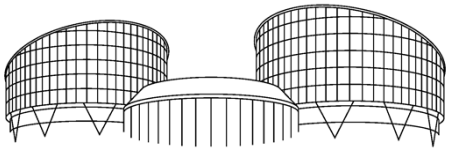

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AL-HAWSAWI v. LITHUANIA

(Application no. 6383/17)

JUDGMENT

Art 1 • Jurisdiction of respondent State for alleged Convention violations of a terrorist suspect's right during the United States (US) Central Intelligence Agency (CIA) extraordinary rendition operations • Responsibility engaged
Art 3 (substantive and procedural) • Inhuman treatment during the applicant's extraordinary rendition to CIA • Respondent State's complicity in the CIA High-Value Detainee Programme enabling the US authorities to subject the applicant to inhuman treatment on its territory and to transfer him from that territory despite a real risk of further treatment contrary to Art 3 • Ineffective investigation into applicant's allegations of serious Convention violations
Art 5 • Unlawful and undisclosed detention of the applicant in a CIA secret detention facility on the respondent State's territory • Respondent State enabled the applicant's transfer by the US authorities from its territory, despite a real risk of being subjected to further undisclosed detention
Art 8 • Interference with the applicant's private and family life not "in accordance with the law" and without justification given the imposition of fundamentally unlawful, undisclosed detention
Art 6 § 1 (criminal) • Art 2 (+ Art 1 P6) • Art 3 (+ Art 1 P6) • Extraordinary rendition to CIA despite real and foreseeable risk of flagrantly unfair trial before the US military commission in Guantánamo and of the death penalty being imposed
Art 13 (+ Arts 3, 5 and 8) • Lack of effective remedies
Art 46 • Execution of judgment • Detailed individual measures indicated by the Court

Prepared by the Registry. Does not bind the Court.

STRASBOURG

16 January 2024

FINAL

16/04/2024

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

In the case of al-Hawsawi v. Lithuania,

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

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Egidijus Kūris,
Pauliine Koskelo,
Lorraine Schembri Orland,
Diana Sârcu,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 6383/17) against the Republic of Lithuania 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, Mr Mustafa Ahmed Adam al-Hawsawi ("the applicant"), on 19 December 2016;

the decision to give notice of the application to the Lithuanian Government ("the Government");

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the International Commission of Jurists and Amnesty International, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 5 December 2023,

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

INTRODUCTION

1. The case concerns allegations of torture, ill-treatment and unacknowledged, incommunicado detention of Mr al-Hawsawi, one of the CIA's so-called "high value detainees", who was captured during the "war on terror" launched by President Bush in the aftermath of the 9/11 attacks and detained secretly in CIA clandestine detention facilities in various countries, allegedly including Lithuania, during the CIA's extraordinary rendition operations in Europe in 2002-2006. The applicant alleged that as from 17 or 18 February or 6 October 2005, and until 25 March 2006 he had been detained in a CIA secret detention facility in Lithuania. The case raises issues under Article 2 of the Convention and Article 1 of Protocol No. 6, and Articles of 3, 5, 6 § 1, 8 and 13 of the Convention.

THE FACTS

2. The applicant, Mr Mustafa Ahmed Adam al-Hawsawi, is a Saudi Arabian national, who was born in 1968 and is currently detained in the Internment Facility at the US Guantánamo Bay Naval Base in Cuba. He was represented before the Court by Mr C. Esdaile, a legal advisor from a non-governmental organisation REDRESS with its seat in London, the United Kingdom.

3. The Government were represented by Ms K. Bubnytė-Širmenė, their Agent at the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. PRELIMINARY CONSIDERATIONS REGARDING THE ESTABLISHMENT OF THE FACTS

5. It is to be noted in the present case involving, as several previous similar applications before the Court, complaints of secret detention, torture and ill-treatment to which the applicant was allegedly subjected during the extraordinary rendition operations by the United States authorities (see paragraphs 9-74 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; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 397, 24 July 2014; *Al Nashiri v. Romania*, no. 33234/12, §§ 16-17, 31 May 2018; and *Abu Zubaydah v. Lithuania*, no. 46454/11, §§ 16-17, 31 May 2018).

This has resulted from the secrecy of the CIA rendition operations and the classification regime imposed by the military commission in Guantánamo, before which the applicant is standing trial.

The classification regime and the restrictions it has placed on the applicant's contact with the outside world and his lawyers were described, *inter alia*, in a declaration of 28 January 2020, made by Mr Walter B. Ruiz, Esq., the lead counsel on the applicant's defence team, representing him before the Guantánamo military commission (see paragraphs 56-57 below)

6. As in the above mentioned cases, the facts of the present case 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 CIA custody, based on various publicly available sources of information and expert evidence collating various pieces of data from materials documenting the CIA rendition operations, which have gradually been declassified or made available since 2009.

II. PRELIMINARY REMARKS ON EVIDENCE BEFORE THE COURT

7. Apart from documentary evidence supplied by the applicant and the Government, in order to establish the facts of the present case the Court has relied, first of all, on the facts that were judicially established – to the standard of proof beyond reasonable doubt – in *Abu Zubaydah v. Lithuania,* in particular its findings as to the existence of a CIA secret detention facility in Lithuania from 17 or 18 February 2005 to 25 March 2006 and the Lithuanian's authorities knowledge of and complicity in the CIA rendition and secret detention operations on its territory (see *Abu Zubaydah v. Lithuania*, cited above, §§ 18-19). The Court has also relied on expert and other evidence collected in *Abu Zubaydah v. Lithuania*, including the public verbatim record of fact-finding hearing devoted to taking oral evidence from experts – Senator Marty, Mr J.G.S. and Mr Crofton Black – in that case. It has further taken into account the extensive material relating to the CIA rendition and secret detention gathered in *Abu Zubaydah v. Lithuania, Husayn (Abu Zubaydah) v. Poland, Al Nashiri v. Poland* and *Al Nashiri v. Romania* (all cited above).

III. BACKGROUND TO THE CASE

A. Terrorist acts of which the applicant has been suspected

8. The US authorities have considered that the applicant was a senior al-Qaeda member, who supported the al-Qaeda terrorist network as a facilitator, financial manager and media committee member. This support is considered to have included the movement and funding of 9/11 hijackers to the USA to participate in a terrorist attack deemed to have been orchestrated by Khaled Sheikh Mohammed.

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

9. 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 Programme") or the Rendition Detention Interrogation Program ("the RDI Programme"). In the Council of Europe's documents it is also described as "the CIA secret detention programme" or "the extraordinary rendition programme". For the purposes of the present case, it is referred to as "the HVD Programme".

10. A detailed account of the HVD Programme can be found in the Court's judgments in *Husyan (Abu Zubaydah) v. Poland* (no. 7511/13, §§ 47–69, 24 July 2014)*; Abu Zubaydah v. Lithuania* (no. 46454/11, §§ 20-53, 31 May 2018) and *Al Nashiri v. Romania* (no. 33234/12, §§ 22-61, 31 May

2018). The abridged description of the programme given below is based on that account.

1. Setting up the CIA programme "to detain and interrogate terrorists at sites abroad"

11. 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.

12. 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".

13. 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."

14. 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").

2. Enhanced Interrogation Techniques

15. 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.

16. 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."

17. 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.

18. 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.

19. 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.

3. Expanding the use of the EITs beyond Abu Zubaydah's interrogations

20. 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.

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

4. Conditions of detention at CIA "Black Sites"

22. 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 the CIA Director, George Tenet, on 28 January 2003.

This document, together with 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 DCI Interrogation Guidelines), 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.

23. 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.

24. 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

25. 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.

26. 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

27. 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.

28. 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.

7. Military Commissions

29. 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.

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.

30. 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 held, in particular:

> "4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 49.72.
>
> (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."

31. 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").

32. 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".

33. A detailed description of the procedure before the military commission and publicly raised concerns regarding that procedure can be found in *Al Nashiri v. Romania* (cited above, §§ 71-77).

8. The 2014 US Senate Committee Report

34. 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 at Detention Site Green located in Thailand (see also paragraphs 51-52 below). The destruction was carried out in November 2005.

35. The US Senate Committee on Intelligence, together with their staff, reviewed thousands of CIA cables describing the interrogations of Abu Zubaydah, Al Nashiri, the applicant and other CIA prisoners, 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.

36. 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. The declassified Executive Summary ("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 *Abu Zubaydah v. Lithuania*, cited above, §§ 70-89).

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

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

39. Conclusion 3 states that "[t]he interrogations of the CIA were brutal and far worse than the CIA represented to policymakers and others". It reads, in so far as relevant, as follows:

> "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.
>
> The waterboarding technique was physically harmful, inducing convulsions and vomiting. Abu Zubaydah, for example, became 'completely unresponsive, with bubbles rising through his open, full mouth'. Internal CIA records describe the waterboarding of Khaled Shaykh Mohammad as evolving into a 'series of near drownings'.
>
> Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads. At least five detainees experienced disturbing hallucinations during prolonged sleep deprivation and, in at least two of those cases, the CIA nonetheless continued the sleep deprivation."

40. 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."

41. 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.

42. 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."

43. 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.

44. 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 twenty-six were wrongfully held.

45. 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".

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

According to the 2014 US Senate Committee Report, both had eroded significantly before President Bush publicly disclosed the programme on 6 September 2006. From the beginning of the programme, 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 (whose name was redacted) 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 program.

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.

47. In early 2004, the anticipation of the US Supreme Court's decision to grant certiorari in the case of *Rasul v. Bush* (where the Supreme Court held that foreign nationals detained in Guantánamo could petition federal courts for writs of habeas corpus to review the legality of their detention) prompted the CIA to move detainees out of a CIA detention facility at Guantánamo Bay.

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 US Supreme Court decision in *Hamdan v. Rumsfeld* (548 U.S. 557,635 (2006)); see also paragraph 24 above) caused the CIA to again temporarily suspend the use of the EITs.

48. 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.

By March 2006 the program 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.

49. Finally, 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.

50. According to the 2014 US Senate Committee Report:

> "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".

9. *Identification of locations of the colour code-named CIA detention sites in the 2014 US Senate Committee Report by experts heard by the Court in* Al Nashiri v. Romania *and* Abu Zubaydah v. Lithuania

51. In the 2014 US Senate Committee Report 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. It is explained 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. The 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".

52. The experts heard by the Court in *Abu Zubaydah v. Lithuania* and *Al Nashiri v. Romania* identified the locations of the above detention sites as follows: Detention Site Green was located in Thailand, Detention Site Blue in Poland, Detention Site Violet in Lithuania, Detention Site Black was identified as having been located in Romania and the remaining four sites were located in Afghanistan (see *Al Nashiri v. Romania,* cited above, § 159, and *Abu Zubaydah v. Lithuania,* cited above, § 166). Dr Sam Raphael, an expert specialising in collecting and analysing records of the CIA rendition programme, made the same conclusions in his witness statements cited below (see paragraphs 113-115 below).

10. Summary of the Court's findings as to the existence of CIA secret detention sites in Poland and Romania

53. In *Husayn (Abu Zubaydah) v. Poland* (cited above, § 419) the Court held as follows:

> "...[T] the Court finds it established beyond reasonable doubt that:
>
> (1) on 5 December 2002 the applicant, together with Mr Al Nashiri arrived in Szymany on board the CIA rendition aircraft N63MU;
>
> (2) from 5 December 2002 to 22 September 2003 the applicant was detained in the CIA detention facility in Poland identified as having the codename "Quartz[1]" and located in Stare Kiejkuty;
>
> (3) during his detention in Poland under the HVD Programme he was "debriefed" by the CIA interrogation team and subjected to the standard procedures and treatment routinely applied to High-Value Detainees in the CIA custody, as defined in the relevant CIA documents;
>
> (4) on 22 September 2003 the applicant was transferred by the CIA from Poland to another CIA secret detention facility elsewhere on board the rendition aircraft N313P.

54. In *Al Nashiri v. Poland* (cited above, § 417), the Court held:

> "... [T]he 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.

55. In *Al Nashiri v. Romania* (cited above, § 542), the Court held:

> "... [T]he 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

[1] Site "Quartz" was referred to as "Detention Site Blue" in the 2014 US Senate Committee Report and so is referred to in the present judgment.

Site Violet and Detention Site Brown according to the 2014 US Senate Committee Report.

C. The circumstances of the case

1. Restrictions on information about the applicant's secret detention and his communication with the outside world

56. The applicant submitted that since March 2003 he had been kept in continuous solitary confinement and virtually deprived of any contact with the outside world, except for the CIA interrogators and personnel, his counsel representing him before the military commission in Guantánamo, the Guantánamo Prison Camp personnel and members of the military commission. He has been prevented under the military commission's rules from speaking publicly – either directly or through his US military counsel – about his torture, ill-treatment, secret detention and rendition.

57. The applicant's situation was described by Mr Walter B. Ruiz Esq, his lead defence counsel, (see also paragraphs 77-78 below) in his (second) declaration of 28 January 2020 as follows:

> "My staff and I are prohibited from confirming or denying any information that details aspects of the CIA Rendition, Detention and Interrogation Program (where it has not been explicitly declassified), even where this information is in the public domain; Regarding communications with individuals charged in the Military Commissions in connection with the 9/11 attacks, which includes Mr. al Hawsawi, the Commission specified in June 2017 that defense counsel (such I and my staff) may not send, communicate or otherwise distribute mail from Mr. al Hawsawi, or any portion of its content (legal or otherwise) to third parties.
>
> Also pursuant to this Order, my staff and I may only convey Commissions case related legal mail to Mr. al Hawsawi, and we cannot forward third-party mail to or from Mr. al Hawsawi.
>
> ...
>
> Unlike other prisoners at Guantánamo, those prisoners at Camp 7, such as Mr. al Hawsawi, are not allowed telephone calls with their families. Until approximately 2014, Mr. al Hawsawi had had no communications with any family member beyond the monthly letters permitted through the International Committee of the Red Cross. In 2014, through the ICRC, the prison authorities began to allow time-delayed video telephone conferences with family members. These communications are only with family members who are vetted by the U.S. intelligence authorities; they take place quarterly, but are dependent on the technology functioning at the time of the scheduled "meeting" and require the family members to travel to a specified location. They consist of non-simultaneous communications: Mr. al Hawsawi may record a video message, which is scrutinized by intelligence authorities and, if approved, the video message is then played for his family. The family can record its own video message, which is again scrutinized, and thereafter played for Mr. al Hawsawi if approved.
>
> ...
>
> The Defense is still not allowed to see the information documenting what was done to Mr. al Hawsawi in black sites, and the conditions there. Rather, the Defense must

rely on government-manufactured summaries of select aspects of that information. And, as explained in the Second Affidavit of my colleague, Lt Col Jennifer Williams, we are also unable to obtain copies of his actual medical records from the three and a half years when he was in black sites (though we do have access to selective summaries of them).

...

The Defense also cannot interview any personnel who were with Mr al Hawsawi in black sites, without going through the prosecution, who make the request for an interview. Because of these obstacles, of all the personnel who encountered Mr. al Hawsawi in those years, only two have agreed to speak with Mr. al Hawsawi's defense counsel. Those interviews are classified, and thus the Defense cannot share with Mr. al Hawsawi what was disclosed in those interviews."

2. The applicant's capture, transfer to CIA custody and secret detention before his alleged rendition to Lithuania

58. The applicant stated that in March 2003 he had been captured by the Pakistani forces in Rawalpindi, Pakistan and transferred to US authorities' custody. From that time onwards he was secretly detained, incommunicado, under the HVD Programme and subjected by the CIA personnel to torture during interrogations with the use of the EITs. According to the applicant, shortly after his capture he was held at Detention Site Cobalt, located in Afghanistan and remained there probably until 21/22 November 2003, the date on which the CIA rendition flight N313P transporting CIA detainees flew from to Kabul, Afghanistan via Rabat, Morocco, to Guantánamo Bay, Cuba.

59. In his application, the applicant stated that he had been detained at the CIA's detention facility in Guantánamo until probably 27 March 2004, the date on which the rendition plane transporting CIA prisoners flew from Guantánamo to a detention facility used by the CIA in Rabat, Morocco. It was, however, also likely that he was rendered to Romania on the second rendition circuit executed by N85VM on 12 April 2004, transporting detainees from Guantánamo Bay to Bucharest.

In that context, the applicant submitted two witness statements of Dr Sam Raphael, an expert in the CIA rendition operations, which reconstructed his fate and the sequence of his renditions from his capture in March 2003 until his final transfer to the US military custody on 4-5 September 2006 (see paragraphs 113-115 below)

3. The applicant's alleged rendition to Lithuania, his secret detention at Detention Site Violet and his rendition from Lithuania

60. In his application, the applicant stated that, on the basis of research into the CIA's rendition operations, he had been rendered by the CIA to Lithuania on one of the following three rendition flights into Lithuania:

(a) N724CL, from Rabat to Vilnius, on 17 February 2005; or

(b) N787WH, from Rabat, via Bucharest, to Palanga, on 18 February 2005; or

(c) N787WH, from Bucharest to Vilnius, on 6 October 2005; via a so-called "double-plane switch" in Tirana, involving N 787WH and the plane N308AB which flew from Bucharest. The "double-switch" operation was executed by using these two planes, each of which completed only half the route so that the CIA prisoners could be transferred from one plane to another in Tirana airport in which they converged. The detainees were transferred from N308AB onto N787WH for the flight to Vilnius.

61. In his observations of 31 January 2020, referring to Dr Rafael's second witness statement of 28 January 2020 (see paragraph 115 below), the applicant stated that, in the light of recent research, he had been rendered to Lithuania on either 18 February or 6 October 2005.

The applicant submitted that he had then been detained in a secret CIA prison, codenamed "Detention Site Violet" in the 2014 US Senate Committee Report and referred to as "Project No. 2" in an inquiry conducted by the Lithuanian Parliament (see paragraphs 84-87 below; see also *Abu Zubaydah v. Lithuania,* cited above, §§ 167-78).

62. Both in his application and his further observations the applicant maintained that he had been transferred out of Lithuania on 25 March 2006 on board the rendition plane N733MA via Cairo and another "double-plane switch", involving N733MA and the CIA rendition plane registered as N740EH, which both made a connection in Cairo on the night of 26 March 2006.

63. Relying on the 2014 US Senate Committee Report, the applicant submitted that Detention Site Violet had opened in early 2005 and closed in March 2006 due to a lack of emergency medical care for him and other detainees. The closure was marked by the above-mentioned flight N733MA from Palanga, Lithuania to Cairo, Egypt on 25 March 2006. The applicant was subsequently taken on board N740EH from Cairo to Afghanistan and detained in a CIA secret detention facility codenamed "Detention Site Brown" in the 2014 US Senate Committee Report.

4. Treatment to which the applicant was subjected and conditions of his detention at CIA secret detention sites

64. The applicant maintained that the EITs had first been used against him at Detention Site Cobalt.

The 2014 US Senate Committee Report confirms that in the course of his detention the applicant was subjected to unapproved EITs, including "water dousing". It further relates two interrogation sessions that took place, respectively, on 5 and 6 April 2003 at Detention Site Cobalt. The relevant part of the report reads:

"[REDACTED] In interrogation sessions on April 5, 2003, and April 6, 2003, senior CIA interrogator [REDACTED] another interrogator used the water dousing technique on detainee Mustafa al-Hawsawi at DETENTION SITE COBALT. Al-Hawsawi later described the session to a different CIA interrogator, who wrote that al- Hawsawi might have been waterboarded or subjected to treatment that 'could be indistinguishable from the waterboard'. An email from the interrogator stated that:

'We did not prompt al-Hawsawi - he described the process and the table on his own. As you know, I have serious reservations about watering them in a prone position because if not done with care, the net effect can approach the effect of the water board. If one is held down on his back, on the table or on the floor, with water poured in his face I think it goes beyond dousing and the effect, to the recipient, could be indistinguishable from the water board.

I have real problems with putting one of them on the water board for 'dousing'. Putting him in a head down attitude and pouring water around his chest and face is just too close to the water board, and if it is continued may lead to problems for us.'

[REDACTED] Several months later, the incident was referred to the CIA inspector general for investigation. A December 6, 2006, inspector general report summarized the findings of this investigation, indicating that water was poured on al-Hawsawi while he was lying on the floor in a prone position, which, in the opinion of at least one CIA interrogator quoted in the report, 'can easily approximate waterboarding'. The OIG could not corroborate whether al- Hawsawi was strapped to the waterboard when he was interrogated at DETENTION SITE COBALT. Both of the interrogators who subjected al-Hawsawi to the CIA's enhanced interrogation techniques on April 6, 2003, said that al-Hawsawi cried out for God while the water was being poured on him and one of the interrogators asserted that this was because of the cold temperature of the water. Both of the interrogators also stated that al-Hawsawi saw the waterboard and that its purpose was made clear to him. The inspector general report also indicates that al-Hawsawi's experience reflected 'the way water dousing was done at [DETENTION SITE COBALT]' and that this method was developed with guidance from CIA CTC attorneys and the CIA's Office of Medical Services."

65. At the fact-finding hearing in *Abu Zubaydah v. Lithuania* Mr J.G.S. made the following statements concerning general conditions of detention at Detention Site Violet (see § 154):

" ... I would be prepared to state that the conditions of confinement in the 'black site' in Lithuania alone pass a threshold that in our human rights protection culture, signified by the European Convention on Human Rights, amounts to a violation of Article 3. There are, by routine and described in documents, practices such as sensory deprivation, sleep deprivation, denial of religious rights, incommunicado detention, indefinite detention on a prolonged basis, as well as a variety of conditioning techniques, as the CIA calls them, which in any other case would themselves be considered forms of ill-treatment. Here they do not even warrant mention in the reporting, because they had become commonplace, but I would not wish for the absence of explicit descriptions of waterboarding or other EITs to be taken as a sign that he was not ill-treated during his time in Lithuania. And I should also point out that, having been detained at that point for more than three years and even up to four years in the totality of his transfer through the sites, there must have been a cumulative effect to the ill-treatment which [Abu Zubaydah] underwent at the hands of his captors."

66. Mr Crofton Black testified as follows (ibid. § 155):

> "... [I]t is true that relatively there is less information about treatment of prisoners in the CIA detention programme in 2005-2006 than there is in the previous years. There are a few exceptions to this. The recently declassified Memorandum from the CIA's Office of Medical Services, which is part of the batch of the records declassified earlier this month, is dated December 2004. It comes into force directly prior to the time that – I take - Abu Zubaydah to have been rendered into Lithuania. This document describes basically the full range of enhanced interrogation techniques, in other words it makes clear that as of December 2004 and thus into 2005, that this full range of techniques is available, it is on the menu. In terms to what extent these techniques were used, we have relatively few indications but there are a couple that I think are worth mentioning. The Senate Report states that there are several occasions on which for example the CIA failed to adhere to his own guidelines in keeping naked prisoners in cold conditions. The guidelines are set out in the Memorandum that I just mentioned, the December 2004 Office of Medical Services Memorandum. The Senate Report says that after that Memorandum, going up until the last time it cites is December 2005, there were prisoners who were being held in colder conditions than what this Memorandum sanctioned. Likewise there were prisoners who were captured in 2005, including Abu Faraj al-Libbi, whom we know from the Senate Report was exposed to lengthy sleep deprivation. Beyond that I do not have any further information about precise conditions, although it is clear – it has been reiterated by the recent batch of declassified documents – that during this time 2005 – 2006, prisoners continued to be held in solitary confinement, that is clear. It is also clear that prior to their arrival in the last site in Afghanistan, which was in March 2006, they did not have any access to natural light. The first time they had access to natural light was following that arrival in March 2006. That is pretty much all I can say on the topic."

5. Detention Site Violet in the 2014 US Senate Committee Report

67. The 2014 US Senate Committee Report refers to "Detention Site Violet" in several sections concerning various events (see also *Abu Zubaydah v. Lithuania,* cited above, §§ 147-49).

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

> "[REDACTED] In a separate [from country hosting Detention Site Black], Country [name blackened], the CIA obtained the approval of the [REDACTED] and the political leadership to establish a detention facility before informing the U.S. ambassador. As the CIA chief of Station stated in his request to CIA Headquarters to brief the ambassador, Country [REDACTED]'s [REDACTED] and the [REDACTED] probably would ask the ambassador about the CIA detention facility. After [REDACTED] delayed briefing the [REDACTED] for [number blackened] months, to the consternation of the CIA Station, which wanted political approval prior to the arrival of CIA detainees. The [REDACTED] Country [REDACTED] official outside of the [REDACTED] aware of the facility, was described as 'shocked', but nonetheless approved.
>
> [REDACTED] By mid-2003 the CIA had concluded that its completed, but still unused 'holding cell' in Country [REDACTED] was insufficient, given the growing number of CIA detainees in the program and the CIA's interest in interrogating multiple

detainees at the same detention site. The CIA thus sought to build a new, expanded detention facility in the country. The CIA also offered $ [one digit number blackened] million to the [REDACTED] to 'show appreciation' for the [REDACTED] support for the program. According to a CIA cable however [long passage blackened]. While the plan to construct the expanded facility was approved by the [REDACTED] of Country [REDACTED], the CIA and [passage redacted] developed complex mechanisms to [long passage REDACTED] in order to provide the $ [one digit number blackened] million to the [REDACTED].

[REDACTED] in Country [REDACTED] complicated the arrangements. [long passage REDACTED] when the Country [REDACTED] requested an update on planning for the CIA detention site, he was told [REDACTED] – inaccurately – that the planning had been discontinued. In [date REDACTED], when the facility received its first detainees, [REDACTED] informed the CIA [REDACTED] that the [REDACTED] of Country [REDACTED] 'probably has an incomplete notion [regarding the facility's] actual function, i.e., he probably believes that it is some sort of [REDACTED] center."

68. In the chapter entitled "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'", the section referring to Detention Site Violet reads as follows:

"[REDACTED] In 2004, CIA detainees were being held in three countries: at DETENTION SITE BLACK in Country [REDACTED], at the [redacted] facility [REDACTED] in Country [REDACTED], as well as at detention facilities in Country [REDACTED]. DETENTION SITE VIOLET in Country [REDACTED] opened in early 2005."

69. In the chapter entitled "Press Stories and the CIA's Inability to Provide Emergency Medical Care to Detainees Result in the Closing of CIA Detention Facilities in Countries [REDACTED] and [REDACTED]", the section referring to the closure of Detention Site Black and events at the Detention Site Violet reads as follows:

"In October 2005, the CIA learned that the *Washington Post* reporter Dana Priest had information about the CIA's Detention and Interrogation Program, [REDACTED]. The CIA then conducted a series of negotiations with *The Washington Post* in which it sought to prevent the newspaper from publishing information on the CIA's Detention and Interrogation Program.

...

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

...

[long passage REDACTED] In [REDACTED] Country [REDACTED] officers refused to admit CIA detainee Mustafa Ahmad al-Hawsawi to a local hospital despite earlier discussions with country representatives about how a detainee's medical emergency would be handled. While the CIA understood the [REDACTED] officers' reluctance to place a CIA detainee in a local hospital given media reports, CIA Headquarters also questioned the 'willingness of [REDACTED] to participate as

originally agreed/planned with regard to provision of emergency medical care'. After failing to gain assistance from the Department of Defense, the CIA was forced to seek assistance from three third-party countries in providing medical care to al-Hawsawi and four other CIA detainees with acute ailments. Ultimately, the CIA paid the [REDACTED] more than $ [two-digit number redacted] million for the treatment of [name REDACTED] and [name REDACTED], and made arrangements for [name REDACTED] and [name REDACTED] be treated in [REDACTED]. The medical issues resulted in the closing of DETENTION SITE VIOLET in Country [REDACTED] in [five characters for the month REDACTED] 2006. The CIA then transferred its remaining detainees to DETENTION SITE BROWN. At that point, all CIA detainees were located in Country [REDACTED].

...

The lack of emergency medical care for detainees, the issue that had forced the closing of DETENTION SITE VIOLET in Country [REDACTED] was raised repeatedly in the context of the construction of the CIA detention facility in Country [REDACTED]. On March [REDACTED two-digit number], 2006 the CIA Headquarters requested that the CIA Station in Country [REDACTED] ask Country [REDACTED] to arrange discreet access to a nearest hospital and medical staff."

6. *The Court's findings of fact in* Abu Zubaydah v. Lithuania *in respect of the planes indicated by the applicant as those involved in his rendition to and from Lithuania and the location of the Detention Site Violet in Lithuania*

70. The Court established that in 2002-2005 the CIA-related aircraft repeatedly crossed Lithuania's airspace (on at least twenty-nine occasions).

In the period from 17 February 2005 to 25 March 2006 four CIA-related aircraft landed in Lithuania:

– planes N724CL and N787WH landed at Vilnius International Airport on, respectively, 17 February 2005 and 6 October 2005;

– planes N787WH and N733MA landed at Palanga International Airport on, respectively, 18 February 2005 and 25 March 2006 (see *Abu Zubaydah v. Lithuania*, cited above, § 499).

The 17-18 February 2005 flights were followed by the landing on 6 October 2005 of the plane N787WH, which, according to the experts, transferred CIA detainees, via a "double-plane switch" operation in Tirana, from the CIA facility codenamed "Detention Site Black" in the 2014 US Senate Committee Report and located in Bucharest in Romania (ibid. § 513).

71. The Court's findings in respect to the N787WH's landing in Vilnius on 6 October 2005 (ibid. § 507) read as follows:

"(b) The N787WH's circuit on 1-7 October 2005 was disguised by both the "dummy" flight planning and switching aircraft in the course of the rendition operation, also called a "double-plane switch" – that is to say, another CIA method of disguising its prisoner-transfers, which was designed, according to expert J.G.S., to avoid the eventuality of the same aircraft appearing at the site of two different places of secret detention (see paragraph 129 above; see also *Al Nashiri v. Romania*, cited above, § 135).

> The experts testified that the 'double-plane switch' operation had been executed on 5-6 October 2005 in Tirana by two planes – N308AB, which arrived there from Bucharest after collecting detainees from the CIA "black site" in Romania, and N787WH. The CIA detainees "switched" planes in Tirana and they were transferred from N308AB onto N787WH for the rendition flight. On its departure from Tirana, N787WH filed a false plan to Tallinn in order to enable the flight to enter Lithuanian airspace, but its true destination was Vilnius, where it landed on 6 October 2005 in the early hours (see paragraphs 114, 130-131 and 140 above).
>
> In relation to this flight it is also noteworthy that the flight data submitted by the Lithuanian aviation authorities to the CNSD in the course of the Seimas inquiry indicated that N787WH had arrived from Antalya, Turkey (see paragraph 174 above). Witnesses questioned in the pre-trial investigation gave inconsistent indications as to where the plane arrived from. For instance, Witness B3 spoke of an "unplanned aircraft from Antalya" (see paragraph 315 above). Witness B4 ("person B") said that it had "arrived from Tallinn without passengers" and that it had "arrived in Tallinn from Antalya" (see paragraph 316 above). The Administration of Civil Aviation, for its part, informed the prosecutor that 'they could [have] confuse[d] the code of Antalya and Tirana due to their similarity (see paragraph 183 above)."

72. The Court further established (ibid. § 532) beyond reasonable doubt that:

> "(a) a CIA detention facility, codenamed Detention Site Violet according to the 2014 US Senate Committee Report, was located in Lithuania;
>
> (b) the facility started operating either from 17 February 2005, the date of the CIA rendition flight N724CL into Vilnius airport, or from 18 February 2005, the date of the CIA rendition flight N787WH into Palanga airport; and
>
> (c) the facility was closed on 25 March 2006 and its closure was marked by the CIA rendition flight N733MA into Palanga airport, which arrived from Porto, Portugal and, having disguised its destination in its flight plan by indicating Porto, on the same day took off for Cairo, Egypt."

73. A detailed analysis of evidence before the Court regarding the question of whether a CIA secret detention facility existed in Lithuania from 17 or 18 February 2005 to 25 March 2006 and elements on which the Court reached the above conclusions can be found in paragraphs 498-531 of the *Abu Zubaydah v. Lithuania* judgment.

7. The applicant's further transfers during CIA custody (until 5 September 2006) as reconstructed by Dr Sam Raphael

74. According to Dr Raphael, on 25 March 2006 the applicant, together with other CIA prisoners, including Abu Zubaydah, Al Nashiri and Khaled Sheikh Mohammed, was rendered from the Detention Site Violet in Lithuania to Detention Site Brown, which was identified as located in Afghanistan, on two CIA aircraft with registration N733MA and N740EH (see paragraph 115 below).

In *Abu Zubaydah v. Lithuania* (see § 548), the Court found it established to the required standard of proof that on 25 March 2006, on board the

rendition plane N733MA and via a subsequent aircraft-switching operation, Mr Abu Zubaydah was transferred by the CIA out of Lithuania to another CIA detention facility, identified by the experts as being codenamed "Detention Site Brown" in the 2014 US Senate Committee Report.

According to Dr Raphael, the applicant was rendered from Afghanistan to the US Guantánamo Bay prison facility on 4-5 September 2006 (see paragraph 115 below).

8. The applicant's detention at the US Guantánamo Bay facility since 5 September 2006 to present

75. Since 5 September 2006 the applicant has been detained in the US Guantánamo Bay Naval Base. He was first held in the highest security Camp 7 and, some fifteen years later (on an unspecified date in April 2021), after Camp 7 had fallen into severe disrepair, he was moved to Camp 5. The location of the camps is classified.

Camp 7 was established in 2006 to hold the high-value detainees transferred from the CIA to military custody.

Visitors other than lawyers are not allowed in that part of the Internment Facility. The inmates are required to wear hoods whenever they are transferred from the cell to meet with their lawyers or for other purposes.

76. The Inter-American Commission on Human Rights' Report "Towards the Closure of Guantánamo", published on 3 June 2015, describes general conditions in Camp 7 as follows:

> "120. Although progress has been made to improve conditions of detention at Guantánamo, there are still many areas of concern. The Inter-American Commission notes in this regard that detainees at Camp 7 do not enjoy the same treatment accorded to other prisoners; that health care faces many challenges, in particular given the ageing population at Guantánamo; and that religion is still a sensitive issue. Further, the IACHR is especially concerned with the suffering, fear and anguish caused by the situation of ongoing indefinite detention, which has led to several hunger strikes as a form of protest and, in some extreme cases, to the drastic decision by prisoners to end their lives.
>
> ...
>
> 122. The Inter-American Commission has received troubling information regarding prison conditions at Camp 7, a single-cell facility currently used to house a small group of special detainees, known as 'high-value detainees'. These detainees are reportedly held incommunicado and are not subject to the same treatment accorded to other prisoners. On May 20, 2013, a group of eighteen military and civilian defense counsel representing the 'high-value detainees' sent a joint request to Secretary of Defense Charles Hagel to improve the conditions of confinement in Guantánamo. They pointed out that these detainees are not permitted to contact their families by telephone or video; that their access to religious materials has been restricted (such as the sayings and descriptions of the life of the Prophet Mohammed); that they have limited recreational opportunities; and that they are not permitted to participate in group prayer, contrary to the entitlements of other detainees.

77. The applicant produced four declarations dated, respectively, 30 November 2016, 28 January 2020, 9 June 2021 and 30 August 2022, made by Mr Walter B. Ruiz, Esq. his lead defence counsel, which described, among other things, the conditions of the applicant's detention. In the (second) declaration of 28 January 2020, the section concerning the applicant's conditions of detention read as follows:

> "The precise conditions of Mr. al Hawsawi's detention remain classified. However, I can state that he is isolated in a separate prison at Guantánamo (referred to as 'Camp 7') where other so-called high-value detainees are imprisoned. Neither I nor any of his defence team are permitted to meet him at that location, and I have only been allowed once – several years ago and only as a result of litigation and a judicial order – to see Mr. al Hawsawi's cell. It is a typical jail cell, namely a very small room with cinderblock walls, a steel toilet and open shower stall. The bed is a metal box with a mat over it. There is only just enough space to stand. The lighting is only artificial light. Occasionally, he is permitted to leave the cell, for medical appointments, to walk in an exercise cage that is slightly larger than his cell, or to watch a movie alone, in a sound padded room. Because of security classification rules, I am not permitted to discuss more about the conditions of Mr. al Hawsawi's confinement."

78. In his (third) declaration of 9 June 2021 Mr Ruiz stated that the applicant had been moved, together with other prisoners from Camp 7 to Camp 5. He is held, as are the other thirteen "High-Value Detainees", in a separate wing of the prison where he is "virtually isolated from the world".

9. The applicant's trial before the military commission

79. On 5 June 2008 the applicant, together with Khaled Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi bin al Shibh, Ali Abdul Aziz and Mohamed al Khatani was arraigned on capital charges before the military commission. The charges against the applicant included terrorism, conspiracy, law of war charges for murder, attacking civilians, intentionally causing serious bodily injury, hijacking, attacking civilian objects, and destruction of property. The case name is *US v. Mohammad, et al*. The proceedings are pending.

80. Mr Ruiz gave the following description of the proceedings in the applicant's case in his second declaration of 28 January 2020 which, in so far as relevant, read as follows:

> "A new judge (Colonel W. Shane Cohen) was assigned to the proceedings on June 3, 2019. In late August 2019, Judge Cohen ordered that the trial on the merits of the case is to begin in January 2021. Jury selection would be the first stage of that trial. Judge Cohen also established a schedule that, at this time, entails pretrial hearings in Guantánamo every month but one, throughout 2020. However, despite setting a trial date, Judge Cohen has commented, in a very general way, that it may be necessary to move the trial date back, given the many issues that remain to be litigated, and the question of resources available to sustain a trial at Guantánamo.
>
> The charges faced by Mr al Hawsawi have not changed and continue to be the following: conspiracy, and law of war charges for murder, attacking civilians, intentionally causing serious bodily injury, hijacking, attacking civilian objects,

destruction of property, and terrorism. The prosecution continues to seek the death penalty. Besides imposing a death sentence, the jury could of course acquit, impose a specific term of years, or a life sentence.

Even if Mr al Hawsawi (or any of the other accused) were acquitted at trial, or received a specific term of years, there is no clear path for their release. The Congress ban on sending detainees from Guantánamo to the United States remains in effect. Moreover, to release a detainee to another country, including his home country, the law continues to require the Secretary of Defense to send to Congress an individualized recommendation for release; Congress must then also approve the individual's release.

The political hurdles make it likely that, even with a successful outcome at trial, indefinite detention would continue.

...

The Defense is still not allowed to see the information documenting what was done to Mr. al Hawsawi in black sites, and the conditions there. Rather, the Defense must rely on government-manufactured summaries of select aspects of that information. And, as explained in the Second Affidavit of my colleague, Lt Col Jennifer Williams, we are also unable to obtain copies of his actual medical records from the three and a half years when he was in black sites (though we do have access to selective summaries of them).

...

One issue to be litigated at the pretrial hearings in 2020 involves whether the prosecution will be permitted to use statements that U.S. Government agents (the FBI) took from Mr. al Hawsawi and the other accused in January 2007 in Guantánamo, after he and his co-accused had been tortured and abused in CIA black sites for more than three years. The hearings will require the testimony of a number of government agents who were at the black sites, including psychologist James Mitchell and Bruce Jessen, who designed and helped the CIA implement the interrogation program.

..."

81. In his (third) declaration of 9 June 2021, Mr Ruiz stated that no hearings had so far been held and that Judge Cohen had left the bench in April 2020. In his (fourth) declaration of 30 August 2022 Mr Ruiz stated that the proceedings had resumed in September 2021 and that in July 2022 a tentative pre-trial hearing schedule had been issued for 2023, which envisioned that pre-trial hearings would take place every other month, for 2-4 weeks, throughout 2023.

10. Psychological and physical effects of the HVD Programme on the applicant

82. The applicant produced two affidavits, the first undated and the second of 27 January 2020, made by Ms Jennifer Williams, a Lieutenant Colonel in the United States Army Reserve Judge Advocate General's Corps, a detailed military counsel for the applicant. According to the affidavit, the applicant suffers from a number of serious ailments, including:

(1) colorectal pain and rectal prolapse/prolapsing haemorrhoids caused by his brutal treatment in CIA custody, namely sodomy with a foreign object conducted as a "rectal exam" without any medical necessity and with

excessive force; in 2017 he was diagnosed with chronic constipation; in November 2018 he was diagnosed with painful anal stenosis and continues to experience rectal pain, bleeding and haemorrhoids.

(2) chronic degenerative disc disease of the cervical spine, with cervicogenic headaches;

(3) chronic headaches and migraines;

(4) hypertension, with side effect such as chest pain, dizziness and shortness of breath;

(5) hearing loss and tinnitus;

(6) chronic sleep disturbances;

(7) hepatitis C/compromised liver health.

83. In his four declarations (see also paragraphs 77-78 above). Mr Walter B. Ruiz stated that the applicant continued to endure severe and debilitating chronic pain from the years of abuse and degradation at the CIA black sites.

11. Parliamentary inquiry in Lithuania

84. On 9 September 2009, in connection with various media reports and publicly expressed concerns regarding the alleged existence of a CIA secret detention facility in Lithuania, the Seimas Committee on National Security and Defence ("the CNSD") and the Seimas Committee on Foreign Affairs held a joint meeting at which they heard representatives of State institutions in relation to the media reports concerning the transportation and detention of CIA prisoners in the Republic of Lithuania. The committees did not receive any data confirming the existence of a CIA prison in Lithuania. Written replies submitted to them by State institutions denied that such a prison had ever existed.

85. On 20 October 2009, during his visit to Lithuania, the Commissioner for Human Rights of the Council of Europe, Mr Thomas Hammarberg, urged the authorities to carry out a thorough investigation concerning the suspicions that a secret CIA prison had operated in the country.

86. On 20 October 2009, at a press conference, the President of the Republic, Ms Dalia Grybauskaitė, in reply to questions regarding the alleged existence of a CIA prison in Lithuania, said that she had "indirect suspicions" that it could have been in Lithuania.

12. The Seimas investigation and findings

87. On 5 November 2009 the Seimas adopted Resolution No. XI–459, assigning the CNSD to conduct a parliamentary investigation into the allegations of transportation and confinement of individuals detained by the CIA on Lithuanian territory.

The following questions were posed to the CNSD:

(1) whether CIA detainees were subject to transportation and confinement on the territory of the Republic of Lithuania;

(2) whether secret CIA detention centres had operated on the territory of the Republic of Lithuania;

(3) whether State institutions of the Republic of Lithuania (politicians, officers, civil servants) considered issues relating to activities of secret CIA detention centres or transportation and confinement of detainees in the Republic of Lithuania.

88. The findings of the inquiry are included in 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" ("CNSD Findings"). The relevant passages from that document are extensively cited in *Abu Zubaydah v. Lithuania* and can be found in paragraph 174 of that judgment.

89. The principal findings of the CNSD can be summarised as follows:

> "In 2002-2005, the aircraft which official investigations link to the transportation of CIA detainees crossed the airspace of the Republic of Lithuania on repeated occasions. The data collected by the Committee indicate that CIA-related aircraft did land in Lithuania within the mentioned period of time.
>
> The Committee failed to establish whether CIA detainees were transported through the territory of the Republic of Lithuania or were brought into or out of the territory of the Republic of Lithuania; however, conditions for such transportation did exist.
>
> ...
>
> The Committee established that the SSD had received a request from the partners to equip facilities in Lithuania suitable for holding detainees.
>
> While implementing Project No. 1 in 2002, conditions were created for holding detainees in Lithuania; however, according to the data available to the Committee, the premises were not used for that purpose.
>
> The persons who gave testimony to the Committee deny any preconditions for and possibilities of holding and interrogating detainees at the facilities of Project No. 2; however, the layout of the building, its enclosed nature and protection of the perimeter as well as fragmented presence of the SSD staff in the premises allowed for the performance of actions by officers of the partners without the control of the SSD and use of the infrastructure at their discretion.
>
> ...
>
> According to the country's top officials (Presidents of the Republic, Prime Ministers, and Speakers of the Seimas), the members of the CNSD of the Seimas were informed about the international cooperation between the SSD and the CIA in a general fashion, without discussing specific operations or their outcomes. The mention of wide-scale direct cooperation between the SSD and CIA was made only once, at a sitting of the State Defence Council (19 September 2001) when considering the issue of international terrorism and anti-terrorist actions and prevention, crisis management and the legal bases for all these. Transportation and detention of detainees were not discussed at the sitting of the State Defence Council of Lithuania. The CNSD of the Seimas was not informed of the nature of the cooperation taking place.

> On the basis of the information received, the Committee established that when carrying out the SSD partnership cooperation Project No. 1 and Project No. 2, the then heads of the SSD did not inform any of the country's top officials of the purposes and content of the said Projects."

13. Criminal investigation in Lithuania

90. On 13 September 2013 the applicant asked the Prosecutor General of the Republic of Lithuania to open an investigation into his alleged extraordinary rendition, secret detention, torture and ill-treatment under the CIA HVD Programme in Lithuania. The request was refused.

91. Following the applicant's appeal, on 28 January 2014 the Vilnius Regional Court quashed the prosecutor's decision refusing to open an investigation.

92. On 13 February 2014 the Prosecutor General's Office instituted a pre-trial investigation (no. 01-2-00015-14) regarding offences of unlawful transportation of persons across the State border and abuse of office by State officials.

93. In May 2014 the prosecutor send a request for legal assistance to the US authorities, asking, *inter alia,* whether the applicant was detained by the law-enforcement authorities of the United States, what charges had been brought against him, where he had been detained before and where was he currently detained. The US authorities were also asked to provide declassified documents or information indicating circumstances surrounding the possibly unlawful transportation of the applicant to and from Lithuania and his possible detention in CIA prisons from March 2004 to 4 September 2006. The prosecutor also asked that the applicant be interviewed and respond to a number of questions, such as what had been his whereabouts (countries, locations, living conditions, prisons), the circumstances of his transfer to Lithuania (if it had happened) and what made him believe that he had been transferred to Lithuania. In that regard, the applicant was to be asked to give time and dates, detailed description of the transfer, its route, full names and descriptions of airports in which he had landed as well as – if he had been sick – to give a detailed description of all circumstances, including the place of treatment and features of his doctors.

The US Department of Justice responded that, due to the subject matter of the case, it was not in a position to provide the information requested.

94. Throughout 2014, the applicant's representatives submitted a number of requests for information regarding the progress in the investigation. In their submission, no substantive responses to these queries were received from the authorities.

95. On 27 January 2015, the Prosecutor General's Office had asked the Cracow Prosecutor of Appeal in Poland for legal assistance "in relation to the alleged unlawful transportation of Mr Mustafa Ahmed al-Hawsawi or other persons across the Lithuanian State border".

96. On 6 February 2015 the investigation into the applicant's allegations was joined with investigation (no. 01-2-000-16-10) concerning Mr Abu Zubaydah (see *Abu Zubaydah v. Lithuania*, cited above, §§ 208-10).

97. On 29 May 2015 the Prosecutor General's Office asked the Prosecutor's Office attached to the Court of Cassation in Romania for legal assistance. Subsequently, requests for legal assistance were also sent to the US authorities, Morocco and Afghanistan. The US authorities, having been addressed twice, replied that they could not provide the information requested. Morocco refused the request and Afghanistan did not reply.

98. In the course of the investigation the applicant asked the authorities to grant him victim status pursuant to Article 28 of the Criminal Code[2]. He made the relevant requests on 9 January and 26 August 2015. He also requested that the scope of the investigation be expanded to consider other potential criminal offences. The requests were rejected by the prosecutor's resolution of 27 November 2015. The applicant appealed against decisions refusing to grant him victim status but they were finally upheld by the Vilnius Regional Court on 30 June 2016.

99. In August 2018, taking into account the Court's findings in *Abu Zubaydah v. Lithuania*, the Prosecutor General again made a request for legal assistance to the US authorities, which was refused by the US Department of Justice, with an indication that they were not in a position to respond to any further requests regarding this matter.

100. On 12 November 2018 the prosecution decided to modify the legal classification of the investigated offence and since then the investigation has been carried out in regard to a possible commission of an offence defined in Article 100 of the Criminal Code[3] (treatment of persons prohibited under international law), which is not subject to the statute of limitations.

101. In their written observations of 29 November 2019 the Government submitted that in the course of the investigation "relevant information was requested from various authorities, witnesses were questioned, expert opinion was obtained, various reports on CIA rendition programme were included into the material of the case, necessary material was translated, the retrospective monitoring of the publicly available sources was conducted, [and] having analysed the evidentiary material other investigative actions were planned".

102. The applicant produced a witness statement made on 23 January 2020 by Ms Ingrida Botyrienė, a lawyer representing him before the Lithuanian prosecution authorities.

According to that statement:

1) On 16 September 2019 Ms Botyrienė asked the Prosecutor General for information about the investigation and its progress.

[2] This provision is cited in *Abu Zubaydah v. Lithuania* (cited above, § 214).
[3] This provision is cited in *Abu Zubaydah v. Lithuania* (cited above, § 213)

2) On 8 October 2019 the request was rejected on two grounds: that the information was requested by a person who was not a party to the proceedings and that information about the investigation was confidential.

3) As of 20 January 2020 the applicant had not yet been granted victim status, as a result of which he could not obtain information on the conduct of the investigation into his allegations.

103. In their observations of 9 September 2021 the Government confirmed that the applicant had not yet been granted the victim status; in their view, the "evidential standard for granting victim status [was] stricter" than for opening an investigation. Besides, under the rules of the criminal procedure, a victim must testify. They added that the prosecutor's office could, of its own motion, grant that status at any stage of the investigation.

As regards access to information on the investigation, the Government said that this "was and will be provided to the [Lithuanian] society through public relations of the Prosecutor General's Office".

They added that the Prosecutor General had also "tried to enhance international cooperation aiming to receive general information about the path taken by Poland in the discovery proceedings under US Code § 1782 (regarding assistance to foreign and international tribunals and to litigants before such tribunals) and, in particular, sought to initiate a coordination meeting. However, on 19 July 2021, the Polish prosecutor responded that the cooperation was not possible in view of the "secrecy of the information".

104. In their factual update of 2 September 2022, the Government stated that "the prosecuting authorities continued their efforts in seeking to obtain relevant data in the context of on-going relevant pre-trial investigation" and that "they were basically related to further exploration of the possibilities to gather evidence in foreign jurisdictions, namely in the US". This, they said, was particularly complex "due to limited available cooperation mechanisms". Referring to the discovery proceedings under US Code § 1782, they said that they were awaiting their outcome.

They also stated that the prosecution's position as to granting the applicant the victim status had remained unchanged.

105. The applicant, in his factual update of 1 September 2022, stated that the applicant's representative, Ms Botyrienė, was not routinely informed of developments in the investigation.

106. The proceedings are still pending and, according to information available to the Court, the applicant has not yet been granted the victim status.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

107. The relevant legal and other material, together with the domestic law and practice, are set out in *Abu Zubaydah v. Lithuania* (cited above) as follows:

(a) for relevant domestic law and practice see §§ 212-19;

(b) for international material, including international law relevant for the case see §§ 220-50;

(c) for selected media reports and articles on the CIA rendition operations see §§ 251-63;

(d) for international inquiries relating to the CIA secret detention and rendition of suspected terrorists in Europe, including Lithuania see §§ 264-303.

EVIDENCE BEFORE THE COURT

I. EXPERT EVIDENCE IN *ABU ZUBAYDAH V. LITHUANIA*

108. In *Abu Zubaydah v. Lithuania* (cited above) the Court took evidence from Senator Marty, Mr J.G.S. and Mr Crofton Black. The extracts from their statements reproduced in the judgment were taken from the verbatim record of the fact-finding hearing devoted to taking evidence from experts, which took place on 28 June 2016. The Chamber which dealt with the case subsequently decided that the verbatim record of that hearing be made public.

109. The experts statements are reproduced in paragraphs 126-145 and 373-395 of the judgment.

110. In the course of the PowerPoint presentation by Senator Marty and Mr J.G.S., a presentation which explained the CIA rendition scheme, including via Lithuania. Mr J.G.S. testified as follows (passage taken from the verbatim record):

> "We have been able definitively to associate three of the CIA's high-value detainees with the site in Lithuania. However, we know that at least five persons were detained there because in the Senate Committee Inquiry Report it refers to one of these men, Mustafa al-Hawsawi, and four others simultaneously being in country. So today I am only in a position to provide references to these three individuals here: the applicant in today's proceedings, the applicant Abu Zubaydah, Khalid Sheikh Mohammed, at the bottom left, who was detained at one time in each of the European sites – in Poland, then in Romania and finally in Lithuania, and the aforementioned Mustafa al-Hawsawi, who became one of the reasons for which the site was closed, as I will illustrate."

He further added (see *Abu Zubaydah v. Lithuania*, cited above, § 135):

> Mr Zubaydah does not have a mention by name in [the 2014 US Senate Committee Report] in connection with the Site Violet but the other two detainees cited here, both do. In the case of Khalid Sheikh Mohammed, there is a lengthy description of his detention in multiple different sites, notably in this passage the reference to his being transferred to Detention Site Violet on that earlier switching aircraft circuit in October 2005. He was also held in Lithuania up until the point of the site's closure. Hence his final transfer to Detention Site Brown which was in Afghanistan on March 25, 2006. The passage around Khalid Sheikh Mohammed also talks about how reporting around him accounted for up to 15% of all CIA detainee intelligence reporting, which demonstrates his enduring importance to the purported intelligence gathering objectives of the programme. I find that pertinent because Khalid Sheikh Mohammed was detained in Poland, he was detained in Romania, he was detained in Lithuania, and he stands as

a symbol of the centrality of these detention sites in Europe to the overall objectives of the CIA's programme.

The third detainee, Mustafa al-Hawsawi, is mentioned in the report in relation to his need for medical care. In this passage here which comes from the later section, pages 154 -156, it states that the CIA was forced to seek assistance from three third-party countries in providing medical care to Mustafa al-Hawsawi because the local authorities in Lithuania had been unable to guarantee provision of emergency medical care. And as is stated explicitly in the Senate Committee's Report, based upon cables sent from the base at Detention Site Violet, these medical issues resulted in the closing of the site in this country in the date March 2006. It was at that point that the CIA transferred its remaining detainees to Detention Site Brown.

In my view these passages, when read in conjunction with the other documents, constitute a fairly comprehensive record of the reasoning and indeed the methodology behind the closure of the Lithuanian site. Furthermore, subsequent packet passage refers to the overall number of persons in the programme at 1 January 2006 as having been twenty-eight. It states that these twenty-eight persons were divided between only two active operational facilities at that time. One was Detention Site Orange in Afghanistan but importantly the other was Detention Site Violet, the Lithuanian site. The date references here, corresponding with the different flights we have had coming in and later going out, place Detention Site Violet in that time period as the hub of detention operations."

II. WITNESS TESTIMONY PRODUCED BY THE GOVERNMENT AND OTHER EVIDENCE AND DOCUMENTS IN *ABU ZUBAYDAH V. LITHUANIA*

111. In *Abu Zubaydah v. Lithuania* the Government produced transcripts of testimony taken from witnesses in the criminal investigation in connection with the implementation of Project No.1 and Project No. 2 – premises which were identified by the experts heard in that case as locations customised for the CIA's secret detention facilities (see *Abu Zubaydah v. Lithuania*, cited above, §§ 304-49).

112. Other documents and evidence, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's Report of 2011 which included the findings of fact as to "two tailored facilities – Project No. 1 and Project No. 2 – can be found in paragraphs 350-71 of the above judgment.

III. WITNESS STATEMENTS BY DR SAM RAPHAEL PRODUCED BY THE APPLICANT

113. The applicant produced two witness statements by Dr Sam Raphael (see also paragraphs 52, 61 and 74 above), professor at the University of Westminster and an expert specialising in collecting and analysing records of the CIA rendition programme. His work comprises the creation of the CIA Flights Database, the CIA Prisoner Database (which includes findings in relation to where and when each of 119 CIA prisoners named in the 2014 US

Senate Committee Report was held in secret detention) and the CIA Cable Database (which includes cable series from the CIA "black sites" allowing to pinpoint geographically the originating location of cables discussing secret detention, rendition and torture of individual prisoners). He also runs the UK Economic and Social Research Council (ESRC)-funded project which works with non-governmental organisations and human rights investigators to uncover and understand human rights violations in the "War on Terror".

114. On 16 December 2016 Dr Sam Raphael made his first witness statement relating to the applicant's rendition to and detention in Lithuania, which concluded as follows:

> "a. The CIA facility referred to as DETENTION SITE VIOLET in the Senate Select Committee on Intelligence ("SSCT')'s 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' ("SSCI Report"[4]) was, beyond reasonable doubt, in Lithuania; and
>
> b. There are multiple indicators contained within the SSCI Report to support the claim that Mr. al-Hawsawi was held in DETENION SITE VIOLET (in Lithuania) from either 18 February 2005 or 6 October 2005 until 25 March 2006."

115. In his second witness statement, dated 28 January 2020, Dr Raphael confirmed the above conclusions and updated the first statement in the light of more recent research, including that presented in a book "CIA Torture Unredacted", which he co-wrote with Dr Crofton Black (an expert heard by the Court in *Abu Zubaydah v. Lithuania* (cited above) and *Al Nashiri v. Romania* (cited above) and Professor Ruth Blakeley. The book was published in July 2019.

Dr Raphael, the lead author of the book, submitted that its findings had been made possible through the collection and analysis of thousands of records relating to the HVD Programme, including flight records, corporate invoices and billing records, declassified CIA documents, court records and prisoner testimonies. This data collection and analysis had continued up until May 2019, and included many records gathered since the submission of his first statement. Also, together with his co-authors, he had developed novel techniques to "unredact" – both literally and metaphorically – the heavily redacted executive summary of the 2014 Senate Report. This included pioneering a technique to unlock the locational data from the thousands of CIA cables referenced by that report. These techniques were only fully developed after the submission of his first statement.

The second statement was supported by source material, including specific circuits of CIA rendition planes relevant for the present case. The various possible CIA planes circuits which, according to the expert, were used for the applicant's rendition from Guantánamo in April 2004 up to his rendition to Detention Site Violet in Lithuania in February or October 2005 were summarised in a diagram.

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[4] Referred to as the "2014 US Senate Committee Report" in the present judgment

Dr Sam Raphael established the fate and whereabouts of the applicant between March 2003 and September 2006 as follows:

(1) The applicant was captured in Pakistan on 1 March 2003, alongside another CIA prisoner, Khaled Sheikh Mohammed. Both were held in Pakistani detention until some point on 3-5 March 2003.

(2) The applicant and Khaled Sheikh Mohammed were rendered to Detention Site Cobalt in Afghanistan between 3 and 5 March 2003. Mohammed was transferred out again relatively quickly, on 7 March 2003, and rendered to Detention Site Blue in Poland. He was held there until the site's closure in September 2003, whereupon he was rendered to Detention Site Black in Romania.

(3) The applicant, meanwhile, was detained and tortured at Detention Site Cobalt until November 2003. He was subjected to beatings, stress positions, confinement boxes and waterboarding.

(4) The applicant was rendered from Afghanistan in November 2003. The only flight out of the country during that month was to Guantánamo Bay on 21 November 2003, by the CIA rendition aircraft with registration N313P;

(5) Between 22 November 2003 and April 2004, the applicant was held alongside four other prisoners at two CIA facilities in Guantánamo Bay. Abu Zubaydah and Abd al-Rahim al-Nashiri had been transferred to the site in September 2003, Abu Zubaydah from detention at Detention Site Blue in Poland and al-Nashiri from Morocco. Ibn Sheikh al-Libi, who had been in CIA custody in Afghanistan since February 2003, was held at Detention Site Cobalt and rendered alongside Mr al-Hawsawi in November 2003. The final prisoner, Ramzi bin al-Shibh, was transferred to the site in December 2003, from his detention in Morocco.

(6) Between December 2003 and April 2004, all five prisoners were held at Guantánamo Bay;

(7) All five prisoners, including Mr al-Hawsawi, were rendered from Guantánamo Bay in April 2004, on board two flights: first on 12 April 2004 to Romania and then Morocco, by the CIA rendition aircraft with registration N85VM; the second on 13 April 2004 direct to Morocco, by the CIA rendition aircraft with registration N368CE. It is possible that Mr al-Hawsawi remained in Romania and was not rendered to Morocco.

(8) A third flight between Guantánamo Bay and Morocco, on 27 March 2004 by N85VM, may also have rendered prisoners between the two sites. Further analysis of the redactions contained in the 2014 US Senate Committee Report suggested that CIA prisoners were not held at the black site in Morocco after December 2003 and before April 2004. As a result, it seemed likely that the five CIA prisoners held at Guantánamo Bay during 2003-2004 were held there until April 2004. It is therefore most likely that Mr al-Hawsawi was rendered on one of the two above-mentioned April flights (see point 7), rather than on the 27 March 2004 flight.

(9) The applicant was held at either Detention Site Black in Romania or in Morocco from April 2004. If he was held in Morocco, it is possible that he was subsequently rendered to Detention Site Black in October 2004, on aircraft N227SV, alongside Ramzi bin al-Shibh;

(10) If the applicant was held in Morocco after October 2004, then he was rendered to Detention Site Violet in Lithuania in February 2005, on aircraft N787WH, alongside Abu Zubaydah.

(11) If the applicant was held at Detention Site Black in Romania after October 2004, then he was rendered to Detention Site Violet in Lithuania in October 2005, on aircraft N308AB and N787WH, alongside Abd al-Rahim al-Nashiri and Khaled Sheikh Mohammed.

(12) Regardless of the location of his prior secret detention, the applicant was held at Detention Site Violet from either February or October 2005 until March 2006.

(13) All prisoners held at Detention Site Violet, including the applicant, Abu Zubaydah, Abd al-Rahim al-Nashiri and Khaled Sheikh Mohammed, were rendered to Detention Site Brown in Afghanistan on 25 March 2006, on two CIA aircraft with registration N733MA and N740EH.

(14) The applicant was held at Detention Site Brown from 26 March 2006 until 4-5 September 2006;

(15) Finally, on 4-5 September 2006 he was rendered from Afghanistan to Guantánamo Bay, where he still remains.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION AS TO COMPATIBILITY *RATIONE PERSONAE* OF THE APPLICATION WITH THE PROVISIONS OF THE CONVENTION ON GROUNDS OF LITHUANIA'S LACK OF JURISDICTION AND RESPONSIBILITY

116. 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."

A. The Government

117. In their first set of observations, the Government submitted that in the *Abu Zubaydah v. Lithuania* case the Court had condemned the Lithuanian State *in abstracto* for most regretful breaches of public international law that had undoubtfully been committed, albeit without any indication of a relevant agent and/or representative of the Lithuanian State or their knowledge of those acts.

In the Government's words, in that case the Court had "started from arguing" that an internationally wrongful act was in fact committed, namely that a CIA detention facility, codenamed Detention Site Violet had been located in Lithuania and the applicant had been transferred there on 17 or 18 February 2005 and was detained there until 25 March 2006 when he was transferred to another CIA detention facility. Then the Court had proceeded to deal with the attributability issue, as if it were the one of secondary importance, although that was obviously not the case under the ILC Articles. This subjective criterion had been much more difficult for the Court to prove in the circumstances of the present case as indeed not a single concrete person from the Lithuanian authorities had been established who would have had known of the said internationally wrongful act, or had given his/her consent. Even though it had made an abstract reference to the 2014 US Senate Committee Report, the Court had ignored the fact that it equally contained doubts as to any knowledge of the facility's actual function, expressly stating that "when the facility [had]received its first detainees, [REDACTED] informed the CIA [REDACTED] that the [REDACTED] of Country [REDACTED] 'probably has an incomplete notion [regarding the facility's] actual function, i.e., he probably believes that it is some sort of [REDACTED] centre." Despite that, the Court had arrived at the conclusion that internationally wrongful acts for which the respondent State must be regarded as responsible under the Convention had been committed by foreign officials on its territory with the knowledge and approval of Lithuanian authorities.

118. The Government acknowledged that, primarily, the jurisdiction within the meaning of Article 1 of the Convention was territorial and that the State could be regarded as responsible for internationally wrongful acts performed by foreign officials on its territory, and also that the State might be held responsible if a removed person was exposed to a violation of Convention guarantees. However, establishment of the State's responsibility inevitably required knowledge of assistance in the commission of wrongful acts or knowledge about the existence of the reals risks that the persons would be subjected to treatment incompatible with the Convention Thus, the Government objected to attributability of the wrongful acts due to the absence of the subjective element of the State's responsibility. The knowledge of being complicit in wrongful acts could not be discerned from the mere abstract knowledge about the CIA rendition programme in general. The Court had itself admitted that it "d[id] not consider that the Lithuanian authorities necessarily knew the details of what exactly went [on] inside the CIA secret facility", and that "the Lithuanian authorities did not have, or could not have had, complete knowledge of the HVD Programme" (see *Abu Zubaydah v. Lithuania*, cited above, §§ 574-75). As stated above, the 2014 US Senate Committee Report had also contained doubts as to completeness of the knowledge of the country's authorities.

119. The Government took the view that the Court should embrace the public international law as its primary gauge for defining jurisdiction because the purpose of the Convention was to integrate its associated body of law into the international legal system. In the Government's view, the ruling in the *Abu Zubaydah* case, which had been indicated as a reference for the assessment of the jurisdiction issue in the present case, had not properly followed the requirements of the public international law, and the absence of any determination of the existence of both necessary elements of the State's responsibility for internationally wrongful acts in the proper order should have led to the conclusion that the facts of the case at issue did not fall within the jurisdiction of the Republic of Lithuania.

120. In their second set of observation, the Government said that while in *Abu Zubaydah v. Lithuania* they had drawn the Court's attention to the lack of direct evidence of the applicant's transfer to and detention in Lithuania, in the present case the issue of jurisdiction was mainly related to a lack of substantive criterion, namely the knowledge of the Lithuanian authorities of the exact use of its territory by the CIA, in order to establish attributability of the activity of the foreign officers to the Lithuanian authorities.

121. They explained that their position in the present case should not be considered a contradiction to the Court's judgment in *Abu Zubaydah*. They did not object to the findings of the Court but they could not provide any new version of events until the domestic investigation was completed.

Thus Lithuania did not seek to deny its responsibility, but by submitting the preliminary objection in the present case the Government were drawing the Court's attention to the difficulties arising from the differences between the determination of the State's accountability for human rights violations by the Court and the imposition of criminal liability in the pre-trial investigation at the domestic level taking into account the applicable standards of proof and procedure. Given the difference in the standard of proof as applied by the Court and the domestic authorities, the circumstances established by the Court in *Abu Zubaydah* could not automatically be transferred to the domestic investigation.

B. The applicant

122. The applicant replied that the Government were not challenging the Court's established jurisprudence on jurisdiction or attribution; rather, they were arguing that they could not be responsible for the alleged conduct of CIA agents on its territory on the ground that none of its officials or agents had sufficient knowledge of the violations of international law taking place against the applicant. These submissions repeated those which had been made by the Government in *Abu Zubaydah v. Lithuania* and which had been dismissed by the Court. In addition, the Government had failed to identify any evidence or compelling ground for challenging the Court's factual

findings in that case in the context of the present application. There was, therefore, no reason why those factual findings should not apply in Mr al–Hawsawi's case to demonstrate the nature and extent of the knowledge of Lithuanian officials and agents regarding CIA activities.

123. In the applicant's view, the Government submissions were flawed on several grounds. First, there was no support for Lithuania's assertion that the level of knowledge required to establish the State's responsibility involved "details of what exactly went [on] inside the CIA secret facility". To set the standard at such a specific and high level would fundamentally undermine the safeguards under the Convention and would permit a State to evade responsibility simply by virtue of its failing to obtain or enquire about details of the conduct of foreign agents on its territory. Furthermore, in *Abu Zubaydah v. Lithuania* the Court had recently made findings specific to Lithuania's knowledge of the CIA programme and the ill-treatment suffered by those within its territory which should equally apply to the present case. In that context, the applicant also referred to extensive evidence that he had provided to the Court and the specific reference to his name in the 2014 US Senate Committee Report.

C. The third-party intervener

124. The International Commissions of Jurists and Amnesty International, in their joint submissions, stated that already in their comments in *Abu Zubaydah* (ibid.) and a number of other cases relating to the involvement and complicity of certain Contracting Parties in the CIA's rendition and secret detention programmes, they had demonstrated that as early as the end of 2002, States, including Lithuania, had had access to substantial, credible and publicly-available evidence that US intelligence agencies and military forces had been engaging in torture and ill-treatment, enforced disappearances, arbitrary detention and secret detainee transfers as part of what the United States had referred to as the "war on terror". Their submissions had also highlighted concerns raised by the International Committee of the Red Cross ("ICRC"), for example, in January, February and July 2004, about "the fate of an unknown number of people ... held in undisclosed locations" beyond recognised places of detention in Bagram in Afghanistan and Guantánamo Bay, noting that detainees labelled as "high value" were at particular risk of abuse, including torture. They further emphasised that all of Amnesty International's annual reports between 2002 and 2005, distributed widely to government officials, including those of Lithuania, and the media, had addressed the growing body of evidence of human rights violations within the context of the US counterterrorism operations. References had been included, not only in the entries on the United States, but also in relation to the involvement of other countries, and it had been noted that such violations had been continuing.

125. The interveners added that in *Abu Zubaydah* (ibid.), the Court had considered a range of open-source material on the CIA's rendition and secret detention programme, as well as the involvement of the Lithuanian authorities and expert evidence. In its judgment, the Court had noted that the Lithuanian Government had not disputed several points made by Mr Abu Zubaydah, including the landing of four CIA planes at Vilnius and Palanga airports between 17 February 2005 and 25 March 2006, and the cooperation of the Lithuanian State Security Department ("SSD") with the CIA in establishing facilities on Lithuanian territory. In 2005 the Lithuanian authorities had attended a NATO-EU meeting with the then US Secretary of State Condoleeza Rice, from whose minutes it was clear that all States participating had known of what the US termed "enhanced interrogation techniques". In addition, the Court relied on the findings of a 2009 inquiry of the Lithuanian parliament into allegations that Lithuania had hosted a secret detention facility (the "Seimas inquiry"), referring to witness statements from high-ranking SSD officers, such as former Directors General, who had confirmed their communications with the Heads of State at the relevant time about CIA requests to participate in the transporting and/or holding of detainees on Lithuanian territory. Based on this evidence, the Court had found that it was established beyond reasonable doubt that the Lithuanian authorities had known, at all material times, that the CIA had been operating a secret detention facility on its territory for the purposes of detaining and interrogating alleged terrorism related suspects. The Court had further held that it was established beyond reasonable doubt that the CIA facility that had been codenamed Detention Site Violet in the SSCI summary had been located in Lithuania.

D. The Court's assessment

126. The Court observes that in contrast to the case of *Abu Zubaydah* (cited above, §§ 410-11), where the Government's objection in effect amounted to denying that the facts adduced by the applicant in respect of Lithuania had actually ever taken place and to challenging the credibility of the evidence produced and relied on by the applicant before the Court, in the present case the Government have not contested the Court's findings in the above-mentioned case with respect to the existence of the CIA secret detention facility codenamed "Detention Site Violet" in the US Senate Committee Report but have challenged the Court's assessment regarding the authorities' knowledge of and complicity in the CIA operations on its territory.

127. However, the Lithuanian State's responsibility under the Convention is not only connected to the issue of whether its authorities knew, or ought to have known of the nature and purposes of the CIA's activities on its territory at the material time, that is between 17 February 2005 and 25 March 2006,

but also to the issue of whether the facts alleged by the applicant actually took place on Lithuanian territory. Consequently, the Court is required first to establish, in the light of the evidence in its possession, whether the events complained of actually occurred on Lithuanian territory and, if so, whether they are attributable to the Lithuanian State (see also *Abu Zubaydah*, cited above, §§ 410-11). The Court will therefore rule on the Government's objection in the light of its findings regarding the facts of the case (see paragraphs 161-163 below).

II. THE COURT'S ESTABLISHMENT OF THE FACTS AND ASSESSMENT OF EVIDENCE

A. The parties' positions on the standard and burden of proof

1. The Government

128. The Government emphasised that, given the differences between the determination of the State's responsibility by the Court and that of criminal liability by the domestic authorities, in *Abu Zubaydah* (cited above) there had been enough evidence for the establishment of the fact that a CIA secret prison had been operating in Lithuania. The Court had arrived at this conclusion once it was satisfied that there was prima facie evidence in favour of Mr Abu Zubaydah's allegation that the CIA secret detention site had operated in Lithuania between 17 or 18 February 2005 and 25 March 2006, thus shifting the burden of proof to the respondent Government, which had failed to demonstrate why the evidence produced could not serve to corroborate the applicant' s allegations. For the domestic prosecution authorities in order to institute a pre-trial investigation it was enough to have information that a criminal act might have been committed, but this was not sufficient to bring charges against specific persons as prosecution required convincing and consistent evidence.

129. Having regard to the witness statements by Dr Raphael (see paragraphs 114-115 above) the Government argued that there was still no direct evidence as regards the applicant's rendition to Lithuania. Dr Raphael had prepared his statement on the basis of the co-written book "CIA Torture Unredacted". Referring to his research, he had stated that nobody had been transferred to Vilnius by the CIA-related flight on 17 February 2005. In addition, it was still not known when exactly the applicant could have been transferred to Lithuania: on 18 February or on 6 October 2005. The Government stressed that Dr Raphael had relied on the CIA cable 3223 as evidence of the applicant's presence in Lithuania, with the reference that this had been indicated at page 100 of the 2014 US Senate Committee Report, but they pointed out that this passage referred to a rectal examination and the applicant's medical condition. Moreover, the Torture Database did not provide any CIA cable which was related to the alleged timeline of the

operation of Detention Site Violet. Thus, the Government could not accept this as evidence of the applicant's presence in Lithuania as the cable indicated no date and had no link to the information contained in other parts of the 2014 US Senate Committee Report relating to Detention Site Violet.

130. In conclusion, the Government said that the Court's findings in *Abu Zubaydah* (cited above) had neither been established nor dismissed in the investigation, and that the investigative actions were being undertaken in order to verify the relevant data and to gather more supporting evidence. In these circumstances and at this stage of the proceedings, the Government were not seeking to object to the Court's findings in *Abu Zubaydah* but, rather, were trying to explain why the Court's judgment in that case had not immediately resulted in the breakthrough in the domestic investigation.

2. The applicant

131. The applicant asked the Court to rely on the extensive evidence provided by him in the case, specific to his secret detention, torture and ill-treatment, and on the intervention of the International Commission of Jurists and Amnesty International. In his view, his case was stronger than that of *Abu Zubaydah*, in particular, in the light of the specific references to his name in the 2014 US Senate Committee Report linked to Detention Site Violet.

132. As regards Dr Raphael's witness statements, the applicant submitted that the expert had updated his evidence concerning the publicly available information as to his fate and whereabouts during his secret detention by the CIA. He emphasised that the book "CIA – Torture Unredacted" presented the findings of a four-year joint investigation by The Rendition Project and The Bureau of Investigative Journalism which, he stressed, was "the most detailed public account to date of the Rendition, Detention and Interrogation ... programme, and moved significantly beyond the findings of past investigations, including those published in heavily-redacted form [in the 2014 US Senate Committee Report]".

Whilst the body of research and analysis had developed since Dr Raphael's first witness statement, his fundamental conclusions remained firmly as set out in his first statement, i.e. that the CIA facility referred to as Detention Site Violet had, beyond reasonable doubt, been located in Lithuania and that there were multiple indicators contained within the 2014 US Senate Committee Report to support the claim that the applicant had been held in Lithuania from either 18 February 2005 or 6 October 2005 to 25 March 2006.

133. This updated information reinforced the Court's conclusions in *Abu Zubaydah v. Lithuania* and the evidence submitted by the applicant in the present case. This was, in particular, in relation to (i) the rendition flight routes to and from Lithuania; (ii) the applicant's whereabouts; (iii) the location of Detention Site Violet (iv) the duration of the applicant's detention

in Lithuania and (v) the timing and circumstances of his transfer to the prison facility in Guantánamo Bay.

134. In conclusion, the applicant invited the Court to draw appropriate inferences and conclusions in relation to the facts of the present case, the State's knowledge and his torture and ill-treatment in the light of that evidence. Moreover, he underlined that the burden of proof had to be regarded as having shifted to Lithuania to disprove these matters; however, the Government's observations were starkly inadequate in this regard and they had not presented any positive material or submissions sufficient to challenge that evidence or the proposed findings of fact.

B. The Court's assessment of the facts and evidence

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

135. 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 and 4 others, § 96, 18 December 2012; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 154, ECHR 2012; *Al Nashiri v. Poland*, cited above, § 393; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 393; and *Abu Zubaydah v. Lithuania*, cited above § 480).

136. 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 the responsibility of Contracting States 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 authorities, *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; *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 93-94, ECHR 2014 (extracts); and *Nasr and Ghali v. Italy*, no. 44883/09, § 119, 23 February 2016; *El-Masri*, cited above, § 151, *Al Nashiri v. Poland*, cited above, § 394; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 394; and *Abu Zubaydah*, cited above, § 481).

137. 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 or her 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 and 8 others, § 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; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 395; and *Abu Zubaydah*, cited above, § 482).

138. 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, §§ 114-15; *El-Masri,* cited above, § 152; *Al Nashiri v. Poland*, cited above, § 396; *Husayn (Abu Zubaydah) v. Poland*, cited above, § 396; *Nasr and Ghali*, cited above, § 220; and *Abu Zubaydah,* cited above, § 483).

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 assessment of the facts and evidence in the present case

139. 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 paragraphs 5-6 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 156-67; *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).

140. The regime applied to High Value Detainees such as the applicant during the CIA rendition operations is described in detail in, among other material, the CIA declassified documents and the 2014 US Senate Committee Report referred to in the present case and in the previous relevant judgments of the Court. That regime included transfers of detainees to multiple locations and involved holding them in continuous solitary confinement, incommunicado, throughout the entire period of their undisclosed detention. The transfers to unknown locations and unpredictable conditions of detention were specifically designed to accentuate their sense of disorientation and isolation. The detainees were usually unaware of their exact location (see *Al Nashiri v. Poland*, cited above, §§ 397-98; *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 397-98; and *Abu* Zubaydah, cited above, § 485; see also paragraphs 9-28 above).

141. As can be seen from the material in the Court's possession, since his capture on 1 March 2003 the applicant has not had any contact with the outside world, save the CIA teams involved in his interrogations, renditions and handling, the Guantánamo military commission members, the Guantánamo prison facility personnel and his US counsel. It has also been submitted that the applicant's communications with the outside world is subject to unprecedented restrictions and that his communication with his US counsel and his account of experiences in CIA custody are classified. In fact, for the last twenty years or more, he has been subjected to a practical ban on communication with others, apart from occasional mail and telephone videoconference contact with his family which was allowed at some point after his transfer to Guantánamo (see paragraphs 56-57 above).

142. The above difficulties in gathering and producing evidence in the present case caused by the restrictions on the applicant's contact with the outside world and by the extreme secrecy surrounding the US rendition operations have inevitably had an impact on his ability to plead his case before the 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.

In consequence, 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 in the other relevant cases (see the above-cited judgments in *Husayn (Abu Zubaydah) v. Poland*, § 400; *Al Nashiri v. Poland*, § 400; and *Abu Zubaydah v. Lithuania,* § 488).

3. As regards the operation of Detention Site Violet in Lithuania

143. The Court observes that the following facts, namely that:

(a) the CIA secret detention facility codenamed "Detention Site Violet" operated in Lithuania from either 17 February 2005, the date of the CIA rendition flight N724CL into Vilnius airport, or from 18 February 2005, the date of the CIA rendition flight N787WH into Palanga airport until 25 March 2006, when it was closed; and

(b) the closure was marked by the CIA rendition flight N733MA into Palanga airport, which arrived from Porto, Portugal and, having disguised its destination in its flight plan by indicating Porto, on the same day took off for Cairo, Egypt,

were already established, to the standard of proof beyond reasonable doubt in *Abu Zubaydah v. Lithuania* after a thorough and meticulous analysis of extensive evidence in the Court's possession (see §§ 498-532 of that judgment). The Government have not contested these facts and the Court's conclusion in the present case (see paragraphs 117-120 above). Nor does the Court find any element in the material before it that could alter this conclusion.

144. Accordingly, the Court must next establish whether the applicant's allegations concerning his rendition to Lithuania, his secret detention and ill treatment in Lithuania and his rendition from Lithuania can be said to have been proved before the Court.

4. As regards the facts and assessment of evidence relevant to the applicant's alleged rendition by the CIA to Lithuania, secret detention in Lithuania and transfer by the CIA out of Lithuania (17 or 18 February or 6 October 2005 and 25 March 2006)

(a) The applicant's transfers and secret detention

145. In his application the applicant indicated three dates for his possible rendition to Lithuania: 17 February 2005 (on flight N724NCL) or 18 February 2005 (on flight N787WH) or 6 October 2005 (on flight N787WH). As regards his rendition from Lithuania, he indicated 25 March 2006, the date of Detention Site Violet's closure marked by flight N733MA into Palanga (see paragraphs 60 and 62 above).

Following Dr Raphael's second witness statement, the applicant corrected his initial indications and submitted that the date of his putative transfer to Lithuania was either 18 February or 6 October 2005 (see paragraph 61 above).

146. The Government claimed there was still no direct evidence that the applicant had been detained in Lithuania and it was not known on which exact date – 18 February or 6 October 2005 – the applicant had been transferred to Lithuania. They also contested the evidence from Dr Raphael, maintaining that the CIA cable 3223, referred to by the expert in his research material, could not be considered evidence demonstrating that the applicant had

actually been rendered to and detained in Lithuania (see paragraph 129 above).

147. As regards the Government's argument as to the lack of direct proof of the applicant's detention in Lithuania, the Court would reiterate that the applicant who, as other high-value detainees, was held for years on end in detention conditions specifically designed to isolate and disorientate detainees 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 Lithuania 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. 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 listed among the persons on board in documents filed with any official institution (see *Abu Zubaydah*, cited above, § 534, with references to *Al Nashiri v. Poland*, §§ 410-11, and *Husayn (Abu Zubaydah) v. Poland*, §§ 410-11, both cited above).

148. The Government also argued that it was still not known on which exact date the applicant had been rendered to Lithuania and that the CIA cable 3223 could not be considered sufficient evidence of the applicant's rendition to and from Lithuania, and his secret detention therein. However, the Court does not find that these elements have any decisive bearing on the credibility of the applicant's allegations or the expert's reliability since Dr Raphael's conclusions as to the putative dates of the applicant's transfers to and from Lithuania and his secret detention at Detention Site Violet have been sufficiently corroborated by the Court's factual findings in *Abu Zubaydah* (cited above), the evidence collected in that case, in particular expert evidence, and other material at its disposal, including the 2014 US Senate Committee Report.

149. To begin with, in *Abu Zubaydah* (ibid.) the Court found it established – and this was not contested by the Government either in that case or the present one – that all the four flights indicated by the applicant were used for the CIA rendition operations. Furthermore, on the basis of numerous strong, clear and concordant inferences, the Court found it proven to the required standard of proof that Mr Abu Zubaydah was transferred from Rabat, Morocco on 17 or on 18 February 2005 to Lithuania on board either the rendition plane N724CL or the rendition plane N787WH. The Court did not find it indispensable to rule on which dates the rendition had been carried out as there were only these two dates on which it could have happened

(ibid. §§ 548 for the Court's conclusion, and ibid. §§ 533-47 for elements that led to this conclusion; in that context, see also ibid. § 514).

150. Similarly – and given the veil of secrecy surrounding the CIA rendition operations and the fact that the applicant's fate can be reconstructed only by an analysis of strings of data from various sources available in the public domain and expert evidence (in that context see also ibid. § 540) – in the present case the Court does not find that the fact that there are two equally possible dates for the applicant's rendition – 18 February and 6 October 2005 – diminishes the credibility of his claim. In consequence, as in *Abu Zubaydah* (ibid.), it is not necessary to rule on which of these dates the applicant was rendered by the CIA to Lithuania.

151. Furthermore, there are other relevant elements consistently demonstrating that there could not be any alternative account of the applicant's fate in the period following these two dates up to 25 March 2006.

In that regard, the Court observes that, in contrast to Mr Abu Zubaydah, the present applicant's name and his presence at Detention Site Violet are explicitly mentioned in one of the most credible sources of knowledge of the CIA rendition operations, namely the 2014 US Senate Committee Report which disclosed (albeit in a heavily redacted form) the circumstances surrounding the secret detention, torture and ill-treatment of the principal High-Value Detainees. In particular, the report relates the refusal of "officers" of the country hosting Detention Site Violet "to admit CIA detainee Mustafa Ahmad al-Hawsawi to a local hospital despite earlier discussions with country representatives about how a detainee's medical emergency would be handled". It further states that as a result of the State authorities' refusal, "the CIA was forced to seek assistance from third-party countries in providing medical care to al-Hawsawi and four other detainees with acute ailments". It is also evident that "[t]he medical issues resulted in the closing of Detention Site Violet" in that country and that "[t]he CIA then transferred its remaining detainees to Detention Site Brown" (see paragraphs 67-69 above).

It is also to be noted that in *Abu Zubaydah* (cited above) one of the experts, Mr J.G.S. confirmed that three of the CIA's high-value detainees, including the applicant, had been definitely associated "with the site in Lithuania" (see paragraph 110 above).

152. In view of the foregoing and having regard to the fact that the Government, apart from their contention that there was still no direct evidence that the applicant was detained in Lithuania, have not adduced any counter evidence capable of challenging the factual findings in the US Senate Committee Report and the expert evidence cited above, the Court finds it established beyond reasonable doubt that:

(1) the applicant was rendered by the CIA to Lithuania either on 18 February 2005 on plane N787WH which arrived in Palanga from Rabat, Morocco or on 6 October 2005 on plane N787WH, which via an

aircraft-switching operation in Tirana, arrived in Vilnius from Bucharest, Romania;

(2) from 18 February or 6 October 2005 to 25 March 2006 the applicant was detained in the CIA detention facility in Lithuania codenamed "Detention Site Violet" according to the 2014 US Senate Committee Report; and

(3) on 25 March 2006 on board the rendition plane N733MA and via a subsequent aircraft-switching operation the applicant was transferred by the CIA out of Lithuania to another CIA detention facility, codenamed "Detention Site Brown" according to the 2014 US Senate Committee Report, and identified by the experts as being located in Afghanistan.

(b) The applicant's treatment in CIA custody in Lithuania

153. The Court observes that, in contrast to treatment inflicted on the applicant during an early period of his secret detention, which included the EITs and the so called "water dousing", and which is documented in the 2014 US Senate Committee Report (see paragraph 64 above), there is no evidence demonstrating any instances of similar acts at Detention Site Violet. In the light of the material in the Court's possession, it does not appear that in Lithuania the applicant was subjected to EITs in connection with interrogations.

154. As regards recourse to harsh interrogation techniques at the relevant time, the 2014 US Senate Committee Report states in general terms that in mid-2004 the CIA temporarily suspended the use of 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 47 above).

155. According to the experts heard by the Court in the case of *Abu Zubaydah* (cited above), it was not possible to be categorical about specific interrogation techniques or other forms of treatment or ill-treatment practised by the CIA in Lithuania, as in 2005-2006 there was less information about the treatment of prisoners in the HVD Programme than there had been in the previous years. However, the CIA documents and the 2014 US Senate Committee Report described the routine conditions of detention at "black sites", which included such practices as sensory deprivation, sleep deprivation, denial of religious rights and incommunicado detention (see paragraphs 22-24 and 40 above).

According to the experts, those conditions alone passed the threshold of treatment prohibited by Article 3 of the Convention (see paragraphs 65-66 above).

156. Furthermore, the detailed rules governing 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 18 February or 6 October 2005 to 25 March 2006. The Court therefore finds it established beyond 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 22-24 above; see also *Husayn (Abu Zubaydah)*, cited above, §§ 418-19 and 510; and *Abu Zubaydah*, cited above, § 552).

While at this stage it is premature to characterise the treatment to which the applicant was subjected during his detention at Detention Site Violet for the purposes of his complaint under the substantive limb of Article 3 of the Convention, the Court would observe that that 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 paragraphs 22-24 above).

III. LITHUANIA'S JURISDICTION AND RESPONSIBILITY UNDER THE CONVENTION

A. Preliminary remarks

157. The Court observes that in the present case the Government's objection to Lithuania's jurisdiction and to its responsibility under the Convention amounts, for all practical purposes, to challenging the Court's findings as to the Lithuanian authorities' knowledge of and complicity in the CIA rendition operations on their territory in *Abu Zubaydah v. Lithuania* (cited above). In particular, the Government have questioned the Court's assessment of the extent of the authorities' acquiescence and the nature of their knowledge in respect of the CIA activities at the material time (see paragraphs 118-120 above).

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

158. The applicable general principles regarding the State's responsibility for an applicant's treatment and detention by foreign officials on its territory were summarised in the *Abu Zubaydah* judgment (cited above) at paragraph 581, as follows:

> "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)."

159. The principles that are relevant to an applicant's removal from the State's territory were set out in paragraphs 582-585 of the *Abu Zubaydah* judgment (ibid.).

160. The Court would reiterate, in particular, the following points:

(1) 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 (ibid., § 582, with further references to the Court's case-law).

(2) 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).

(3) 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*, cited above; *Al Nashiri v. Poland*, cited above, § 455; *Husayn (Abu Zubaydah)*, cited above, § 451; and *Nasr and Ghali*, cited above, § 244).

(4) 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; *Husayn (Abu Zubaydah)*, cited above, § 453; and *Al Nashiri v. Romania*, cited above, § 597).

(5) 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 *Abu Zubaydah*, cited above, § 585; with references to, among others, *Al-Saadoon and Mufdhi*, cited above, § 125; and *El-Masri*, cited above, §§ 213-14).

C. The Government's arguments as to Lithuania's lack of knowledge of and complicity in the CIA HVD Programme

161. The Court observes that in *Abu Zubaydah* (cited above) it found it established beyond reasonable doubt that:

(a) the Lithuanian authorities knew of the nature and purposes of the CIA's activities on its territory at the material time;

(b) the Lithuanian authorities, by approving the hosting of the CIA Detention Site Violet, 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; and

(c) given their knowledge of the nature and purposes of the CIA's activities on their territory and their involvement in the execution of that programme, the Lithuanian authorities knew that, by enabling the CIA to detain terrorist suspects – including the applicant – on their territory, they were exposing them to a serious risk of treatment contrary to the Convention (ibid., § 576).

162. These conclusions were reached after a detailed and scrupulous assessment of the facts supplied by the parties and extensive material, including expert evidence. In that context, the Court had particular regard to

(1) the relations of cooperation between the Lithuanian authorities and the CIA;

(2) the agreement to host a CIA detention facility and acceptance of a financial reward for supporting the HVD Programme;

(3) the authorities' assistance in the acquisition and adaptation of the premises for the CIA's activities (Project No. 1 and Project No. 2);

(4) the authorities' assistance in disguising the CIA rendition aircraft routes through Lithuania by means of the so-called "dummy" flight planning (an intentional disguise of flight plans for rendition aircraft applied by the air companies contracted by the CIA in a deliberate effort to cover up the CIA flights into the country) – which required active cooperation on the part of the host country;

(5) the special procedure for CIA flights applied by the authorities;

(6) the circumstances routinely surrounding HVD transfers and reception at the CIA "black site", showing, among other things, that the transportation of prisoners over land from the planes to the CIA detention site could not be effected without at least minimal assistance by the host country's authorities;

(7) public knowledge of treatment to which captured terrorist suspects were subjected in US custody in 2002-2005; and

(8) an informal transatlantic meeting of the European Union and North Atlantic Treaty Organisation foreign ministers held on 7 December 2005,

convened in connection with media disclosures naming European countries that had allegedly hosted CIA "black sites" (ibid., §§ 553-75).

163. The Court would also wish to reiterate part of its conclusions at paragraphs 574-575 of the *Abu Zubaydah* judgment (ibid.), which read as follows:

> "574. The Court, as in previous similar cases, does not consider that the Lithuanian authorities necessarily knew the details of what exactly went on inside the CIA secret facility or witnessed treatment or interrogations to which the CIA prisoners were subjected in Lithuania. As in other countries hosting clandestine prisons, the operation of the site was entirely in the hands of the CIA and the interrogations were exclusively the CIA's responsibility (see paragraph 272 above; see also *Al Nashiri v. Poland*, cited above, § 441; and *Husayn (Abu Zubaydah) v. Poland*, cited above, § 443).
>
> 575. However, in the Court's view, even if the Lithuanian authorities did not have, or could not have had, complete knowledge of the HVD Programme, the facts available to them through their contacts and cooperation with their CIA partners, taken together with extensive and widely available information on 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 Lithuanian press (see paragraphs 565-568 above), enabled them to conjure up a reasonably accurate image of the CIA's activities and, more particularly, the treatment to which the CIA was likely to have subjected their prisoners in Lithuania.
>
> 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. All the more so did the authorities, in 2005-2006, have 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 their territory.
>
> It further observes that it is – as was the case in respect of Poland – inconceivable that the rendition aircraft could have crossed the country's airspace, landed at and departed from its airports, or that the CIA could have 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 their territory. Nor can it stand to reason that activities of such character and scale, possibly vital for the country's military and political interests, could have been undertaken on Lithuanian territory without the Lithuanian authorities' knowledge and without the necessary authorisation and assistance being given at the appropriate level of the State (see *Al Nashiri v. Poland*, cited above, §§ 441-442 and *Husayn (Abu Zubaydah) v. Poland*, cited above, §§ 443-444)."

D. The Court's conclusion

164. In the present case the Government have not adduced any material or indeed a single piece of evidence that would be capable of casting doubt on, not to mention altering, the Court's above-mentioned conclusions as to the Lithuanian authorities' knowledge of and complicity in the CIA HVD Programme. Consequently, the Court dismisses the Government's

preliminary objection as to compatibility *ratione personae* with the Convention.

165. The Court will accordingly examine the applicant's complaints and the extent to which the events complained of are attributable to the Lithuanian State in the light of the above principles of State responsibility under the Convention, in accordance with its case-law (ibid., § 587).

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

166. The applicant's complaints under Article 3 of the Convention concerned both substantive and procedural aspects of this provision.

167. Article 3 of the Convention states:

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

168. The Court will first examine the applicant's complaint under the procedural aspect of Article 3 about the lack of an effective and thorough criminal investigation into his allegations of ill-treatment while in CIA custody on Lithuanian territory (see *El-Masri*, cited above, § 181; *Al Nashiri v. Poland*, cited above, § 462; and *Husayn (Abu Zubaydah)*, cited above, § 459).

A. Procedural aspect of Article 3

169. The applicant complained that Lithuania, by failing to carry out an effective investigation into his allegations of serious violations of the Convention, had violated Article 3 of the Convention in its procedural aspect. He submitted that his allegations concerning arbitrary, undisclosed detention and torture and ill-treatment in Lithuania had not been adequately or effectively investigated. In particular, given its limited scope, the ongoing pre-trial investigation lacked the requisite transparency, was not prompt, adequate or thorough, and did not allow him, as a victim, to participate in the proceedings.

1. Admissibility

170. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) The parties submissions

(i) The applicant

171. The applicant observed that limited progress had been made in the domestic investigation but, at the same time, underlined that the Government had themselves accepted that it remained incomplete. Given the passage of time, there seemed to have been an ever-decreasing prospect of justice for the applicant.

In particular, the investigation had not been undertaken promptly, and had not been "effective and thorough". This conclusion was reinforced by the following facts: (i) the authorities still failed to provide details of the precise steps taken in the investigation and when they had been taken; (ii) they had failed to provide details of the evidence (or documents) obtained in the investigation; (iii) they had failed to provide a likely timescale for the further investigative actions foreseen.

172. In the applicant's view, the authorities' approach had been – and still was – unduly narrow and the State was failing to grapple with its own responsibility for the conduct alleged. For example, in their observations, the Government had relied on the complexity of the investigation due to the need for evidence from foreign jurisdictions. But no explanation had been given as to why substantial progress could not have been made in Lithuania itself in relation to the knowledge, conduct and actions or omissions of Lithuanian officials. These matters had been the subject of the *Seimas* inquiry and other investigations to which the Court had referred in *Abu Zubaydah* (cited above).

173. Furthermore, certain investigative steps requested on behalf of the applicant in 2013 had still not been undertaken. In particular, the authorities continued to refuse to recognise the applicant as a victim or otherwise involve him in the proceedings.

In addition, they continued to rely on State secrets as a basis for refusing to provide information about the purported investigation. The Lithuanian authorities had not provided any meaningful information to the public which would allow an accurate assessment of whether the investigation was being conducted in a way that would enable it to uncover the truth and lead to the identification and punishment of those responsible. This situation had not improved since the Court's finding in *Abu Zubaydah* (ibid.).

It was unusual, the applicant added, for the Court to be faced with the same investigation as in a previous case – *Abu Zubaydah* (ibid.) – where it had found a breach of the procedural obligation under Article 3 of the Convention. This demonstrated that Lithuania had failed to implement the Court's judgment.

174. In sum, the applicant invited the Court to find that the respondent State was in breach of its procedural obligation under Article 3 of the Convention and that this breach was continuing.

(ii) The Government

175. The Government emphasised that in conducting the investigation the Prosecutor General's Office was confronted with particular difficulties owing to the different rules of evidence and distinct purposes of the proceedings before the Strasbourg Court and domestic criminal proceedings. Despite that, it had tried to integrate into the domestic investigation the findings of the Court in the *Abu Zubaydah* judgment (ibid.) and give them their proper weight.

Following that judgment, the prosecution authorities had approved an updated investigation plan, which was constantly being developed to take into account the material collected. The investigation was being conducted at the highest level of the law-enforcement institutions: the investigation team comprised a prosecutor of the Department for the Investigation of Organised Crime and Corruption at the Prosecutor General's Office and a pre-trial investigator of the Criminal Police Bureau of Lithuania.

176. In order to reactivate the investigation in accordance with the Court's indications in *Abu Zubaydah* (ibid.) the authorities had conducted numerous investigative actions: several requests for legal assistance had been submitted, witnesses had been questioned, some witnesses had been additionally questioned, detailed retrospective monitoring of the publicly available sources had been carried out, an expert in international criminal law had been consulted, several requests for information had been sent to the competent domestic authorities, Interpol had been engaged in order to obtain information about the identity of Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) and Mustafa Ahmed Adam al-Hawsawi, the redacted version of the 2014 US Senate Report had been obtained and included in the investigation, along with the translation of the relevant extracts of this document, and other relevant reports had been added to the investigation material.

177. In particular, special attention had been given to the inconsistencies in witness statements identified by the Court. In order to remove certain contradictions, the main witnesses who had worked at the State Security Department at the relevant time had been interviewed repeatedly. Furthermore, several new witnesses had been questioned to investigate the possible inquiries for the arrangement of medical assistance to the alleged CIA prisoners, as referred to in the 2014 US Senate Committee Report and the Court's judgment in *Abu Zubaydah* (ibid., §§ 135 and 149).

178. However, the complexity of the investigation was compounded by the fact that the main evidence was in the possession of authorities in foreign jurisdictions. Thus, the effectiveness of the investigation without the proper cooperation of other States concerned was heavily limited.

The authorities had made repeated attempts to seek assistance and judicial cooperation from the US authorities. In September 2018 they had made a comprehensive request for international legal assistance to the US

Department of Justice; however, they had only received negative replies, with the most recent one stating that the US authorities were not in a position to respond to any further requests regarding this matter. Morocco had rejected the legal assistance request and Afghanistan had never replied. No relevant or important information had been received from the Polish or Romanian authorities.

179. For the Government, it was of the utmost importance that the Prosecutor General's Office had decided to extend the scope of the investigation (which had initially been instituted with regard to the offences of abuse of power and unlawful transportation of a person across the State border) to cover the offence under Article 100 of the Criminal Code (treatment of persons prohibited under international law, e.g. crimes against humanity), which was not subject to the statute of limitations.

180. The Government also underlined that the Court's verbatim record of the fact-finding hearing in *Abu Zubaydah* (ibid.) had been included in the investigation material. The prosecutor had also asked Dr Crofton Black, one of the experts, whether he could give a witness statement on such issues as actual data in connection with research on CIA extraordinary rendition and the presumable sources of information. However, the expert had responded that he had not been in a position to provide further evidence as all the findings of his investigative work on the matter had been published in "CIA Torture Unredacted". In consequence, the authorities had decided not to summon him but to rely on the relevant written material.

181. Having regard to the attempt by Mr Abu Zubaydah's representative to seek information from two CIA contractors in the discovery proceedings under US Code § 1782, the prosecution had also considered taking a similar path. To this end, they had also contacted Mr Abu Zubaydah's counsel to discuss possible cooperation. However, the progress had been slowed down by the COVID-19 pandemic. In addition, as the above proceedings had not been successful and the US Supreme Court had suggested that Mr Abu Zubaydah make a fresh request for a deposition in such a way as to avoid disclosing sensitive information, the prosecution currently considered whether it would be feasible to continue such actions.

Another delay resulted from the fact that in September 2022 the coordinating prosecutor had been seconded to the International Criminal Court and the new prosecutor had needed time to become acquainted with the investigation material.

182. As regards access to information from the investigation, the Government maintained that this had been and would be made available through the public relations unit of the Prosecutor General's Office, to ensure a sufficient degree of public scrutiny. However, given its sensitive nature, the information was covered by the confidentiality of the investigation.

(b) The Court's assessment

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

183. Where an individual raises an arguable claim that he or she 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)*, cited above, § 479; *Cestaro v. Italy*, no. 6884/11, §§ 205-08, 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).

184. 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, §§ 183-85; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167; *Al Nashiri v. Poland*, cited above, § 486; and *Husayn (Abu Zubaydah)*, cited above, § 480).

185. 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, §§ 494-95; and *Husayn (Abu Zubaydah)*, cited above, §§ 488-89, both judgments with further references to the Court's case-law).

186. 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, §§191-92; *Al Nashiri v. Poland*, cited above, § 495; and *Husayn (Abu Zubaydah)*, cited above, § 489, with further references to the Court's case-law).

(ii) Application of the above principles to the present case

(α) Preliminary remarks

187. The Court notes at the outset that the investigation in the applicant's case partly overlapped with the investigation concerning Mr Abu Zubaydah, in respect of which the Court previously found a violation of Article 3 of the Convention in its procedural aspect (see *Abu Zubaydah*, cited above, §§ 179-211 and 611-22). The investigation in the applicant's case, instituted on 13 February 2014, was joined with the investigation in the case of Mr Abu Zubaydah on 6 February 2015 (see paragraphs 96-106 above).

Accordingly, the Court's findings in *Abu Zubaydah*, in so far as they relate to the period from 6 February 2015 to 10 April 2018, the date of adoption of the Court's judgment in that case, are relevant for the assessment of the authorities' conduct in the present case.

(β) The Court's findings

188. The investigation in the applicant's case, which has been pending since 13 February 2014, has so far lasted nearly ten years.

189. As regards the period from 6 February 2015 to 10 April 2018 the Court previously concluded that it did not appear that any meaningful progress in investigating Lithuania's complicity in the CIA HVD Programme and identifying the persons responsible had so far been achieved (see *Abu*

Zubaydah, cited above, § 617). This conclusion, account being taken of the fact that on 10 April 2018 the investigation in the applicant's case had already been pending for over four years, also applies to the present case.

190. As regards the period subsequent to 10 April 2018, the Court notes that the Government heavily relied on their repeated but so far fruitless attempts to obtain legal assistance or information from other States, in particular the US (see paragraph 178 above). Indeed, between August 2018 and September 2022 most actions taken in the investigation, as described by the Government, consisted in making several requests for legal assistance and, pending the outcome of the discovery proceedings instituted by Mr Abu Zubaydah's counsel in the US, considering a similar attempt or exploring other – unspecified – possibilities to gather evidence in foreign jurisdictions (see paragraphs 99-104 above).

However, as also pointed out by the applicant (see paragraph 172 above), the Government have not given any satisfactory reasons why over that time the prosecution authorities did not make any tangible progress in the investigation in regard to the knowledge, complicity in the CIA's activities, conduct and actions or omissions of Lithuanian officials, matters which had already been the object of the *Seimas* inquiry of 2010 referred to in *Abu Zubaydah* (cited above; see also paragraphs 100-106 above).

191. It is true that the Government mentioned, for instance, that in the course of the investigation after August 2018 "the relevant information [had been] requested", "expert opinion [had been] obtained", "witnesses [had been questioned", "the necessary material [had been] translated", and "the redacted version of the 2014 US Senate Committee Report [had been] obtained" (see paragraphs 101 and 176 above). Yet they remained conspicuously vague as to the details of the actions taken and unspecific as to the dates on which they had been taken or the progress – if any – so far achieved, or the action plan for future investigative measures. In actual fact, except for 12 November 2018, the date on which the scope of the investigation was extended to cover the offence under Article 100 of the Criminal Code – an event that the Government considered significant – they have given no single date or time–frame relating to the conduct of the investigation (see paragraphs 99-104 and 179 above).

192. The Court accepts that the prosecution were confronted with a difficult and complex task, which was not facilitated by the lack of response to their requests for legal assistance. However, this cannot justify the apparent lack of any substantial progress in the investigation in the period under consideration.

193. Furthermore, the Court notes that the applicant, despite his numerous, repeated requests, dating back as far as 2015, to be granted victim status or at least to be provided with information about the investigation, has been unsuccessful on both accounts. As a result, he finds himself in a kind of perpetual limbo: victim status has been denied to him because of the

applicable "strict evidential standard", which in the prosecution's view he has not yet met, and he cannot obtain information about the investigation because he is not a party to the proceedings (see paragraphs 102-106 above).

194. In that regard, the Court would underline that the securing of proper accountability of those responsible for enabling the CIA to run Detention Site Violet on Lithuanian territory is conducive to maintaining confidence in the adherence of the Lithuanian 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 operations in Lithuania and his secret detention and to know what happened at the material time. A victim who has 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 186 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; *Husayn (Abu Zubaydah)*, cited above, § 487; and *Abu Zubaydah*, cited above, § 620).

195. Lastly, as regards the transparency of the investigation, the Court notes that the Government maintained that access of the public to information had been ensured by the Prosecutor General Office's public relations unit, but without explaining how this has been done.

It is to be reiterated that the importance and gravity of the issues involved require particularly intense public scrutiny of the investigation. The Lithuanian public have 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 with respect to the investigation (see *Al Nashiri v. Poland*, cited above, § 497, and *Husayn (Abu Zubaydah)*, cited above, § 489).

(γ) Conclusion

196. Having regard to the above deficiencies of the impugned proceedings, the Court considers that Lithuania has failed to comply with the requirements of an "effective and thorough" investigation for the purposes of Article 3 of the Convention.

There has accordingly been a violation of Article 3 of the Convention, in its procedural aspect.

B. Substantive aspect of Article 3

197. The applicant alleged a violation of Article 3 in its substantive aspect, as Lithuania had not fulfilled its positive obligation under this provision to protect him from torture and other forms of ill-treatment by the CIA on its territory and to prevent his rendition from its territory to another

CIA secret detention facility, thus exposing him to further torture and ill-treatment in CIA custody.

The Government submitted that there was no evidence as to the specific treatment to which the applicant had been subjected in Lithuania or after his transfer from Lithuania.

1. Admissibility

198. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

(i) The applicant

199. The applicant alleged that Lithuania had violated Article 3 of the Convention in its substantive aspect through its complicity in the CIA's extraordinary rendition programme in that it had permitted and/or enabled the US authorities to subject him to torture and ill-treatment on its territory. It had also failed to take measures to ensure that he was not subjected to torture or ill-treatment.

200. Relying on the Court's case-law, notably the judgments in *Al Nashiri v. Poland* and *Nasr and Ghali* (both cited above), the applicant underlined that a respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities. While detained in Lithuania the applicant had been subjected to treatment that had caused him great anguish and distress, as well as severe physical pain. This included delayed access to emergency medical care (a fact confirmed by the 2014 US Senate Committee Report), the ongoing fear of return to the torture to which he had earlier been subjected and prolonged secret, incommunicado detention.

201. In the applicant's submission, Lithuania's failure to take measures to prevent his transfer from its territory and facilitation of such transfer without seeking any assurances, despite the existence of a real risk that he would be subjected to further treatment contrary to Article 3 constituted a further violation of that Article.

Lithuania knew or ought to have known that he would, if removed, face a real risk of being subjected to torture and ill-treatment under the HVD Programme. Indeed, since his transfer from Lithuania, the applicant has been subjected to treatment contrary to Article 3 during his further incommunicado, secret detention in CIA hands and to this day in Guantánamo, including denial of access to adequate medical care for injuries suffered during his detention over many years.

(ii) The Government

202. The Government submitted that there was no concrete data concerning the treatment to which the applicant or any other detainee allegedly detained with him had been subjected at Detention Site Violet. The Court in the *Abu Zubaydah* case (cited above) had not established that the applicant had been subjected to particularly cruel ill-treatment while detained in Lithuania. In this regard, the Government referred to the information provided in the Audit Report "CIA-Controlled Facilities Operated Under the 17 September 2001 Memorandum of Notification", namely that during the period from July 2005 until February 2006 no enhanced interrogations had been conducted. Besides, according to the publicly available information, the transfer of "high value detainees" from Guantánamo to other locations in 2004 had not resulted in any need for further application of "enhanced interrogation techniques" but rather, had responded to the need to remove those CIA detainees from US jurisdiction, seeking to avoid any possible *habeas corpus* proceedings in the US courts.

(b) The Court's assessment

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

203. 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 v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161; *Selmouni*, 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*, cited above, § 119; *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)*, cited above, § 499; and *Nasr and Ghali*, cited above, § 280).

204. 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*, 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).

205. 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 (UN) 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 UN 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*), cited above, § 500).

206. 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*), cited above, § 501).

207. 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* 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, cited above, § 509; *Husayn (Abu Zubaydah)*, cited above, § 502; and *Nasr and Ghali*, cited above, § 283).

(ii) Application of the above principles to the present case

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

208. As already noted above, in the light of the material in the case file it does not appear that at Detention Site Violet the applicant was subjected to EITs in connection with interrogations (see paragraph 153 above). However, the Court considers that the applicant's experience in CIA custody prior to his detention in Lithuania is an important factor to be taken into account in its assessment of the severity of the treatment to which he was subsequently subjected (see *Abu Zubaydah*, cited above, § 634).

209. The Court has already established beyond reasonable doubt that during his detention in Lithuania the applicant was kept – as any other CIA detainee – under the regime of "standard conditions of confinement" laid down in the DCI Confinement Guidelines (see paragraph 156 above). That regime included, as a matter of fixed, predictable routine, blindfolding or hooding of 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 paragraphs 22-24 and 156 above). 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 *Abu Zubaydah*, cited above, § 635).

210. 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 than [those] the CIA represented to the policymakers and others" and describes them as being "poor" and "especially bleak early in the programme" (see paragraph 40 above). It further states that in respect of the conditions of detention the DCI Confinement Guidelines of 28 January 2003 set forth minimal standards and required only that the facility be sufficient to meet "basic health needs". That, according to the report, in practice meant that a facility in which detainees were kept shackled in complete darkness and isolation, with a bucket for human waste and without heating during the winter months met that standard (see paragraph 22 above).

211. 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 behavioural 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 40 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 24 above).

212. 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 Lithuania or the conditions in which he was transferred to and out of Lithuania. While the intensity of the measures inflicted on him by the CIA might have varied, 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 Lithuania and likewise elsewhere, following his transfer from Lithuania, as an integral part of the HVD Programme (see also *Al Nashiri v. Poland*, cited above, §§ 514-15; *Husayn (Abu Zubaydah)*, cited above, § 510; and *Abu Zubaydah*, cited above, § 639).

213. Considering all the foregoing elements, the Court finds that during his detention in Lithuania 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 also caused by the past experience of torture and cruel treatment in the CIA's hands and fear of his future fate. Even though at that time he had apparently not been subjected to interrogations with the use of the harshest methods, the applicant – having beforehand experienced the most brutal torture – inevitably faced the constant fear that, if he failed to "comply", the previous cruel treatment would at any given time be inflicted on him again (see *Husayn (Abu Zubaydah)*, cited above, §§ 86-89, 99-102, 401 and 416-17; and *Abu Zubaydah*, cited above, § 640). 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)*, cited above, §§ 509-10).

214. Consequently, having regard to the regime of detention to which the applicant must have been subjected in Lithuania and its cumulative effects on him, the Court finds that the treatment complained of is to be characterised as having involved intense physical and mental suffering falling within the notion of "inhuman treatment" under Article 3 of the Convention (see paragraphs 204-205 above, with references to the Court's case-law).

(β) The Court's conclusion as to Lithuania's responsibility

215. The Court has previously found that the Lithuanian authorities 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's extraordinary rendition, secret detention and interrogation operations on Lithuanian territory. It has also found that, given their knowledge and involvement in the execution of the HVD Programme the Lithuanian authorities knew that, by enabling the CIA to detain terrorist suspects – including the applicant – on Lithuania's territory, they were exposing them to a serious risk of treatment contrary to the Convention.

216. It is true that, as the Court held in *Abu Zubaydah* (cited above), the Lithuanian authorities did not know the details of what exactly went on inside Detention Site Violet and did not actually witness the 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 of torture on detainees.

However, under Article 1 of the Convention, taken together with Article 3, Lithuania 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.

Notwithstanding the above Convention obligation, the Lithuanian authorities, for all practical purposes, facilitated the whole process of the operation of the HVD Programme on their territory, created the conditions for it to happen and made no attempt to prevent it from occurring. As held above, on the basis of their own knowledge of the CIA activities deriving from Lithuania'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 Lithuanian territory.

Accordingly, the Lithuanian authorities, on account of their "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 their territory (see paragraph 592; see also *El-Masri*, cited above, §§ 206 and 211; *Al Nashiri v. Poland*, cited above, § 517; *Husayn (Abu Zubaydah)*, cited above, § 512; and *Abu Zubaydah*, § 642).

217. Furthermore, the Lithuanian authorities were aware that the transfer of the applicant to and from their territory was effected by means of "extraordinary rendition", that is, "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and

interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see *El-Masri*, cited above, § 221; *Al Nashiri v. Poland*, cited above, § 518; and *Husayn (Abu Zubaydah)*, 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 160 above). Consequently, by enabling the CIA to transfer the applicant out of Lithuania 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 (see *Abu Zubaydah*, cited above, § 643).

218. There has accordingly been a violation of Article 3 of the Convention, also in its substantive aspect.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

219. The applicant complained that Lithuania was in breach of Article 5 of the Convention since it had collaborated with the CIA, permitting and/or enabling it to establish a secreted detention facility. Lithuania had facilitated and/or assisted the US authorities' rendition of the applicant to and from Lithuania, his secret, incommunicado detention, and his transfer to further arbitrary detention.

Article 5 of the Convention 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

220. The Government restated their position as to Lithuania's responsibility under the Convention and refrained from making any observations on the admissibility and merits of this complaint.

221. The applicant submitted that the respondent State (or its officials) had collaborated with the CIA, permitting and enabling it to establish two facilities on Lithuanian territory for the purposes of secret detention. Through this conduct and the use of special arrangements for rendition flights entering and leaving its territory, Lithuania had facilitated and/or assisted the US authorities' rendition of the applicant to Lithuania, facilitated his secret, incommunicado detention, and his transfer to further, at the material time yet undisclosed, secret detention facilities. The applicant had been arbitrarily detained, unacknowledged and outside of any legal process in Lithuania. The applicant's transfer from Lithuania, permitted and/or enabled by Lithuania, had exposed him to the real and foreseeable risk that he would be subjected to further arbitrary, undisclosed and indefinite detention in flagrant violation of Article 5.

After his transfer from Lithuania, the applicant had indeed been subjected to further secret, undisclosed, incommunicado detention under the HVD Programme and transferred to ongoing arbitrary detention at Guantánamo.

B. The Court's assessment

1. Admissibility

222. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

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

223. 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).

224. 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)*, cited above, § 522; and *Nasr and Ghali*, cited above, § 297).

225. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see *Aksoy*, cited above, § 78, and *El-Masri*, cited above, § 232).

The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see *Kurt v. Turkey*, 25 May

1998, §§ 123-24, *Reports* 1998-III; and *El-Masri*, cited above, § 233; see also *Al Nashiri v. Poland*, cited above, § 529; *Husayn (Abu Zubaydah)*, cited above, § 523; and *Nasr and Ghali*, cited above, § 298).

(b) Application of the above principles to the present case

226. 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, §§ 531-32; *Husayn (Abu Zubaydah)*, cited above, §§ 525-26; and *Nasr and Ghali*, cited above, §§ 302-03). The Court does not see any reason to hold otherwise in the present case.

227. As the Court held in *Al Nashiri v. Poland* (cited above, § 530) and *Husayn (Abu Zubaydah)* (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, namely 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.

228. The rendition operations 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, thus ensuring 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 by those authorities, such as the customising of the premises for the CIA's needs or the provision of security and logistics, constituted 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)*, cited above, § 524).

229. In respect of the applicant's complaint under the substantive aspect of Article 3, the Court has already found that the Lithuanian authorities were aware that he had been transferred from their territory by means of "extraordinary rendition" and that by enabling the CIA to transfer him to its other secret detention facilities, they exposed him to a foreseeable serious risk

of further ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraphs 217-218 above). These conclusions are likewise valid in the context of the applicant's complaint under Article 5. In consequence, Lithuania's responsibility under the Convention is engaged in respect of both the applicant's secret detention on its territory and his transfer from Lithuania to another CIA detention site.

230. There has accordingly been a violation of Article 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

231. The applicant further complained that Lithuania had violated his rights under Article 8 by permitting and/or enabling the CIA to subject him to physical abuse and to deprive him of any contact with his family.

Article 8 of the Convention states:

> "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

232. The Government refrained from making any submissions in respect of this complaint.

2. The applicant

233. The applicant said that Lithuania had violated his rights under Article 8 by permitting the CIA to hold him in secret detention on its territory and thus enabling the CIA to subject him to physical abuse and to deprive him of any contact with his family. The arbitrary detention and ill-treatment to which the applicant had been subjected in Lithuania had interfered with his physical and mental integrity and had resulted in a severe deterioration of his physical well-being, in violation of Article 8. Furthermore, the entire purpose of the CIA HVD Programme had been to disorient him and interfere with his psychological and physical integrity in order to extract information from him. By facilitating his transfer from Lithuania the authorities had exposed him to a continuing violation of his rights under Article 8, both during his secret detention and his ongoing detention at Guantánamo. To this day, the applicant's communication with his family had been so severely restricted that it was virtually non-existent.

B. The Court's assessment

1. Admissibility

234. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

235. The notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the mental 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)*, 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*, cited above; and *Husayn (Abu Zubaydah)*, cited above).

236. Having regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention (see paragraphs 217-218 and 229 above), the Court is of the view that Lithuania'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)*, cited above, § 533).

237. There has accordingly been a violation of Article 8 of the Convention.

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

238. The applicant complained that Lithuania's facilitation of his transfer from its territory, although the authorities knew – or ought to have known –

at the time that there was a real and serious risk that he would be transferred to a jurisdiction of military commissions where he would be subjected to a flagrantly unfair trial, had breached its obligations under Article 6 of the Convention.

Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. The parties' submissions

1. The Government

239. The Government submitted that, according to the Court's case-law, a "flagrant denial of justice" was a stringent test in which the unfairness of the proceedings had to go beyond mere irregularities or lack of safeguards in the trial procedures. What would be required for a denial of justice was a breach of the principles of fair trial amounting to a nullification or destruction of the very essence of the right guaranteed by Article 6 of the Convention. In that regard, they relied on the judgment in *Othman (Abu Qatada)* (cited above).

240. They further emphasised that in 2012, in the proceedings in the case of *US v. Mohammad et al.* before the Military Commission, where Khaled Sheikh Mohammed and four other men, including Mustafa Ahmed al-Hawsawi, had been charged with plotting the terrorist attacks of 11 September 2001**,** the issue of the admissibility of evidence had been analysed in depth with particular attention. A new judge, an Air Force colonel, W, Shane Cohen, who had taken over the case in June 2019 would consider whether each of the five defendants' F.B.I. interrogations should be admissible (the FBI "clean team" had re-questioned high value detainees, including Mustafa Ahmed al-Hawsawi, in January 2007 with a view to obtaining voluntary statements untainted by torture).

241. Moreover, all current military commission proceedings at Guantánamo were governed by the 2009 Military Commission Act, which had instituted significant reforms to the system of military commissions. These reforms included a prohibition on the admission at trial of statements obtained through cruel, inhuman or degrading treatment, in addition to torture, except for the use of statements by individuals alleging that they had been subjected to torture or similar treatment as evidence against the persons accused of committing the torture or mistreatment.

Since the procedure before the military commission had improved, it could not be regarded as violating the essence of the fair trial guarantees under Article 6 § 1 of the Convention.

2. The applicant

242. The applicant reiterated his complaint, adding that his ongoing arbitrary detention, with the denial of his fair trial rights during his trial on capital charges before the Guantánamo military commission, underscored that he had continually been facing a grave denial of justice.

243. The risk that he would be subjected to an unfair trial continued unabated, including as a result of concerns regarding the possible use of compromised evidence, excessive delays, and the destruction of evidence and access to evidence. The applicant had been detained without being charged for five years, before being brought before the military commission. He had initially faced the proceedings without any legal representation. The case had now been ongoing for fifteen years without any indication of a potential resolution for the applicant. In the circumstances, he faced a flagrant denial of justice in breach of Article 6 of the Convention.

B. The Court's assessment

1. Admissibility

244. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

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

245. 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* 1998-IV, and *Öcalan*, cited above, § 112).

246. 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)

247. 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 (ibid., §§ 264-65).

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),* cited above, § 554).

(b) Application of the above principles to the present case

248. In *Al Nashiri v. Poland* (cited above, 566-569) and *Al Nashiri v. Romania* (cited above, §§ 719-22) 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 Mr Al Nashiri's transfers from Poland and Romania, 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 29-31 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 30 above).

The Court considered that at the time of Mr Al Nashiri's transfers from Poland and Romania 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 or independence of the executive as required of a "tribunal" under the Court's case-law (see also paragraph 245 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

(iii) there was a sufficiently high probability of admission of evidence obtained under torture in trials against terrorist suspects (see *Al Nashiri v. Poland,* §§ 566-67, and *Al Nashiri v. Romania*, §§ 719-20, both cited above).

249. 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 (see *Al Nashiri v. Romania*, cited above, § 720).

250. Having regard to the fact that the applicant was transferred out of Lithuania on 26 March 2006 when the same rules governing the procedure before the military commission applied (see paragraphs 29-33 above), the same considerations are valid in the present case.

As in *Al Nashiri v. Poland* (cited above, § 568) and *Al Nashiri v. Romania* (cited above, § 721) the Court would also refer to the Resolution of 26 June 2003 of the Parliamentary Assembly of the Council of Europe, 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". Lithuania, 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, 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 Lithuania'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 in the US proceedings, engaged its responsibility under Article 6 § 1 of the Convention (see also paragraph 160 above).

251. There has accordingly been a violation of Article 6 § 1 of the Convention.

VIII. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 6 TO THE CONVENTION

252. The applicant complained that by knowingly permitting and/or enabling the CIA to transfer him from its territory, despite substantial grounds for believing that there was a real and serious risk that he would be sentenced to the death penalty in the procedure before the US military commission, Lithuania had violated Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention.

Article 2 of the Convention, in so far as relevant, reads:

> "1. Everyone's right to life shall be protected by law. ...

Article 1 of Protocol No. 6 to the Convention states:

> "The death penalty shall be abolished. No-one shall be condemned to such penalty or executed."

A. The parties' submissions

253. The Government made no particular observations on this part of the application.

254. The applicant reiterated his complaint. He also added that after his detention in Lithuania, he had been transferred to further detention under the HVD Programme, before his final transfer to detention in Guantánamo. The US Government had been seeking the death penalty in the proceedings against him before the military commission. At the time of his transfer from Lithuania, the Lithuanian authorities had known that the applicant, considered a terrorist, would face a serious risk of being sentenced to the death penalty if he was transferred to US custody as part of the CIA's extraordinary rendition programme. Lithuania had not then, or since, sought assurances that he would not face the death penalty, contrary to its obligations under the Convention.

B. The Court's assessment

1. Admissibility

255. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

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

256. 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*, cited above, § 99; *Al Saadoon and Mufdhi*, § 123; *Al Nashiri v. Poland*, cited above, § 576; see also paragraph 160 above).

257. 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

258. As in *Al Nashiri v. Poland* (cited above, § 578) and *Al Nashiri v. Romania* (cited above, § 728), the Court finds that at the time of the applicant's transfer from Lithuania there was a substantial and foreseeable risk that he could be subjected to the death penalty following his trial before the military commission. Considering the fact that the applicant was arraigned on capital charges on 5 June 2008 and that since then he has been on trial facing the prospect of the death penalty (see paragraphs 80-81 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 Lithuania'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 paragraphs 250-51 above).

259. 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.

IX. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLES 3, 5 AND 8 OF THE CONVENTION

260. The applicant complained that Lithuania was in breach of Article 13 of the Convention by failing to provide him with an effective remedy in respect of serious violations of his rights under Articles 2, 3, 5, 6 and 8 of the Convention and Article 1 of Protocol No. 6 to the Convention.

Article 13 of the Convention states:

> "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

261. The Government have not made any specific observations apart from stating that the criminal investigation in Lithuania was compliant with the requirements of Articles 3 and 13 of the Convention.

262. The applicant maintained that Lithuania had violated Article 13 by its failure to provide him with an effective domestic remedy by which to challenge the alleged breaches of Articles 2, 3, 5, 6 and 8 of the Convention and Article 1 of Protocol No. 6 to the Convention. Despite having brought his allegations to the attention of the Lithuanian authorities in 2013, the applicant has been denied a thorough and effective investigation, capable of leading to the identification and punishment of those responsible and including his effective access to the investigatory procedure. The decision to allow his transfer from Lithuania's territory to CIA custody had never been reviewed with reference to the risk of the imposition of the death penalty, ill-treatment or a flagrant breach of his right to liberty and security, either by a judicial authority or by any other authority, providing sufficient guarantees that an effective remedy would be available.

B. The Court's assessment

1. Preliminary remarks

263. The Court, having regard to its power to decide on the characterisation to be given in law to the facts of a complaint (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018 § 126) whereby it may examine a complaint under Articles or provisions of the Convention that are different from those relied upon by the applicant,

considers that the present complaint should be examined under Article 13 of the Convention taken in conjunction with Articles 3, 5 and 8 of the Convention.

2. Admissibility

264. 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 170 above). The complaints under Article 3 in its substantive limb, and Articles 5 and 8 of the Convention have likewise been declared admissible. It thus follows that the remainder of the application must be declared admissible.

3. Merits

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

265. 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* 1998-I, and *Mahmut Kaya*, cited above, § 124).

266. Where an individual has an arguable claim that he or she 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, §§ 161-62, ECHR 2002; *Assenov and Others*, cited above, §§ 114 et seq.; *Aksoy*, cited above, §§ 95 and 98; and *El-Masri*, cited above, § 255).

267. 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).

268. 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 or her 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, §§ 546-48; and *Husayn (Abu Zubaydah),* cited above, §§ 540-43).

(b) Application of the above principles to the present case

269. 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. The complaints under these Articles are therefore "arguable" for the purposes of Article 13 and the applicant should accordingly have been able to avail himself of effective practical remedies capable of leading to the identification and punishment of those responsible for violations of his rights and to an award of compensation, as required by that provision (see also *El-Masri*, cited above, § 259; *Al Nashiri v. Poland*, cited above, § 550; and *Husayn (Abu Zubaydah)*, cited above, § 544).

For the reasons set out in detail above, the Court has found that the criminal investigation in Lithuania fell short of the standards of the "effective investigation" that should have been carried out in accordance with Article 3 of the Convention. For the reasons that prompted the Court to find a violation of the procedural aspect of Article 3, 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 Lithuania an "effective remedy" by which to assert his claims of a violation of Articles 3, 5 and 8 of the Convention.

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

X. APPLICATION OF ARTICLE 46 OF THE CONVENTION

271. Article 46 of the Convention states, in so far as relevant:

> "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

272. The applicant sought a ruling from the Court indicating that the Lithuanian Government should take certain specific individual measures in execution of the judgment, as follows:

(1) Make representations on the applicant's behalf to the United States seeking to remove or limit the effects of the Convention violations committed by Lithuania (including to put an end to his arbitrary detention, not to apply the death penalty in the case against him, and not to use evidence obtained under torture against him) by all available means, including using all possible steps to obtain assurances from the US authorities.

(2) Seek the cooperation and assistance of the US Government in order to establish the full and precise details of the applicant's treatment in Lithuania.

(3) Provide an apology for and acknowledgement by Lithuania of the applicant's treatment and the State's responsibility for such treatment.

(3) Reactivate and advance the pending criminal investigation into the circumstances and conditions under which the applicant had been brought into Lithuania, his treatment while there and his subsequent removal, so as to enable the identification, investigation, prosecution and, where appropriate, punishment of all those responsible. This investigation should be overseen by the Committee of Ministers of the Council of Europe.

(4) Ensure that the pending criminal investigation:

(a) be completed within a reasonable time, considering that more than 17 years had passed since the applicant had been rendered to and detained in Lithuania;

(b) be undertaken in compliance with Chapter III of the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Istanbul Protocol"), and that in this context Lithuania should submit an investigation plan;

(c) would allow for independent legal representation of the applicant as an interested party in the investigation (at the expense of Lithuania);

(d) would provide the applicant, via REDRESS with the information envisaged in the Istanbul Protocol Chapter III, § 89:

> "From the outset, the alleged victim should be informed, wherever possible, of the nature of the proceedings, why his or her evidence is being sought, if and how evidence offered by the alleged victim may be used. Investigators should explain to the person which portions of the investigation will be public information and which portions will be confidential. The person has the right to refuse to cooperate with all or part of the investigation. Every effort should be made to accommodate his or her schedule and wishes. The alleged torture victim should be regularly informed of the progress of the investigation. The alleged victim should also be notified of all key hearings in the investigation and prosecution of the case. The investigators should inform the alleged victim of the arrest of the suspected perpetrator. Alleged victims of torture should be given contact information for advocacy and treatment groups that might be of assistance to them. Investigators should work with advocacy groups within their Jurisdiction to ensure that there is a mutual exchange of information and training concerning torture."

(e) would conclude that all those individuals that were to be considered, upon proper investigation, to be responsible for crimes committed against the applicant on Lithuanian territory should be subject to prosecution and appropriate punishment in accordance with the gravity of the crimes; the State should also clarify that there could be no legal impediments to accountability for the crimes in question under Lithuanian law; and

(f) involved steps to publicise the results of the investigation so that the public in Lithuania would be informed of the truth relating to the facts of this case.

273. The Government, relying on the Court's well-established case-law on the matter, underlined that the respondent State remained free to choose the means by which it would discharge its legal obligation under Article 46 of the Convention, provided that such means were compatible with the conclusions set out in the Court's judgment. In this regard, the discretion left to the State was grounded on the principle of subsidiarity which was fundamental in the Convention system. In its supervision, the Committee of Ministers took into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment.

274. In conclusion, they stated that the request with regard to the domestic criminal investigation was too detailed. In the Government's view, the Court should not depart from its case-law in similar cases and refrain from ruling on individual measures under Article 46 of the Convention as there was no need to doubt the competence of the Committee of Ministers to supervise the execution process properly. In this regard, they noted that the execution procedure enabled the representatives of the applicant, as well as non-governmental organisations, to actively participate in the supervision process and submit their comments.

B. The Court's assessment

275. The Court observes that the present case, as previous similar cases (see *Al Nashiri v. Romania*, §§ 738-743; and *Abu Zubaydah*, cited above, §§ 680-84) 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 the above cases and in *Al Nashiri v. Poland* (cited above, §§ 586-88, with further references to the Court's case-law, in particular to *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; *Savriddin Dzhurayev v. Russia*, no. 71386/10, §§ 138, 252-54 and 256, ECHR 2013 (extracts); and *Al-Saadoon and Mufdhi*, cited above, § 170).

276. The Court has already found that the Lithuanian authorities, in the context of their complicity in the operation of the CIA HVD Programme on Lithuania's territory, exposed the applicant to the risk of the death penalty being imposed on him. Even though the proceedings against him before the military commission 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 Lithuanian 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*, § 589, and *Al Nashiri v. Romania,* § 739, both cited above).

277. As regards other possible representations to the US authorities by the respondent State, as requested by the applicant, the Court would reiterate its finding that, by enabling the transfer of the applicant to another CIA detention site, the Lithuanian authorities had exposed him to a foreseeable risk of continued secret, incommunicado and otherwise arbitrary detention, in breach of Article 5 of the Convention as well as to further ill-treatment and conditions of detention, in breach of Article 3. The Court is mindful of the fact that the Lithuanian authorities have already sought assistance and judicial cooperation from the US authorities in the context of the domestic criminal investigation. However, in the opinion of the Court, the treaty obligation of Lithuania under Article 46 of the Convention to take the necessary individual measures to redress as far as possible the violation found by the Court, requires that the Lithuanian authorities attempt to make further representations to the US authorities with a view to removing or, at the very least seeking to limit, as far as possible, the effects of the above Convention violations suffered by the applicant.

278. In the context of individual measures to be adopted by the respondent State, the applicant also contended that the Lithuanian authorities were obliged to reactivate and advance the pending criminal investigation into the circumstances and conditions under which he had been brought to, and detained in, Lithuania and to ensure the punishment of those responsible.

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*, cited above, § 202; *Benzer and Others v. Turkey,* no. 23502/06, §§ 218-19, 12 November 2013; 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).

279. The Court considers that, having regard in particular to the nature of the procedural violation of Article 3 found in the present case, the obligation incumbent on Lithuania under Article 46 inevitably requires that all necessary steps to reactivate and advance the still pending criminal investigation be taken without delay. Thereafter, in accordance with the applicable Convention principles, 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 Lithuania, treated in Lithuania and thereafter removed from Lithuania have been elucidated further, so as to enable the identification, accountability and, where appropriate, punishment of those responsible. As stated above, the securing of proper accountability of those responsible for enabling the CIA to run Detention Site Violet on Lithuanian territory is conducive to maintaining confidence in the adherence of the State's institutions to the rule of law (see paragraph 194 above). The Court notes that on the basis of the elements in the case file, including the findings of the 2014 US Senate Committee Report in respect of Detention Site Violet, there appear to be no insurmountable practical obstacles to the hitherto lacking effective investigation being carried out in this manner (see, *mutatis mutandis, Abuyeva and Others v. Russia*, no. 27065/05, §§ 240-41, 2 December 2010). It is not, however, for the Court to address to the respondent State detailed, prescriptive injunctions of the kind requested by the applicant. 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,* ibid., § 243, and *Al Nashiri v. Poland*, cited above, § 586, with further references to the Court's case-law).

280. For the remainder, the Court is satisfied that the issues raised by the applicant in his requests for specific measures are adequately addressed by its findings of violations of the Convention.

XI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

281. 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

282. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. He submitted that multiple violations of the Convention

in his case had caused significant harm to his mental and physical health and thus should be reflected in just satisfaction awarded by the Court. Among the factors relevant to an assessment of non-pecuniary damage were (i) the seriousness of the violations of Articles 3, 5 and 8 of the Convention and (ii) their duration, context and lasting impact on the applicant's mental and physical health. The CIA HVD Programme in which Lithuania had been complicit had had, as its primary goal, the unfettered extraction of information through the EITs, interrogation measures recognised as amounting to torture. Additionally, secret detention and enforced disappearance were of themselves a form of torture, involving the manipulation of the complete vulnerability of the individual with a profound psychological impact. In that regard, he referred to the second affidavit of Ms Jennifer Williams (see paragraph 82-83 above), setting out the details of the continuing consequences of torture, ill-treatment and secret detention on his health.

283. The Government, taking into account the Court's awards in similar cases, did not object to granting the applicant's claim should the Court find a violation of his rights under the Convention.

284. Having regard 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)*, cited above, § 567; and *Nasr and Ghali*, cited above, § 348), the Court awards him EUR 100,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

285. The applicant also claimed 34,620 pounds sterling (GBP) for the costs and expenses incurred before the Court. He submitted a detailed, itemised statement of claim, indicating the services performed by his representative before the Court and four other persons involved in the work on the case, including two interns.

286. The Government observed that it appeared from the case material and publicly available information that REDRESS had provided its services on a *pro bono* basis, especially taking into account that REDRESS was a charity, non-profit organisation. Besides, as far as the work of interns was concerned, in the absence of information as to whether their internship had been remunerated the claimed amount could not be considered as actually incurred. Furthermore, it should be noted that while there were several authority forms submitted to the Court, none of the four persons providing services in addition to Mr Esdaile had been included among the applicant's representatives. Should the Court award costs and expenses, it would be

useful to award them to REDRESS as the applicant's legal representative before the Strasbourg Court.

287. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 30,000 for the proceedings before the Court, to be paid directly to REDRESS, plus any tax that may be chargeable on that amount.

C. Default interest

288. 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 Lithuania within the meaning of Article 1 of the Convention and that the responsibility of Lithuania is engaged under the Convention;

2. *Declares* the application admissible;

3. *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;

4. *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 Lithuanian territory and to transfer him from that territory in spite of a real risk that he would be subjected to treatment contrary to Article 3;

5. *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;

6. *Holds* that there has been a violation of Article 8 of the Convention;

7. *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 would face a flagrant denial of justice;

8. *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 would be subjected to the death penalty;

9. *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 complaints under Articles 3, 5 and 8 of the Convention;

10. *Holds*
    (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
        (i) to the applicant EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable on that amount, in respect of non–pecuniary damage;
        (ii) to REDRESS EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable on that amount, in respect of costs and expenses;
    (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *Dismisses*, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 January 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President