. On 23 September 2003 the plane took off from Bucharest for Rabat (see *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 408 and 419; and paragraphs 112-113, 326 and 504 above).

(b) On 5 November 2005 plane N1HC, having indicated in its flight plan Mihail Kogălniceanu International Airport in Constanţa as its destination, in fact landed at Băneasa Airport in Bucharest and on the same day took off from Bucharest for Amman.

(c) On 5 November 2005 plane N248AB arrived in Amman at 23:49 and on 6 November 2005, on the same night, left for Kabul;

(d) On the same night of 5-6 November 2005 both N1HC and N248AB were in the same airport in Amman between 00:21 (N1HC's landing) and 00:55 (N248AB's departure) (see paragraph 135 above).

510. It has not been disputed by the Government that the *Washington Post* publication was the first one in which East European countries were mentioned in the context of the HVD Programme (see paragraphs 236 and 421 above).

It was followed by subsequent, more specific reports.

On 6 November 2005 Human Rights Watch, in the 2005 HRW Statement, indicated Poland and Romania as the CIA accomplices in the HVD Programme (see paragraphs 226-227 above).

That statement was followed by the HRW List of 30 November 2005 which referred to "ghost prisoners", including the applicant, considered to be possibly held in secret detention by the CIA (see paragraph 228 above).

A few days later, on 5 December 2005, an *ABC News* report named Poland and Romania as countries hosting CIA secret prisons and listed the names of eleven top al-Qaeda terrorist suspects, including the applicant, being held in CIA custody. It also stated that, according to the CIA sources, the US authorities had "scrambled to get all the suspects off the European soil before Secretary of State Condoleezza Rice arrived there today" (see paragraph 237 above).

511. Nor has it been disputed that the above disclosures soon triggered a number of international inquiries into the CIA rendition and secret detention

operations and allegations of torture and ill-treatment of prisoners. The multiple investigations by international governmental organisations started with the Council of Europe's inquiry under Article 52 of the Convention and the Marty Inquiry, followed by the European Parliament's Fava Inquiry, the 2010 UN Joint Study and the investigative work of the Council of Europe's Commissioner for Human Rights carried out until 2012. Also, in that context, the ICRC independently prepared its earlier, confidential reports and the 2007 ICRC Report (see paragraphs 246-280, 290 and 294-296 above). As a follow-up to the Fava Report, the European Parliament LIBE Committee still continues to investigate the issue of the CIA secret prisons in Europe (see paragraphs 282-290 above).

512. The initial 2006-2007 reports drawn up in the framework of the inquiries conducted by the international governmental organisations confirmed consistently, albeit in various terms, that there was at least a strong suspicion that a CIA clandestine detention site had operated in Romania.

(a) The 2006 Marty Report stated that, while the factual elements gathered so far had not provided definitive evidence of secret detention centres, Romania was "thus far the only Council of Europe member state to be located on one of the rendition circuits" which bore "all the characteristics of a detainee drop-off point". The rendition circuit in question was executed on 25 January 2004 by plane N313P which, before landing in Romania, on 23 January 2004 rendered Mr El-Masri from Skopje to the CIA "black site" in Kabul (see paragraphs 253 and 327-330 above and *El Masri,* cited above, §§ 21 and 157-158).

(b) The 2007 Marty Report affirmed that there was "now enough evidence to state that secret detention facilities run by the CIA [had] existed in Europe from 2003 to 2005, in particular in Poland and Romania" (see paragraph 258 above). It stated that "Romania [had been] developed into a site in which more detainees were transferred only as the HVD Programme [had] expanded". It was Senator Marty's understanding that "the Romanian "black site" [had been] incorporated into the programme in 2003, attained its greatest significance in 2004 and operated until the second half of 2005" (see paragraph 261 above).

The report also referred to the "clear inconsistencies in the flight data" provided by various Romanian sources, when compared with data gathered by the Marty Inquiry independently. The disagreement between these sources was found to be "too fundamental and widespread to be explained away by simple administrative glitches, or even by in-flight changes of destinations by Pilots-in-Command, which were communicated to one authority but not to another". In sum, the report stated that "presently there exist[ed] no truthful account of detainee transfer flights to Romania" (see paragraph 264 above).

Senator Marty in the 2006 and 2007 Marty Reports, as well as in his affidavit of 24 April 2013 and testimony given at the fact-finding hearing before the Court explained comprehensively the methodology adopted in his inquiry and the sources of information on the basis of which the respective findings had been made (see paragraphs 258, 262, 354 and 379 above).

(c) The Fava Report expressed "serious concern" about twenty-one stopovers made by the CIA-operated aircraft at Romanian airports, which on most occasions had come from or been bound for countries linked with extraordinary rendition circuits.

It was also found that five flight plans had been filed with inconsistencies as they had indicated a landing airport which had not corresponded with the subsequent take-off airport (see paragraphs 271 and 274 above). Moreover, the Fava Report identified three aircraft with multiple stopovers in Romania that already at that early stage of the inquiries into the HVD Programme had been known to have been involved in the CIA rendition operations.

Among those aircraft was N85VM, conclusively identified as having been used for the rendition of Mr Osama Mustafa Nasr aka Abu Omar from Germany to Egypt on 17 February 2003 (see also *Nasr and Ghali,* cited above, §§ 39, 112 and 231) and N313P conclusively identified as having been used for the rendition of Mr El-Masri from Skopje to Kabul on 23 January 2004 (see *El-Masri,* cited above, §§ 67 and 157-159).

The report also listed flights from suspicious locations that stopped over in Romania in 2003-2005. The first flight N313P, from Szymany, Poland to Bucharest, en route to Rabat, took place on 22 September 2003, the last one, N1HC, from Bucharest to Amman, took place on 5 November 2005 (see paragraphs 271, 273 and 276 above).

The conclusion in the Fava Report was that it could not exclude, "based only on the statements made by Romanian authorities to the Temporary Committee delegation to Romania, the possibility that US secret services [had] operated in Romania and that no definite evidence ha[d] been provided to contradict any of the allegations concerning the running of a secret detention facility on Romanian soil" (see paragraphs 271 and 280 above).

With reference to that conclusion, Mr Fava testified at the fact-finding hearing that "the conclusion we reached was a very strong suspicion that [a CIA detention facility] existed, not certainty – there was no smoking gun" (see paragraph 363 above).

The Fava Report relied on comprehensive materials from multiple sources, comprising those collected during the TDIP delegation's visits to the countries concerned, including Romania, extensive flight data, expert evidence, analysis of specific cases of several victims of the CIA extraordinary rendition, interviews with the victims and their lawyers and material acquired in the context of meetings with the national authorities (see paragraphs 268-273 above).

513. The 2010 UN Study, referring to Romania, mentioned that the analysis of complex aeronautical data had demonstrated the circuit flown by N313P in September 2003 and that the experts had not been able to identify "any definite evidence of a detainee transfer into Romania" taking place prior to that flight (see paragraph 296 above).

514. Subsequent reports, which were based on fuller knowledge of the HVD Programme emerging from the CIA documents declassified in 2009 and 2010 and took into account progress in the research into rendition flights, contained more categorical conclusions.

(a) Mr Hammarberg, in his dossier of 30 March 2012 addressed to the Romanian Prosecutor General, stated that "sufficient evidence ha[d] now been amassed to allow us to consider the existence of a CIA "black site" in Romania as a proven fact, and to affirm that serious human rights abuses [had taken] place there". According to Mr Hammarberg's findings, the opening of the CIA prison, codenamed "Bright Light" and the start of the CIA detention operations in Bucharest was marked by the plane N313P landing in Bucharest on the night of 22 September 2003. The physical location was identified as the ORNISS building in Bucharest. The dossier included, in chronological order, a list of eight disguised rendition flights into Bucharest in respect of which "dummy" flight plans featuring Constanţa or Timişoara had been filed, starting from the N313P flight on 22 September 2003 and ending with the N860JB flight on 21 August 2005. No specific date of closure of the detention site was given; paragraph 18 of the dossier indicated that it had operated for "a period of at least one year" (see paragraphs 334-339). In response to the Court's question regarding this point, Mr Hammarberg explained that at that time their research had not managed to establish the precise dates for the closure of the Romanian "black site" nor for the applicant's transfer from Romania (see paragraph 346 above).

Mr Hammarberg, in his written response to the Court's questions, gave an account of the sources and methodology on which he relied in his findings. The conclusions as to the operation of a secret CIA "black site" in Romania were based on "a number of different sources which were cross-referenced and not on one piece of evidence in isolation". This included among other things, official US documents, flight records and aeronautical data amassed from diverse entities across the global aviation sector (see paragraph 345 above).

(b) The 2015 LIBE Briefing, which in addition to extensive flight data had been based on an analysis of a large amount of new material disclosed in the 2014 US Senate Committee Report, stated that it had been established beyond reasonable doubt that a facility in Romania had been used by the CIA to hold prisoners, that the first prisoners had been transferred to this facility in September 2003 and that the last prisoners had been transferred out of this facility in November 2005. The dossier included a list of fifteen

rendition circuits through Romania, the first of which was executed by N313P on 22-23 September 2003, the last of which was executed on 5-6 November 2005 and involved two planes N1HC (from Romania to Jordan) and N248AB (from Jordan to Afghanistan) (see paragraphs 355-358 above).

515. Furthermore, in *Husayn (Abu Zubaydah) v. Poland* Senator Marty and Mr J.G.S., referring in their PowerPoint presentation to the "final rendition circuit" through Poland executed by N313P, testified that this particular circuit had marked the closure of the CIA "black site" in Poland and the opening of the CIA's second secret detention site in Europe – located in Romania (see *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 312 and 414; *Al Nashiri v. Poland,* cited above, § 414; and paragraph 112 above).

516. At the fact-finding hearing held in the present case the experts heard by the Court confirmed in clear and categorical terms that a secret detention facility had operated in Romania in the period indicated by the applicant. They stated that the N313P flight on 22-23 September 2003 had marked the opening of the site and that a "double-plane switch" circuit involving two planes, identified as N1HC and N248AB had indicated its closure, prompted by the publication of the *Washington Post* article referred to above (see paragraph 508 above). In the same categorical terms they identified the CIA detention facility located in Romania as the one referred to in the 2014 US Senate Committee Report as "Detention Site Black" (see also paragraphs 160-164 above).

(a) Senator Marty and Mr J.G.S in their PowerPoint presentation, in support of the above conclusions, referred to the extensive flight data and their correlation, as well as to the 2014 US Senate Committee Report. In particular, Mr J.G.S. in connection with several specific references in that report stated that the code name "Detention Site Black" in the report corresponded in such "precise and extensive detail" to other multiple data concerning Romania that "Romania, its territory, its airspace, its detention facility, [was] inseparable from Detention Site Black (see paragraphs 131, 371, 374-376 above)

(b) Mr Black stated that it was "clear, beyond reasonable doubt that there was a CIA detention facility in Romania" and that he was convinced on "a wide array of different types of evidence" that it operated from September 2003 until November 2005. He testified that there was no doubt that the flight in November 2005 – which had been a two-plane switch taking prisoners to Afghanistan – had signalled the end of the Romanian site and that that flight had come within 72 hours after the existence of the site had been revealed in the *Washington Post* article. He added that the 2014 US Senate Committee Report was very clear that at that point everyone who had been remaining in Romania had been "shipped out to Afghanistan" (see paragraphs 132 and 390 above).

In his testimony, he also mentioned specific HVDs, including the applicant, who had been detained in Romania between September 2003 and 2005, saying that "the fact that those individuals [had been] held in Romania at various points between 2003 and 2005 [was] absolutely beyond reasonable doubt, there [could not] be any alternative narrative to that that [made] any sense". He further stated that "Detention Site Black [was] the site that fulfil[ed], in terms of its operating times, the flight paths that we [knew] to have been connected to prisoner movements and to the CIA rendition programme. Detention Site Black [was] the one which correlate[d] precisely with those flight paths that our research [had] discovered, [had] reconstructed" (see paragraphs 390 and 392 above).

517. The 2014 US Senate Committee Report includes several references to Detention Site Black. To begin with, the report confirms that CIA detainees were transferred to Detention Site Black in a country whose name was redacted "in the fall of 2003". It further confirms that the site still operated in "the fall of 2004", as well as in April and May 2005 (see paragraphs 160-164 above) and that Mr Al Nashiri was held there in October 2004 and June and July 2005 (see paragraphs 127, 158 and 162-163 above).

Finally, it indicates that Detention Site Black was closed "after publication of the *Washington Post* article", following the pressure from the country concerned, which demanded the closure within a number of hours which, although redacted in the text, clearly comprised two digits (see paragraph 133 above).

518. The Court observes that this indication in theory could mean any time between 10 and 99 hours. However, in reality, given that the CIA had to secure a safe, secret transfer of possibly several detainees by air to another consenting country, such demand could not be dealt with abruptly and immediately and, by the nature of things, inevitably required some preparation and handling of logistical problems. According to the 2014 US Senate Committee Report, the "CIA transferred ... the remaining CIA detainees out of the facility shortly thereafter" (see paragraph 133 above). Having regard to the fact that the *Washington Post* article was published on 2 November 2005, the dates on which the transfer could realistically have been carried out – that is to say, within the range of 24-99 hours – had to be situated in the short period from 3 to 6 November 2005. This coincides exactly with the flight identified by the experts as the one marking the closure of "Detention Site Black" in Romania, namely N1HC from Bucharest to Amman, executed on 5 November 2005 (see also paragraph 509 above).

519. Furthermore, all the materials in the Court's possession, including the list of twenty-one "suspicious flights" produced by the Government unambiguously demonstrate that a series of CIA-associated aircraft landings at Bucharest Băneasa Airport started on 22 September 2003 with N313P

and ended on 5 November 2005 with N1HC. Markedly, these two particular flight circuits were disguised by the so-called "dummy flight planning"– a practice that, as described by the experts and analysed by the Court in its previous judgments concerning the CIA rendition operations in Poland, consisted in filling false flight plans that indicated a route which the planes did not, or even intend to, fly. Both aircraft's flight plans indicated Constanţa as their destination but in fact they landed at and took off from Bucharest Băneasa Airport (see paragraphs 112, with references to *Husayn (Abu Zubaydah) v. Poland,* and 130, 134-135 and 372-373 above; see also *Al Nashiri v. Poland*, cited above, §§ 419-422).

520. The Government acknowledged that on 22-23 September 2003 the flight plan for N313P, initially indicating Constanţa as its destination, had been changed to Bucharest Băneasa Airport when the plane had been en route (see paragraph 439 above). However, they did not see how the change of flight plans executed by the flight operator – a change on which the Romanian authorities had no influence – could be indicative of their complicity in the CIA rendition operations or, still less, of the existence of a CIA "black site" in Romania (see paragraphs 436-440 above).

521. Addressing the Government's arguments, the Court finds it appropriate to reiterate certain findings concerning the operation of the CIA-associated flights in Romania emerging from the material in the case file.

(a) As already noted above (see paragraph 512 above), the Fava Report referred to twenty-one stopovers made by the CIA-operated aircraft at Romanian airports during the relevant period. Significantly, most stopovers (thirteen) and take-offs (five) found suspicious took place at Bucharest airports. Several of those flights are included in the Government's list of twenty-one "suspicious flights" (see paragraphs 273 and 327 above). The Fava Inquiry also identified fourteen different CIA aircraft that landed in Romania at the material time and referred to at least five inconsistent flight plans, concerning, among others, the N1HC flight on 5 November 2005. All these plans indicated destinations filed for Constanţa or Timisoara; however, the aircraft real destination was Bucharest Băneasa Airport, at which those flights in fact landed and from which they took off subsequently (see paragraphs 271-274 and 276 above).

(b) Mr Hammarberg's dossier for the Romanian Prosecutor General contained a – non-exhaustive – list of the most significant eight flights into Bucharest, starting from N313P on 22 September 2003. Destinations for all of them were disguised by the "dummy" flight planning. All bore the characteristics of "detainee drop-offs", i.e. transportation of CIA prisoners into the country. All those planes are on the list of twenty-one "suspicious flights" furnished by the Government (see paragraphs 327 and 337 above).

(c) The 2015 LIBE Briefing identified fifteen rendition missions linking Romania to other CIA prison host countries or to known or suspected prisoner transfers. According to that report, the first such mission was

executed by N313P on 22 September 2003, the last by N1HC on 5 November 2005 (see paragraphs 357-358 and 514 above).

The list of fifteen rendition missions in the 2015 LIBE Briefing overlaps with the Government's list of twenty-one "suspicious flights" (see paragraphs 327 and 357-358 above).

(d) In all the inquiries conducted by the international governmental and non-governmental organisations, which were extensively referred to above, most planes included in the Government's list have been conclusively and definitely identified as carrying out the CIA rendition missions (see paragraphs 250-264; 268-290; 296; 327-330; 334-336; and 355-358 above).

(e) It emerges from the comparison of the list of twenty-one "suspicious flights" with the above reports identifying the aircraft associated with the CIA's transportation of prisoners that between 23 September 2003 and 5 November 2005 there was a continued, steady and concentrated flow of those planes through Bucharest Băneasa Airport. According to the material produced by the Government themselves, during that period fifteen CIA flights arrived at Bucharest Băneasa Airport and only two were recorded by the Romanian authorities as landing at Constanţa Mihail Kogălniceanu Airport. The CIA flights into Bucharest arrived at fairly regular intervals of between one and some three months (see paragraphs 327 and 357-358 above).

522. Considering the material referred to above as a whole, the Court is satisfied that there is prima facie evidence in favour of the applicant's allegation that the CIA secret detention site operated in Romania between 22 September 2003 and the beginning of November 2005. Accordingly, the burden of proof should shift to the respondent Government (see *El-Masri*, cited above, §§ 154-165, and paragraphs 492-493 above).

523. However, the Government have failed to demonstrate why the evidence referred to above cannot serve to corroborate the applicant's allegations. Apart from their firm, albeit general, denial that the facts as presented by the applicant and disclosed in the international inquiries – to begin with the Marty Inquiry and Mr Hammarberg's investigative work – never took place or were grossly distorted to Romania's disadvantage, they have not offered any cogent reasons for the series of landings of CIA-associated aircraft at Bucharest between 22 September 2003 and 5 November 2005 (see also *Al Nashiri v. Poland*, cited above, § 414; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 414).

Likewise, the Government have not produced any evidence capable of contradicting the findings of the international inquiries and the experts heard by the Court, categorically stating that the aircraft in question were used by the CIA for transportation of prisoners into Romania. Nor have they refuted expert evidence to the effect that the CIA prison referred to in the 2014 US Senate Report as "Detention Site Black" was located in Romania (see also

and compare with *Al Nashiri v. Poland*, cited above, §§ 414-415; and *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 414-415).

524. In that context, the Court cannot but note that all the international inquiries and other reports challenged by the Government were based on extensive, meticulous work which was done by the experts and politicians of the highest integrity and competence and whose only aim and mission was to reveal the facts and establish the truth about what had occurred in Europe during the CIA rendition operations. Their work was often impeded by the extreme secrecy surrounding the CIA operations, the uncooperative attitude of the national authorities and the lack of access to the necessary information – information which was revealed only gradually, over many years and which still remains incomplete due to the classification of essential documents, in particular the full version of the 2014 US Senate Committee Report. It is worth noting that the inquiries conducted in 2006-2007 did not have the benefit of access to the CIA declassified documents, which were released in 2009-2010 (see paragraphs 36-58 above) and which provided an important insight into the fate of specific HVDs, including Mr Al Nashiri, with such details as dates of detainees' transfers between the CIA "black sites" and interrogation schedules.

As regards the Government's challenge to the impartiality and credibility of Reprieve, based on its involvement in ongoing investigations into CIA rendition and secret detention and case work regarding Guantánamo prisoners (see paragraph 434 above), the Court finds no ground whatsoever to consider that Reprieve and its experts, who have – as for instance Mr Black – also been involved in the European Parliament's inquiry, lack objectivity in representing the facts concerning the operation of the HVD Programme in Europe and the plight of detainees, including the applicant.

In so far as the Government can be seen as impliedly contesting the credibility of evidence from other experts heard at the fact-finding hearing (see paragraphs 399 and 430-435 above), the Court would wish to underline that Mr Fava, Senator Marty and Mr J.G.S. already gave evidence in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland.* The Court, in its examination of those cases, relied heavily on their testimonies considering them to be one of the most important parts of the evidence and finding them fully reliable and credible (see *Al Nashiri v. Poland*, cited above, §§ 404, 415, 434-436 and 441; and *Husayn (Abu Zubaydah) v Poland*, cited above, §§ 404, 415-416, 426-427, 434- 436, 439-440). Furthermore, in *El-Masri* the Court considered the expert report from Mr J.G.S. to be "compelling evidence" which was duly taken into account in its establishment of the facts in the case (see *El-Masri*, cited above, §§ 159 and 166).

Consequently, in the Court's eyes, there is nothing in the Government's submission that would be capable of shedding the doubt on the integrity and dependability of the experts whose testimony was taken in the present case.

525. The Government also argued that the fact that the sources relied on by the applicant, including the 2007 Marty Report and Mr Hammarberg's dossier, had given different indications as to the exact location of the alleged "black site" in Romania deprived his allegations of credibility. Referring in particular to the ORNISS building, they relied on witness R's statements obtained in the investigation denying that this location had, or could ever have been, used for the CIA prison (see paragraphs 325 and 422-425 above).

The Court does not find these arguments convincing.

It is true that the applicant, relying on the press disclosures, indicated the ORNISS building as a probable CIA prison. However, considering the secrecy of the CIA operations it cannot be realistically expected that this kind of indication will be absolutely certain, unless the governments concerned decide to disclose such locations and formally "officialise" the information circulating in the public domain. In that regard, the Court would note in passing that the likelihood of the ORNISS building having hosted the CIA facility has also been considered in the inquiry conducted by the European Parliament; however, the Romanian authorities did not enable the LIBE delegation to visit the site during their fact-finding mission in September 2015 (see paragraphs 288-290 above).

The Court will not speculate on that likelihood. Nor is it necessary for the purposes of its ruling to establish where the CIA facility was exactly located. Given the coherent and unrefuted evidence corroborating the applicant's allegations as to the existence of the CIA "black site" in Romania, the fact that he did not state its precise location does not undermine the credibility of his allegations.

526. In view of the foregoing, the Government's objection to the credibility of the evidence and sources relied on by the applicant (see paragraphs 430-435 above) cannot be upheld.

527. Consequently, the Court considers the applicant's allegations sufficiently convincing and, having regard to the above evidence from numerous sources corroborating his version, finds it established beyond reasonable doubt that:

(a) a CIA detention facility, codenamed Detention Site Black in the 2014 US Senate Committee Report, was located in Romania;

(b) the facility operated from 22 September 2003 and its opening was marked by flight N313P which took off from Szymany, Poland on 22 September 2003 and, having disguised its destination by indicating Mihail Kogălniceanu International Airport in Constanţa, landed at Bucharest Băneasa Airport on the same day; and

(c) the facility was closed on the Romanian authorities' demand and its closure was marked by flight N1HC which took off from Porto, Portugal on 5 November 2005 and, having disguised its destination by indicating Mihail

Kogălniceanu International Airport in Constanţa, landed at Bucharest Băneasa Airport and on the same day took off for Amman, Jordan.

(b) Whether the applicant's allegations concerning his rendition to Romania, secret detention at the CIA Detention Site Black in Romania and transfer from Romania to another CIA secret detention facility elsewhere (from 12 April 2004 to 6 October 2005 or 5 November 2005) were proved before the Court

528. It is alleged that the applicant was transferred to Romania from Guantánamo on board N85VM on 12 April 2004 and that he was detained at Detention Site Black in Romania, also codenamed "Bright Light" or "Britelite" until at least 6 October 2005 or, at the latest, until 5 November 2005 (see paragraphs 115-116 and 445-451 above). The Government firmly contested this (see paragraphs 426-429 and 436-437 above).

(i) Preliminary considerations

529. The Court is mindful that, as regards the applicant's actual presence in Romania, there is no direct evidence that it was the applicant who was transported on board the N85VM flight from Guantánamo to Bucharest or that he was subsequently transferred from Bucharest to another CIA secret detention facility on 6 October or 5 November 2006, the two possible dates indicated by the experts (see paragraphs 129-135 above).

The applicant, who for years on end was held in detention conditions specifically designed to isolate and disorientate a person by transfers to unknown locations, even if he had been allowed to testify before the Court, would not be able to say where he was detained. Nor can it be reasonably expected that he will ever, on his own, be able to identify the places in which he was held.

No trace of the applicant can, or will, be found in any official flight or border police records in Romania or in other countries because his presence on the planes and on their territories was, by the very nature of the rendition operations, purposefully not to be recorded. As confirmed by expert J.G.S. in *Al Nashiri v. Poland,* in the countries concerned the official records showing numbers of passengers and crew arriving and departing on the rendition planes neither included, nor purported to include detainees who were brought into or out of the territory involuntarily, by means of clandestine HVD renditions. Those detainees were never appeared in a record of persons on board filed with any official institution (see *Al Nashiri v. Poland*, cited above, §§ 410-411).

530. In view of the foregoing, in order to ascertain whether or not it can be concluded that the applicant was detained at Detention Site Black in Romania at the relevant time, the Court will take into account all the facts that have already been found established beyond reasonable doubt (see paragraphs 499, 507 and 527 above) and analyse all other material in its

possession, including, in particular, the 2014 US Senate Committee Report and expert evidence reconstructing the chronology of the applicant's rendition and detention in 2003-2005 (see paragraphs 102-140, 159-164, 167-190 and 251-393 above).

(ii) Transfers and secret detention

531. The Court observes that the following facts either are not disputed or have also been confirmed by flight data from numerous sources, including the documents produced by the respondent Government:

(a) On 12 April 2004 plane N85VM, having indicated in its flight plans Mihail Kogălniceanu International Airport in Constanţa as its destination, in fact landed in Băneasa Airport in Bucharest and took off from there on the same day (see paragraph 118 above);

(b) that on 5 October 2005 plane N308AB, having indicated in its flight plans Mihail Kogălniceanu International Airport in Constanţa as its destination, in fact landed at Băneasa Airport in Bucharest and took off from Bucharest for Tirana on the same day;

(c) that on 5 October 2005 plane N787WH landed in Tirana at 05:52 and stayed there until 23:44, at which time it departed for Shannon;

(d) that on 5 October 2005 both N308AB and N787WH were in the same airport in Tirana between 22:38 (N308AB's landing) and 23:44 (N787WH's departure);

(e) that on 6 October 2005 N787WH, having indicated in its flight plans Tallinn, Estonia as its destination, in fact landed at Vilnius International Airport in Lithuania (see paragraphs 135 and 331 above).

532. As regards the rendition circuit of 5-6 November 2005, the Court would reiterate that it has already been established that:

- on 5 November 2005 N1HC, having disguised its destination as Constanţa, in fact landed at Bucharest Băneasa Airport and took off from there for Amman, arriving there in the night on 5 November 2005;

- N248AB arrived in Amman 6 November 2005, and on the same night, left for Kabul; and

- on the same night of 5/6 November 2005 both N1HC and N248AB were in the same airport in Amman between 00:21 and 00:55 (see paragraphs 509 and 527 above).

533. The Court has also established that after his transfers from Poland to Morocco and from Morocco to Guantánamo the applicant was detained in Guantánamo until an unspecified two-digit date in April 2004 (see paragraph 507 above). As noted above, the 2014 US Senate Committee Report states that by that date, "all five CIA detainees were transferred from Guantánamo to other CIA detention facilities" (see paragraphs 114 and 505 above, with further references).

534. Mr J.G.S., in his testimony, explained that the use of the word "facilities" in the plural in the 2014 US Senate Committee Report was

significant in the context of the applicant's detention given that, as the very same report established, following his transfer from Poland, he had been held at five different CIA "black sites" (see also paragraphs 102 and 104-108 above). Mr Al Nashiri could not, therefore, have been transferred from Guantánamo back to Morocco. Mr J.G.S. further explained that at the relevant time there had been two distinct detainee transfers from Guantánamo; the first which had taken some detainees to Rabat on 27 March 2004 and the second which had taken the remaining ones on plane N85VM to Romania, via a stopover in Tenerife, on 12 April 2004. This, he said, was the sole outward flight linking Guantánamo with Romania. Also, it emerged from the 2014 US Senate Committee Report and cables regarding the applicant's treatment that he found himself at Detention Site Black in the third and fourth quarter of 2004 and in July 2005. Mr J.G.S concluded that, in order for the applicant to be at Detention Site Black or "Britelite" by that time, he had to have been brought to Romania on flight N85VM on 12 April 2004 (see paragraphs 119-120 above).

Moreover, in respect of that flight the CIA had recourse to its systematic practice of disguised flight planning which, as the expert stated, "in fact became a tell-tale sign of rendition or detainee transfer activity on such flights" (see paragraph 119 above).

535. Mr Black stated that he was aware of two possible flights that could have taken the applicant into Romania and N85VM was one of them. He indicated that there had been a potential other flight that had occurred in February 2005. While it was known for a fact that the applicant had been in Romania after February 2005 and in June 2005, there were also indications that he had been held in Romania before, in late 2004. That led Mr Black to prefer, of these two possibilities, the 12 April 2004 flight as being the more likely of the two (see paragraph 121 above).

536. The Government acknowledged that the flight plan for N85VM, initially indicating Constanţa as its destination, had been changed to Bucharest, Băneasa Airport when the plane had been en route but did not consider that this element could confirm the applicant's secret detention in Romania (see paragraph 437 above). They produced documents issued by the RAS at Băneasa Airport in connection with the N85VM landing on 12 April 2004 (see paragraph 118 above).

As in respect of other allegedly "suspicious" flights, the Government asserted that the flight had been of a "private and non-commercial nature" and had not been executed in connection with the HVD Programme (see paragraph 436 above).

537. However, this assertion does not seem to be supported by the materials gathered in the present case. To the contrary, the Court finds that in addition to the expert evidence referred to above, there is other abundant evidence to the effect that on 12 April 2004 plane N85VM executed a

rendition mission to Romania with the purpose of "dropping off" detainees from Guantánamo.

In that regard, the Court observes that since at least 2007 the findings of the international inquiries have clearly associated N85VM with the CIA rendition operations (see paragraphs 271- 273, 337, 342 and 358 above). As already noted above, N85VM was conclusively identified as the plane used earlier for the rendition of Osama Mustafa Nasr otherwise known as Abu Omar (see paragraph 512 above). The former Council of Europe's Commissioner for Human Rights dossier for the Romanian Prosecutor General included that flight among disguised rendition flights into Bucharest, bearing the character of detainee "drop-off" (see paragraph 337 above). The same dossier listed the applicant among HVDs who had been brought to a CIA "black site" in Romania and indicated 12 April 2004 as the date of his transfer to Romania (see paragraph 342 above).

The 2015 LIBE Briefing indicated flight N85VM on 12 April 2004 among the missions carried out under rendition contracts (see paragraph 358 above).

That flight is also listed among twenty-one "suspicious flights" in the document produced by the Government (see paragraph 327 above).

538. As to the applicant's rendition by the CIA from Romania, the experts gave 6 October 2005 and 5 November 2005 as two possible dates of the applicant's transfer (see paragraphs 129-132 above).

Mr J.G.S described in detail the CIA "plane-switch" operation that, according to him, had taken place in the course of the flight circuit on 5-6 October 2005 and involved two aircraft: N308AB and N787WH. On this premise, on 5 October 2005 the applicant was taken on board N308AB from Băneasa Bucharest City Airport to Tirana and, subsequently, on board N787WH to Vilnius to a CIA "black site" in Lithuania, referred to as "Detention Site Violet" in the 2014 US Senate Committee Report (see paragraphs 130-131 above).

Mr Black considered both dates as probable, with the 6 October 2005 transfer of the applicant being more likely (see paragraph 132 above).

539. Having regard to all the various documentary and oral evidence referred to above, the Court is satisfied that there is prima facie evidence in favour of the applicant's version of the events and that the burden of proof should shift to the Government.

540. Yet again in the Court's view the Government have failed to give any convincing grounds to explain why the evidence considered above cannot support the applicant's allegations. They asserted that the applicant's version of events should be rejected as it was incoherent and that in his account of the facts there had been inconsistencies regarding the dates, circumstances and the exact period of his alleged detention in Romania (see paragraphs 426-429 above).

The Court does not share the Government's assessment.

While it is true that, with the passage of time, the applicant adduced newly disclosed facts relevant for his complaints or corrected the dates initially given for his detention (see paragraphs 115-116 above), this does not by itself render his version of events inconsistent or incredible. In that context the Court would again refer to the fact that since his capture in mid-October 2002 the applicant has been continually prevented from giving any direct account of his fate even to the counsel representing him before the Court (see paragraphs 494-497 above).

541. Furthermore, having regard to the above evidence demonstrating clearly, consistently and conclusively the chronology of the events preceding the applicant's transfer to Romania, his transfer to Romania on 12 April 2004 and his presence at Detention Site Black located in Romania in 2004 and 2005 (see paragraphs 126-127, 158 and 162-163 above and 545 below), as well as expert evidence confirming that there were two – and only two – possible dates on which he could be taken by the CIA out of Romania, the Court does not find it indispensable to determine on which specific date the transfer occurred. It is certain and beyond any reasonable doubt that the applicant, once detained at Detention Site Black and, as confirmed by the 2014 US Senate Committee Report and the experts, still present there at least until July 2005, must have been transferred out of it at some later point before or when the site was definitely closed on 5 November 2005 (see paragraph 527 above). The experts' conclusions are founded on in-depth analysis of extensive international aviation data, contractual documents pertaining to rendition missions executed by the air companies used by the CIA and large amount of data released by the US authorities, including the CIA. On this basis, they gave a time-frame which is sufficiently accurate for the Court to conclude that the applicant must have been taken out of Romania either on 6 October 2005 or on 5 November 2005 to one of the – at the time two – remaining CIA detention facilities, referred to in the 2014 US Senate Committee Report as Detention Site Violet and Detention Site Brown.

542. Accordingly, the Court finds it established beyond reasonable doubt that:

(a) On 12 April 2004 the applicant was transferred by the CIA from Guantánamo to Romania on board N85VM.

(b) From 12 April 2004 to 6 October 2005 or, at the latest, 5 November 2005, the applicant was detained in the CIA detention facility in Romania code-named "Detention Site Black" according to the 2014 US Senate Committee Report.

(c) On 6 October 2005 on board N308AB or, at the latest, on 5 November 2005, on board N1HC via a double-plane switch the applicant was transferred by the CIA out of Romania to one of the two remaining CIA detention facilities, code-named Detention Site Violet and Detention Site Brown according to the 2014 US Senate Committee Report.

(iii) The applicant's treatment in CIA custody in Romania

543. It is alleged that during his secret detention in Romania the applicant was subjected to torture and other forms of treatment prohibited by Article 3 of the Convention. The Government have not addressed this issue.

544. The Court observes that, in contrast to *Al Nashiri v. Poland* where the treatment to which the applicant was subjected by the CIA during his detention in Poland could be established with certainty owing to the CIA's declassified materials depicting in graphic detail the torture inflicted on him in the course of the interrogations (see *Al Nashiri v. Poland,* cited above, §§ 416 and 514-516), in the present case there is no evidence demonstrating that at Detention Site Black in Romania he was subjected to EITs in connection with interrogations (see paragraphs 48-55 above).

545. As regards recourse to harsh interrogation techniques at the relevant time, the 2014 US Senate Committee Report mentions in general terms that in mid-2004 the CIA temporarily suspended the use of the EITs. While their use was at some point resumed and they were apparently applied throughout the most part of 2005, such techniques were again temporarily suspended in late 2005 and in 2006 (see paragraph 94 above).

In respect of the applicant, the report states that in the "final years" of his detention "most of the intelligence requirements for Al Nashiri involved showing [him] photographs". Those "debriefings" were suspended in June 2005 apparently because of the low value of intelligence obtained from him and "because debriefings often were the 'catalyst' for his outbursts" (see paragraphs 126-127 above). Other heavily redacted passages in the report speak of "feeding him rectally", which resulted from his "short-lived hunger strike" at some unspecified time in 2004. It is also mentioned that in October 2004 he underwent a psychological assessment in the context of "management challenges" posed to the CIA by psychological problems experienced by the detainees "who had been held in austere conditions and in solitary confinement". The applicant's assessment was used by the CIA in discussions on "establishing an endgame" for the HVD Programme (see paragraphs 126, 158 and 162-163 above). In July 2005 the CIA expressed concern regarding the applicant's "continued state of depression and uncooperative attitude". Days later a psychologist established that the applicant was "on the verge of a breakdown" (see paragraph 158 above).

546. According to the experts, even though the applicant was in all likelihood no longer interrogated with the use of the EITs, he did, as Mr J.G.S. stated "purely by virtue of the conditions in which he [had been] held" suffer ill-treatment (see paragraph 124 above). Mr Black added that it was clear that the applicant, in particular when he had been in Romania, was experiencing serious psychological problems as a result of the treatment he had received (see paragraph 125 above).

547. As regards the Court's establishment of the facts of the case, the detailed rules governing the conditions in which the CIA kept its prisoners leave no room for speculation as to the basic aspects of the situation in which the applicant found himself from 12 April 2004 to 6 October 2005 or 5 November 2005. The Court therefore finds it established beyond any reasonable doubt that the applicant was kept – as any other high-value detainee – in conditions described in the DCI Confinement Guidelines, which applied from the end of January 2003 to September 2006 to all CIA detainees (see paragraphs 56-58 above; see also *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 418-419 and 510).

While at this stage it is premature to characterise the treatment to which the applicant was subjected during his detention at Detention Site Black for the purposes of his complaint under the substantive limb of Article 3 of the Convention**,** the Court observes that the regime included at least "six standard conditions of confinement". That meant blindfolding or hooding the detainees, designed to disorient them and keep from learning their location or the layout of the detention facility; removal of hair upon arrival at the site; incommunicado, solitary confinement; continuous noise of high and varying intensity played at all times; continuous light such that each cell was illuminated to about the same brightness as an office; and use of leg shackles in all aspects of detainee management and movement (see paragraph 56-58 above).

5. As regards the establishment of the facts and assessment of evidence relevant to the applicant's allegations concerning Romania's knowledge of and complicity in the CIA HVD Programme

(a) Relations of cooperation between the Romanian authorities and the CIA, including an agreement to host a detention facility, request for and acceptance of a "subsidy" from the CIA, provision of premises for the CIA and acquaintance with some elements of the HVD Programme

(i) Agreement to host a CIA detention facility, request for and acceptance of a "subsidy" from the CIA and provision of premises for the CIA

548. The 2014 US Senate Committee Report, in the chapter giving details as to the establishment of Detention Site Black, states that in an unspecified month (redacted the text) in 2002 the CIA "entered into an agreement" with the country concerned "to host a CIA detention facility".

While the terms of that agreement have not been disclosed, it appears from subsequent passages that, in order to demonstrate to the country's authority (or person) whose name was redacted and to "the highest levels of the Country ... government" that the US authorities "deeply appreciate[d] their cooperation and support for the detention program", the CIA station in the country was invited by their Headquarters "to identify ways to support

the" – again redacted – country's bodies (presumably, or activities) by financial means, defined as a "subsidy" (see paragraph 161 above).

549. The requested subsidy which was received in appreciation of "cooperation and support" amounted to a sum (redacted in the text) that was a multiple of USD million; in fact, the amount which was initially put on – in the report's words – "wish list" presented on behalf of the country by the CIA station was later increased by a further (redacted) multiple of USD million (see paragraph 161 above).

The fact that such financial rewards were, as a matter of the general policy and practice, offered to the authorities of countries hosting CIA "black sites" is also confirmed in Conclusion 20 of the 2014 US Senate Committee Report. The conclusion states that "to encourage governments to clandestinely host CIA detention sites, or to increase support for existing sites, the CIA provided millions of dollars in cash payments to foreign government officials" and that "the CIA Headquarters encouraged CIA Stations to construct "wish lists" of proposed financial assistance" and "to 'think big' in terms of that assistance" (see paragraph 97 above).

550. In that context, the Court would also wish to refer to its findings regarding the national authorities' knowledge of the CIA HVD Programme in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* and the issue of the alleged existence of a bilateral agreement between Poland and the USA on the setting up and running of a secret CIA prison. In that case, the Court did not find it necessary for its examination of the case to establish whether such agreement or agreements existed and if so, in what format or what was specifically provided therein. It did, however, consider it inconceivable that the rendition aircraft could have crossed Polish airspace, landed at and departed from a Polish airport and that the CIA could have occupied the premises in Poland without some kind of pre-existing arrangement enabling the CIA operation in Poland to be first prepared and then executed (see *Al Nashiri v. Poland*, cited above, §§ 423-428; and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 425-430).

The same conclusion is valid in respect of Romania; moreover, in the present case it has been reinforced by evidence from the 2014 US Senate Committee Report, unambiguously demonstrating the existence of a bilateral agreement between Romania and the USA on hosting Detention Site Black on Romanian territory.

551. The Court would also add that the above-cited sections of the 2014 US Senate Committee Report further support the conclusions of the 2007 Marty Report, stating that "the key arrangements for CIA clandestine operations in Europe were secured on a bilateral level", that "the CIA brokered 'operating agreements' with the Governments of Poland and Romania to hold its high-value detainees ... in secret detention facilities on their respective territories" and that "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" (see paragraph 260 above; see also *Al Nashiri v. Poland*, cited above, §§ 423-428; and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 425-430).

In his affidavit made several years later, on 24 April 2013, Senator Marty stated that his "convictions regarding Romania's participation in the CIA's HVD Programme were unambiguous and unwavering", adding that "up to the present day, I stand by every one of the factual findings I delivered in my 2006 and 2007 PACE Reports" and that his "certitude that a CIA 'black site' existed in Romania [had] only increased since that time" (see paragraph 354 above).

At the fact-finding hearing he added that, based on "extremely precise testimony" obtained in the course of his inquiry, the Romanian officials "must have known that the CIA used their territory for transfers of prisoners in the context of the war on terror" (see paragraph 380 above)

552. In that regard, the Court notes that the 2007 Marty Report listed by name several individual high-office holders who "knew about, authorised and stand accountable for Romania's role in the CIA's operation of 'out-of-theatre' secret detention facilities on Romanian territory, from 2003 to 2005" (see paragraph 262 above).

Two of those identified in the report, namely former President of Romania, Ion Iliescu and his former Advisor on National Security, Ioan Talpeş several years later made public statements relating to the CIA rendition operation in their interviews given to *Spiegel Online* in 2014 and 2015 (see paragraphs 244 and 245 above).

553. In December 2014, in the first *Spiegel Online* publication, Mr Talpeş was reported as saying that "there were one or two locations in Romania at which the CIA probably held persons who were subjected to inhuman treatment". It was further reported that "had, from 2003 onwards, continued discussions with officials of the CIA and the US military about a more intense cooperation" and that in that context "it was agreed that the CIA could carry out its own activities in certain locations". He did not know where they were and "Romania was, expressly, not interested in what the CIA was doing there". Mr Talpeş also told *Spiegel Online* that in 2003 and 2004 he had informed President Iliescu that the CIA had carried out "certain activities" on Romanian territory; at that time "he did not think that the CIA could possibly torture captives" (see paragraph 244 above).

554. In April 2015, in the second *Spiegel Online* publication, Mr Iliescu was reported as stating that "around the turn of the year 2002-2003, our allies asked us for a site" and that he, as Head of State, had in principle granted that request but the details had been taken care of by Mr Talpeş. He added that "we [had not interfered] with the activities of the USA on this site".

Spiegel Online further reported that Mr Talpeş had confirmed Mr Iliescu's statements, adding that at the turn of 2002-2003 he had received a request from a representative of the CIA in Romania for premises, which the CIA needed for its own activities. He had arranged for a building in Bucharest to be given to the CIA. The building was used by the CIA from 2003 to 2006 and no longer existed; Mr Talpeş would not reveal its location (see paragraph 245 above).

555. In that context, it is also to be noted that the 2016 EP Resolution states that Mr Talpeş "admitted on record to the European Parliament delegation that he had been fully aware of the CIA's presence on Romanian territory, acknowledging that he had given permission to 'lease' a government building to the CIA" (see paragraph 290 above).

556. Referring to Mr Iliescu's and Mr Talpeş' interviews in *Spiegel Online,* the Government argued that subsequently their initially ambiguous statements had been clarified to the effect that there had been no cooperation and no complicity in the CIA rendition and secret detention operations on the part of Romania. In that regard, the Government also relied on evidence from witnesses obtained in the criminal investigation conducted in Romania (see paragraphs 441-442 above).

557. The Court does not share this assessment.

It is true that certain Romanian officials, for instance Y and Z, who testified in the investigation in May and June 2015, denied receiving any such request or having any knowledge of the existence of the CIA prisons in the country (see paragraphs 300-302 above).

Yet in that regard the Court cannot but note that witness Z in his testimony given on 18 June 2015 nevertheless confirmed that "USA Government officials [had] asked the Romanian authorities to offer some locations on Romanian territory to be used for actions of combating the international terrorist threats by the representatives of the CIA, on the same pattern as that used in the other NATO Member States" and that "finally one single location [had been] offered". It was understood "at that stage, in 2003, that it should be an office building in Bucharest" (see paragraph 302 above).

558. The accounts given by Mr Talpeş and Mr Iliescu to *Spiegel Online* in their interviews and Mr Talpeş' admission to the European Parliament's delegation match the disclosures in the 2014 US Senate Committee Report, in particular regarding the date of the agreement to host a CIA secret detention site (2002), the fact that the Romanian authorities were asked for premises for the CIA, the time at which the premises were provided (2003) and the fact that they were informed of the purpose for which the premises that Romania offered were to be used (see paragraphs 161 and 548 above). They also correspond to the Court's above findings as to the dates marking the opening of Detention Site Black in Romania (see paragraph 527 above).

559. The statements obtained in the investigation relied on by the Government are in a marked contrast to the disclosures made by the US authorities, Romania's partner under the agreement. The Court does not see how the findings of the US Senate Intelligence Committee, based on a several-year-long investigation and in-depth analysis of first-hand evidence, which in most part came from classified "top secret" sources, including more than six million pages of CIA documents (see paragraphs 78-80 above) could be undermined by the material referred to by the Government.

(ii) Acquiescence with some elements of the HVD Programme

560. The 2014 US Senate Committee Report, in the chapter concerning the establishment of the CIA Detention Site Black (see paragraphs 161 and 548 above) also refers to several interventions *vis-à-vis* the CIA made by the US ambassador in the country in the context of the operation of the CIA HVD Programme in that country and public disclosures of ill-treatment of detainees in US custody. First, in August 2003, he expressed concern as to whether the State Department was aware of the CIA detention facility in the country and its "potential impact" on US policy in respect of the State concerned. The second and third interventions, prompted by "revelations about US detainee abuses" were made in May 2004 and in the "fall of 2004".

The report further states that "while it is unclear how the ambassador's concerns were resolved, he later joined the chief of Station in making a presentation" to the country's authorities (or representatives) whose names were redacted in the text. The presentation did not describe the EITs but "represented that without the full range of these interrogation measures" the US "would not have succeeded in overcoming [the] resistance "of Khalid Sheikh Mohammed" and "other equally resistant HVDs". The presentation also included representations "attributing to CIA detainees critical information" on several terror plots, including the "Karachi Plot", the "Heathrow Plot" and the "Second Wave Plot". Also, in the context of intelligence obtained, several well-known HVDs in US custody were mentioned by name (see paragraph 161 above).

561. The above information originated in an evidential source to which the Court attributes utmost credibility (see also paragraph 559 above). It gives a description of a concrete event – an oral presentation – that occurred at some time following "the fall of 2004" and during which, in the context of the operation of Detention Site Black in the country, the Romanian authorities were presented with an outline of the CIA HVD Programme by the US officials. Even though the format of the meeting and names or functions of participants representing the host country have not been revealed, the disclosure clearly shows that the presentation included a fairly extensive account of the HVD Programme. To begin with, the US officials clearly spoke of intelligence that had been obtained from high-value

detainees through "overcoming resistance" by means of a "full range of interrogation measures". They also suggested that specific terrorist suspects in CIA custody had provided "critical intelligence" on prominent terror plots. CIA prisoners whose resistance was "overcome" as a result of interrogations were spoken of, to mention only Khalid Sheikh Mohammed, the top HVD in CIA custody, suspected of masterminding the 11 September 2001 terrorist attacks in the USA.

(b) Assistance in disguising the CIA rendition aircraft's routes through Romania by means of the so-called "dummy" flight planning

562. In *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* the fact that the national authorities cooperated with the CIA in disguising the rendition aircraft's actual routes and validated incomplete or false flight plans in order to cover up the CIA activities in the country was considered relevant for the Court's assessment of the State authorities' knowledge of, and complicity in, the HVD Programme (see *Al Nashiri v. Poland*, cited above, §§ 419-422; and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 421-424). The Court will follow that approach in analysing the facts of the present case.

563. It is to be reiterated that the Government acknowledged that in respect of two flights, namely N313P on 22 September 2003 and NVM85 on 12 April 2004 the flight plans had been changed when the planes had been in the air. They denied that any role in the process had been played by the Romanian authorities, except for a passive, "automatic" acceptance of the change for which the plane operator had been solely responsible and assistance in transmitting the flight plans to the entity managing the integrated initial flight plan processing system (see paragraph 439 above).

564. However, as already noted above, the clear inconsistencies in the flight data pertaining to destinations where the CIA-associated aircraft were supposed to arrive and from where they actually took off presented by the Romanian authorities were already identified in the 2007 Marty Report and the Fava Report (see paragraphs 264 and 512 above). Also, Mr Hammarberg's dossier addressed to the Romanian Prosecutor General listed eight rendition flight circuits occurring between 22 September 2003 and 21 August 2005 in respect of which false flight plans had been filed (see paragraph 337 above).

565. The practice of so-called "dummy" flight planning, i.e. a process of intentional disguise of flight plans for rendition aircraft used by the air companies contracted by the CIA, for instance Jeppesen Dataplan Inc. or Richmor Aviation (see paragraphs 63-70 above), was explained by Senator Marty and Mr J.G.S. in their testimony during the PowerPoint presentation on the basis of two examples of the CIA rendition circuits through Romania executed by plane N313P on 20-24 September 2003 and 16-28 January 2004 (see paragraphs 328 and 371 above). The experts described the

"dummy" flight planning as "a systematic practice deployed by the CIA and its aviation services providers to disguise CIA flights into and out of its most sensitive operational locations". They added that the CIA could not execute this tactic alone since it "depended upon, however discrete, a role played by the national counterpart authority". The Romanian documentary records demonstrated the landing of N313P on 25 January 2004 at Bucharest Băneasa Airport despite the absence of a valid flight plan. According to the experts, "this was part of a systematic practice and through our investigations we [had] generated numerous, up to twelve instances on which CIA rendition aircraft [had] transferred detainees into, and out of, Bucharest, Romania" (see paragraph 373 above).

In this connection, the Court would also reiterate its above findings that the flights N313P and N1HC marking the opening and the closure of the CIA detention facility in Romania, flight N85VM, identified as the one that brought the applicant into Romania and flight N308AB, identified as one of the two possible flights on which the applicant was taken out of Romania were concealed by the "dummy" flight planning (see paragraphs 519, 527, 531, 534-537 and 542 above)

566. As the Court found in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, the "dummy" flight planning, a deliberate effort to cover up the CIA flights, required active cooperation on the part of the host countries through which the planes travelled. In addition to granting the CIA rendition aircraft overflight permissions, the national authorities navigated the planes through the country's airspace to undeclared destinations in contravention of international aviation regulations and issued false landing permits (see *Al Nashiri v. Poland,* cited above, §§ 419-422; and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 421-424).

567. Consequently, the fact that the Romanian aviation authorities navigated the CIA flights into Bucharest, despite the fact that the relevant flight plans named Constanţa or Timişoara as the airports of destination and accepted flight plans naming those destinations but navigated the planes to Bucharest demonstrated that they knowingly assisted in the process of disguise of the CIA planes (ibid.).

(c) Special procedure for CIA flights

568. The Government asserted that, in contrast to the circumstances in *Al Nashiri v. Poland,* in Romania there had been no special procedure for receiving the impugned flights (see paragraphs 436-440 above).

In that regard they relied on evidence from witnesses heard in the investigation, who had not related any special treatment of the US flights that would deviate from routine procedures for any ordinary flight (see paragraphs 437-438 above).

569. The Court notes that, indeed, several witnesses said that they had not heard about or seen any "clandestine passengers", "detainees" or "any

passenger especially of Arab origin" (see paragraphs 306-309 and 317-319 above) or that they had not noted "anything out of the ordinary when the 'private planes' [had] landed" or that there had been "no special services provided" (see paragraphs 320 and 323 above).

570. However, the statements of several other witnesses who referred to the "special" or "N" status flights with the US registrations contradict the Government's assertion.

Witness E knew about three or four such flights that landed at night time and parked on the airport platform for about 10-15 minutes. He said that that the only person approaching them had been witness X.

Witness G knew of the "N" flights having been announced as special flights for which the staff had not been requested. Witness O spoke of one plane that had been treated differently and the staff had been asked to stay in the office and not go to the plane. Witness P knew that special flights had been "carried out at night"; also, on one night he had seen a plane without a call sign and a man in dark overalls and military boots walking a dog near the plane (see paragraphs 310, 314 and 322-323 above).

Witness X, apparently the only person who had been seen approaching the "special planes" did not explain in concrete terms what had in reality been going on but said that his presence in the airport had been connected with "bilateral relations" with the US" equivalent structures" and "aimed at ensuring protocol relations during processing as well as bilateral courtesy-setting according to diplomatic norms and international rules" (see paragraph 299 above).

571. Witness Z, in his statement of 17 September 2013 given to the prosecutor was more explicit. He confirmed that in the context of Romania's forthcoming accession to NATO "some developments or agreements [had taken] place in relation to the American flights to be operated by the CIA" and that, "from about 2003 onwards several contacts had taken place in that direction and they resulted in concrete agreements that made possible the operation of the special American flights on Romanian territory, in different conditions than those provided for by international customs". He added that "those flights [had] had a special character and they [had] not [been] under an obligation to obey usual rules imposed on civil flights" (see paragraph 301 above).

572. Lastly, in the Court's view, the way in which the Romanian authorities dealt with the accident on the landing of the aircraft N478GS that occurred on 6 December 2004 is one more element that contradicts the Government's above assertion as to the lack of any special treatment of the CIA-associated flights. The incident was described in the Fava Report and the 2007 EP Resolution, and was also related by Mr Fava at the fact-finding hearing (see paragraphs 275, 280 and 362 above). The presence in Romania of seven passengers on the plane which came from Bagram, Afghanistan, was apparently concealed. Only on the TDIP's considerable insistence did

the Romanian authorities give them a list of passengers, all of them US citizens with service passports. One of them was armed with a Beretta gun and had ammunition on him. No questions were asked about the purpose of their trip from Bagram, a place reported as hosting a CIA detention site for the purposes of interrogations of captured terrorist-suspects (see paragraph 362 above).

(d) Informal transatlantic meeting

573. As in *Al Nashiri v. Poland* (cited above § 434) and *Husayn (Abu Zubaydah) v. Poland* (cited above § 436) the Court considers the informal transatlantic meeting of the European Union and North Atlantic Treaty Organisation foreign ministers with the then US Secretary of State, Ms Condoleezza Rice, held on 7 December 2005, to be one of the elements relevant for its assessment of the respondent State's knowledge of the CIA rendition and secret detention operations in 2003-2005.

574. In his testimony in *Al Nashiri v. Poland*, Mr Fava stated that the meeting had been convened in connection with recent international media reports, including *The Washington Post* and *ABC News* disclosures of, respectively, 2 November 2005 and 5 December 2005, naming European countries that had allegedly hosted CIA "black sites" on their territories (see *Al Nashiri v. Poland*, cited above, §§ 306 and 434). He also described the content of the "debriefing" of that meeting, a document that the TDIP obtained from a credible confidential source in the offices of the European Union. He stated that it had appeared from Ms Rice's statement "we all know about these techniques" made in the context of the CIA operations and interrogations of terrorist suspects which had been recorded in the debriefing that there had been an attempt on the USA's part to share the "weight of accusations" (ibid.).

575. In the present case Mr Fava testified that it had emerged from the debriefing that, at that stage, all the governments had known that this "operational means" had been chosen by the CIA and that the extraordinary renditions were a tool in the war against terrorism.

Mr Fava further stated that the TDIP had "never had doubts" given the precision of the debriefing notes and the fact that in the course of their further work they had received confirmation from Mr Bellinger, legal advisor to Ms Rice, that the US had "never violated the sovereignty of any EU Member States or indeed any States in in the process of accession to the EU" and that everything what they had done "[had been] done by always informing and asking for cooperation and never trying to prevail over the will of the governments of the Member States" (see paragraph 361 above).

576. In the context of Romania's knowledge of the CIA HVD Programme, Mr Fava moreover referred to a statement of Mr Pascu, listed in the 2007 Marty Report among the Romanian high-office holders "who knew about, authorised and [stood] accountable" for Romania's role in the

CIA HVD Programme (see paragraph 262 above). According to Mr Fava, Mr Pascu, as Minister of Defence, had been aware that the Romanian authorities had not had access to certain sites which had been under the control of the US army or intelligence services. In Mr Fava's opinion, this statement, although later rectified by Mr Pascu, was truthful (see paragraph 363 above).

(e) Circumstances routinely surrounding HVDs transfers and reception at the CIA "black site"

577. The Court considers, as it did in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* (both cited above), that the circumstances and conditions in which HVDs were routinely transferred by the CIA from rendition planes to the CIA "black sites" in the host countries should be taken into account in the context of the State authorities' alleged knowledge and complicity in the HVD Programme (see *Al Nashiri v. Poland*, cited above, § 437; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 439).

It follows from the Court's findings in the above cases and the CIA materials describing the routine procedure for transfers of detainees between the "black sites" (see paragraphs 48-51 above) that for the duration of his transfer a HVD was "securely shackled" by his hands and feet, deprived of sight and sound by the use of blindfolds, earmuffs and hood and that upon arrival at his destination was moved to the "black site" under the same conditions.

578. The Court finds it implausible that the transportation of prisoners on land from the planes to the CIA detention site could, for all practical purposes, have been effected without at least the minimum assistance of the host country's authorities, if only to secure the area near and around the landed planes and provide the conditions for the secret and safe transfer of passengers. Inevitably, the Romanian personnel responsible for security arrangements, in particular the reception of the flights and overland transit, must have witnessed at least some elements of the detainees' transfer to Detention Site Black, for instance the unloading of blindfolded and shackled passengers from the planes (see also *Al Nashiri v. Poland*, cited above, §§ 330 and 437).

Consequently, the Court concludes that the Romanian authorities who received the CIA personnel in the airport could not have been unaware that the persons brought by them to Romania were the CIA prisoners.

(f) Public knowledge of treatment to which captured terrorist suspects were subjected in US custody in 2002-2005

579. The Court also attaches importance to various material referring to ill-treatment and abuse of terrorist suspects captured and detained by US authorities in the "war on terror" which were available in the public domain at the relevant time (see *El Masri*, cited above, § 160; *Al Nashiri v. Poland*,

cited above, § 439; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 441; and *Nasr and Ghali*, cited above, § 234).

580. Before analysing that material, the Court wishes to refer to President's Bush memorandum of 7 February 2002, stating that neither al-Qaeda nor Taliban detainees qualified as prisoners of war under the Geneva Conventions and that Common Article 3 of the Geneva Conventions (see paragraph 204-209 above), did not apply to them. The White House Press Secretary announced that decision at the press conference on the same day. It was widely commented in the US and international media. That decision, although including a disclaimer that even detainees "not legally entitled" to be treated humanely would be so treated, also spoke of respecting the principles of the Geneva Conventions "to the extent appropriate and consistent with military necessity" (see paragraphs 31-32 above). Consequently, already at this very early stage of the "war on terror" it was well known that "military necessity" was a parameter for determining the treatment to be received by the captured terrorist-suspects.

581. The Court would further note that from at least January 2002, when the UN High Commissioner for Human Rights issued a statement relating to the detention of Taliban and al-Qaeda prisoners in Guantánamo, strong concerns were expressed publicly as to the treatment of detainees, in particular the use of "stress and duress" methods of interrogation and arbitrary and incommunicado detention. From January 2002 to the publication of the *Washington Post* report on 2 November 2005 the international governmental and non-governmental organisations regularly published reports and statements disclosing ill-treatment and abuse to which captured terrorist suspects were subjected in US custody in various places, for instance in Guantánamo and the US Bagram military base in Afghanistan. The material summarised above and cited in the AI/ICJ's *amicus curiae* brief include only some sources selected from a large amount of documents available in the public domain throughout the above period (see paragraphs 212-225 and 470-477 above).

Also, in the 2003 PACE Resolution of 26 June 2003 – of which Romania, one of the Council of Europe's member States must have been aware – the Parliamentary Assembly of the Council of Europe was "deeply concerned at the conditions of detention" of captured "unlawful combatants" held in the custody of the US authorities (see paragraph 216 above).

582. At the material time the ill-treatment, use of harsh interrogation measures, and arbitrary detention of al-Qaeda and Taliban prisoners in US custody, as well as the existence of "US overseas centres" for interrogations was also often reported in the international and Romanian media (see paragraphs 230-243 above). In particular, between January 2002 and May 2003 the Romanian press published a number of articles concerning

ill-treatment of prisoners and the use of "violent interrogation techniques" against captured terrorists by the CIA (see paragraphs 239-243 above).

6. The Court's conclusions as to Romania's alleged knowledge of and complicity in the CIA HVD Programme

583. The Court is mindful of the fact that knowledge of the CIA rendition and secret detention operations and the scale of abuse to which high-value detainees were subjected in CIA custody have evolved over time, from 2002 to the present day. A considerable part of evidence before the Court emerged several years after the events complained of (see paragraphs 36-59, 78-97, 251-297, 333-342 and 355-358 above; see also *Al Nashiri,* cited above, § 440; and *Husayn (Abu Zubaydah),* cited above, § 442).

Romania's alleged knowledge and complicity in the HVD Programme must be assessed with reference to the elements that it knew or ought to have known at or closely around the relevant time, that is to say between 22 September 2003 and 5 November 2005. However, the Court, as it has done in respect of the establishment of the facts relating to the applicant's secret detention in Romania, will also rely on recent evidence which, as for instance the 2014 US Senate Committee Report and expert evidence obtained by the Court, relate, explain or disclose the facts occurring in the past (see *Al Nashiri v. Poland*, cited above, § 440 ; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 442).

584. In its assessment, the Court has considered all the evidence in its possession and the various related circumstances referred to above (see paragraphs 548-582 above). Having regard to all these elements taken as a whole, the Court finds that it has been adequately demonstrated to the required standard of proof that the Romanian authorities knew that the CIA operated on Romanian territory a detention facility for the purposes of secretly detaining and interrogating terrorist suspects captured within the "war on terror" operation by the US authorities.

This finding is primarily based on compelling and crucial evidence deriving from the 2014 US Senate Committee Report and, to a considerable extent, evidence from experts.

The passages of the report about the agreement brokered between the USA and the country hosting Detention Site Black leave no doubt as to the fact as to the Romanian high-office holders' prior acceptance of a CIA detention facility on their territory. Nor can there be any doubt that they provided "cooperation and support" for the "detention programme" and that, in appreciation, were offered and accepted a financial reward, referred to as a "subsidy" amounting to a redacted multiple of USD million (see paragraph 548-549 above). The experts, with reference to the reward received by the Romanian authorities, spoke of a "substantial sum, in the region of ten million United States dollars" (see paragraph 384 above) or

"more than eight million dollars" (see paragraph 391 above). However, for the purposes of its ruling, the Court does not need, nor does it intend, to determine the sum that was at stake.

585. The Court further attaches importance to the fact that the former Head of State Mr Iliescu and his national-security advisor Mr Talpeş, admitted publicly in the press interviews that the authorities had made available to the CIA premises which, as Mr Talpeş later explained, were located in Bucharest (see paragraphs 553-554 above). While it is true that Witness Y and Witness Z in their testimonies before the prosecutor contradicted the statements of Mr Iliescu and Mr Talpeş reported in *Spiegel Online*, in the Court's view their denial cannot be considered credible as being in conflict with all other relevant materials cited above (see paragraphs 548-559 above). In any event, as noted above, Witness Z confirmed that a location "for actions of combating international terrorist threats" was offered to the CIA (see paragraphs 302 and-557 above).

586. Furthermore, the disclosure in the 2014 US Senate Committee Report demonstrates conclusively that in the autumn of 2004, when Detention Site Black had already been operating in Romania for around one year, the national authorities were given a presentation outlining the HVD Programme by the chief of the CIA station and the US ambassador. The content of that presentation as related in the report leaves no doubt as to the fact that at the very least the Romanian authorities had learnt from the CIA of a "full range of interrogation measures" being used against their detainees in order to "overcome resistance" in the context of obtaining intelligence (see paragraphs 560-561 above).

587. Furthermore, the experts, who in the course of their inquiries also had the benefit of contact with various, including confidential, sources unanimously and categorically stated that Romania not only ought to have known but actually did know of the nature and purposes of the CIA activities in the country.

Senator Marty said that the authorities "must have known that the CIA had used their territory for transfers of prisoners in the context of the war on terror". Mr J.G.S. stated that "quite clearly, categorically the Romanian authorities, at the highest level, did know of the existence of secret detention on their territory" and that "they were aware of the precise purpose of the rendition flights entering and exiting the country, and the conditions, or roughly the conditions, under which the detainees were held in between their arrivals and their departures". Mr Hammarberg stated that "though the operations were conducted under extreme secrecy, it is obvious that the CIA plane could not land with its cargo and depart without agreement from high-level Romanian decision makers". Mr Black said that it was "clear that the authorities were aware of [the purposes of the CIA aircraft landings in Romania] because, among other things, they received money for it" and that, based on the 2014 US Senate Committee Report, it was "normally

common practice ... that the host country's officials were in the know about these facilities and the purposes of them" (see paragraphs 344, 380, 384 and 391 above).

This did not mean, the experts added, that the Romanian authorities had known the details of what exactly went on inside Detention Site Black or witnessed treatment to which the CIA prisoners had been subjected in Romania. As in other countries hosting clandestine prisons, the operation of the site was entirely in the hands of the CIA and the interrogations had been exclusively the CIA's responsibility (see paragraphs 344, 380 and 384 above; see also *Al Nashiri v. Poland*, cited above, § 441; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 443).

588. However, in the Court's view, even if the Romanian authorities did not, or could not, have complete knowledge of the HVD Programme, the facts available to them, in particular those presented to them directly by their US partners, taken together with extensive and widely available information about torture, ill-treatment, abuse and harsh interrogation measures inflicted on terrorist suspects in US custody which in 2002-2005 circulated in the public domain, including the Romanian press (see paragraphs 579-582 above), enabled them to conjure up a reasonably accurate image of the CIA's activities and, more particularly, the treatment to which the CIA were likely to have subjected their prisoners in Romania.

In that regard the Court would reiterate that in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* it has found that already in 2002-2003 the public sources reported practices resorted to, or tolerated by, the US authorities that were manifestly contrary to the principles of the Convention. Consequently, the Romanian authorities had good reason to believe that a person detained under the CIA rendition and secret detention programme could be exposed to a serious risk of treatment contrary to those principles on Romanian territory.

It further observes that it is – as previously found in respect of Poland – inconceivable that the rendition aircraft could have crossed the country's airspace, landing at and departing from its airports, that the CIA occupied the premises offered by the national authorities and transported detainees there, without the State authorities being informed of or involved in the preparation and execution of the HVD Programme on its territory. Nor can it stand to reason that activities of such a character and scale, possibly vital for the country's military and political interests, could have been undertaken on Romanian territory without Romania's knowledge and without the necessary authorisation and assistance being given at the appropriate level of the State authorities (see *Al Nashiri v. Poland*, cited above, §§ 441-442; and *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 443-444).

589. The Court accordingly finds it established beyond reasonable doubt that:

(a) Romania knew of the nature and purposes of the CIA's activities on its territory at the material time.

(b) Romania, by entering into an agreement with the CIA on hosting Detention Site Black, enabling the CIA to use its airspace and airports and to disguise the movements of rendition aircraft, providing logistics and services, securing the premises for the CIA and transportation of the CIA teams with detainees on land, cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory.

(c) Given its knowledge of the nature and purposes of the CIA's activities on its territory and its involvement in the execution of that programme, Romania knew that, by enabling the CIA to detain terrorist suspects on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

III. ROMANIA'S JURISDICTION AND RESPONSIBILITY UNDER THE CONVENTION

A. The parties' submissions

590. The parties' submissions regarding the Government's objection that Romania lacked jurisdiction within the meaning of Article 1 of the Convention and, consequently, could not be responsible under the Convention are set out above (see paragraphs 395-409 above).

B. The Court's assessment

591. The Court notes that the applicant's complaints relate both to the events that occurred on Romania's territory and to the consequences of his transfer from Romania to other places where he was secretly detained (see paragraphs 115-190 above).

In that regard, the Court would wish to reiterate the relevant applicable principles.

1. As regards jurisdiction

592. It follows from Article 1 that States parties must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction".

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it

which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

In that regard, the Court would refer to its case-law to the effect that the concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, judgment of 14 May 2002; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; and *Ilaşcu and Others*, cited above, §§ 311-312).

From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial, but also that jurisdiction is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312 with further references to the Court's case-law; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 149-150, ECHR 2015).

593. It must also be reiterated that, for the purposes of the Convention, the sole issue of relevance is the State's international responsibility, irrespective of the national authority to which the breach of the Convention in the domestic system is attributable (see *Assanidze*, cited above, § 146, with further references to the Court's case-law).

2. As regards the State's responsibility for an applicant's treatment and detention by foreign officials on its territory

594. In accordance with the Court's settled case-law, the respondent State must be regarded as responsible under the Convention for internationally wrongful acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others*, cited above, § 318; *El-Masri,* cited above*,* § 206; *Al Nashiri v. Poland*, cited above, § 452; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 449; and *Nasr and Ghali*, cited above, § 241).

3. As regards the State's responsibility for an applicant's removal from its territory

595. The Court has repeatedly held that the decision of a Contracting State to remove a person – and, *a fortiori*, the actual removal itself – may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person in question would, if removed, face a real risk of being subjected to treatment contrary to that provision in the destination country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91 and 113; Series A no. 161, § 91; *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008; *Babar Ahmad and Others v. the United Kingdom*,

nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 168, 10 April 2012; *El-Masri*, cited above, §§ 212-214, with further references; *Al Nashiri v. Poland*, cited above, § 454; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 450; and *Nasr and Ghali*, cited above, § 242).

Where it has been established that the sending State knew, or ought to have known at the relevant time, that a person removed from its territory was being subjected to "extraordinary rendition", that is, "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment", the possibility of a breach of Article 3 is particularly strong and must be considered intrinsic in the transfer (see *El-Masri,* cited above, §§ 218- 221; *Al Nashiri v. Poland*, cited above, § 454 and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 450; and *Nasr and Ghali*, cited above, § 243).

596. Furthermore, a Contracting State would be in violation of Article 5 of the Convention if it removed, or enabled the removal, of an applicant to a State where he or she was at real risk of a flagrant breach of that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 233 and 285, ECHR 2012 (extracts); and *El-Masri*, cited above, § 239).

Again, that risk is inherent where an applicant has been subjected to "extraordinary rendition", which entails detention "outside the normal legal system" and which, "by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention" (see *El-Masri,* ibid.; *Al Nashiri v. Poland*, cited above, § 455; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 451; and *Nasr and Ghali*, cited above, § 244).

597. Similar principles apply to cases where there are substantial grounds for believing that, if removed from a Contracting State, an applicant would be exposed to a real risk of being subjected to a flagrant denial of justice (see *Othman (Abu Qatada)*, cited above, §§ 261 and 285) or sentenced to the death penalty (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 123, ECHR 2010; *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009; *Al Nashiri v. Poland*, cited above, § 456; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 453).

598. While the establishment of the host State's responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise.

In so far as any responsibility under the Convention is or may be incurred, it is responsibility incurred by the host Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other alleged violations of the

Convention (see *Soering*, cited above, §§ 91 and 113; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 67 and 90, ECHR 2005-I, with further references; *Othman (Abu Qatada),* cited above, § 258; and *El-Masri*, cited above, §§ 212 and 239).

599. In determining whether substantial grounds have been shown for believing that a real risk of the Convention violations exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material it has obtained *proprio motu*. It must examine the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there and his personal circumstances.

The existence of the alleged risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the removal. However, where the transfer has already taken place at the date of the Court's examination, the Court is not precluded from having regard to information which comes to light subsequently (see *Al-Saadoon and Mufdhi* (cited above), § 125; *El-Masri,* cited above, §§ 213-214, with further references; *Al Nashiri v. Poland*, cited above, § 458; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 455; and *Nasr and Ghali*, cited above, § 246).

4. Conclusion as to the Romanian Government's preliminary objection that Romania lacks jurisdiction and responsibility under the Convention

600. The Court has duly noted that the Government, while denying that the facts as alleged by the applicant occurred in Romania, accepted that Romania could be responsible under the Convention if it had knowingly permitted its territory to be used by another State for activities involving human rights violations and if, given the public awareness of the CIA HVD Programme, the authorities had become aware that the flights operating on Romanian's territory had been used for the CIA rendition operations and that the CIA had run a secret detention facility in the country (see paragraph 396 above).

601. Following an extensive and detailed analysis of the evidence in the present case, the Court has established conclusively and beyond reasonable doubt that Romania hosted CIA Detention Site Black from 22 September 2003 to 5 November 2005; that the applicant was secretly detained there from 12 April 2004 to 6 October 2005, or, at the latest, to 5 November 2005; that Romania knew of the nature and purposes of the CIA's activities in its country and cooperated in the execution of the HVD Programme; and that Romania knew that, by enabling the CIA to detain terrorist suspects on its territory, it was exposing them to a serious risk of treatment contrary to the Convention (see paragraphs 508-589 above).

The above findings suffice for the Court to conclude that the matters complained of in the present case fall within the "jurisdiction" of Romania within the meaning of Article 1 of the Convention and are capable of engaging the respondent State's responsibility under the Convention.

Accordingly, the Government's preliminary objection on these grounds must be dismissed.

602. The Court will accordingly examine the applicant's complaints and the extent to which the events complained of are attributable to the Romanian State in the light of the above principles of State responsibility under the Convention, as deriving from its case-law (see also *Al Nashiri v. Poland*, cited above, § 459; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 456).

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

603. The applicant's complaints under Article 3 of the Convention concerned both substantive and procedural aspects of this provision.

(1) As regards his alleged ill-treatment and detention in Romania, he maintained that the respondent State had violated Article 3 in enabling his ill-treatment on its territory. Romania knew or must have known about the CIA extraordinary rendition programme, the existence of the "black site" in Romania and the torture and inhuman and degrading treatment to which the CIA had subjected "high-value detainees" as part of this programme.

(2) As regards his transfer from Romania, the applicant submitted that Romania had knowingly and intentionally enabled his transfer from its territory in spite of there being substantial grounds for believing that there had been a real risk of his being subjected to further treatment contrary to Article 3 in CIA custody.

(3) The applicant also complained under Article 3 read alone and in conjunction with Article 13 of the Convention that the Romanian authorities had failed to conduct an effective investigation into his allegations of ill-treatment during his detention in a CIA-run detention facility in Romania. He also alleged that by its refusal to acknowledge, promptly and effectively investigate and disclose details of his ill-treatment, detention, enforced disappearance and rendition, Romania had violated his and the public's right to the truth under Article 3.

604. Article 3 of the Convention states:

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

605. The Court will first examine the applicant's complaint under the procedural aspect of Article 3 about the lack of an effective and thorough investigation into his allegations of ill-treatment when in CIA custody on Romania's territory (see *El-Masri*, cited above, § 181; *Al Nashiri v. Poland*,

cited above, § 462; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 459).

A. Procedural aspect of Article 3

1. The parties' submissions

(a) The Government

606. In their written pleadings, the Government underlined that the Court had consistently held that the obligation to investigate allegations of ill-treatment was not one of result, but one of means: not every investigation should necessarily be successful or come to a conclusion which coincided with the claimant's account of events. However, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations proved to be true, to the identification and punishment of those responsible. The Court had also acknowledged that the scope of the State's procedural obligation under Article 3, as well as the particular form of investigation, might vary depending on the situation that had triggered that obligation.

In their view, both the parliamentary inquiry conducted by the Romanian Senate and the criminal investigation initiated by the applicant's criminal complaint of 29 May 2012 had been prompt, thorough and independent, as required by Article 3 of the Convention. They added that in the criminal investigation the applicant's rights as victim had been duly recognised and respected.

607. Referring to concerns and criticism regarding the allegedly superficial nature of the parliamentary inquiry and the alleged abuse of State secrecy and national security expressed in, among others, the Fava Report and the 2011 Marty Report, the Government maintained that the authorities had thoroughly investigated the issues of the suspicious flights and alleged secret detention facility. In contrast to what had been claimed in the above reports, the 2007 Romanian Senate Report had not been confined to the defence of Romania's official position but constituted a comprehensive analysis of the vast material collected by the Romanian Senate Inquiry Committee during an extensive investigation.

In particular, between January 2006 and January 2007, the committee's activity had consisted of twenty-one meetings for documentation review and analysis with the leaders of the institutions and of the specialised structures; over forty meetings with official delegations and members of the European Council and Commission, other politicians, and journalists; six trips of the committee's delegations to the airports and military airbases alleged to have been used for secret detentions and illegal prisoner transfers; hearings involving over 200 persons, with attributions regarding flights records, verification, coordination, and on-ground security and services; study of

over 4,200 pages, containing relevant information for the terms of reference of the committee.

608. As regards the submissions of the applicant and APADOR-CH regarding the alleged secrecy of annexes to the 2008 Romanian Senate Report (see paragraph 631 below), the Government maintained that, notwithstanding the classification of eleven annexes to the Report, most of the annexes had not been secret. Moreover, the information related to the alleged suspicious flights, included in the classified annexes, had been available to the official investigators of the PACE and the European Parliament. As could be seen from the 2007 Romanian Senate Report, the committee had investigated all the airports and airfields mentioned in Eurocontrol's documents and examined the Marty Reports and flight plans of all the aircraft regarded as suspicious. The Romanian Senate Inquiry Committee had also had access to the classified documents on which the report's conclusions relied.

In view of the foregoing, the Government asserted that the parliamentary inquiry had been thorough and expeditious.

609. Given that the 2007 Romanian Senate Report had conclusively established that there had been no CIA secret detention sites in Romania, that the allegedly suspicious flights had had nothing to do with the illegal transportation of prisoners and that there had been no evidence that Romanian institutions or persons had knowingly or by negligence participated in the rendition operations, there had been no legal or factual grounds on which to conduct a criminal investigation into those matters.

However, following the applicant's criminal complaint, the prosecution had promptly opened an investigation. The proceedings had progressed without delay. The investigative authorities had taken several steps in order to clarify the facts related to the applicant's complaint. In order to verify the matters complained of by the applicant, internal verifications had been performed, consisting in, among other things, sending letters to RCAA asking it to make available flight data relating to suspicious flights and to the relevant airports. Various ministries, for instance the Ministry of Defence, the Ministry of Transport and the Ministry of Foreign Affairs had been asked to provide information regarding the alleged existence of a CIA secret prison and any material that could be relevant. Many witnesses, including some high-ranking officials and the airport security and civil personnel, had been heard by the prosecutor. Furthermore, a number of requests for legal assistance had been addressed to the US authorities, asking for specific information about the applicant, namely, whether he had ever been brought to Romania under the US extraordinary rendition programme and whether Romania had been involved in that programme. Those requests had so far been unsuccessful.

610. In the Government's submission, the material collected in the investigation had not revealed the existence of a CIA secret detention

facility. Nevertheless, the Romanian investigative authorities were committed to taking into account the 2014 US Senate Committee Report published in December 2014 and the subsequent speculations concerning the so-called "black sites" on Romanian territory. The proceedings were ongoing and their outcome could not be anticipated by the Government.

611. As regards the length of the investigation, the Government submitted that it was true that the proceedings had been lengthy, but not unduly so, especially considering their exceptional complexity and the factors which had had an impact on their progress and which were beyond the Romanian prosecution authority's control, such as a lack of response to requests for legal assistance on the part of the US authorities.

612. At the public hearing, the Government underlined that the conclusions of the 2007 Romanian Senate Report had not amounted to mere statements, but had been the result of real work done in the investigation extending from January 2006 to January 2007, and whose value should not be underestimated. They also underlined that the previously classified annexes to that report had been made publicly available, in particular in the proceedings before the Court. The annexes helped to shed some light on the work of the Romanian Senate Inquiry Committee and demonstrated the thorough nature of the parliamentary inquiry. The committee had requested, and received, information concerning the purpose of the allegedly suspicious flights, the service rendered by the civil handling agents, as well as the diplomatic overflight requests received by the Ministry of Defence from the United States Embassy from 2001 to 2005.

Even though the annexes had been classified up to a recent date, at no point had the Romanian authorities tried to hide behind a wall of "State secrecy" and national security. The relevant, albeit summarised, information contained in the classified annexes had been disclosed together with the report, being made available to all the interested parties.

613. The Government reiterated that the criminal investigation had been thorough and supervised by an independent body, and that it had offered the victim's representatives the possibility of participating effectively in its conduct. In that regard, they stressed that, according to the Romanian Code of Criminal Procedure, the applicant's representatives could have asked the prosecutor if they could be informed about any action taken in the criminal investigation and attend any examination of witnesses. However, no such request had so far been received.

614. From the beginning of the investigation, the Public Prosecutor's Office had established an investigation plan, based on the content of the criminal complaint and on information available in the public domain. Most of the actions stated in this plan had already been carried out; only the requests for legal assistance to the US authorities had remained unanswered. All the institutions that could hold information about the flights that were

considered suspicious in various reports had been contacted by the Public Prosecutor's Office and requested to submit all the relevant data.

The Prosecutor's Office had taken a particular interest in the identification of personnel working at Băneasa Airport on the dates of the flights allegedly used in rendition circuits; twenty-three witnesses working for the Border Police, for the private handling agent Romanian airport services and for the Airport Security Department, had been heard in relation to working procedures, rules of access and, in particular, about the "N" flights. On the basis of the witness statements, the Public Prosecutor's Office had been able to determine the procedures for the landing of private non-commercial flights and the normal processing of passengers at the time, and whether there had been blatant breaches of these procedures in the case of the US-registered flights.

615. The Government were convinced that the investigation had been effective, that each and every possible lead had been considered and that evidence had been gathered in order to establish the facts.

They accordingly invited the Court to find that the criminal investigation in the present case had been effective and aimed at disclosing the truth in respect of the so-called rendition programme, the alleged involvement of the Romanian authorities in that programme and the applicant's alleged secret detention in Romania.

(b) The applicant

616. The applicant maintained that Romania had failed to carry out an investigation that satisfied its obligations under Article 3 of the Convention. In spite of their duty to investigate of their own accord any arguable claims of Article 3 violations, and despite being on notice since November 2005 of possible torture, ill-treatment, and incommunicado detention in a prison on Romanian territory, the authorities had not commenced a criminal investigation into the prison until almost seven years later, i.e., until July 2012, when they issued a preliminary response stating that they would review the criminal complaint filed on behalf of the applicant with the Prosecutor General in May 2012. Several years later, the criminal investigation was still ongoing.

In that regard, the applicant emphasised that the Government had a continuing obligation to investigate allegations of the national authorities' involvement in serious human rights violations and to uncover the truth behind such involvement.

617. In the applicant's view, the Government had offered no cogent explanation as to why the authorities had not initiated a criminal investigation into secret CIA prisons on Romanian territory shortly after public reports of such a prison had first surfaced and irrespective of the growing information on the existence of the HVD Programme and Romania's involvement in that programme. The prosecution had shown a

complete lack of interest in the topic. In addition, as set out in Mr Hammarberg's affidavit, the Romanian authorities had ignored his repeated requests for an investigation and had not responded to his dossier of evidence relating to the secret CIA prison that he had submitted to the Prosecutor General.

618. Indeed, for several years following the applicant's criminal complaint no serious efforts had been made to interview witnesses with likely knowledge of the secret CIA prison or of the suspicious rendition flights, to investigate the Government building where the "Bright Light" CIA detention site had been located, to speak to intelligence officials who might have had knowledge of any agreement with the USA, to investigate the building work that must have been done in order to convert it into a prison, to seek to speak to the multiple sources referenced in the Council of Europe's and other official and unofficial investigations, or to look any further than the previously conducted Romanian Senate's inquiry, which had been fundamentally flawed. To date the prosecution had made no attempt to communicate with the Office of the Human Rights Commissioner for the Council of Europe regarding the dossier of information relating to the CIA prison that former Commissioner Thomas Hammarberg had shared with the Prosecutor General in March 2012. Nor had the authorities spoken with Senator Marty about the findings in his two reports confirming that Romania had hosted a secret CIA prison or asked him whether he could supply relevant documents or witnesses' names.

619. The applicant further argued that, despite the fact that the Government had placed great weight on the Romanian Senate's inquiry into secret prisons, this inquiry had by its very nature been ineffective because it had not been a criminal inquiry, and therefore had been incapable of "leading to the identification and punishment of those responsible". As found in the Marty and Fava Reports, the inquiry had been superficial and not sufficiently independent or impartial. It did not constitute a genuine attempt to hold officials responsible; rather, it had been aimed at issuing categorical denials of allegations relating to the CIA prison on Romanian territory. It had overlooked extensive evidence to the contrary from valuable and credible sources.

620. The applicant asserted that the authorities had made no attempt to inform him of the conduct of the investigation or to involve him in the proceedings through his counsel. It was true that, given the applicant's circumstances, contacting him directly would have been impossible. But there had been no attempt whatsoever even to contact the applicant's representatives, let alone involve them in any way in the investigation or inform them on the progress in the proceedings.

Furthermore, the investigation lacked transparency and there had been no public scrutiny of the investigation. The investigative authorities in

Romania had disclosed no information to the public about the terms of reference of the investigation, what stage it was at, which crimes were at issue, or when it was likely to conclude. As such, they had failed to fulfil the public scrutiny requirement of an effective investigation. In particular, in a case such as this, the public element of the investigation was essential to encourage other witnesses to come forward, such as those who might have been involved in the preparation and conversion of the ORNISS building into a secret prison.

621. At the public hearing, the applicant reiterated once again that since 6 November 2005, when the allegations regarding Romania's involvement in the CIA rendition programme had been made public in the 2006 HRW Statement, Romania had been under an obligation, promptly and of its own motion, to initiate an investigation capable of determining all the circumstances and possible victims.

It would have been of utmost importance for the effectiveness of the criminal investigation to be initiated as early as possible, as the events had been recent and important evidence, such as fresh witness testimony, could have been gathered. If such investigations had been opened, it would have been possible for the domestic authorities to identify the applicant as one of the victims and to establish when he had been transferred out of Romania and to what treatment he had been subjected. Indeed, if independent investigators had been able to establish these facts during subsequent research into the materials available in the public domain, it would have been possible for official investigators as well, as long as there had been a will and effort to follow the matter.

622. Instead, the authorities had remained passive despite the fact that further information on the existence of the HVD Programme and the involvement of Romania had been disclosed to the public in the following years and that inquiries had been instituted by the Council of Europe and by the European Parliament, resulting in detailed reports. For example, Senator Marty's reports had been quite specific in describing Romania's involvement in the programme and in calling for an investigation. The only response had been a superficial parliamentary inquiry, falling short of all standards under Article 3 of the Convention. No criminal investigation had been initiated even though, under the Code of Criminal Procedure in force at the material time, the prosecutor could open such an investigation of his own motion and had not been bound by the findings of the parliamentary inquiry. Nor had the mounting evidence made public since then, including the US authorities' official acknowledgements of the CIA secret detention programme made as early as 2006, changed the Romanian authorities' attitude. It had only been after the applicant had lodged a formal criminal complaint in May 2012 that such an investigation had been opened. A closer scrutiny of the documents produced by the Government showed that some, although not significant, procedural steps had been taken only after notice of

the application had been given to the Government. Even so, although several years had passed since, little progress had been achieved. In fact, the entry into force of a new Code of Criminal Procedure on 1 February 2014 had forced the prosecution to open the criminal investigation *in rem*; otherwise the case would have most probably remained at a preparatory phase. At present, the investigation was still pending against persons unknown, after more than ten years since the first reports of Romania's involvement in the CIA programme had been made public.

623. The applicant considered that another example of the ineffectiveness of the investigation was the fact that there was no indication in the investigation file that the 2014 US Senate Committee Report – which had been widely publicised and must have been known to any diligent investigator – had been taken into account in any way in the proceedings or that there had been any effort to corroborate the information in the report by gathering any additional evidence.

In fact, it appeared that the investigation had been completely stalled for over two years. Except for obtaining two witness statements, nothing at all had happened since 2013-2014.

624. In view of the foregoing, the applicant asked the Court to find that the respondent State was in breach of Article 3 of the Convention since, despite his credible claim that he had been subjected to torture, ill-treatment and secret detention in Romania, the investigation conducted by the Romanian authorities was not prompt, thorough, effective and sufficiently transparent, as required by that provision.

2. The third-party interveners

(a) The UN Special Rapporteur

625. The UN Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, stressing that the victim's right to truth had been expressly recognised in a number of international instruments negotiated under the auspices of the United Nations, maintained that international law nowadays protected the legal right of the victim, his or her relatives, and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, including the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation had officially been authorised. It also included the right of the victim to adequate reparation (of which the establishment of the truth is an indispensable part). The payment of monetary compensation without full public exposure of the truth was not sufficient to discharge this obligation.

626. On the other side of the equation, international law imposed corresponding obligations on States which could conveniently be gathered under the rubric of the international law principle of accountability. This

imposed specific duties on all three branches of government. The executive, the judiciary and parliamentary oversight bodies, as well as independent bodies entrusted with official responsibility for review of intelligence matters and/or the conduct of intelligence and law-enforcement agencies, each bore a share of the State's responsibility to secure the realisation of the right to truth and the principle of accountability.

627. Where a plausible allegation was made that public officials had committed (or been complicit in the commission of) gross or systemic human rights violations, the executive authorities of the State(s) concerned were obliged under international law to carry out an official investigation which had to begin promptly, secure all relevant evidence, and be capable of leading to the identification and, where appropriate, the punishment of the perpetrator(s) and those on whose authority the violations had been committed. Any deficiency in the investigation which undermined its ability to establish the identity of the persons responsible would risk falling foul of the requisite legal standard.

628. The investigating authorities were obliged to allow the victims or (if deceased) their relatives, effective access to the investigative process, respecting their right to be informed and to participate, to disclose all relevant evidence and findings to the victims (subject only to legitimate national security limitations that were adjudged to be strictly necessary by an independent and impartial judicial or quasi-judicial tribunal); and to protect the physical and moral integrity of victims and witnesses against reprisals and threats.

To meet the requirements of international law, such an investigative body must be genuinely independent of the officials implicated in the violations. This implied not only a lack of hierarchical or institutional connection but also a practical independence.

629. In *El-Masri* the Court had acknowledged the existence of right to truth (as such) for the first time in its jurisprudence, treating it as an aspect of the State's adjectival obligation under Article 3 of the Convention to conduct an official investigation into allegations of torture.

The experience of the past decade, however, showed that there were various means by which the right to truth and the principle of accountability could be (and had been) frustrated, thereby perpetuating impunity for the public officials implicated in such crimes. These included the grant of *de facto* or *de jure* immunities; the official destruction of relevant evidence; executive obstruction of (or interference in) independent investigations into past practices; the assertion by the executive of unjustified claims of secrecy on grounds of national security or the maintenance of good foreign relations; the suppression or delayed publication of reports of independent investigations whose findings might expose past official wrongdoing to public scrutiny; executive inertia motivated by a desire to "draw a line" under the past; the more or less oblique invocation of the "superior orders"

defence, despite its prohibition under customary law and relevant international treaties; and excessive judicial deference to the executive on matters related to national security or the maintenance of good foreign relations, with the effect of excluding the right of access to court, or unjustifiably restricting the exposure of the facts, often on the basis of highly dubious legal reasoning.

(b) APADOR-CH

630. APADOR-CH submitted that both the parliamentary inquiry and criminal investigation in Romania had been inadequate for the purposes of Article 3 of the Convention.

631. As regards the parliamentary inquiry, they stressed that it had failed to demonstrate that it had been aimed at discovering the truth in relation to the allegations of rendition flight landings and the existence of the CIA secret detention facility in Romania. First of all, the Senate had clearly stated that it had not been part of its mandate to look into the reason why flights later proved to be used by the CIA had landed in Romania, although its mandate had been to investigate such flights. Second, the procedure adopted by the Romanian Senate Inquiry Committee had lacked transparency. In particular, the annexes to the 2007 Romanian Senate Report had never been declassified, nor had they been intended to be made public.

632. As regards the criminal investigation, APADOR-CH maintained that it should have been instituted promptly after the allegations of a secret CIA prison in Romania had emerged rather than being conditional on a criminal complaint filed by a victim.

(c) Joint submissions by Amnesty International (AI) and the International Commission of Jurists (ICJ) on "effective investigation"

633. AI/ICJ stressed that the Convention case-law had long established that Contracting Parties had an obligation to investigate any credible information disclosing evidence of violations of Convention rights. Any such investigation must be prompt, thorough, independent in law and in practice, allowing for the participation of the victim and "capable of leading to the identification and punishment of those responsible".

In this context, the interveners also stressed the importance that such investigations be initiated *ex officio*, rather than relying on a criminal complaint lodged by the victims or their relatives.

634. In AC/ICJ's submission, the above investigative obligations on Contracting States were of particular importance in cases of renditions or enforced disappearances in which the State authorities might be implicated in the human rights violations.

In cases involving rendition an individual typically experienced continuing violations of his rights outside the jurisdiction of the State where

he had initially been apprehended. However, this did not divest Contracting Parties of their duty to investigate credible information disclosing evidence of involvement in renditions.

Therefore, in cases of such illegal transfers, as well as torture and enforced disappearance, where the act or omission of a Contracting Party had a direct causal connection with or was part of the operation of a rendition involving a continuing violation of Convention rights, taking place partly on its territory and partly elsewhere, the State had an obligation not only to prevent, but also to take such investigative and remedial measures as were available to it to investigate and remedy the continuing violation of Convention rights.

635. The right to an effective investigation and to an effective remedy under, *inter alia*, Articles 3 and 5, read together with Article 13, required disclosure of the truth concerning the violations of Convention rights perpetrated in the context of the secret detention and rendition programmes This was so, not only because of the scale and severity of the human rights violations concerned, but also and in particular because of the widespread impunity for these practices, and the suppression of information about them, which had persisted in multiple national jurisdictions.

Where renditions or secret detentions had taken place with the co-operation of Contracting Parties, or in violation of those States' positive obligations of prevention, the Convention obligations of those States to investigate and provide remedies required that they take all reasonable measures open to them to disclose to victims, their families and society as a whole, information about the human rights violations those victims had suffered within the context of these counter-terrorism operations.

(d) Media Groups

636. The Media Groups' submission focused on open justice and the accessibility to the public of documents adduced in the Court procedure. They also referred to the freedom of expression in the context of grave violations of human rights, in particular in relation to media reporting. In so far as the applicant's allegations of a breach of procedural obligations under Article 3 were concerned, the third party criticised the lack of transparency of the parliamentary inquiry in Romania.

3. The Court's assessment

(a) Admissibility

637. The Court takes the view that the applicant's complaint under the procedural aspect of Article 3 raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. Furthermore, the Court has already found that the Government's objection based on non-compliance with the rule of exhaustion of domestic

remedies and with the six-month rule should be joined to the merits of this complaint (see paragraph 418 above). Consequently, it cannot be considered that the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible having been established, the complaint must therefore be declared admissible.

(b) Merits

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

638. Where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of agents of the respondent State or, likewise, as a result of acts performed by foreign officials with that State's acquiescence or connivance, that provision, read in conjunction with the Contracting States' general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such investigation should be capable of leading to the identification and – where appropriate – punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other examples, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII; *Ilaşcu and Others*, cited above, §§ 318, 442, 449 and 454; *El-Masri*, cited above, § 182; *Al Nashiri v. Poland*, cited above, § 485; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 479; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 317, ECHR 2014 (extracts), *Cestaro v. Italy*, no. 6884/11, §§ 205-208, 7 April 2015; *Nasr and Ghali*, cited above, § 262; see also *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233, ECHR 2016).

639. The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

The investigation should be independent of the executive. Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms. Furthermore, the victim should be able to participate effectively in the investigation in one form or another (see, *El-Masri,* cited above, §§ 183-185**;** *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011; *Al Nashiri v. Poland*, cited above, § 486; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 480; and *Mocanu and Others,* cited above, §§ 321-323).

640. Even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests (see *Al Nashiri v. Poland*, cited above, §§ 494-495; and *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 488-489, both judgments with further references to the Court's case-law).

641. Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.

An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see *El-Masri*, cited above, §§ 191-192; *Al Nashiri v. Poland*, cited above, § 495; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 489, with further references to the Court's case-law).

(ii) Application of the above principles to the present case

642. The Court notes that the respondent Government argued that both the parliamentary inquiry conducted by the Romanian Senate and the criminal investigation instituted by the prosecution had been prompt, thorough, independent and effective, as required by Article 3 of the Convention (see paragraphs 606-615 above).

It further notes that these two investigations were separated by several years. The Romanian Senate's inquiry was initiated in late December 2005, following the PACE President's appeal of 24 November 2005, asking the

Romanian Parliament to investigate the allegations concerning the CIA extraordinary rendition operations in Europe and the disclosures in *The Washington Post* of 2 November 2005 and the 2005 HRW Statement of 6 November 2005, the latter naming Romania as one of the European countries allegedly hosting CIA secret prisons (see paragraphs 165-166, 226 and 236 above). The criminal investigation, initiated by the applicant's criminal complaint, began over some six years and eight months later, in late July 2012 (see paragraphs 171-172 above).

643. Given that the parliamentary inquiry commenced within a mere three weeks after the disclosures suggesting that the CIA had run a secret detention site in Romania, it cannot be said that the respondent State failed to give a prompt response to the public allegations of Romania's possible complicity in the CIA HVD Programme. The Court therefore accepts the Government's argument that the reaction of the political bodies was swift and that the Romanian Senate Inquiry Committee's work progressed reasonably quickly, in particular considering the voluminous materials gathered and examined, as well as a number of fact-finding missions carried out (see paragraphs 167 and 607 above). The work was accomplished within a year, from January 2006 to January 2007, and the deadline for the final report was set for the beginning of March 2007 (see paragraphs 165-167 above). The 2007 Romanian Senate Report was published at the beginning of May 2008, although its annexes remained classified which, in the view of the applicant and APADOR-CH, demonstrated a lack of transparency of the parliamentary procedure (see paragraphs 165 and 631 above).

644. The Court does not find it necessary to establish whether, and if so to what extent, restrictions on public access to the annexes impacted on the adequacy of the Romanian Senate's inquiry. For the Court's assessment the central question is whether that inquiry was capable of "leading to the identification and punishment of those responsible", which is an indispensable element of an "effective investigation" for the purposes of Article 3 (see paragraph 638 above).

The Court has taken into account the applicant's arguments regarding that issue (see paragraph 619 above). It has also had regard to the terms of reference of the Romanian Senate's inquiry, which were defined as "investigating statements regarding the existence of the CIA detention facilities or of some planes leased by the CIA on the territory of Romania" (see paragraph 166 above). These terms of reference were further extended to include certain particular incidents, for instance the accident suffered by plane N478GS on landing in Bucharest on 6 December 2004 (see paragraphs 168, 275 and 362 above). The inquiry focused on eight principal questions regarding the existence of a CIA secret prison in Romania, illegal transfer of detainees, suspicious aircraft and possible participation of the Romanian authorities in the CIA scheme. They were answered in the negative in the 2007 Romanian Senate Report's conclusions, except for the

question relating to the need for a parliamentary inquiry (see paragraph 169 above). None of those questions concerned the establishment of possible responsibility of State officials in the event of their complicity in the CIA scheme, nor was the inquiry aimed at ensuring, even in general terms, the accountability of those who could have been involved in the execution of the alleged CIA operations in the country. Moreover, as can be seen from the letter of the President of the Romanian Senate to APADOR-CH of 13 October 2008, the inquiry was strictly limited to the issues set out in its terms of reference and did not collect information regarding the purpose of the flights in question (see paragraph 170 above).

645. In that connection, the Court would also observe that the investigative work of the Romanian Senate Inquiry Committee overlapped with international inquiries conducted in 2006-2007 by the PACE and the European Parliament (see paragraphs 165-169, 246-265 and 268-280 above). It can therefore be reasonably assumed that all the simultaneously working bodies of inquiry had similar material at their disposal. For instance, as noted above, the list of twenty-one suspicious flights in the declassified annex to the 2007 Romanian Senate Report included the aircraft identified as carrying out rendition missions in the Fava Report (see paragraphs 272-273, 276 and 327 above). Yet in contrast to the Romanian Senate's categorical conclusions rejecting any possibility of a CIA detention facility having operated in Romania or the flights in question being used for extraordinary rendition, the findings in the 2006 Marty Report and the Fava Report pointed to a number of elements justifying at least a strong suspicion that such a facility had existed in Romania in 2003-2005 and conclusively identified some aircraft that stopped over in Romania as rendition planes (see paragraphs 251-256 and 268-276 above). The 2007 EP Resolution expressly, although with regret, called the 2007 Romanian Senate Report's conclusions "premature and superficial" (see paragraph 280 above). Mr Fava, at the fact-finding hearing pointed out in respect of the Romanian Senate's work that "it was chosen not to check all the facts and hear all the people who could have provided further elements", for instance non-governmental organisations, airport staff or journalists (see paragraph 364 above).

646. Having regard to the foregoing and, in particular, to the limited scope of the inquiry, the Court finds that the measures taken by the Romanian Parliament cannot be regarded as an adequate and sufficient response to serious allegations of Romania's implication in the CIA HVD Programme – a scheme which in the light of the widespread public knowledge involved undisclosed detention, torture and ill-treatment of terrorist-suspects.

647. It remains for the Court to determine whether the subsequent criminal investigation met the requirements of Article 3.

As noted above, the proceedings began in late July 2012, which was some six years and eight months after the public disclosures indicating Romania's possible complicity in the CIA extraordinary rendition and secret detention operations and over five years after the closure of the parliamentary inquiry. The Government explained that in the light of the 2007 Romanian Senate Report's conclusions, the authorities had had no legal or factual grounds on which to conduct of their own motion a criminal investigation into the same matters. However, following the applicant's criminal complaint, the prosecution had promptly opened an investigation (see paragraph 609 above).

648. The Court does not share the Government's point of view. On the contrary, it considers that the extremely grave nature of the allegations of human rights abuses committed during the operation of the HVD Programme and indications of Romania's complicity in the CIA's activities that emerged at the beginning of November 2005 taken together with the subsequent findings as to Romania's possible role in that programme in the Fava Report and the 2006 Marty Report, required of the authorities to act of their initiative instantly, without waiting for a victim to bring the matter to their attention (see paragraph 639 above).

649. Pursuant to Article 221 of the old CCP, as applicable at the material time, a criminal investigation authority had a duty to take action of its own motion if it had discovered that an offence had been committed (see paragraph 196 above). The 2005 HRW Statement explicitly referred to "extremely serious activities", "incommunicado detention", "torture" (describing the waterboarding interrogation technique) and "mistreatment of detainees" (see paragraph 226 above). In the face of public allegations of such serious criminal activity having been perpetrated on Romania's territory, allegations which on account of the world-wide publicity could not have gone unperceived, the Romanian prosecution authorities had a duty to initiate promptly a criminal investigation into the matter, notwithstanding the conclusions of the parliamentary inquiry (see *El-Masri*, cited above, § 192; *Al Nashiri v. Poland*, cited above, § 491; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 485).

650. In spite of that duty and despite further disclosures and growing public knowledge of the CIA extraordinary rendition operations – to mention only the publication of the vast CIA declassified materials in 2009-2010 – the authorities remained passive from the finalisation of the 2007 Romanian Senate Report in March 2007 to 20 July 2012, when the applicant's criminal complaint was registered (see paragraph 172 above). Having regard to the exceptional gravity and plausibility of the allegations, such delay must be considered inordinate (see *Al Nashiri v. Poland,* cited above, § 492; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 486). The fact that the applicant's criminal complaint was lodged over six years after the closure of Detention Site Black in Romania is not decisive and

does not change the Court's conclusion that the authorities bear full responsibility for the significant delay in investigating the matter. As stated above, the information about serious violations of Article 3 possibly occurring in Romania in 2003-2005 which was brought to their knowledge already in November 2005 gave rise *ipso facto* to an obligation to carry out an effective investigation (see also *El-Masri*, cited above, § 186).

651. Furthermore, as rightly pointed out by the applicant (see paragraphs 621-622 above), the long delay in opening the criminal investigation most likely diminished the prospects of its effectiveness. For instance, owing to the passage of time, retention periods for storing certain data had already expired between 2008 and 2010. As a result, important aeronautical data was already erased from the records kept by the Romanian authorities (see paragraphs 180-181 above).

While it is not possible to say with certainty what might have happened had it not been for the culpable delay on the part of the authorities, the authorities' inaction can be seen as a factor capable of affecting adversely the process of gathering evidence. It is entirely conceivable that more evidence could have been secured and obtained shortly after the closure of Detention Site Black in Romania if the prosecution authorities, with their full range of powers available under the criminal law – powers which are by definition stronger and more effective than those enjoyed by parliamentary investigative bodies – had decided to act promptly.

652. As regards the procedural activity displayed by the prosecution since May-July 2012, the Government maintained that there had been no undue procrastination and that the investigation had progressed swiftly, account being taken of the exceptional complexity of the case and the US authorities' unresponsive attitude to the requests for legal assistance. They added that a number of important procedural steps had been taken, such as taking evidence from a considerable number of witnesses and obtaining information as to the alleged existence of a CIA secret prison and suspicious flights from various Government ministries, State authorities, private companies and airports (see paragraphs 609-610 and 614-615 above). The applicant argued that the case had lain dormant for the last two years and that since 2013-2014 no meaningful progress had been achieved, save for taking statements from two witnesses. He also maintained that the authorities had not informed his counsel of the actions taken and that, by their failure to disclose to the public at least some elements, such as the terms of reference of the investigation, had not ensured public scrutiny of the proceedings (see paragraphs 620 and 622-623 above).

653. The Court does not underestimate the difficulties faced by the Romanian prosecutors in their investigation, involving as it did a complex, secret scheme of rendition and detention with international ramifications, voluminous material from various sources, including classified documents, and last, but not least, issues of national security and cooperation between

the Romanian and the US intelligence services. However, as noted above, the passage of time between the events and institution of the proceedings must have inevitably affected the authorities' ability to establish all the relevant circumstances and compounded the problems with collecting evidence. The proceedings, which have been pending for over six years, are apparently still directed against persons unknown and no individuals bearing responsibility for Romania's role in the HVD Programme have so far been identified. Neither does it seem – and nor was it pleaded by the Government – that any information from the investigation or about its conduct has been disclosed to the public (see paragraphs 171-190 above).

654. In that regard, the Court would emphasise that the securing of proper accountability of those responsible for enabling the CIA to run Detention Site Black on Romanian territory is conducive to maintaining confidence in the adherence by the Romanian State's institutions to the rule of law. The applicant and the public have a right to know the truth regarding the circumstances surrounding the extraordinary rendition and secret detention operations in Romania and to find out what happened at the material time. A victim, such as the applicant in the present case, who had made a credible allegation of being subjected to ill-treatment in breach of Article 3 of the Convention, has the right to obtain an accurate account of the suffering endured and the role of those responsible for his ordeal (see paragraph 641 above; see also *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011; *Al Nashiri v. Poland*, cited above, § 495; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 487). That right has to date been denied to the applicant.

655. Moreover, the importance and gravity of the issues involved require particularly intense public scrutiny of the investigation. The Romanian public has a legitimate interest in being informed of the criminal proceedings and their results. It therefore falls to the national authorities to ensure that, without compromising national security, a sufficient degree of public scrutiny is maintained in respect to the investigation (see *Al Nashiri v. Poland*, cited above, § 497; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 489).

656. Having regard to its above findings as to the inadequacy of the parliamentary inquiry and deficiencies in the criminal investigation, the Court considers that Romania has failed to comply with the requirements of a "prompt", "thorough" and "effective" investigation for the purposes of Article 3 of the Convention.

Consequently, the Court dismisses the Government's preliminary objections of non-exhaustion of domestic remedies and non-compliance with the six-month rule (see paragraphs 412-418 above) and finds that there has been a violation of Article 3 of the Convention, in its procedural aspect.

B. Substantive aspect of Article 3

1. The parties' submissions

(a) The Government

657. The Government contended that, having regard to Romania's lack of jurisdiction and responsibility under the Convention as invoked above, it was impossible for them to make any observations on the merits of the applicant's complaint under the substantive limb of Article 3 of the Convention.

(b) The applicant

658. The applicant submitted that Romania had known or must have known about the CIA's secret detention and extraordinary rendition programme, the secret CIA prison in Romania, and the torture and cruel, inhuman and degrading treatment to which the CIA had subjected high-value detainees as part of this programme. Yet Romania had knowingly and intentionally assisted the CIA in detaining the applicant in Detention Site Black, thereby allowing the CIA to subject him on Romanian territory to treatment in violation of Article 3 of the Convention.

659. In respect of the nature of the ill-treatment inflicted on him in various CIA prisons, the applicant referred to the transcript of the hearing held by the Combatant Status Review Tribunal in Guantánamo on 14 March 2007, as released on 15 June 2016 (see paragraph 123 above). At that hearing he had stated that he had continually endured torture in the CIA's hands from the time he had been arrested in mid-October 2002 until his transfer to military custody on 5 September 2006. During that time he had, among other things, been hung upside down for almost a month, subjected to waterboarding on numerous occasions, put inside a box for a week, hit against the wall, kept in stressful positions, subjected to nudity, held in stressful and painful positions, beaten, abused and ill-treated in many other ways.

660. As regards the ill-treatment inflicted on him in Romania, the applicant underlined that because of the unprecedented secrecy associated with CIA detention and rendition operations, the publicly available information was scarce and incomplete. Moreover, as he had already submitted, he had been deprived of any possibility of giving a direct account of his ordeal to the Court. However, it had transpired from the CIA declassified documents and the 2014 US Senate Committee Report that it was in Bucharest, in May 2004, where he was subjected to rectal feeding after he had tried to go on hunger strike. The 2014 US Senate Committee Report described rectal feeding as a practice applied by the CIA on detainees "without evidence of medical necessity" and as a means of "behaviour control".

It had been in Bucharest where the applicant had been subjected to all of the standard abusive conditions of CIA detention: incommunicado solitary confinement, blindfolds and hooding, forced shaving, continuous noise, continuous light and leg shackling. It had been at Detention Site Black where during the first months of their detention CIA prisoners had been subjected to sleep deprivation, doused with water and slapped or forced to stand in painful positions. Moreover, he had inevitably faced the constant fear that the torture inflicted on him in Poland and other previous places of secret detention would be inflicted on him again, leaving him in a state of permanent anxiety caused by complete uncertainty about his fate at the hands of the CIA.

661. The applicant submitted that the Court had expressly recognised this form of ill-treatment in *Abu Zubaydah v. Poland* as being in breach of Article 3. Indeed, torture and prisoner abuse had been the hallmark, the standard operating procedure of the CIA secret detention programme. The predictability of the fate of the detainees under the programme gave sufficient grounds to believe that the applicant had been abused and ill-treated in Romania, as well as after his transfer from the country.

662. Torture and ill-treatment endured by the applicant had caused him significant damage, as confirmed by his above statement given before the Combatant Stratus Review Tribunal and the fact that, as a result of his experiences during his secret detention, he had suffered from Post-Traumatic Stress Syndrome.

663. Lastly, the applicant contended that in the light of the Court's case-law, Romania had a positive obligation under Article 3 to protect him from treatment in violation of that provision on its territory and to prevent his transfer from Romania to other CIA secret detention facilities, thus exposing him to further, continuing violations of Article 3. Romania's failure to stop or prevent the violations of his rights had amounted to a breach of that provision.

2. The Court's assessment

(a) Admissibility

664. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

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

665. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the

Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in time of war or other public emergency threatening the life of the nation (see, among many other examples, *Soering*, cited above, § 88; *Selmouni v. France,* cited above, § 95; *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; *Ilaşcu and Others,* cited above, § 424; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 375, ECHR 2005-III; *El-Masri*, cited above, § 195; see also *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 26-31, ECHR 2001-XI).

Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V; see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; *Öcalan v. Turkey* [GC], no. 46221/99, § 179 ECHR 2005-IV; *El-Masri*, cited above, § 195; *Al Nashiri v. Poland*, cited above, § 507; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 499; and *Nasr and Ghali*, cited above, § 280).

666. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, cited above, § 162; *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI; and *Jalloh v. Germany,* cited above, § 67). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia*, *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004; and *El-Masri*, cited above, § 196).

Treatment has been held by the Court to be "inhuman" because, *inter alia,* it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Labita*, cited above, § 120).

In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aksoy*, cited above, § 62). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *İlhan v. Turkey* [GC], no. 22277/93, § 85, ECHR 2000-VII; *El-Masri*, cited above, § 197; *Al Nashiri v. Poland*, cited above, § 508; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 500).

667. Furthermore, a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment (see *Gäfgen v. Germany* [GC], no. 22978/05, § 91, ECHR 2010; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 501).

668. The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI and *Z. and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III; *El-Masri*, cited above, § 198; *Al Nashiri v.* Poland, § 509; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 502; and *Nasr and Ghali*, cited above, § 283).

(ii) Application of the above principles to the present case

669. The Court has already found that the applicant's allegations concerning his secret detention in Romania from 12 April 2004 to 6 October 2005 or, at the latest, 5 November 2005 and his transfer from Romania to another CIA black site on one of those latter dates have been proved before the Court and that those facts are established beyond reasonable doubt (see paragraphs 531-542 above).

It remains to be determined whether the treatment to which he was subjected during his detention falls within the ambit of Article 3 of the Convention and, if so, whether and to what extent it can be attributed to the respondent State (see paragraphs 591-602 above).

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

670. In the light of the material in its possession the Court has already found that it does not appear that at Detention Site Black the applicant was

subjected to EITs in connection with interrogations (see paragraphs 545-546 above). However, it has established beyond reasonable doubt that during his detention in Romania the applicant was kept – as any other CIA detainee – under the regime of "standard conditions of confinement" laid down in the DCI Confinement Guidelines. That regime included, as a matter of fixed, predictable routine, the blindfolding or hooding of detainees, which was designed to disorient them and keep them from learning of their location or the layout of the detention facility; removal of hair upon arrival at the site; incommunicado, solitary confinement; continuous noise of high and varying intensity played at all times; continuous light such that each cell was illuminated to about the same brightness as an office; and use of leg shackles in all aspects of detainee management and movement (see paragraphs 56-58 and 547 above). The conditions of confinement were an integral part of the CIA interrogation scheme and served the same purposes as interrogation measures, namely to "dislocate psychologically" the detainee, to "maximise his feeling of vulnerability and helplessness" and "reduce or eliminate his will to resist ... efforts to obtain critical intelligence" (see paragraphs 42, 53 and 56-58 above).

671. A complementary description of the applicant's conditions of detention throughout the entire period that he spent in CIA custody can also be found in the 2007 ICRC Report. According to that description, based on the applicant's own account and on that of thirteen other high-value detainees, they "had no knowledge of where they were being held, no contact with persons other than their interrogators or guards"; and "even the guards were usually masked and, other than the absolute minimum, did not communicate in any way with detainees". None of the detainees "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". They had "no access to news from the outside world, apart from the later stages of their detention when some of them occasionally received printouts of sports news from the Internet and one reported receiving newspapers". The situation was further exacerbated by other aspects of the detention regime, such as deprivation of access to open air and exercise, lack of appropriate hygiene facilities and deprivation of basic items in pursuance of interrogations (see paragraph 293 above).

672. Referring to the general situation in the CIA secret prisons, the 2014 US Senate Committee Report states that "the conditions of confinement for CIA detainees were harsher that the CIA represented to the policymakers and others" and describes them as being "poor" and "especially bleak early in the programme" (see paragraph 85 above). It further states that in respect of the conditions of detention the DCI Confinement Guidelines of 28 January set forth minimal standards and required only that the facility be sufficient to meet "basic health needs". That, according to the report meant in practice that a facility in which

detainees were kept shackled in complete darkness and isolation, with a bucket for human waste and without heat during the winter months, met that standard (see paragraph 56 above).

673. As regards the impact of the regime on the CIA detainees, the 2014 US Senate Committee Report states that "multiple CIA detainees who were subjected to the CIA's enhanced interrogation techniques and extended isolation exhibited psychological and behavioral issues, including hallucinations, paranoia insomnia and attempts at self-harm and self-mutilation" and that "multiple psychologists identified the lack of human contact experienced by detainees as a cause of psychiatric problems" (see paragraph 85 above). In the CIA's declassified documents, adverse effects of extreme isolation to which HVDs were subjected have been recognised as imposing a "psychological toll" and capable of altering "the detainee's ability to interact with others" (see paragraph 58 above).

674. As regards the applicant's situation during his detention at Detention Site Black, the 2014 US Senate Committee Report confirms that in May 2004, following his hunger strike, the CIA "responded by force feeding him rectally" (see paragraphs 126 and 158 above). Also, according to the report, he clearly suffered serious psychological problems resulting from treatment inflicted on him during his detention, such as "outbursts" during debriefings" and a "continued state of depression". He displayed behaviour described as "unpredictable", "disruptive" and "repeated belligerent acts". In July 2005 he was assessed as being "on the verge of a breakdown" (see paragraphs 127 and 158 above).

675. For the purposes of its ruling the Court does not find it necessary to analyse each and every aspect of the applicant's treatment in detention, the physical conditions in which he was detained in Romania, or the conditions in which he was transferred to and out of Romania. The predictability of the CIA's regime of confinement and treatment routinely applied to the high-value detainees give sufficient grounds for the Court to conclude that the above-described standard measures were used in respect of the applicant in Romania and likewise elsewhere, following his transfer from Romania, as an integral part of the HVD Programme (see also *Al Nashiri v. Poland*, cited above, §§ 514-515).

Considering all the elements, the Court finds that during his detention in Romania the applicant was subjected to an extremely harsh detention regime, including a virtually complete sensory isolation from the outside world, and suffered from permanent emotional and psychological distress and anxiety caused by the past experience of torture and cruel treatment in the CIA's hands and fear of his future fate. Even though during that period he had not been subjected to interrogations with the use of the harshest methods but "debriefings", the applicant – having beforehand experienced the most brutal torture, for instance waterboarding, mock executions, hanging upside down and prolonged confinement in a box (see *Al Nashiri*

v. Poland, cited above, §§ 86-89, 99-102, 401 and 416-417) – inevitably faced the constant fear that, if he failed to "comply", the previous cruel treatment would at any given time be inflicted on him again. Thus, Article 3 of the Convention does not refer exclusively to the infliction of physical pain but also to that of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault (see *El-Masri*, cited above, § 202; and *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 509-510).

Consequently, having regard to the treatment to which the applicant must have been subjected and its cumulative effects on him, the Court finds that it is to be characterised as intense physical and mental suffering falling within the notion of "inhuman treatment" under Article 3 of the Convention (see paragraph 665 above).

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

676. The Court has already found that Romania knew of the nature and purposes of the CIA's activities on its territory at the material time and cooperated in the preparation and execution of the CIA extraordinary rendition, secret detention and interrogation operations on Romanian territory. It has also found that, given its knowledge and its involvement in the execution of the HVD Programme Romania knew that, by enabling the CIA to detain terrorist-suspects on its territory, it was exposing them to a serious risk of treatment contrary to the Convention (see paragraph 589 above).

677. It is true that in the assessment of the experts – which the Court accepts – the Romanian authorities did not know the details of what exactly happened inside Detention Site Black or witnessed treatment to which the CIA's detainees were subjected. The running of the detention facility was entirely in the hands of and controlled by the CIA. It was the CIA personnel who were responsible for the physical conditions of confinement, interrogations, debriefings, ill-treatment and inflicting torture on detainees (see paragraphs 344, 380, 384 and 587 above).

However, under Article 1 of the Convention, taken together with Article 3, Romania was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals (see paragraph 668 above)

Notwithstanding the above Convention obligation, Romania, for all practical purposes, facilitated the whole process of the operation of the HVD Programme on its territory, created the conditions for it to happen and made no attempt to prevent it from occurring. As found above**,** on the basis of their own knowledge of the CIA activities deriving from Romanian's complicity in the HVD Programme and from publicly accessible information on treatment applied in the context of the "war on terror" to

terrorist suspects in US custody the authorities – even if they did not see or participate in the specific acts of ill-treatment and abuse endured by the applicant and other HVDs – must have been aware of the serious risk of treatment contrary to Article 3 occurring in the CIA detention facility on Romanian territory.

Accordingly, Romania, on account of its "acquiescence and connivance" in the HVD Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory (see paragraph 594 above; see also *El-Masri*, cited above, §§ 206 and 211; *Al Nashiri v. Poland*, cited above, § 517; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 512).

678. Furthermore, Romania was aware that the transfer of the applicant to and from its territory was effected by means of "extraordinary rendition", that is, "an extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see *El-Masri*, cited above, § 221; *Al Nashiri v Poland*, cited above, § 518; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 513).

In these circumstances, the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer (see paragraph 595 above). Consequently, by enabling the CIA to transfer the applicant out of Romania to another detention facility, the authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention.

679. There has accordingly been a violation of Article 3 of the Convention, in its substantive aspect.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

680. The applicant complained that Romania had enabled the CIA to hold him on its territory in secret, unacknowledged detention, which had been imposed and implemented outside any legal procedures. Moreover, by enabling the CIA to transfer him from Romanian territory to other secret CIA detention facilities elsewhere, it had exposed him to a real and serious of risk of further undisclosed detention.

He alleged a breach of Article 5 of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

1. The Government

681. The Government reiterated their position that Romania lacked jurisdiction and refrained from making any observations on the admissibility and merits of the complaint.

2. The applicant

682. The applicant submitted that his secret detention in Romania had violated Article 5 § 1 because it had not been "in accordance with a procedure prescribed by law". Romania had entered into an agreement with the CIA to permit it to fly in and secretly detain detainees, including the applicant on Romanian territory. It had also provided extraordinary security cover for these secret detention operations.

He underlined that the Court had repeatedly held, including in *El-Masri* (cited above), that unacknowledged detention was a "complete negation" of

Article 5 guarantees and "a most grave violation of article 5". The Grand Chamber had further reiterated in *El-Masri* that "Article 5 of the Convention laid down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone in its jurisdiction".

683. The respondent State had known and should have known that the applicant had not received any legal process for his detention in the light of the extraordinary secrecy associated with the CIA's rendition and detention operations. It had been on notice of the secret detention of prisoners from its own negotiations concerning the hosting of a detention facility with the US authorities, as well as from public sources and its diplomatic missions. Yet Romania had assisted the CIA secret detention operations, including by providing a detention site and extraordinary security cover for the CIA and maintaining the secrecy associated with these operations. It had also failed to take measures to protect the applicant from incommunicado detention while he had been on Romanian territory. Accordingly, Romania had violated his rights under Article 5 of the Convention.

684. Moreover, Romania's participation in the applicant's transfer from the country had exposed him to the further continuing risk of incommunicado detention in violation of Article 5 § 1. Romania had known and should have known that the CIA had been likely to continue to subject its prisoners – including the applicant – to incommunicado detention after their transfer from Romanian territory. By failing to meet its positive obligation to protect him from detention in violation of Article 5 and knowingly and intentionally participating in his transfer despite the above risk Romania was responsible for the length of arbitrary detention he had endured after being transferred from its territory.

B. The Court's assessment

1. Admissibility

685. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

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

686. The guarantees contained in Article 5 are of fundamental importance for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason

that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal*, cited above, § 118; and *El-Masri*, cited above, § 230). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311; and *El-Masri*, cited above, § 230).

687. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness, by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptness and judicial supervision assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see *Aksoy*, cited above, § 76). What is at stake is both the protection of the physical liberty of individuals and their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (see *El-Masri*, cited above, § 231; *Al Nashiri v. Poland*, cited above, § 528; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 522; and *Nasr and Ghali*, cited above, § 297).

688. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that they have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see *Aksoy*, cited above, § 78; and *El-Masri*, cited above, § 232).

The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a

person has been taken into custody and has not been seen since (see *Kurt v Turkey*, 25 May 1998, §§ 123-124, *Reports of Judgments and Decisions* 1998-III; and *El-Masri*, cited above, § 233; see also *Al Nashiri v. Poland*, cited above, § 529; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 523; and *Nasr and Ghali*, cited above, § 298).

(b) Application of the above principles to the present case

689. In the previous cases concerning similar allegations of a breach of Article 5 arising from secret detention under the CIA HVD Programme in other European countries the Court found that the respondent States' responsibility was engaged and that they were in violation of that provision on account of their complicity in that programme and cooperation with the CIA (see *El-Masri*, cited above, § 241; *Al Nashiri v. Poland*, cited above, §§ 531-532; *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 525-526; and *Nasr and Ghali*, cited above, §§ 302-303). The Court does not see any reason to hold otherwise in the present case.

690. As the Court has held in *Al Nashiri v. Poland* (cited above, § 530) and *Husayn (Abu Zubaydah) v. Poland* (cited above, § 524), secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme. The rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention, to mention only the right to be brought before a judge and be tried within a reasonable time or the *habeas corpus* guarantees. To this end, the whole scheme had to operate outside the jurisdiction of the US courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities (see also paragraphs 22-23, 28-59, 62 and 78-97 above).

The rendition operations had largely depended on the cooperation, assistance and active involvement of the countries which put at the USA's disposal their airspace, airports for the landing of aircraft transporting CIA prisoners, and facilities in which the prisoners could be securely detained and interrogated and ensured the secrecy and smooth operation of the HVD Programme. While, as noted above, the interrogations of captured terrorist suspects was the CIA's exclusive responsibility and the local authorities were not to be involved, the cooperation and various forms of assistance provided by those authorities, such as customising the premises for the CIA's needs, ensuring security and providing the logistics were the necessary condition for the effective operation of the CIA secret detention facilities (see *Al Nashiri v. Poland*, cited above, § 530; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 524).

691. In respect of the applicant's complaint under the substantive aspect of Article 3 the Court has already found that Romania was aware that he had

been transferred from its territory by means of "extraordinary rendition" and that the Romanian authorities, by enabling the CIA to transfer the applicant to its other secret detention facilities, exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraph 678 above).These conclusions are likewise valid in the context of the applicant's complaint under Article 5. In consequence, Romania's responsibility under the Convention is engaged in respect of both the applicant's secret detention on its territory and his transfer from Romania to CIA detention elsewhere.

692. There has accordingly been a violation of Article 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

693. The applicant further complained that Romania had violated his rights under Article 8 by enabling the CIA to ill-treat and detain him incommunicado on its territory and to deprive him of any contact with his family.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

694. The Government restated their position that Romania lacked jurisdiction and responsibility under the Convention. They refrained from making any observations on the admissibility and merits of the complaint.

2. The applicant

695. The applicant contended that his incommunicado secret detention in Romania with no access to or contact with his family had violated Article 8 of the Convention.

Romania had known or must have known from public sources and its diplomatic missions of the possible torture, abuse and secret detention of the US terrorist suspects. Nonetheless, it had agreed to host a secret CIA prison and provide security for the CIA's secret detention and rendition operations. Romania had known or must have known that detainees like the applicant

had been deprived of access to their family as it had helped maintain secrecy regarding these operations. Clearly, a secret prison outside the law did not allow for family visits. By participating in the CIA's secret detention of prisoners and failing to take measures to protect the applicant from such detention without access to his family while he had been on Romanian territory, Romania had violated his rights under Article 8.

B. The Court's assessment

1. Admissibility

696. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

697. The notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person. These aspects of the concept extend to situations of deprivation of liberty (see *El-Masri*, cited above, § 248, with further references to the Court's case-law; *Al Nashiri v. Poland*, cited above, § 538; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 532).

Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world. A person should not be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom" (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 65, ECHR 2002-III). Furthermore, the mutual enjoyment by members of a family of each other's company constitutes a fundamental element of family. In that context, the Court would also reiterate that an essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities (see *El-Masri*, cited above, § 248; *Al Nashiri v. Poland*, *ibid.*; and *Husayn (Abu Zubaydah) v. Poland, ibid.*).

698. Having regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention (see paragraphs 676-679 and 691 above), the Court is of the view that Romania's actions and omissions in respect of the applicant's detention and transfer likewise engaged its responsibility under Article 8 of the Convention. Considering that the interference with the applicant's right to respect for his private and family life occurred in the context of the imposition of fundamentally unlawful, undisclosed detention, it must be regarded as not "in accordance with the law" and as inherently lacking any conceivable

justification under paragraph 2 of that Article (see *El-Masri*, cited above, § 249; *Al Nashiri v. Poland*, cited above, § 539, and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 533).

699. There has accordingly been a violation of Article 8 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLES 3, 5 AND 8 OF THE CONVENTION

700. The applicant complained that Romania had been in breach of Article 13 of the Convention, taken separately and in conjunction with Articles 3, 5 and 8 on account of having failed to carry out an effective, prompt and thorough investigation into his allegations of serious violations of Articles 3, 5 and 8 of the Convention.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

701. The parties essentially reiterated their observations concerning the procedural aspect of Article 3 of the Convention.

702. The Government maintained that that the parliamentary inquiry and criminal investigation had been thorough and effective and had, therefore, met the requirements of an "effective remedy" for the purposes of Article 13 of the Convention.

703. The applicant disagreed and said that the investigation had been initiated after a considerable delay and with marked reluctance on the part of the Romanian authorities Despite the fact that the investigation had been pending for over five years, no meaningful progress had been achieved.

B. The Court's assessment

1. Admissibility

704. The Court notes that this complaint is linked to the complaint under the procedural aspect of Article 3, which has been found admissible (see paragraph 637 above). It must likewise be declared admissible.

2. Merits

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

705. Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see, among other authorities, *Kaya v. Turkey*, 19 February 1998, § 106, *Reports of Judgments and Decisions* 1998-I; and *Mahmut Kaya*, cited above, § 124).

706. Where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a procedure enabling a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002; *Assenov and Others*, cited above, §§ 114 et seq.; *Aksoy*, cited above, §§ 95 and 98; and *El-Masri*, cited above, § 255).

707. The requirements of Article 13 are broader than a Contracting State's obligation under Articles 3 and 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible (see *El-Masri*, cited above, § 255, with further references to the Court's case-law).

708. Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of the claim of, or on behalf of, the individual concerned that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant his expulsion or to any perceived threat to the national security of the State from which the person is to be removed (see *Chahal*, cited above, § 151; and *El-Masri*, cited above, § 257; see also *Al Nashiri v. Poland*, cited above, §§ 546-548; and *Husayn (Abu Zubaydah) v. Poland,* cited above, §§ 540-543).

(b) Application of the above principles to the present case

709. The Court has already concluded that the respondent State is responsible for violations of the applicant's rights under Articles 3, 5 and 8 of the Convention (see paragraphs 676-679, 691 and 698 above). The complaints under these Articles are therefore "arguable" for the purposes of Article 13 and that he should accordingly have been able to avail himself of effective practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation, as required by that provision (see paragraph 705 above; see also *El-Masri*, cited above, § 259; *Al Nashiri v. Poland*, cited above, § 550; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 544).

For the reasons set out in detail above, the Court has found that the criminal investigation in Romania fell short of the standards of the "effective investigation" that should have been carried out in accordance with Article 3 (see paragraph 656 above). In these circumstances, the remedy relied on by the Government (see paragraphs 412-413 above) cannot be regarded as "effective" in practice. For the reasons that prompted the Court to dismiss the Government's preliminary objection of non-exhaustion of domestic remedies (see paragraphs 642-656 above), the Court must also find that the requirements of Article 13 of the Convention were not satisfied in the present case and that the applicant did not have available to him in Romania an "effective remedy" to ventilate his claims of a violation of Articles 3, 5 and 8 of the Convention.

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

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

711. The applicant complained that Romania, by enabling the CIA to transfer him from its territory, had exposed to him to a real and serious risk of being transferred to a jurisdiction where he would be subjected to a flagrantly unfair trial, in breach of Article 6 § 1 of the Convention. That provision, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial by an independent and impartial tribunal established by law."

A. The parties' submissions

1. The Government

712. The Government reiterated their position that Romania lacked jurisdiction and refrained from making observations on the admissibility and merits of the complaint.

2. The applicant

713. The applicant maintained that by the time of his transfer from Romania, the Romanian authorities had known or must have known that there were substantial grounds for believing that he had faced a real risk of being subjected to a flagrant denial of justice. The deficiencies of the military commission rules applicable to terrorist-suspects in US custody at that time had been publicly criticised by the Council of Europe, the Human Rights Chamber for Bosnia and Herzegovina, various non-governmental organisations and also in news reports. The US Government had also published documents detailing the rules for military commissions under which the applicant was likely to be tried.

The military commissions had been flagrantly unfair because they had not been sufficiently independent and impartial, had been contrary to US law and discriminatory, had admitted evidence obtained from torture and inhuman and degrading treatment, had not respected the principle of equality of arms, had not been public and had admitted hearsay evidence. Despite knowing the flagrant unfairness of the US military commissions which would be likely to try the applicant, Romania had assisted in his transfer out of its territory.

714. Although military commission rules applicable to the applicant had changed since the time he had been transferred from Romania, they retained a number of deficiencies which, especially when considered in the context of a death penalty case, cumulatively amounted to a flagrant denial of justice under Article 6 of the Convention.

B. The Court's assessment

1. Admissibility

715. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

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

716. In the Court's case-law, the term "flagrant denial of justice" is synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other examples, *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II, and *Othman (Abu Qatada),* cited above, § 258).

In *Othman (Abu Qatada*), citing many examples from its case-law, the Court referred to certain forms of unfairness that could amount to a flagrant denial of justice. These include conviction *in absentia* with no subsequent possibility to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed, and deliberate and systematic denial of access to a lawyer, especially for an individual detained in a foreign country (ibid. § 259).

In other cases, the Court has also attached importance to the fact that if a civilian has to appear before a court composed, even only in part, of members of the armed forces taking orders from the executive, the guarantees of impartiality and independence are open to serious doubt (see *Incal v. Turkey*, 9 June 1998, §§ 68 et seq. *Reports of Judgments and Decisions* 1998-IV, and *Öcalan*, cited above, § 112).

717. However, "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada),* cited above, § 260)

718. The Court has taken a clear, constant and unequivocal position on the admission of torture evidence. No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself. The prohibition of the use of torture is fundamental (see *Othman (Abu Qatada*, cited above, §§ 264-265).

Statements obtained in violation of Article 3 are intrinsically unreliable. Indeed, experience has all too often shown that the victim of torture will say anything – true or not – as the shortest method of freeing himself from the

torment of torture (see *Söylemez v. Turkey*, no. 46661/99, § 122, 21 September 2006; and *Othman (Abu Qatada)*, cited above, § 264).

The admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome.

It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial (see *Othman (Abu Qatada)*, cited above, § 267; see also *Al Nashiri v. Poland*, cited above, § 564; and *Husayn (Abu Zubaydah) v. Poland,* cited above, § 554).

(b) Application of the above principles to the present case

719. In *Al Nashiri v. Poland* the Court examined a similar complaint and found a violation of Article 6 § 1 of the Convention on the following grounds.

At the time of the applicant's transfer from Poland, the procedure before military commissions was governed by the Military Order of 13 November 2001 and the Military Commission Order no. 1 of 21 March 2002 (see also paragraphs 71-72 above).

The commissions were set up specifically to try "certain non-citizens in the war against terrorism", outside the US federal judicial system. They were composed exclusively of commissioned officers of the United States armed forces. The appeal procedure was conducted by a review panel likewise composed of military officers. The commission rules did not exclude any evidence, including that obtained under torture, if it "would have probative value to a reasonable person".

On 29 June 2006 the US Supreme Court ruled in *Hamdan v. Rumsfeld* that the military commission "lacked power to proceed" and that the scheme had violated both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949 (see also paragraph 73 above).

The Court considered that at the time of the applicant's transfer from Poland there was a real risk that his trial before the military commission would amount to a flagrant denial of justice having regard to the following elements:

(i) the military commission did not offer guarantees of impartiality of independence of the executive as required of a "tribunal" under the Court's case-law (see also paragraph 716 above, with references to the Court's case-law);

(ii) it did not have legitimacy under US and international law resulting in, as the Supreme Court found, its lacking the "power to proceed" and, consequently, it was not "established by law" for the purposes of Article 6 § 1; and

(ii) there was a sufficiently high probability of admission of evidence obtained under torture in trials against terrorist suspects (see *Al Nashiri v. Poland,* cited above, §§ 566- 567).

720. The Court has also attached importance to the fact that at the material time, in the light of publicly available information, it was evident that any terrorist suspect would be tried before a military commission. Furthermore, the procedure before the commission raised serious worldwide concerns among human rights organisations and the media (ibid. § 568; see also paragraphs 75-77 above).

721. Having regard to the fact that the applicant was transferred out of Romania on 6 October 2005 or, at the latest, on 5 November 2005 when the same rules governing the procedure before the military commission applied (see paragraphs 71-74 and 542 above), the same considerations are valid in the present case.

As in *Al Nashiri v. Poland,* the Court would also refer to the 2003 PACE Resolution of 26 June 2003, expressing "disapproval that those held in detention may be subject to trial by a military commission, thus receiving a different standard of justice than United States nationals, which amount[ed] to a serious violation of the right to receive a fair trial" (see paragraph 216 above). Romania, as any other member State of the Council of Europe, must have necessarily been aware of the underlying circumstances that gave rise to the grave concerns stated in the resolution.

Also, given the strong, publicly expressed concerns regarding the procedure before the military commission in 2001-2003 (see paragraphs 75-76 above), it must have been a matter of common knowledge that trials before the commissions did not offer the most basic guarantees required by Article 6 § 1 of the Convention.

In view of the foregoing, the Court finds that Romania's cooperation and assistance in the applicant's transfer from its territory, despite a real and foreseeable risk that he could face a flagrant denial of justice engaged its responsibility under Article 6 § 1 of the Convention (see also paragraphs 597-598 above, with references to the Court's case-law).

722. There has accordingly been a violation of Article 6 § 1 of the Convention.

IX. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL NO. 6 TO THE CONVENTION

A. The parties' submissions

1. The Government

723. The Government reiterated their position that Romania lacked jurisdiction and made no observations on the admissibility and merits of the complaint.

2. The applicant

724. The applicant submitted that Romania's participation in his transfer out of its territory despite substantial grounds for believing that there had been a real risk that he would be subjected to the death penalty had violated his right to life under Article. In previous cases, the Court had found that Article 2 prohibited the transfer of an individual to another State in such circumstances. It had also previously found that the implementation of the death penalty in respect of a person who had not had a fair trial would violate Article 2.

Furthermore, in other cases the Court had found a violation of Article 3 on account of the psychological suffering associated with a post-transfer risk of being subjected to the death penalty. It had also held that the imposition of the death penalty following an unfair trial violated Article 3 and that there was a further violation of Article 3 where the transferred individual was at risk of being subjected to the "death row phenomenon".

Romania had assisted the CIA in transporting the applicant out of Romania despite being on notice that terrorist suspects in US custody had been likely to be subjected to the death penalty as well as an unfair trial by the military commission. Romania's participation in the applicant's transfer out of its territory also violated Article 1 of Protocol No. 6.

Lastly, the applicant emphasised that since his trial was still pending he continued to be at risk of having the death penalty imposed on him. Romania was therefore under a post-transfer duty to use all available means to ensure that he would not be subjected to that penalty.

B. The Court's assessment

1. Admissibility

725. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

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

726. Article 2 of the Convention prohibits any transfer of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see, *mutatis mutandis*, *Soering*, cited above, § 111; *Kaboulov v. Ukraine*, cited above, § 99; *Al Saadoon and Mufdhi*, cited above, § 123; *Al Nashiri v. Poland*, cited above, § 576; see also paragraph 597 above).

727. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as "convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings" (see *Al-Saadoon and Mufdhi*, cited above, § 115; and *Al Nashiri v. Poland*, cited above, § 577).

(b) Application of the above principles to the present case

728. As in *Al Nashiri v. Poland* (cited above, § 578), the Court finds that at the time of the applicant's transfer from Romania there was a substantial and foreseeable risk that he could be subjected to the death penalty following his trial before the military commission (see also paragraphs 71-72 above). Considering the fact that the applicant was indicted on capital charges on 20 April 2011, that those charges were approved on 28 September 2011 and that since then he has been on trial facing the prospect of the death penalty being imposed on him (see paragraphs 152-156 above), that risk has not diminished.

Having regard to its conclusions concerning the respondent State's responsibility for exposing the applicant to the risk of a flagrant denial of justice in breach of Article 6 § 1 of the Convention on account of his transfer to the military commission's jurisdiction, the Court considers that Romania's actions and omissions likewise engaged its responsibility under Article 2 taken together with Article 1 of Protocol No. 6 and under Article 3 of the Convention (see paragraph 721 above)..

729. There has accordingly been a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention.

X. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

730. Lastly, the applicant complained under Article 10 of the Convention that Poland, by its refusal to acknowledge, disclose and promptly and effectively investigate details of his secret detention, ill-treatment and rendition, had violated his and the public's right to the truth under Articles 2, 3, 5 and 10 of the Convention.

Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

731. The Court observes that similar complaints were raised in *El-Masri* and *Al Nashiri v. Poland* and were declared inadmissible as being manifestly ill-founded (see *El-Masri,* cited above, § 264-265; and *Al Nashiri v. Poland*, cited above, §§ 581-582).

732. It finds no reason to hold otherwise in the present case and concludes that this complaint must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

XI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

733. Article 46 of the Convention reads, in so far as relevant, as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. .."

A. The parties' submissions

734. The applicant submitted that the Romanian Government was under an obligation to use all available means at its disposal to ensure that the USA would not subject him to the death penalty. He relied, among other things, on the Court's judgment in *Al-Saadoon and Mufdhi* (cited above). In his submission, those means should include but not be limited to:

(i) making written submissions against the death penalty to the US Secretary of Defense, copied to the applicant's military defence counsel;

(ii) obtaining diplomatic assurances from the US Government that they would not subject him to the death penalty;

(iii) taking all possible steps to establish contact with the applicant in Guantánamo Bay, including by sending delegates to meet him and monitor his treatment in custody; and

(iv) retaining – and bearing the costs of – lawyers authorised and admitted to practice in the relevant jurisdictions in order to take all necessary action to protect the applicant's rights while in US custody, including in military, criminal or other proceedings involving his case.

735. In the applicant's view, the nature and severity of the violations sustained by him were comparable to the Convention violations established the Court's judgment in *Association "21 December 1989" and Others v. Romania* (cited above). He was the victim of a large, multi-State programme of secret transfers and detention that raised fundamental questions under the Convention system. This was a situation that, as in *Kelly and Others v. the United Kingdom* (no. 30054/96, § 118, 4 May 2001) ... "cried out for an explanation" and Romania had an ongoing duty to conduct an effective investigation into this case. He thus argued that, accordingly, Romania must put an end to the continuing violation of his rights through an effective investigation, also taking into account the importance for society in Romania and beyond to know the truth about his ill-treatment and secret detention in Romania.

736. The Government first emphasised that the requested measures were entirely related to the enforcement of a judgment of the Court. As the Court had held on many occasions, this issue fell under the competence of the States, which retained the choice of the means by which they would discharge their legal obligation, subject to monitoring by the Committee of Ministers.

Secondly, as opposed to *Al-Saadoon and Mufdhi*, in the instant case there was no compelling evidence that the applicant had been transferred to the USA from Romania. There was therefore no obligation on the part of the Romanian Government to obtain binding assurances that the death penalty would not be imposed on the applicant.

Thirdly, some of the measures suggested by the applicant would be nonsense or would even go against international law. As the Court had already held in *Iskandarov v. Russia* (no. 17185/05, judgment of 23 September 2010, § 161) "the individual measure sought by the applicant would require the respondent Government to interfere with the internal affairs of a sovereign State". There was no reason to depart from these findings in the present, similar case.

737. In sum, the Government invited the Court to find that the applicant's request for individual measures had no merit and to reject it as unsubstantiated.

B. The Court's assessment

738. The present case concerns the removal of an applicant from the territory of the respondent State by means of extraordinary rendition. The general principles deriving from the Court's case-law under Article 46 as to when, in such a situation, the Court may be led to indicate to the State concerned the adoption of individual measures, including the taking of "all possible steps" to obtain the appropriate diplomatic assurances from the destination State have been summarised in *Al Nashiri v. Poland* (cited above, §§ 586-588, with further references to the Court's case-law, in particular *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 209, ECHR 2012; *Assanidze v. Georgia* [GC], no. 71503/01, §§ 198 and 202, ECHR 2004-II; see *Savriddin Dzhurayev v. Russia*, no. 71386/10, §§ 138, 252-254 and 256, ECHR 2013 (extracts); and *Al-Saadoon and Mufdhi*, cited above, § 170).

739. The Court has already found that, through the actions and inaction of the Romanian authorities in the context of their complicity in the operation of the CIA HVD Programme on Romania's territory, the applicant has been exposed to the risk of the death penalty being imposed on him (see paragraph 728 above). Even though the proceedings against him before the military commissions are still pending and the outcome of the trial remains uncertain, that risk still continues. For the Court, compliance with their obligations under Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention requires the Romanian Government to endeavour to remove that risk as soon as possible, by seeking assurances from the US authorities that he will not be subjected to the death penalty (see also *Al Nashiri v. Poland,* cited above*,* § 589).

740. The applicant also contended that the Romanian authorities were obliged under Article 46 of the Convention to put an end to the continuing violation of his rights by carrying out an effective investigation (see paragraph 735 above). In this connection, it can be inferred from the Court's case-law that the obligation of a Contracting State to conduct an effective investigation under Article 3, as under Article 2, of the Convention persists as long as such an investigation remains feasible but has not been carried out or has not met the Convention standards (see, for instance, *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 202, 24 May 2011; *Benzer and Others v. Turkey,* no. 23502/06, §§ 218-219, 12 November 2013; *Mocanu and Others*, cited above, §§ 314-326; see also, *mutatis mutandis, Jeronovičs v. Latvia* [GC]*,* no. 44898/10, §§ 107 and 118, 5 July 2016). An ongoing failure to provide

the requisite investigation will be regarded as a continuing violation of that provision (see, *mutatis mutandis*, *Cyprus v. Turkey*, cited above, § 136; and *Aslakhanova and Others v. Russia,* cited above, §§ 214 and 230).

741. In the present case, given the deficiencies of the investigative procedures carried out in the applicant's case, the Court has concluded that to date Romania has failed to comply with the requirements of a "prompt", "thorough" and "effective" investigation for the purposes of Article 3 of the Convention. In particular, it has found that, in the light of the material before it, no individuals bearing responsibility for Romanian's role in the HVD Programme have so far been identified (see paragraphs 647-656 above). On the basis of the elements in the case-file, there appear to be no insurmountable practical obstacles to the hitherto lacking effective investigation being carried out (see *Abuyeva and Others v. Russia*, no. 27065/05, §§ 240-241, 2 December 2010).

742. Referring to its case-law cited above (see paragraph 740 above) regarding the kind of exceptional circumstances capable of justifying the indication to the respondent State of individual measures under Article 46 of the Convention, the Court considers it appropriate to give the following indications.

First of all, having regard in particular to the nature of the procedural violation of Article 3 found in the present case, the obligation incumbent on Romania under Article 46 inevitably requires that all necessary steps to reactivate the still pending criminal investigation be taken without delay. Thereafter, in accordance with the applicable Convention principles (see paragraphs 638-641 above, with references to the Court's case-law), the criminal investigation should be brought to a close as soon as possible, once, in so far as this proves feasible, the circumstances and conditions under which the applicant was brought into Romania, treated in Romania and thereafter removed from Romania have been elucidated further, so as to enable the identification and, where appropriate, punishment of those responsible.

743. It is not, however, for the Court to give any detailed, prescriptive injunctions in that regard. It falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance (see, *mutatis mutandis, Abuyeva and Others v. Russia,* cited above, § 243); and *Al Nashiri v. Poland* (cited above), § 586, with further references to the Court's case-law).

XII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

744. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

745. The applicant made no claim for pecuniary damage.

746. As regards non-pecuniary damage, he submitted that Romania's acts and omissions had resulted in his suffering very substantial pain and had caused significant harm to his mental health and overall well-being.

747. Emphasising the severity of the ill-treatment to which he had been subjected in Romania and the fact that he had endured incommunicado detention and the violation of his right to respect for his private and family life during his detention in Romania for a period of one year and some six months, he asked the Court to make an award of 300,000 euros (EUR) in that respect. In support of his claim, he cited a number of the Court's judgments, including *Assanidze*, *Selmouni* (both cited above), *Mikheyev v. Russia* (no. 77617/01, judgment of 26 January 2006) and *El-Masri* (cited above). As regards the latter, the applicant maintained that Mr El-Masri, a victim of extremely serious violations of the Convention committed in the framework of the extraordinary rendition operations, had endured his ordeal for a period of four months, whereas the applicant had been secretly detained in Romania for a much longer period. In addition, he was subject to a criminal process, which entailed a violation of Article 6 § 1 and faced the death penalty if convicted. Consequently, the non-pecuniary damage that he had sustained was more severe.

748. The Government asked the Court to find that the claim was unsubstantiated since there had been no violation of the applicant's rights under the Convention. Should the Court consider that the application was admissible and that the interference with his rights called for an award of just satisfaction, they maintained that the sum asked for was excessive in comparison, for instance, to the award made in *El-Masri.*

749. Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.

In the present case the Court has found serious violations of several Convention provisions by the respondent State. It has held that the responsibility of the respondent State is engaged in respect of the applicant's treatment contrary to Article 3 and his secret detention in breach of Article 5. The respondent State has also failed to carry out an effective investigation as required under Articles 3 and 13 of the Convention. In addition, the Court has found a violation of the applicant's rights under Article 8. Furthermore, the respondent State has been found responsible for enabling the CIA to transfer him from its territory, despite the serious risk that he could have a flagrantly unfair trial in breach of Article 6 § 1 and that

the death penalty could be imposed on him, in violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention (see paragraphs 656, 678-679, 691-692, 698-699, 710, 722 and 729 above).

In view of the foregoing, the Court considers that the applicant has undeniably sustained non-pecuniary damage which cannot be made good by the mere finding of a violation.

750. Consequently, regard being had to the extreme seriousness of the violations of the Convention of which the applicant has been a victim and ruling on an equitable basis, as required by Article 41 of the Convention (see *El-Masri*, cited above, § 270; *Al Nashiri v. Poland*, cited above, § 595; *Husayn (Abu Zubaydah) v. Poland,* cited above, § 567; and *Nasr and Ghali*, cited above, § 348), the Court awards him EUR 100,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

751. The applicant made no claim for the costs and expenses incurred in the proceedings.

752. Accordingly, there is no call to award him any sum on that account.

C. Default interest

753. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that the matters complained of are within the "jurisdiction" of Romania within the meaning of Article 1 of the Convention and that the responsibility of Romania is engaged under the Convention, and *dismisses* the Government's preliminary objection concerning a lack of jurisdiction and responsibility;

2. *Decides* to join to the merits the Government's preliminary objections of non-exhaustion of domestic remedies and non-compliance with the six-month rule and dismisses them;

3. *Declares* the complaints under Articles 2, 3, 5, 6 § 1, 8 and 13 of the Convention and Article 1 of Protocol No. 6 to the Convention admissible and the remainder of the application inadmissible;

4. *Holds* that there has been a violation of Article 3 of the Convention in its procedural aspect on account of the respondent State's failure to carry out an effective investigation into the applicant's allegations of serious violations of the Convention, including inhuman treatment and undisclosed detention;

5. *Holds* that there has been a violation of Article 3 of the Convention in its substantive aspect, on account of the respondent State's complicity in the CIA High-Value Detainee Programme in that it enabled the US authorities to subject the applicant to inhuman treatment on its territory and to transfer him from its territory in spite of a real risk that he would be subjected to treatment contrary to Article 3;

6. *Holds* that there has been a violation of Article 5 of the Convention on account of the applicant's undisclosed detention on the respondent State's territory and the fact that the respondent State enabled the US authorities to transfer him from its territory, in spite of a real risk that he would be subjected to further undisclosed detention;

7. *Holds* that there has been a violation of Article 8 of the Convention;

8. *Holds* that there has been a violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the applicant's grievances under Articles 3, 5 and 8 of the Convention;

9. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the transfer of the applicant from the respondent State's territory in spite of a real risk that he could face a flagrant denial of justice;

10. *Holds* that there has been a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention on account of the transfer of the applicant from the respondent State's territory in spite of a real risk that he could be subjected to the death penalty;

11. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable in respect of non-pecuniary damage;

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

12. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 31 May 2018.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President

ANNEX I

List of abbreviations used in the Court's judgment

2001 Military Commission Order – Military Order of 13 November 2001 on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism issued by President George W. Bush

2002 Military Commission Order – US Department of Defence Military Commission Order No. 1 on Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism of 21 March 2002, issued by D. Rumsfeld, the US Secretary of Defense

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

2004 CIA Background Paper – background paper on the CIA's combined interrogation techniques of 30 December 2004

2004 CIA Report – CIA Inspector General's report of 7 May 2004 "Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003"

2005 HRW List – Human Rights Watch's "List of 'Ghost Prisoners' Possibly in CIA Custody" of 30 November 2005

2005 HRW Statement – Human Rights Watch's Statement on US Secret Detention Facilities of 6 November 2005

2006 Marty Report – Report of the Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, of 12 June 2006, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states" (Doc. 10957)

2006 MCA - US Congress Military Commissions Act of 2006 signed by President George W. Bush on 17 October 2006

2007 EP Resolution – European Parliament resolution of 14 February 2007 on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/22009INI)

2007 Marty Report – Report of the Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, of 11 June 2007 "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report" - (Doc. 11302.rev)

2007 Romanian Senate Report – Report of the Romanian Senate Inquiry Committee for investigating statements regarding the existence of the CIA detention facilities or of some flights of planes leased by the CIA on the territory of Romania, published in the Official Monitor on 7 May 2008

2009 DOJ Report – Report of the US Department of Justice, Office of Professional Responsibility of 29 July 2009 -"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"

2009 MCA – US Congress Military Commissions Act enacted on 28 October 2009

2010 UN Joint Study – UN Human Rights Council "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", released on 19 February 2010

2011 Marty Report – Report of the Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, of 16 September 2011, "Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations" (Doc. 12714)

2012 EP Resolution – European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI))

2013 EP Resolution – European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP)

2014 US Senate Committee Report – US Senate Select Committee on Intelligence's Executive Summary of the "Study of the Central Intelligence Agency's Detention and Interrogation Program", released on 9 December 2014

2015 EP Resolution – European Parliament resolution of 11 February 2015 on the US Senate Report on the use of torture by the CIA (2014/2997(RSP))

2015 LIBE Briefing – Briefing for the European Parliament's LIBE Committee Delegation to Romania: CIA Detention in Romania and the Senate Intelligence Committee Report, dated 15 September 2015

2016 EP Resolution – European Parliament resolution of 8 June 2016 on follow-up to the European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2016/2573(RSP))

ACLU - American Civil Liberties Union

AI - Amnesty International,

APADOR-CH - Association for the Defence of Human Rights in Romania – the Helsinki Committee

ATS – Air Traffic Service

CAT – UN Committee against Torture

CIA – Central Intelligence Agency of the United States

CNSD – Lithuanian Seimas Committee on National Security and Defence

CNSD Findings – the Annex to the Seimas' Resolution No. XI-659 of 19 January 2010 – "Findings of the parliamentary investigation by the Seimas Committee on National Security and Defence concerning the alleged transportation and confinement of persons detained by the Central Intelligence Agency of the United States of America on the territory of the Republic of Lithuania"

CSC – Computer Sciences Corporation

CTC – Chief of the Counterterrorism Center

DCI Confinement Guidelines – CIA Guidelines on Confinement Conditions for CIA Detainees signed on 28 January 2003

DCI Interrogation Guidelines – CIA Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001 signed on 28 January 2003

DDO – CIA Deputy Director for Operations

EITs – Enhanced Interrogation Techniques

EP – European Parliament

EU – European Union

Fava Inquiry – inquiry following the European Parliament's decision setting up a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners of 18 January 2006, Rapporteur Giovanni Claudio Fava

FBI - Federal Bureau of Investigation

Flautre Report – Report of the European Parliament Committee on Civil Liberties Justice and Home Affairs on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee (2012/2033(INI)), Rapporteur Hélène Flautre, adopted by the European Parliament on 11 September 2012

HVD - high-value detainee

HVD Programme - High-Value Detainees Program

HVTs - high-value targets

ICCPR - International Covenant on Civil and Political Rights

ICJ - International Commission of Jurists

ICRC - International Committee of the Red Cross

III Geneva Convention - Geneva (III) Convention relative to the Treatment of Prisoners of War of 12 August 1949

IV Geneva Convention - Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949

ILC Articles – International Law Commission 2001 Articles on Responsibility of States for Internationally Wrongful Acts

IRCT Convention International Rehabilitation Council for Torture

JITPS Convention Jeppesen International Trip Planning Service

LIBE – European Parliament's Committee on Civil Liberties, Justice and Home Affairs

Marty Inquiry - inquiry into the allegations of CIA secret detention facilities in the Council of Europe's member States launched by the Parliamentary Assembly of the Council of Europe on 1 November 2005 and conducted by Senator Dick Marty

Media Groups - twelve media organisations represented by Howard Kennedy Fsi LLP

MON - covert action Memorandum of Notification signed by President George W. Bush on 17 September 2001

NATO – North Atlantic Treaty Organisation

new CCP - Romanian Code of Criminal Procedure of 1 July 2010 in force as from 1 February 2014

ODNI - Office of the Director of National Intelligence

OGC - CIA Office of General Counsel

OIG – Office of Inspector General

OLC – Office of Legal Counsel

old CCP – Romanian Code of Criminal Procedure in force until 31 January 2014

ORNISS – the National Registry Office for Classified Information (*Oficiul Registrului Naţional al Informaţiilor Secrete de Stat)*

OSJI – Open Society Justice Initiative

OTS – Office of Technical Service

PACE – Parliamentary Assembly of the Council of Europe

PICCJ – Prosecutor's Office attached to the Court of Cassation – (*Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie)*

RAS – Romanian Airport Services

RCAA – Romanian Civil Aeronautical Authority (*Autoritatea Aeronautică Civilă Română)*

RDI Programme - Rendition Detention Interrogation Program

Romanian Senate Inquiry Committee - Inquiry Committee for investigating statements regarding the existence of the CIA detention facilities or of some flights of planes leased by the CIA on the territory of Romania (*Comisia de anchetă pentru investigarea afirmaţiilor cu privire la existenţa unor centre de detenţie ale CIA sau a unor zboruri ale avioanelor închiriate de CIA pe teritoriul României)* set up by the Romanian Parliament on 21 December 2005

ROMATSA – Romanian Air Traffic Services Administration

TBIJ/TRP – Bureau of Investigative Journalism and the Rendition Project

TDIP – European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

UN – United Nations

UN Special Rapporteur – UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

UNCAT – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984

Venice Commission - European Commission for Democracy through Law

ANNEX II

List of references to the Court's case-law

A. v. the United Kingdom, 23 September 1998, *Reports of Judgments and Decisions* 1998-VI

Abuyeva and Others v. Russia, no. 27065/05, 2 December 2010

Aksoy v. Turkey, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI

Al Nashiri v. Poland, no. 28761/11, 24 July 2014

Al-Adsani v. the United Kingdom [GC], no. 35763/97, ECHR 2001-XI

Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, ECHR 2010

Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, ECHR 2011

Anguelova v. Bulgaria, no. 38361/97, ECHR 2002 IV

Armani Da Silva v. the United Kingdom [GC], no. 5878/08, ECHR 2016

Aslakhanova and Others v. Russia, nos. 2944/06 and 4 others, 18 December 2012

Assanidze v. Georgia [GC], no. 71503/01, ECHR 2004-II

Assenov and Others v. Bulgaria, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII

Association "21 December 1989" and Others v. Romania, nos. 33810/07 and 18817/08, 24 May 2011

Babar Ahmad and Others v. the United Kingdom, nos. 24027/07 and 4 others, 10 April 2012

Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99, ECHR 2001-XII

Benzer and Others v. Turkey, no. 23502/06, 12 November 2013

Çakıcı v. Turkey [GC], no. 23657/94, ECHR 1999-IV

Cestaro v. Italy, no. 6884/11, 7 April 2015

Chahal v. the United Kingdom, 15 November 1996, *Reports of Judgments and Decisions* 1996-V

Creangă v. Romania [GC], no. 29226/03, 23 February 2012

Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV

Egmez v. Cyprus, no. 30873/96, ECHR 2000-XII

El-Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, ECHR 2012

Gäfgen v. Germany [GC], no. 22978/05, § 91, ECHR 2010

Gentilhomme, Schaff-Benhadji and Zerouki v. France, nos. 48205/99 and 2 others, 14 May 2002

Georgia v. Russia (I) [GC], no. 13255/07, ECHR 2014 (extracts)

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