Abu Zubaydah v Lithuania

Application 46454/11

Supplementary Submissions to the European Court of Human Rights

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Introduction

1. On 25 March 2015 the Court wrote to the Applicant's representatives inviting them to produce any further evidence on which they wish to rely and to submit "any comments they wish to make on the facts, evidence and legal issues arising in the case in the light of the Court's judgments in *El-Masri v Former Republic of Macedonia*, *Al Nashiri v Poland* and *Husayn (Abu Zubaydah) v Poland.*"[1] The Court invited the government's submissions on the same terms. The Court also asked the government whether, in light of 'developments which took place after communication,' the government wishes to maintain its objection to the validity of the application and the Applicant's legal representation.
2. These brief submissions are focused in two parts. Part A draws the Court's attention to developments of fact since the Applicant's original application (27 October 2011), supplementary submissions (10 September 2012) and the response to the government's observations (15 July 2013) were filed. Supplementary information will be presented on three issues: i) the Applicant's torture and secret detention within the secret extraordinary rendition programme, ii) Lithuanian knowledge of and involvement in that programme and iii) the continuing failure of the Lithuanian authorities to conduct an investigation, acknowledge the truth, ensure accountability or afford reparation, despite growing international pressure.
3. Section B addresses legal issues arising in light of the rendition cases decided by this Court since our previous submissions. The legal arguments submitted by the Applicant to date are consistent with the approach the Court has adopted in subsequent judgments. The submissions refer in particular to the relevance of the Court's approach, jurisprudence and findings in the *Abu Zubaydah v Poland* case. As this case concerns the same applicant and materially similar issues, and is the most recent authoritative statement of law on relevant issues, the Court would be expected to follow closely the approach adopted in that case.
4. These submissions do not reiterate the facts and argument set out in previous submissions, which remain valid. Rather, they indicate a more voluminous body of evidence now in the public domain, including most notably, from the authoritative United States Senate Select Committee on Intelligence Report (SSCI Report) and the jurisprudence of this Court,

[1] Letter, 25 March 2015, from S Naismith to H Duffy. Cases respectively noted; El-Masri v Former Yugoslav Republic of Macedonia (Application no. 39630/09), ECHR, Judgment, 13 December 2012; Al Nashiri v Poland, (Application no. 28761/11), ECHR, Judgment, 24 July 2014; Case of Husayn (Abu Zubaydahh) v Poland, (Application no. 7511/13) ECHR, Judgment, 24 July 2014 (hereafter 'Abu Zubaydah v Poland').

which provides further support to the Applicant's case and renders Lithuania's responsibility for the violation of the Applicant's rights beyond reasonable dispute.

Part A – SUPPLEMENTARY FACTUAL INFORMATION

I. Evidence concerning the rendition programme and Abu Zubaydah: US Senate Select Committee on Intelligence Report

5. Since submissions have been lodged in this case, information has continued to emerge regarding the purpose, modus operandi and brutality of the CIA-operated rendition, secret detention and interrogation programme. On the international level, enquiries and reports have been concluded by several entities including for example, the Committee against Torture [2], the European Parliament [3] and reports by UN Special Rapporteur Ben Emmerson. [4] Multiple national level enquires have probed into the nature of the programme and the involvement of multiple states. Most significant among them is undoubtedly the United States Senate Select Committee on Intelligence's enquiry. The United States Select Committee on Intelligence conducted a detailed inquiry into CIA overseas detention, during which it had unprecedented access to CIA files. It produced a report of more than 6000 pages, which remains classified, and a much shorter and heavily redacted 524 page summary was released on 9 December 2014.[5]

[2] E.g. Committee against Torture third periodic report of Lithuania (CAT/C/SR.1242 and CAT/C/SR. 1243) 2014

[3] European Parliament, Temporary committee on use of European countries by the CIA, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", (2006/2200(INI)), A6-0020/2007, 30 January 2007 available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN; European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapporteur Hélène Flautre, "Report on Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA: Follow-Up of the European Parliament TDIP Committee Report", (2012/2033(INI)), A7-0266/2012, 2 August 2012, available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0266&language; See also European Parliament Resolution, Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA, (2013/2702(RSP)), 10 October 2013, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0418+0+DOC+XML+V0//EN.

[4] United Nations, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter- terrorism initiatives", A/HRC/22/52, 1 March 2013, (Special Rapporteur Emmerson, Framework Principles), available at www.ohchr.org/documents/hrbodies/hrcouncil/.../a-hrc-22-52_en.pdf. There have been mutliple reports by journalists and civil society too voluminous to note here, but which included eg USA, Crimes and Impunity, Amnesty International 2015.

[5] *See* Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary, Approved Dec. 13, 2012, Updated for Release April 3, 2014, available at http://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf, (Senate Report), 'Findings and Conclusions', p. 3.

6. Undoubtedly, more relevant information is contained in the full report, including Volume III which reportedly includes details on detainees held in Lithuania,[6] and the Court is urged to request a full, unredacted version of the report from the US authorities.
7. In *Abu Zubaydah v Poland*, decided on 24 July 2014 and *Al Nashiri v Poland*[7] of the same date, this Court set out in some detail the background of the ERP. This account is notably consistent with and borne out by other information in the public domain, including the summary Senate report.
8. However, the summary provides greater detail than previously available, lays bare a systematic programme of detainee torture and abuse and, with no less than 1001 unredacted references to Abu Zubaydah specifically, provides important details concerning the treatment of the Applicant and the deliberate generation of misinformation in relation to his case. Key elements of the report of relevance to the Applicant's case against Lithuania are highlighted below.

Nature and Brutality of the Applicant's Treatment in CIA Custody

9. The Senate Report underscores the relevance and accuracy of this Court's findings of fact in the *Abu Zubaydah* and *al Nashiri v Poland* cases. Moreover, it provides additional critical information regarding the treatment of the Applicant in CIA detention, revealing that Abu Zubaydah's treatment was "brutal and far worse" than previously disclosed.[8]
10. Contrary to claims from the CIA, the Report found that "[r]ecords do not support CIA representations that the CIA initially used an 'an open, non-threatening approach' to the interrogation of the Applicant, or that interrogations began with the 'least coercive technique possible' and escalated to more coercive techniques only as necessary."[9] The Senate Report states that from the outset, Abu Zubaydah was subject to enhanced interrogation techniques continuously for days or weeks at a time.[10]
11. The Senate Report, reflecting the Court's judgment in the case against Poland and our earlier submissions in this case, documents conditions of detention and interrogation techniques, including "wallings" (slamming detainees against a wall), cramped confinement in small boxes and in larger coffin-shaped boxes, sleep deprivation (usually

[6] Senate Report, Executive Summary, footnote 582, p. 99.
[7] (Application no. 28761/11), ECHR Judgment, 24 July 2014.
[8] *See* Senate Report, Findings and Conclusions, p. 3.
[9] Senate Report, Findings and Conclusions, p. 3.
[10] Senate Report, Findings and Conclusions, p. 3.

standing or in stress positions) for up to 180 hours, the combined use of stress positions, nudity, cold, noise and white light, and water boarding.

12. However, the Report also illustrates the even greater degree of brutality and cruelty employed in practice than previously documented, with physical, mental and sexual violence including life-threatening beatings, mock executions, Russian roulette and threats of sexual violence on family members, among the grotesque catalogue of cruelty meted out to rendition victims.[11]

13. Passages relating specifically to Abu Zubaydah include, for example, the following information:
    - the intensity and impact of the waterboarding of Abu Zubaydah is described as "physically harmful, inducing convulsions and vomiting. Abu Zubaydah ... became completely unresponsive, with bubbles rising through his open, full mouth."[12]
    - Abu Zubaydah and other prisoners were subjected to sexual violence in the form of forced anal penetration for punitive purposes. The report details excessive rectal examinations[13] and rectal feeding of prisoners "as a means of behavior control".[14] The report makes clear that several detainees were subject to, or threatened with, rectal rehydration without medical necessity,[15] and that Abu Zubaydah received "rectal fluid resuscitation" for "partially refusing liquids."[16] The Senate Report details that the Office of Medical Services (OMS) described rectal rehydration, euphemistically, as "helping to 'clear a person's head".[17] They boasted, "we used the largest Ewal [sic] tube we had".[18] Rectal feeding and rehydration was carried out with excessive force and deliberate cruelty[19] and in some cases has caused long term health implications.[20]

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[11] These submissions detail only those violations known to have been of direct relevance to the Applicant's case.

[12] Senate Report, Findings and Conclusions, at p. 3.

[13] Senate Report, Executive Summary, p. 488. [Note: The Senate Report describes Abu Zubaydahh being tense, seemingly in response to a recent rectal examination. The corresponding footnote (2566) does not mention Abu Zubaydahh specifically but states that CIA leadership was informed of allegations that rectal examinations were performed with 'exceeding force' on at least two detainees.]

[14] Senate Report, Executive Summary, footnote 584, p. 100.

[15] Senate Report, Executive Summary, p. 100.

[16] Senate Report, Executive Summary, footnote 584, p. 100.

[17] Senate Report Executive Summary, p. 83, referring to the use of this technique on KSM.

[18] Senate Report, Executive Summary, footnote 584, p. 100, 'Majid Khan's "lunch tray," consisting of hummus, pasta with sauce, nuts, and raisons was "pureed" and rectally infused.'

[19] E.g. Senate Report, Executive Summary, footnote 584, p.100, on the 'excessive force' employed during anal rehydration and the serious injuries, including "chronic hemorrhoids, an anal fissure, and symptomatic rectal prolapse," caused to at least one detainee.

[20] Senate Report, Executive Summary, footnote 584, p. 100, "CIA records indicate that one of the detainees, Mustufa al-Hawsawi was later diagnosed with chronic hemorrhoids, an anal fissure and symptomatic rectal prolapse,"

- Abu Zubdaydah was also subject to the deliberate withholding of medical care as an interrogation technique. The denial of medical care upon capture lead to the deterioration of bullet wounds sustained during his capture and may have contributed to the loss of his eye.[21]

14. The Report indicates that the CIA sought and was granted presidential approval to clandestinely host Abu Zubaydah in black sites, specifically to avoid having to declare his detention to the International Committee of the Red Cross (ICRC) and to prevent access to US Courts. Secret foreign sites were preferred over Guantanamo Bay, Cuba, given concern that secrecy could not be maintained and about the "possible loss of control to US military and/or FBI."[22]
15. The extent to which the CIA was unprepared for the rendition programme is made clear, noting that it did not commence training its officers on interrogation techniques until 3 months after already using the enhanced interrogation techniques on Abu Zubaydah.[23] The techniques were developed by psychologists with no experience in interrogations or counter-terrorism.[24]
16. The Report provides information demonstrating that during one early period of captivity, the CIA subjected the Applicant to its enhanced interrogation techniques on a near 24-hour-per-day basis.[25]
17. The torture continued despite the interrogators having come to the conclusion that it was highly unlikely he had the information they sought.[26]
18. The Report suggests that Abu Zubaydah frequently cried, begged and pleaded, denying he had information on threats to the United States, but to no avail.[27]

Misinformation Concerning the Applicant's Role in Al-Qaeda and Information Provided through Torture

19. The Senate Report makes it clear that Abu Zubaydah was not who US government officials thought he was when he was captured and tortured. The Report also documents in the clearest terms how much misinformation has been generated and manipulated in

[21] Senate Report, Findings and Conclusions, p. 3; Senate Report, Executive Summary, pp. 111-2 and p. 491.
[22] Senate Report, Executive Summary, p. 22.
[23] Senate Report, Findings and Conclusions, p. 10.
[24] Senate Report, Findings and Conclusions, p. 11.
[25] Senate Report, Executive Summary, p. 40.
[26] Senate Report, Executive Summary, p. 42.
[27] Senate Report, Executive Summary, p. 42.

relation to Abu Zubaydah.[28] Assertions reiterated by the CIA, long after they were known to be false, are illuminated throughout the Report. The following excerpt of the Report (pages 410-411) illustrates the Report's findings:

> *"Much of the information provided by the CIA to the OLC was unsupported by CIA records. Examples include:*
> *Abu Zubaydah's Status in Al-Qa'ida: The OLC memorandum repeated the CIA's representation that Abu Zubaydah was the "third or fourth man" in al-Qa'ida." This CIA assessment was based on single-source reporting that was recanted prior to the August 1, 2002, OLC legal memorandum. This retraction was provided to several senior CIA officers, including [redacted] CTC Legal, to whom the information was emailed on July 10, 2002, three weeks prior to the issuance of the August 1, 2002, OLC memorandum. The CIA later concluded that Abu Zubaydah was not a member of al Qa'ida.*
> *Abu Zubaydah's Role in Al-Qa 'ida Plots: The OLC memorandum repeated the CIA's representation that Abu Zubaydah "has been involved in every major terrorist operation carried out by al Qaeda," and that Abu Zubaydah "was one of the planners of the September 11 attacks". CIA records do not support these claims.*
> *Abu Zubaydah's Expertise in Interrogation Resistance Training: The OLC memorandum repeated the CIA's representation that Abu Zubaydah was "well-versed" in resistance to interrogation techniques, and that "it is believed Zubaydah wrote al Qaeda's manual on resistance techniques."" A review of CIA records found no information to support these claims. […]*
> *Abu Zubaydah's Withholding of Information on Pending Terrorist Attacks: The OLC memorandum repeated CIA representations stating that "the interrogation team is certain" Abu Zubaydah was withholding information related to planned attacks against the United States, either within the U.S. homeland or abroad. CIA records do not support this claim. […]"*

[28] The CIA provided inaccurate information to the Office of Legal Counsel on Abu Zubaydah's status within al-Qaeda, its certainty that Abu Zubaydah was withholding of information, and how the techniques were used against him. See for example Senate Report, Findings and Conclusions, p. 5. Note also that CIA reports acknowledge that Zubaydah was "miscast" as a senior terror leader and that claims about his involvement with al-Qaeda were "inaccurate." See also, ´misconceptions´ about Afghanistan training camps with which Abu Zubaydah was associated resulting in reporting that miscast Abu Zubaydah as a senior al-Qaeda lieutenant and the CIA assessment that concluded that "I do not believe that Abu Zubaydah was as wired with al Qaida as we believed him to be prior to capture", at Senate Report, Executive Summary, p. 466, and p. 410 ("Abu Zubaydah was not a member of al Qaeda)".

20. The Senate Report also demonstrates that government officials withheld and manipulated information from the public and oversight bodies, regarding the 'effectiveness' of the enhanced interrogation techniques, including by making false public assertions that the torture of Abu Zubaydah and others led to valuable actionable intelligence. This contributes to the Committee's first finding that "*based on a review of CIA interrogation records […] the use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information...*".[29]

Commitment to Detain the Applicant, Incommunicado, for Life

21. The Senate Report reveals concerted efforts to ensure that Abu Zubaydah would never be granted access to justice.
22. According to the Report, because of the treatment CIA agents planned to subject the Applicant to, they sought (and received) assurances that Abu Zubaydah would be held *incommunicado* for the remainder of his life. The Report cites a CIA cable which states as follows: *"especially in light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life"*.[30] The Reply cable confirms: "*[Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life."*[31]
23. Black site detention on foreign soil was specifically designed to remove the individuals from the protection of the law and to preclude any possibility of gaining access to justice. The report makes clear that the CIA was reliant on foreign countries cooperation in order to sustain the denial of justice, moving individuals on if there was a risk of oversight; had those countries not agreed to "host" these facilities, the CIA would have been forced to "curtail" their interrogation and detention program and give these detainees access to counsel.[32]

[29] Senate Report, Findings and Conclusions, p. 2.
[30] Senate Report, Executive Summary, p. 35.
[31] Senate Report, Executive Summary, p. 35.
[32] Senate Report, Executive Summary, pp. 150-151.

II. Evidence of Black Site Detention in Lithuania: SSCI Report on Detention Site Violet

24. Information that has continued to unfold since the Applicant's original submissions leaves no plausible room for doubt that Lithuania hosted black sites on its territory. Support for the Applicant's allegations regarding the Lithuanian role comes from several sources, but the key source must again be the Senate Committee Report, given its extraordinary level of access.
25. The Senate Report does not identify cooperating states by name. However, its description of one 'Detention Site Violet' has led commentators, NGOs, journalists and investigators to the consistent conclusion that this site was in Lithuania.[33] Among these secondary reports is the analysis by Reprieve, which summarises detailed information on three sites and compares it to public source data to show that site Violet was in Lithuania.
26. The remarkable coincidence of detail between the SSCI Report's description and that of the Lithuanian Seimas Report, has been acknowledged by Lithuanian officials. The government has acknowledged this in its correspondence to the Court (when it purports to, once again, reopen the criminal investigation). The head of the former Lithuanian parliamentary committee, in turn, when confronted with the Senate Report, publicly acknowledged "a convincing case that prisoners were indeed held at the Lithuanian site."
27. The CIA is described in the SSCI Report as having obtained approval of the political leadership and others (identities redacted), to establish a detention facility in the country.[34] It indicates that the US ambassador was informed.[35]
28. The SSCI Report makes clear that a Lithuanian detention site was constructed in 2003. It confirms however that the detention site Violet was in fact opened in early 2005,[36] and closed in 2006.[37]
29. It states that "*by mid-2003 the CIA had concluded that its completed, but still unused 'holding cell' [in site violet] would be insufficient, given the growing number of CIA detainees in the program and the CIA's interest in interrogating multiple detainees at the*

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[33] *See* e.g. Amnesty International, Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' Must Act after Senate Torture Report, January 2015, available at https://www.amnesty.org/download/Documents/.../eur010022015en.pdf; US, Crimes and Impunity, April 2015; 'US Senate Report Suggests ' Detention Site Violet' May Have Operated in Lithuania', *Liberties.eu*, 22 December 2014, available at: http://www.liberties.eu/en/short-news/2477; 'Not so magnificent 7: nations 'busted' in redacted CIA terror report', RT, 12 December 2014, available at: http://rt.com/news/213483-cia-torture-country-scandal/; Ben Bryant, 'CIA Held Detainees at Lithuania Black Site, Investigators Claim', Vice News, 16 January 2015, available at: https://news.vice.com/article/cia-held-detainees-at-lithuania-black-site-investigators-claim.
[34] Senate Report, Executive Summary, p. 98.
[35] Senate Report, Executive Summary, p. 98.
[36] Senate Report, Executive Summary, p. 143.
[37] Senate Report, Executive Summary, p. 154.

same detention site. The CIA thus sought to build a new, expanded detention facility in the country."[38] This mirrors the Seimas Committee's findings, referred to in detail in the application to the Court.

30. The SSCI Report suggests that one reason for the closure may have been the lack of emergency medical care available at black sites.[39] It notes medical issues encountered by several high value detainees, such as broken bones, deteriorating wounds and the loss of an eye.[40] In light of the purported 'high value' of the detainees for information-gathering purposes, it was considered necessary to provide medical assistance to ensure further interrogation of the detainees, which continued for years. The SSCI Report refers to a 2006 Inspector General Audit that concludes that CIA detention facilities were constructed, equipped, and staffed for "prompt intelligence exploitation of detainees" and "are not equipped to provide medical treatment to detainees who have developed serious physical and mental disorders".[41] However, the SSCI Report states that in relation to al-Hawsawi and four other unidentified detainees, emergency medical assistance had to be sought from third-parties due to the lack of medical facilities at the detention sites and concern over CIA officers using local hospitals.[42]
31. The SSCI Report also indicates that, as at January 2006, 28 detainees were in CIA custody in detention sites Violet (Lithuania) and Brown (Afghanistan) collectively.[43] This indicates that the Lithuanian site was shut down sometime later that year.
32. Detainees were eventually transferred from the Lithuanian site to Detention Site Brown, at which point the SSCI Report states that all CIA detainees were located in the same country.[44] The SSCI Report earlier states that Detention Site Brown was in the same country as Detention Site Cobalt,[45] and it is clear from numerous sources that this country was Afghanistan. As set out in our application, the Applicant was transferred from Lithuania to Afghanistan in March 2006. The dates of his entry into Lithuania, and exit from Lithuania, established in our application are consistent with the operating period of Detention Site Violet as set out in the SSCI Report. These dates also correspond to the

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[38] Senate Report, Executive Summary, p. 98.
[39] Senate Report, Executive Summary, pp. 154 – 155, "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 CIA detention facility in Country [redacted]".
[40] See pp. 111-113 of the Senate Report, Executive Summary, for more information.
[41] Senate Report, Executive Summary, footnote 949, p. 155.
[42] Senate Report, Executive Summary, p. 154.
[43] Senate Report, Executive Summary, p. 156.
[44] Senate Report, Executive Summary, p. 154.
[45] Senate Report, Executive Summary, p. 61.

arrival and departure of flights known to have been operated by CIA contractors for the rendition program, as detailed in previous submissions.

33. The SSCI Report makes clear that the CIA provided an unidentified (redacted) number of millions of dollars to Lithuania to *"show appreciation for the [redacted] support for the program."*[46] The SSCI Report goes on to state that "*the plan to construct the expanded facility was approved by the [redacted] of Country [redacted] and [redacted] developed a complex mechanism to [redacted] in order to provide the [redacted] million*."[47] The finding demonstrates that Lithuanian officials approved the construction of the CIA black site, and that the US paid millions of dollars in order to operate the site in Lithuania.

Other Sources Corroborating Lithuania Black Site Detention

Flight Data

34. The information in the Senate Report also corresponds to the evidence in the form of flight data and contracts submitted to the court in the original application and supplementary dossier. A report prepared by the NGO Reprieve, in light of the Senate Report, tracks this, explaining "how the newly declassified US Senate Report on CIA detention correlates with flight data and contracting documents; and demonstrates that prisoners were moved into Lithuania in February and October 2005, and out of Lithuania to Afghanistan in March 2006.'[48] The transfer dates correspond with those of the Applicant as set out in our application and supplementary submissions. This dossier, which Reprieve has presented to the Lithuanian Prosecutor, is attached as an annex to these submissions.

Report of the Special Rapporteur

35. A growing number of other sources have also supported the existence of a black site on Lithuanian soil. Even before the Senate Report, the current UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Special Rapporteur on Terrorism) has said that there is now credible evidence to show that CIA "black sites" were located on the territory of Lithuania, Morocco,

[46] Senate Report, Executive Summary, p. 99.
[47] Senate Report, Executive Summary, p. 99.
[48] Reprieve, 'New evidence shows CIA held prisoners in Lithuania', 16 January 2015, available at: http://www.reprieve.org.uk/press/new-evidence-shows-cia-held-prisoners-in-lithuania/.

Poland, Romania and Thailand and that the officials of at least 49 other states allowed their airspace or airports to be used for rendition flights.[49]

36. This information is further corroborated by the multiple and various other sources, from media and other international and regional enquires, already presented to the Court.

III. Information on Lithuanian Knowledge of the CIA Programme at the Relevant Time

37. Information that has come to light since the submissions were filed in the present case make increasingly clear that Lithuanian officials were directly aware of what was happening in the programme.
38. Simply on the basis of the information in the Senate report itself, there are numerous clear indications of agreements reached between Lithuanian officials and the CIA, and of large sums of money changing hands in exchange for support.
39. The Senate report notes more broadly that there were tensions between states arising precisely from the controversy surrounding detainee torture and abuse, clearly premised on an understanding of what was in fact happening in the detention centres. A briefing for the CIA director, Porter Goss, noted as follows:
    39.1. "*CIA urgently needs [the President of the United States] and Principals Committee direction to establish a long-term disposition policy for the 12 High-Value detainees (HVD)s we hold in overseas detention sites. Our liaison partners who host these sites are deeply concerned by [REDACTED] press leaks, and they are increasingly skeptical of the [U.S. government's] commitment to keep secret their cooperation.... A combination of press leaks, international scrutiny of alleged [U.S. government] detainee abuse, and the perception that [U.S. government] policy on detainees lacks direction is eroding our partners' trust in U.S. resolve to protect their identities and supporting roles. If a [U.S. government] plan for long-term [detainee] disposition does not emerge soon, the handful of liaison partners who cooperate may ask us to close down our facilities on their territory. Few countries are willing to accept the huge risks associated with hosting a CIA detention site, so shrinkage of the already small pool of willing candidates could force us to curtail our highly successful interrogation and detention program. Fear of public exposure may also prompt previously cooperative liaison partners not to accept custody of detainees we have captured and interrogated. Establishment of a clear, publicly announced*

[49] Statement by Ben Emmerson QC, 1 March 2013.

[detainee] 'endgame' - one sanctioned by [the President of the United States] and supported by Congress - will reduce our partners' concerns and rekindle their enthusiasm for helping the US in the War on Terrorism."[50]

40. As noted above, the Report discusses the CIA's attempt to obtain medical assistance for Mustafa al Hawsawi in Lithuania and discussions with local officers on how medical treatment for the detainees was to be handled.[51] There is a reference to medical assistance being sought but that ultimately 'the medical issues resulted in the closing of Detention Site Violet ... in 2006.'[52]
41. In addition, it is increasingly clear that Lithuanian officials would have been well-aware of what was happening simply on the basis of public reports. The Court's findings in *Abu Zubaydah v Poland* as regards Polish knowledge of the rendition programme apply with greater force in the context of Lithuania. In *Abu Zubaydah v Poland* the Court referred to an amicus brief by several NGOs on public knowledge of the programme emerging as early as 2002.[53] It notes that '*from early 2002 it had become clear that non-US nationals outsider the US suspected of involvement in international terrorism had been at a real risk … from US operatives*.'[54] It goes on to note publicly and internationally available reports of serious violations arising in Guantanamo Bay and, notably, Afghanistan (the site to which the Applicant was transferred from Lithuania) already by 2003.[55]
42. Partnering states knowingly and willingly supported the CIA rendition program and only sought to end their complicity in the program when the details became publicly known. According to the CIA, "[i]t was only as leaks detailing the program began to emerge that foreign partners felt compelled to alter the scope of their involvement."[56]

IV. Information Concerning Lithuania's Failure to Carry out a Thorough, Independent and Effective Investigation

43. Abu Zubaydah's application to this Court was submitted in 2011, following the decision, on 14 January 2011, to close down a perfunctory investigation.

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[50] CIA document dated, January 12, 2005, entitled, "DCI Talking Points for Weekly Meeting with National Security Advisor", cited at, Senate Report, Executive Summary, footnote 907, p. 150.
[51] Senate Report, Executive Summary, p. 154.
[52] Senate Report, Executive Summary, p. 154.
[53] Abu Zubaydah v Poland, para. 387 - §390.
[54] Abu Zubaydah v Poland, para. 387.
[55] Abu Zubaydah v Poland, para. 388 - §390.
[56] Senate Report, Executive Summary, footnote 80, p. 24.

44. That investigation had been formally opened in response to pressure generated by the Seimas parliamentary inquiry's finding that Lithuanian officials had cooperated with the CIA to create two holding sites capable of detaining prisoners "allow[ed] for the performance of actions by officers of the partners [the CIA] without the control of the SSD and use of the infrastructure at their discretion."[57]
45. The investigation that was supposedly launched in response in 2010 was promptly closed one year later. The lack of rigour was readily apparent from prosecutors' statements at that time. The closure was purportedly justified on the basis of the 'categorical denials' by those allegedly involved in the criminal conspiracy, and by the failure of others to provide information. On the basis that information had not therefore emerged, prosecutors concluded that "no deed has been done which has indications of a criminal offence".[58]
46. Prosecutors also claimed that the statute of limitations had expired.[59] This reflected the inadequate scope of the investigation and nature of the crimes investigated (which apparently focused on 'abuse of office,' as opposed to the more appropriate serious crimes under international law that the rendition programme represents).
47. Information on the investigation was not made public, but remained shrouded in secrecy due to the blanket invocation of 'state secrecy' by the relevant authorities.[60]
48. Since 2011, information and international pressure have both grown, yet there has been no meaningful progress consistent with the willingness to uncover the truth or to hold anyone to account.
49. The authorities' failure – and lack of commitment – to investigate Lithuanian involvement in the CIA rendition and detention programme in our client's case is also apparent from the facts surrounding another rendition victim, Mr Mustafa al Hawsawi, whose detention in Lithuania has been well-documented.[61] Lawyers acting on his behalf provided the prosecutor's office with information and requested that it take specific investigative steps to preserve, secure and disclose relevant evidence, yet the prosecutor explicitly refused to

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[57] A. Sytas & C. Lowe, 'Exclusive: Lithuania prosecutors restart investigation into CIA jail', Reuters, 2 April 2015, available at: http://www.reuters.com/article/2015/04/02/us-usa-cia-torture-lithuania-idUSKBN0MT18Z20150402.
[58] Sytas & Lowe (online); see also C. Black, 'Legal Case Demands Details about the CIA's Secret Prison in Lithuania', The Bureau of Investigative Journalism, 9 September 2015, available at: http://www.truth-out.org/news/item/32709-legal-case-demands-details-about-the-cia-s-secret-prison-in-lithuania.
[59] AFP, Lithuania re-opens black site investigation', 2 April 2015, available at: http://news.yahoo.com/lithuania-reopens-cia-black-investigation-192106042.html.
[60] On this being out of step with the requirements of transparency see part B.
[61] Redress, 'Lithuanian court urges prosecutors to investigate Guantánamo detainee rendition claims, available at: http://www.redress.org/downloads/press-release-29-01-14---final.pdf.

open an investigation in that case.[62] Only when a court order found that the closure of the case was baseless,[63] did the Prosecutor-General's office announce, on 20 February 2014, that it had reopened an investigation. The limited scope of that purported investigation is again noteworthy, as it was stated as relating to criminal activity provided for in Article 292 paragraph 3 of the Criminal Code of the Republic of Lithuania ('illegal transportation of persons across state border') rather than addressing the grave crimes at issue in the case.

50. Moreover, the formal reopening of the al Hawsawi investigation has reaped tellingly few results in practice. The state appears not to have taken the steps requested by al Hawasi's representatives, it has refused to recognise him as a victim in the proceedings or to provide any information as to what is has done or intends to do in the investigation. The Lithuanian authorities continue to rely on state secrets as a basis for its blanket refusal to provide any information in relation to the purported investigation.

51. The lack of any meaningful investigation in Lithuania has drawn attention and criticism by multiple international entities. In addition to the Parliamentary Assembly of the Council of Europe and the European Parliament investigative reports to which the Court has already been referred,[64] concern has been expressed and calls issued for effective investigation in Lithuania more recently by several other regional and international human rights mechanisms, to no avail.

52. For example, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism called for effective investigation.[65] He criticised efforts to subvert accountability and the pursuit of the right to truth in relation to the extraordinary rendition and torture program, such as 'executive obstruction of (or interference in) independent investigations into past practices' or 'unjustified claims for secrecy on grounds of national security or the maintenance of good foreign relations'.[66]

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[62] Decision of 2 October 2013.

[63] Appeal upheld in, Appeal No. 1S-5-312/2014, Vilnius Regional Court Ruling, 28 January 2014.

[64] 2011 Report, p6, para 2.1 The 2012 Report, para 5 and 8 called on Lithuania to investigate into secret services and intelligence agencies for any possible human rights violations, and urging states to refrain from relying on claims of national security as an excuse to hide human rights violations. The 2013 European Parliament resolution for example notes that "the Lithuanian authorities have reiterated their commitment to reopening the criminal investigation into Lithuania's involvement in the CIA programme if new elements emerge, but still have not done so" and that "the Lithuanian authorities demonstrated critical shortcomings in their investigations and a failure to grasp the meaning of the new information…"

[65] Special Rapporteur Emmerson, Framework Principles, para. 52.

[66] Special Rapporteur Emmerson, Framework Principles, para. 37.

53. On 20 May 2014, the Committee against Torture noted the need for an effective investigation as among its principle subjects of concern in the context of its Concluding observations on the third periodic report of Lithuania (CAT/C/SR.1242 and CAT/C/SR. 1243) (para 16). Detailed questioning in relation to the Lithuanian investigation during the CAT session provided little by way of answers, however, as on previous occasions. CAT expressed concern that 'the file constitutes an official secret'
54. The CAT also called for Lithuanian domestic law to be bought into line with international obligations by enshrining torture as a crime beyond armed conflict, to prevent prescription applying to torture as is currently the case, and to the address the lack of proportionate penalties in domestic law.[67]
55. More recently, on 2 April 2015, following media attention generated by the SSCI report, Prosecutors once again announced publicly that an investigation would be relaunched in relation to our client's situation,[68] and merged with "*an ongoing separate probe into suspicions that Saudi national Mustafa al-Hawsawi was imprisoned at a secret CIA jail in Lithuania in 2005-2006*."[69] This Court was so informed by letter dated 25 March 2015, in which the government stresses the relevance of this development to the objections on the non-exhaustion of domestic remedies.
56. According to a spokesperson for the prosecutor's office, the renewed investigation was prompted by the release of the SSCI Report.[70] Yet it has been 10 years since our client was subject, pursuant to prior agreement by Lithuanian authorities, to torture and secret detention in Lithuania, and 6 years since a 2009 media report first publicized the existence of the CIA secret detention centre, since the Council of Europe Commissioner's report confirmed the allegations and since the Lithuanian parliament called for a criminal investigation. Since then more information has streamed into the public domain, which is merely confirmed by the supporting information in the most recent and detailed SSCI report. The prosecution authority has responded to pressure by opening and closing several investigations but has thus far failed to take the steps required of it to conduct a thorough and effective investigation, within Lithuania and in cooperation with other states, or to provide public access to the truth or remedies or reparation for victims (see part B below).

[67] CAT Lithuanian Concluding Observations, 2014, para 9.
[68] Sytas and Lowe (online), 2 April 2015; AFP, 2 April 2015.
[69] AFP, 2 April 2015; Letter to ECHR, dated 25 March 2015.
[70] Sytas and Lowe (online), 2 April 2015; AFP, 2 April 2015.

57. During this period the state has consistently refused to provide even basic information on its role in the rendition programme or on the investigation(s), continuing to resort to broad 'state secrecy' justifications. There is characteristically no information on the scope of the supposed new investigation, whether the statutes of limitation referred to previously would not apply and what concrete steps the states has taken. The only information made public after the release of the SSCI Report was that "*Lithuanian prosecutors sought more information from US authorities but had yet to receive a reply*".[71] While the lack of cooperation from US authorities is a matter of regret and may impede investigation, it cannot be enough to preclude any such investigation. There is no information provided as to collection of evidence available within Lithuania and, critically, in cooperation with the many other states involved in extraordinary rendition.[72]

58. Given the inordinate delay and failures of the investigation to date, current facts suggest no more than the mirage of another formal investigation.

V. Updates on Abu Zubaydah's Current Situation

59. The chilling commitment that was made before our client was subjected to systematic torture as revealed by the SSCI report – to subject him to indefinite incommunicado detention to protect his torturers – sadly corresponds to the reality of what has happened to him since. The extreme regime of secrecy imposed on counsel, set out in the original application, continues in place and means that there are strict limits on what we can tell this Court about his situation. However, it is well known that he continues to be held in arbitrary detention to the present date (see *Abu Zubaydah v Poland* judgment 118-121). The following are key features of his current situation:

    59.1. He has now been detained for over 13 years and has never been charged with any crime. Counsel have formally requested the US government that he be charged and tried, even by military commission, on the basis that even a fundamentally flawed process is better than no process at all.

    59.2. He has never had the lawfulness of his detention reviewed by a judge. It should be noted that while the *Abu Zubaydah v Poland* judgment refers to our client not having had the lawfulness of his detention reviewed since 2007, he has in fact never had judicial review of the lawfulness of his detention. The reference is to the

[71] AFP, 2 April 2015, citing Rita Stundiene, a spokesperson for the prosecutors.

[72] Eg Finnish authorities have requested that Lithuania and other states provide information pursuant to its investigation of the facts.

administrative Combatant Status Review Tribunal (CSRT) procedure, which was a perfunctory procedure, before the Applicant even had access to a lawyer, during which he saw no evidence against him, and which has since been rejected as inadequate by the US Supreme Court and abolished. Although in theory Abu Zubaydah has the right to challenge the legitimacy of his detention in a habeas corpus hearing, in practice, there is no meaningful process afforded to him. The US court in which his habeas corpus application is pending has simply refused to rule on even preliminary motions for more than six years.[73]

59.3. Moreover such is the anomaly of the dysfunctional habeas system for Guantanamo detainees in the United States at this time that even if he were afforded a habeas hearing and won his challenge, the court would not have the authority to order his release.[74] Indeed many of the men imprisoned in Guantanamo have been cleared for release for years, to no effect.

59.4. Abu Zubaydah has still had no access to judicial remedies in respect of the on-going grave violations of his rights. Multiple impediments, including legislation blocking access by Guantanamo detainees, and a broad invocation of the state secrecy doctrine in US courts and elsewhere, mean that the European Court of Human Rights proceedings have provided his only access to a court of law.

59.5. He continues to be subject to an absolute ban on all communication with the outside world. As set out in our submissions, and recognised by the Court in its Poland judgment, all information from or about Abu Zubaydah remains presumptively classified, including information about the conditions of his current confinement. As noted in the Poland Judgment, referring to our submissions, he is "a man deprived of his voice, barred from communicating with the outside world or with this Court and from presenting evidence in support of his case". Even the Power of Attorney, a standardized form for this case which merely had Abu Zubaydah's signature on it, was denied declassification. As noted below, the Lithuanian government has consistently used this as a basis to question his representation and his right to present a petition to this Court.

[73] See the latest motion: "Petitioner's Motion to Recuse Judge Roberts for Nonfeasance, Including Protracted Failure to Rule on More than a Dozen Fully Briefed Motions Filed by a Man Imprisoned Without Charge for Nearly Thirteen Years," Husayn v Gates, 08-cv-1360 (D.D.C. Feb. 2015). The actual motion is under seal. Such is the disarray in current habeas proceedings that even if he did have a meaningful habeas hearing, currently the judge could not order his release; see e.g., Kiyemba v Obama, 605 F.3d 1046 (D.C.Cir. 2010).

[74] See, e.g., Kiyemba v Obama, 605 F.3d 1046 (D.C.Cir. 2010).

59.6. The US government appears to intend to hold him indefinitely in arbitrary detention for the remainder of his life. The government has explicitly maintained that some people will be held indefinitely, on the basis that it is not 'feasible' to try or to release them. These individuals have not been identified but there is every reason to believe that that is their intention for Abu Zubaydah. Although far-reaching allegations made publicly have long since been dropped, following access to a lawyer, the government continues to assert the right to hold him according to 'law of war authority,' in plain violation of international law.

59.7. In *Abu Zubaydah v Poland,* as in other rendition cases, the Court has described "extraordinary rendition" as "detention ... which by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention".[75] The complete circumvention of legal process that was present when he was captured and disappeared in 2002 and maintained during his secret detention and torture in Lithuania in 2005, still continues to the present day.

59.8. Even though other Guantanamo detainees have been able to obtain information about their treatment cleared, that information is still being refused in the case of Abu Zubaydah,[76] despite public claims that this information would no longer be classified in the aftermath of the SSCI report.[77]

Part B – LEGAL ARGUMENT

The Court has asked for observations on the parties' legal arguments in light of its previous judgments in the *El-Masri v Macedonia*, *Abu Zubaydah v Poland* and *al Nashiri v Poland* cases, handed down since submissions were lodged in this case. The *Abu Zubaydah v Poland* case in particular addresses the situation of the same applicant held in black site detention, raising virtually identical legal issues. The Court's approach to the interpretation and application of the Convention in that case is therefore directly relevant to the present proceedings and should be taken as a current statement of the law. The Court is referred to relevant sections of that judgment which are not repeated in detail here. A few specific

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[75] Abu Zubaydah v Poland, para. 452, citing El-Masri v Former Yugoslav Republic of Macedonia, para. 239.
[76] See, D. Rohde, 'U.S. government blocks release of new CIA torture details', Reuters, 10 September 2015, available at http://www.reuters.com/article/2015/09/11/us-usa-cia-torture-idUSKCN0RA2RM20150911.
[77] See, Government Motion to Amend AE013DDD Second Amended Protective Order #1 To Protect Against Disclosure of National Security Information, AE013RRR (Gov), United States v. Mohammad et al. (Military Comm'n, Guantánamo Bay, Cuba Jan. 30, 2015).

aspects of the Court's approach in this and other relevant recent cases, and their application in the present case, are however highlighted below.

I. Preliminary Matters: Evidence and Proof

1. The Court made clear in *Abu Zubaydah v Poland*, as in other cases before it, that it will adopt a flexible approach to the determination of facts and the evaluation of evidence, reflecting the realities of the case before it.
2. As regards the evaluation of evidence, the Court has stated that it will adopt conclusions supported by *"the free evaluation of all evidence..."* [78] and that *"proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."* [79] Notably, *"[w]hile it is for the applicant to make a prima facie case and adduce appropriate evidence, if the respondent Government in their response to his allegations fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred, strong inferences can be drawn."* [80]
3. It has further indicated that "*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***." [81]
4. The unusual facts of the present case, including the uniquely challenging circumstances facing the Applicant in his ability to present evidence in his case, were recognized by the Court in the *Abu Zubaydah v Poland* judgment.[82] The Court also recognised that the case concerns the most egregious violations of Convention rights which, in our submission (see below) concern torture, enforced disappearance, flagrant denial of justice and arbitrary detention, amounting not only to serious violations of human rights but, given the systematicity of the rendition programme, to crimes against humanity.[83]

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[78] Abu Zubaydah v Poland, para. 394.
[79] Abu Zubaydah v Poland, para. 394.
[80] Abu Zubaydah v Poland, para. 395. Also in Varnava and Others v. Turkey [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 184, ECHR 2009, with further references; Kadirova and Others v. Russia, no. 5432/07, § 94, 27 March 2012; and Aslakhanova and Others v. Russia, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, § 97, 18 December 2012).
[81] Abu Zubaydah v Poland, para. 394 and El-Masri v Former Yugoslav Republic of Macedonia, para. 151.
[82] Abu Zubaydah v Poland, paras. 397-400.
[83] UN Joint Study on global practices in relation to secret detention in the context of countering terrorism, UN Doc A/HRC/13/42 (2010), (UN Joint Study on Secret Detention), has analysed the rendition 'secret detention', paras. 30-31 and 282.

5. Ample evidence giving rise to concordant inferences of fact are set out in the original application, supplementary submissions and dossier, as supplemented by the consistent updated statement of facts in Part A above. Yet the State has failed to investigate, or to provide any evidence to refute its role and responsibility. As with the Polish government, the Lithuanian authorities have failed to investigate and to provide information to the public or to the Court that would go any way towards discharging the burden incumbent upon the government in a case such as this.
6. The state of Lithuania is responsible for the black site detention and torture of our client on its soil, on the basis of ever stronger, more concordant inferences of fact that remain unrebutted by the government many years after this case was first presented to this Court.

II. Lithuanian Knowledge of and Responsibility for Violations on its Territory

7. The Lithuanian government is responsible, in accordance with Article 1 of the Convention, for the violation of the Applicant's rights in circumstances in which it knew or should have known of the risks he faced and failed to take necessary measures to secure the protection of his rights.
8. The Court should make clear that this is the relevant legal standard under the Convention for State responsibility for the failure to prevent and protect. In a few recent cases, including the Poland cases, the Court has noted that 'the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.'[84] While acquiescence and connivance undoubtedly arise on the facts of the present case, it is noted that it suffices for responsibility under the Convention that the state should have known of risks and failed to take necessary and available steps to prevent and protect.
9. As regards the *application* of the 'knew or should have known' test in the present case, the Court's findings as to the state's knowledge in *Abu Zubaydah v Poland* apply with even greater clarity in the context of Lithuania.
10. As noted in the statement of facts, the Applicant was detained in Lithuania from 2005 - 2006, some three years after his detention in Poland. The Court has noted in *Abu Zubaydah v Poland* that as early as 2002 or 2003 it was clear that non-US nationals

[84] Abu Zubaydah v Poland, para. 449; Ilaşcu and Others v. Moldova and Russia, App No 48787/99, (ECHR 8 July 2004), para. 318; and El-Masri v Former Yugoslav Republic of Macedonia, para. 206. In some places the court refers to 'acquiescence and connivance', e.g., Abu Zubaydah v Poland, para. 512; Al Nashiri v Poland, para. 517.

outside the US suspected of involvement in international terrorism were at risk of serious rights violations at the hand of the CIA and others at its behest.[85] In the present case, arising three years later, knowledge of violations arising through the programme, even if it were based purely on public knowledge, is simply incontrovertible.

11. Lithuanian knowledge in the present case is not however merely constructed from publicly available information. In addition to the vast amount of general knowledge in the public domain by 2005 to 2006, the statement of facts at Part A reveals growing evidence of direct Lithuanian knowledge. This includes the Senate report's account of high level political agreements, discussions as to the potential or not of providing detainees with medical assistance, and the exchange of large sums by way of financial incentives.

12. Moreover, and in any event, in all the circumstances of a case concerning the establishment of secret detention centres on a state's territory, it is, as the Court noted in *Abu Zubaydah v Poland*, simply 'inconceivable' that Lithuania would not have had direct knowledge and authorization at appropriately high levels. The Court made the following finding, the logic of which the Applicant submits, applies equally to the present situation:

    "It is inconceivable that the rendition aircraft could have crossed Polish airspace, landed in and departed from a Polish airport, or that the CIA occupied the premises in Stare Kiejkuty and transported detainees there, without the Polish State being informed of and involved in the preparation and execution of the HVD ['High Value Detainee'] Programme on its territory. It is also inconceivable that activities of that character and scale, possibly vital for the country's military and political interests, could have been undertaken on Polish territory without Poland's knowledge and without the necessary authorisation being given at the appropriate level of the State authorities."[86]

    On the facts of this case, the Court is urged to find that Lithuania, in 2005/6, knew or should have known of the risks to individuals on its territory and that it failed to take measures to prevent the execution of the HVD programme on its territory. As reflected in *Abu Zubaydah v Poland*, the US programme of rendition, secret detention and torture of detainees relied on - and would not have been possible but for - the cooperation of states such as Lithuania which bars international responsibility for its acts and omissions.[87]

[85] Abu Zubaydah v Poland, para. 387; on knowledge of violations in Guantanamo and Afghanistan by 2003, see Abu Zubaydah v Poland, paras. 387-390.
[86] Abu Zubaydah v Poland, para. 443.
[87] Abu Zubaydah v Poland, para. 524.

III. Violations of Articles 3, 5, 6 and 8

13. The court is referred to the heads of claim and legal arguments set out in our original submissions, which remain valid and are simply reinforced by recent developments in practice and jurisprudence. A few specific aspects of those arguments worthy of emphasis in light of those developments are flagged below.

Extraordinary Rendition as Torture

14. The Court is urged to follow its previous approach in finding that rendition and secret detention itself amounted to torture, in violation of Article 3 of the Convention.
15. The torture of the applicant in the present case has multiple dimensions, comprising the 'standards conditions of detention and transfer', the nature of the interrogation techniques and the secrecy of the detention itself and the extreme vulnerability of the detainee that resulted. The extent of the brutality and cruelty of the rendition programme, which went beyond that known at the time of the Poland judgments, has been illuminated by subsequent information, notably through the SSCI report referred to in Part A.
16. There can be no reasonable doubt that each of these dimensions amounted, separately and cumulatively, to torture and cruel, inhuman and degrading treatment.

Rendition as Arbitrary Deprivation of Liberty and Anathema to the Rule of Law

17. In numerous cases, including the Polish cases, the Court has stated 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."*[88] The relevance and importance of these guarantees in the counter-terrorism context has been emphasised by the Court in many cases, and it has recently reiterated that the challenges of terrorism "*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."*[89] The deprivation of liberty in this case, devoid of safeguards, as part of a system specifically designed to remove oversight and the

[88] Abu Zubaydah v Poland, para. 521; and El-Masri v Former Yugoslav Republic of Macedonia, para. 230.
[89] Abu Zubaydah v Poland, para. 523.

protection of the law, epitomizes arbitrariness and is the antithesis of the rule of law protections built into Article 5.

18. As confirmed in the *El Masri*, *al Nashiri* and *Abu Zubaydah*, a flagrant breach of Article 5 is *"inherent where an applicant is subject 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'"*.[90]

Rendition, torture and black site detention as Enforced Disappearance of Persons.

19. The Court is urged to follow the approach of numerous international mechanisms and legal authorities that have categorized extraordinary rendition as amounting to enforced disappearance of persons. Such categorization reflects the true character, gravity and impact of the violations in question.

20. The Applicant's secret and unacknowledged detention, with a view to removing him from the protection of law, clearly falls within the definition of enforced disappearance of persons under international law:

    "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." [91]

21. This Court has in several other very recent cases noted that practices before it should be characterised as 'enforced disappearances'.[92] Indeed, this Court, like other international authorities have consistently recognised that enforced disappearance amounts to violations of several rights, including liberty and security and torture.[93] A UN report made clearer the inter-relationship by noting that "*Every instance of secret detention also amounts to a*

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[90] Abu Zubaydah v Poland, para. 452; and El-Masri v Former Yugoslav Republic of Macedonia, para. 239.

[91] UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Article 2.

[92] Islamova v. Russia, 30 April 2015, no. 5713/11, paras. 69-73. Ireziyevy v. Russia, 2 April 2015, no. 21135/09, paras. 77-81. The original brief recognizes that other international courts and bodies have long recognised the inter-relationship between enforced disappearance and Convention rights. Velásquez-Rodríguez v Honduras, Merits, 29 July 1988, Inter-Am. Ct. ABU. R. Series C. No. 4, para. 187; Chaparro-Álvarez and Lapo-Íñiguez v Ecuador, Merits, Reparations and Costs, 21 November 2007, Inter-AM. Ct. ABU. R. Series C. No. 170, para. 171.

[93] El-Masri v Former Yugoslav Republic of Macedonia, para. 18. Velásquez-Rodríguez v Honduras, para. 187; Chaparro-Álvarez and Lapo-Íñiguez v Ecuador, para. 171; Mojica v Dominican Republic, 15 July 1994, Communication No. 449/1991. para 5.7.

case of enforced disappearance (para 28)".[94] The same study further concluded that "[i]f secret detention constitutes enforced disappearances and is widely or systematically practiced, it may even amount to a crime against humanity."[95]

22. In *El Masri,* the Court described the abduction and detention of a person under the rendition programme as amounting to "enforced disappearance," characterized by "uncertainty and unaccountability".[96] This is a significant finding which the Court is urged to follow in its judgement in the present case.
23. The applicant therefore alleges violations of the specific rights enumerated under the Convention and notes that due to their nature, context and gravity those violations amount to enforced disappearance of persons and to crimes against humanity under international law.

Private and Family Life, Article 8

24. The Court is referred to *Abu Zubaydah v Poland*, in which the Court found a violation of the rights to private and family life enshrined in Article 8.[97] Similar reasoning was applied in other rendition cases, such as *El Masri* and *al Nashiri.*[98]
25. The additional information available as to the nature of the rendition programme and its long term impact on the lives of its victim,[99] only serve to underscore the disproportionate and unlawful nature of the interference with the Applicant's rights to private and family life set out in the original application. Moreover, it is noted that these violations of our Applicant's rights continue to the present day through his on-going incommunicado detention, and the excessive communication ban to which he continues to be subject.

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[94] UN Joint Study on Secret Detention has analysed the rendition 'secret detention'.
[95] UN Joint Study on Secret Detention, para. 282. See also para. 30: "Since secret detention amounts to an enforced disappearance, if resorted to in a widespread or systematic manner, such aggravated form of enforced disappearance can reach the threshold of a crime against humanity. In its article 7, the Rome Statute of the International Criminal Court labels the "enforced disappearance of persons" as a crime against humanity if it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.23 Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance states that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law, and should attract the consequences provided for under such applicable international law, thus confirming this approach."
[96] El-Masri v Former Yugoslav Republic of Macedonia, para. 240, describing the detention as "amounting to 'enforced disappearance' as defined in international law. The applicant's 'enforced disappearance', although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see *Varnava and Others*, cited above, para 148)."
[97] Abu Zubaydah v Poland, para. 533.
[98] El-Masri v Former Yugoslav Republic of Macedonia, para. 249; Al Nashiri v Poland, para. 539.
[99] Senate Report, Executive Summary, p. 71, "we have serious reservations with the continued use of enhanced techniques with [al-Nashiri] and its long term impact on him".

26. The Court is urged to draw the same conclusion as regards violations of Article 8 in this case as were drawn in *Abu Zubaydah v Poland*.

Responsibility for the Applicant's removal from Lithuania under Articles 3, 5 and 6

27. As regards the Applicant's transfer out of Lithuania, the Court noted that:

    "removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination."[100]

28. The state of Lithuania is responsible as it knew or should have known of the risks facing the applicant in other CIA secret detention facilities elsewhere.[101] In particular, the state of Lithuania knew or should have known of the risks facing him in other CIA secret detention facilities elsewhere, specifically in Afghanistan and Guantanamo Bay to where he was transferred following black site detention in Lithuania.[102]
29. As noted above in relation to knowledge or risks in CIA custody *in* Lithuania, knowledge of on-going risks from CIA secret detention and torture elsewhere, and knowledge of violations in Afghanistan and Guantanamo specifically, can readily be inferred from widely available information in the public domain at the relevant time. The Court has noted that information concerning serious violations in Guantanamo Bay and, notably, Afghanistan (the site to which the Applicant was transferred immediately after Lithuania) was firmly in the public domain by 2003.[103]
30. Consistent with the Poland judgment, the transfer out of Lithuania should be found to give rise to the violations of Convention rights highlighted above.
31. The Court found in *El Masri v Macedonia*, and later in the Poland cases, that where 'the sending State knew, or ought to have known at the relevant time that a person removed

[100] Abu Zubaydah v Poland, para. 450; but also refer to Soering v. the United Kingdom, 7 July 1989, Series A no. 161, paras. 90-91 and 113; Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, paras. 90-91, ECHR 2005-I with further references; Saadi v. Italy [GC], no. 37201/06, § 125, ECHR 2008; Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, § 149, ECHR 2010; Babar Ahmad and Others v. the United Kingdom, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 168, 10 April 2012; Othman (Abu Qatada) v. the United Kingdom, no. 8139/09, §§ 233 and 285, ECHR 2012 (extracts) and El-Masri v Former Yugoslav Republic of Macedonia, paras. 212-214 and 239.
[101] Abu Zubaydah v Poland, para. 447, with references to Lithuania replacing references to Poland.
[102] Abu Zubaydah v Poland, para. 447, with references to Lithuania replacing references to Poland.
[103] Section 39 in S/Ment of Fact.

from its territory would be subjected to "extraordinary rendition", a breach of Article 3 [prohibition on torture] must be considered intrinsic in the transfer.'[104]

32. In *Abu Zubaydah v Poland*, the Court also found his transfer to continuing unlawful detention at Guantanamo Bay to constitute a violation of Article 5.[105] The Court found that a violation of Article 5 arose where a contracting state "*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*."[106]

33. Similar principles apply with regard to exposure to 'a real risk of being subjected to a flagrant denial of justice' in violation of Article 6.[107] The court in the Poland cases found that transfer to a real risk of trial by military commission gave rise to a violation of Article 6, irrespective of the fact that in Abu Zubaydah's case he had not ultimately been subject to the military commission process. Unequivocally condemning transfer to the military commission process underway at Guantanamo Bay, the Court found that:

> *"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..... It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial (ibid. § 267)."*[108]

34. . The Court is likewise urged to clearly adopt the view previously expressed by this Court in *Abu Zubaydah v Poland*, supported by other international mechanisms,[109] that the on-going arbitrary detention of the applicant itself amounts to a 'flagrant denial of justice'. Indefinite detention without *any* trial is an even more 'flagrant denial of justice' than a flawed trial. The Court has accordingly recognised that the applicant *"has not been listed for trial before the military commission and that since 27 March 2002 ... has remained in indefinite detention without ever being charged with a criminal offence ...This, in the Court's view, by itself amounts to a flagrant denial of justice [...]."*[110]

35. The totality of the circumstances of the Applicant's situation, including the gagging order depriving him of his voice and his ability to communicate with the outside world,

[104] Abu Zubaydah v Poland, para. 451; also El-Masri v Former Yugoslav Republic of Macedonia, paras. 218-221.
[105] Abu Zubaydah v Poland, para. 519.
[106] Abu Zubaydah v Poland, para. 452; see also Othman (AbuAbu Qatada) v. the United Kingdom, 9 May 2012, ECHR No. 8139/09, para. 233; and El-Masri v Former Yugoslav Republic of Macedonia, para. 239.
[107] Abu Zubaydah v Poland, para. 453; Othman (AbuAbu Qatada) v United Kingdom, paras. 261 and 285.
[108] Abu Zubaydah v Poland, para. 554; see also Gäfgen v. Germany, 1 June 2010, 22978/05 para. 165.
[109] For a recent example see Human Rights Committee, Al-Rabassi v. Lybia, Comm. No. 1860/2009, 18 July 2014, paras. 7.5 and 7.8.
[110] Abu Zubaydah v Poland, para. 559

compound the flagrant nature of the denial of justice in his case. The Court should reiterate, as it did in *Abu Zubaydah v Poland*, that his on-going arbitrary detention with no prospect of any legal process is itself a flagrant denial of justice.

36. Following its own approach in the Polish cases, it is inconceivable that in 2006 the authorities were not aware either of the applicant's transfer from Lithuanian territory and his subsequent exposure to a foreseeable serious risk of further serious violations.[111] Lithuania enabled to CIA to transfer him from its territory, thereby exposing him to years of further torture, ill-treatment, secret and arbitraryy detention and flagrant denial of justice at the hands of the US authorities.

The Duty to Investigate and Hold to Account and Violations in this Case

37. Where there is an arguable claim that serious violations may have been committed, there is an obligation on the authorities to investigate, as set out in the applicant's original application. The Court clearly set out the obligations of states in this context in *Abu Zubaydah v Poland*, by stating that *"[w]here an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of agents of the respondent State or, likewise, as a result of acts performed by foreign officials with that State's acquiescence or connivance … there should be an effective official investigation."*[112]
38. There was little doubt in the Court's mind in *Abu Zubaydah v Poland*, just as there can be little room for doubt in light of the evidence presented in this case, that there was an arguable claim warranting a thorough and effective investigation.
39. The Court in the Polish cases clarified the standard for the investigation required under the Convention. In line with existing jurisprudence, the Court found it to include the following:
    - It must be *"capable of leading to the identification and punishment of those responsible"* to ensure effectiveness of the prohibition of torture and inhuman and degrading treatment and accountability for those who abuse the rights of others.[113]
    - It must be prompt and thorough, meaning that the *"authorities must act of their own attention and must always make a serious attempt to find out what happened and*

[111] Abu Zubaydah v Poland, para. 525.
[112] Abu Zubaydah v Poland, para. 479.
[113] Abu Zubaydah v Poland, para. 479.

should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions";[114]

- The investigation must be independent of the executive;[115]
- The victim must be able to participate throughout the investigation; the Court made this important dimension of the duty clear in the Poland cases, as it did earlier in *El Masri v Former Yugoslav Republic of Macedonia* and *A and Others v UK,*[116] and is further elaborated in the context of the *EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*.[117]
- Proceedings should moreover, as far as possible, be transparent; the Court noted that investigations by a state's authorities must include "a sufficient element of public scrutiny of the investigation or its results to secure accountability," which is "essential in maintaining public confidence in their adherence to the rule of law".[118] This is closely linked to the right to truth addressed below.

40. In the context of transnational criminality involving the territories of various States, an effective investigation requires international cooperation between states.[119] States are therefore obliged to take steps to seek, and to provide, cooperation from the many other states involved in the investigation of rendition crimes.
41. The Court's findings as regards the deficiencies in the Polish investigation in the *Abu Zubaydah* and *al Nashiri* cases apply with greater weight in the context of Lithuania, The lack of willingness to carry out any investigation has been apparent from the outset. Official investigations formally launched or reopened have been narrow in scope, failing to appropriately address the grave nature of the criminality at issue, and have had no impact in practice. They have later been officially closed, with no information provided. Basic investigative steps have still not been taken, in Lithuania or in cooperation with other states, and no information has been provided as to the fruits of the various purported investigations to date.

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[114] Abu Zubaydah v Poland, para. 480.
[115] Abu Zubaydah v Poland, para. 480.
[116] El-Masri v Former Yugoslav Republic of Macedonia, paras. 183-185 and Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, para. 167; Abu Zubaydah v Poland, para. 480.
[117] European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14 November 2012, which all states must have reflected in domestic legislation and practice by November 2015.
[118] El-Masri v Former Yugoslav Republic of Macedonia, paras. 192.
[119] See eg *Rantsev v. Cyprus and Russia*, 2010.

42. As set out in Part A, it is now a decade since the Applicant was first secretly detained and tortured on Lithuanian soil pursuant to an agreement reached (as the SSCI Report makes clear) at the highest level of Lithuanian government. Several years have transpired since information in this respect was firmly in the public domain and calls for truth, investigation and accountability began. None of the Convention requirements of promptness, effectiveness, rigour or independence have been met. Evidence has long been available in the public domain and brought to the attention of the prosecutor's office and yet no effective official investigation has been conducted by the Lithuanian authorities and there has been absolutely no meaningful attempt to hold to account those responsible.

The Right to Truth and the Importance of Transparency

43. The judgment in this case should make clear that the Lithuanian state has violated the right to truth.
44. In the *Abu Zubaydah* and *al Nashiri* cases, the Court makes clear that the applicants – and society as a whole – have a right to truth. In this respect the Court made clear:

    "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."[120]
45. The Court is referred to submissions on the 'right to truth' presented orally by the UN Special Rapporteur during the hearings in the cases of *Abu Zubaydah v Poland* and *Al Nashiri v Poland* hearing on 3 December 2014,[121] and to his report on accountability which emphasizes the importance of this right.[122]
46. The Special Rapporteur argued that the right to truth should be understood not only as an aspect of the duty to investigate under Articles 3 or 5, but independently under Article 10 of the Convention as part of the right to receive information.[123] In his statement the Special Rapporteur refers to the consistent position of the UN mechanisms, and the decision of this Court to acknowledge, albeit in passing, such a right, bringing it into line with a broader corpus of international legal authority. The Court adopted an approach

[120] Abu Zubaydah v Poland, para. 489; Al Nashiri v Poland, para. 495.
[121] Al Nashiri v Poland, para. 479.
[122] Special Rapporteur Emmerson, Framework Principles, paras. 23-27, 32-33, 35, 37-38 and 51.
[123] Al Nashiri v Poland, para. 483.

consistent with that jurisprudence in finding that *"where gross or systematic human rights violations were alleged to have occurred, the right to know the truth was not one that belonged solely to the immediate victim but also to society."*[124]

47. The right to truth and the obligation to investigate are closely interlinked and interdependent. As noted above, the Court made clear in *Abu Zubaydah v Poland* that as much information as possible should be made available throughout proceedings. Restrictions should be strictly necessary and justified in relation to particular pieces of information rather than applied in a blanket manner, or simply assumed.[125] Moreover, *"where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests (see, mutatis mutandis, A. and Others v. the United Kingdom [GC], no. 3455/05, §§ 216-218, ECHR 2009)."*[126] This overarching invocation of state secrecy has been subject to increasing criticism on the international level, including by the Special Rapporteur on Terrorism and Human Rights who has expressed concern over "unjustified claims for secrecy on grounds of national security or the maintenance of good foreign relations' subverting the right to truth or principle of accountability.'[127] As an example, he referred to the *El Masri* case, noting that 'in the context of the secret detention, rendition and torture programme of the Bush-era CIA, the Court rightly concluded that the concept of state secrets "has often been invoked to obstruct the search for the truth"[128]."
48. In the context of the Lithuania case, it is particularly critical that the Court take the opportunity to assert clearly the obligations of states to make public the truth and to ensure transparency. The Lithuania case epitomises the overuse of the doctrine of state secrecy to shield its investigation from public scrutiny and to preclude access to justice and the right to truth. The over-reliance on state secrecy is seen also in the myriad failed attempts by victim representatives and NGOs to secure information through freedom of information act requests, which have consistently been blocked.
49. In these circumstances the Court is urged to emphasise the incompatibility of the state secrets doctrine, as invoked by Lithuania in the present case, with its obligations in relation investigation, accountability, truth and transparency under the Convention.

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[124] Al Nashiri v Poland, para. 483.
[125] Abu Zubaydah v Poland, para. 488.
[126] Abu Zubaydah v Poland, para.488.
[127] Special Rapporteur Emmerson, Framework Principles, para. 37.
[128] Special Rapporteur Emmerson, Framework Principles, para. 39.

The Right to a Remedy: Article 13 in Conjunctions with Articles 3, 5, 6 and 8

50. The Court in *Abu Zubaydah v Poland*, as in other extraordinary rendition cases, recognised that respecting the right to a remedy for rendition victims entails ensuring access to 'effective practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation'.[129]
51. An 'effective and thorough' criminal investigation in face of an 'arguable claim' that serious violations have arisen is clearly a key dimension of the right to a remedy in cases of this nature. The requirement for an investigation under Article 13 is broader than under Articles 3 and 5[130] but the same dearth of investigative activity that lead to a violation of the obligations to investigate and to hold to account those responsible, addressed above, readily applies in relation to the violation of this aspect of the right to a remedy under Article 13.[131]
52. Particular remedies arise from the unlawful transfer of persons at the heart of this case, to which the Court's attention is therefore drawn. The Court noted in the *Abu Zubaydah* case that 'an effective remedy under Article 13 requires independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant his expulsion or to any perceived threat to the national security of the State from which the person is to be removed.'[132] The complete lack of any legal process of challenge and review whatsoever, prior to the Applicant's transfer plainly violates these obligations.
53. When an individual has been transferred unlawfully and, as a result, is subject to on-going violations of his most basic rights, the right to a remedy should be understood to entail the on-going obligation to take steps to bring those violations to an end. This is reflected in the Court's approach in the cases of *Abu Zubaydah v Poland*, *El Masri v Macedonia* and *Al Nashiri v Poland* which enshrine standards for reparations for violations by contracting states within the framework of extraordinary rendition programs.
54. In particular, the Court in *Al Nashiri* specified that where the transfer of an Applicant has exposed him to a serious risk of cruel inhuman or degrading treatment or of the death

[129] Abu Zubaydah v Poland, para. REF PARA. Al Nashiri v Poland, para. 550.
[130] Abu Zubaydah v Poland, para. 542.
[131] Abu Zubaydah v Poland, para. 541; see also Anguelova, cited above, §§ 161-162; Assenov and Others, cited above, §§ 114 et seq.; Aksoy, cited above, §§ 95 and 98 and El-Masri v Former Yugoslav Republic of Macedonia, para. 255.
[132] Abu Zubaydah v Poland, para. 543.

penalty, the Court may "require the State concerned to 'take all possible steps' to obtain the appropriate diplomatic assurances from the destination State."[133] The Court noted that "these principles apply *a fortiori* in cases where a person, as in the present case, has been subjected to extraordinary rendition."[134]

55. The Court's judgment notes that the Court may require states to take 'all possible steps' to obtain assurances from the destination state even where the transfer has taken place and the violations are on-going. Among the 'possible' steps available to states, in the Court's view, are 'tangible remedial measures [taken] with a view to protecting the applicant against the existing risks to his life and health in a foreign jurisdiction."[135]
56. In line with the Court's approach in *al Nashiri v Poland*, the Committee of Ministers in implementing the *Abu Zubaydah v Poland* judgment has acknowledged the on-going responsibility of the state that contributed to violations to take steps to bring them to an end, including by seeking assurances that the victims would not be subject to 'flagrant denial of justice'.[136]
57. The same obligations apply to Lithuania in light of the continuing flagrant denial of justice, and the apparent intention of US authorities (revealed by the Senate Committee report) to keep him in incommunicado detention for the remainder of his life. The approach to remedies in the judgment should reflect the unusual features of the present case. The violations of the applicant's rights continue to the present day. His detention remains entirely without any rule of law framework, there being no legal basis for detention, no review of its lawfulness, no procedural safeguards, no access to a remedy and no apparent attempt to ever try or release him.
58. The court is urged to find in this context that Lithuania should to take all possible measures (as per *al Nashiri*, para 587) individually, and collectively with other states, to bring the flagrant denial of justice to an end.
59. The right to a remedy in cases of this nature also has other additional critical dimensions. The Court is urged to clarify that an effective remedy in these cases includes recognition of responsibility and the rendering of appropriate acknowledgment and apology.
60. It entails also engagement with meaningful guarantees of non-repetition. Among the issues referred to by the Court in *Abu Zubdaydah v Poland*, is ensuring more effective

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[133] Al Nashiri v Poland, para. 587.
[134] Al Nashiri v Poland, para. 588.
[135] Al Nashiri v Poland, para. 588.
[136] Council of Europe Committee of Ministers, First Review of the Abu Zubaydah Judgment, 1222nd meeting, 12 March 2015, at para 1-2.

oversight, in law and in practice, of intelligence agencies which constitutes a dimension of such guarantees.[137]

61. As such, the Court is urged to adopt an approach to the right to a remedy in this case that reflects the nature of the wrongs, and accepted international standards.[138] In the context of counter-terrorism it has been noted that the State is obliged to make full and effective reparation to the victim in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as appropriate.[139]
62. However, the complete lack of any recognition or vindication of the victim's right to a remedy in Lithuania remains stark. Instead, the government throughout this process has engaged in the complete denial of their rights, questioning at one point whether the applicant existed at all, and preferring to shift the onus on to him to meet impossible burdens (such as submitting forms that the US would not declassify) rather than taking responsibility for violations. More broadly, the complete disregard for the right to a remedy in the context of war on terror violations, epitomised by the rendition programme and the Applicant's case in particular, undermines a rule of law approach to countering terrorism consistent with the Convention.[140]
63. In its judgment the Court should clarify the nature of Lithuanian obligations in respect of key elements of remedy and reparation in a case such as this.

IV. Exhaustion of Domestic Remedies

64. The Court is referred to the applicants' prior submissions on admissibility, including satisfaction of the requisite time limits and the exhaustion of domestic remedies.
65. In its recent correspondence the government has again referred the Court to its arguments in respect of the inadmissibility of the complaint, including the purported non-exhaustion of domestic remedies. The court is referred to arguments made previously, in the original

[137] The Court referred to the case pointing to 'a more general problem of democratic oversight of intelligence agencies' in para 492.
[138] These are set out in the original application; see eg UNHRC GC 31; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.
[139] See Principles above. In the counter-terrorism context see Special Rapporteur Emmerson, UNGA Doc A/HRC/20/14, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 4 June 2012, para 51-52. Note: Principle of accountability dealt with in paras 36 and 67.See generally submissions in the original application, referring for example to UN Human Rights Committee *General Comment No. 31*, cit., § 2.
[140] Emmerson et al.

application and supplementary submissions, and to the Court's approach to admissibility, including exhaustion, in the *Abu Zubaydah v Poland* case.

66. The applicant recognizes the fundamental importance of the Lithuanian state having the opportunity (as well as the obligation) to address violations arising on its territory.[141] It is well established that among the remedies that a state must provide in cases of this nature is a prompt and thorough criminal investigation. Lithuania has had every such opportunity to conduct such an investigation and, as set out in the original application, the applicant has taken all reasonable steps in the exceptional circumstances of his case to seek to ensure that it did so.

67. In this respect, the question of admissibility and merits are inextricably interlinked. Just as in *Abu Zubdaydah v Poland* (para 337), the Court should consider the question of admissibility and merits together and find that there has been no effective investigation, and that there are no effective domestic remedies, in Lithuania.

68. The application was brought to the ECHR within six months of a cursory and inadequate investigation having been formally and publicly closed, on the basis set out above. .As noted above, in a case such as this, a criminal investigation capable of identifying those responsible is an essential dimension of an adequate domestic remedy. The formal closure of the investigation, and refusal to reopen it despite request from the applicant and others, confirmed the non-existence of effective domestic remedies in Lithuania at that time

69. The remedies that the applicant was obliged to exhaust were those domestic remedies available to him 'in theory and in practice at the relevant time', before bringing his case to the ECHR. The Court has noted likewise that 'national courts should *initially* have the opportunity to determine questions regarding the compatibility of domestic law with the Convention (A, B and C v. Ireland [GC], § 142)'.

70. While the applicant submits that the question for court is whether, *when the application was brought*, there were domestic remedies available to him, he also notes in any event that developments since then (in his investigation and in others) further demonstrate the continuing lack of an effective investigation in Lithuania.

71. The government's current protestation as to the reopening of the pre-trial investigation and suggestion that it should be given more time[142] echo those made repeatedly at earlier junctures, in response to (and with a view to removing) other forms of national or

[141] A, B and C v. Ireland [GC], § 142.
[142] Letter to the court dated 25 March 2015.

international pressure. They have never however resulted in an effective investigation or the provision of any effective remedy on the domestic level.

72. As noted above, the states has still not recognized any wrong doing on its part. It has not recognized the victimization of our client or others. Investigations have been opened and closed, without tangible effect in terms of access to information or accountability. Rather, the authorities continue, even beyond the US Senate report, to assert state secrecy to preclude public access to any information and meaningful accounting for investigative steps taken in Lithuania or in cooperation with other states. There is little to indicate any volte face on the part of Lithuanian authorities towards meeting its international obligations of investigation, accountability and reparation.
73. Contrary to the suggestion by the government before the Court, the state's approach to the circumstances of the applicant's case has been one of denial and obfuscation from the outset up to the present day. Its denial of the applicants' existence, or its inflexible insistence on the power of attorney form in this and other cases, despite the extraordinary circumstances recognized by the Court and the straightforward impossibility of obtaining declassification of such forms is the clearest manifestation. Such an approach makes it risible that the government should then suggest that the onus is on the applicant to seek a remedy before the Lithuanian courts that refuse to recognize him.
74. Moreover, as details about the programme and the Lithuanian facility have emerged over time, officials (including notably prosecuting authorities) have responded defensively, hiding behind the lack of certainty as to allegations while giving no indication of a genuine attempt on their part to uncover and address the truth.[143]
75. The acts and omissions of the state thus far are not consistent with the availability, in 2011 or 2015, of effective domestic remedies in Lithuania.
76. In any event, as the Court is well aware and as it has reiterated in recent cases, where the government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available,[144] in law and in practice.[145] The remedy must offer reasonable prospects of success, demonstrable

[143] In one example officials from the Lithuanian prosecutor's office told investigators from the Constitution Project – a US NGO – in 2012 prison network that the centre "was not necessarily a jail" and that it "could just as well have been meant to hold valuables".
[144] (Dalia v. France, § 38; McFarlane v. Ireland [GC], § 107)
[145] Vernillo v. France. The Court's 2014 Guidance suggests that the remedy's basis in domestic law and practice must be clear (para 76).

by reference to practice in the state in question.[146] The state of Lithuania has failed to discharge its burden in this respect.

60. It is submitted that the proper operation of the rule of domestic remedies must be distinguished from the ability to turn on and off international oversight on the basis of speculative future action. The government's on-going assertions regarding domestic remedies, despite the excessive passage of time and its demonstrable failure to date, should not be allowed to shield it from its responsibility or to derail the advanced process before the court prior to judgment and the Applicant's right to a remedy.

V. Request for Confidentiality of the Case File before the Court

77. Finally, the Applicant addresses the government's request (letter from the Lithuanian representative to the Court dated 8 April 2015) to restrict public access to all documents that the government may produce in accordance with the Court's order of 25 March 2015. The Court's letter to the Applicants (17 April 2015) indicates that "[t]he President of the Section has acceded to the Government's request at this stage, subject to her future decision as to which particular parts of those documents are to be inaccessible to the public (Rule 33 § 3) – in the light of the specific reasons that are to be adduced by the Government on submission of those materials."
78. Allowing information to be submitted confidentially to the Court is an exceptional course of action, even on a temporary basis. While this decision may help to facilitate the Court's initial access to information, given the pressing rights and interests at stake in this case, the Court should ensure that it promptly determines whether withholding specific parts of documents is in fact justified, and ensures that the bulk of any information submitted to it is put into the public domain without delay.
79. It is imperative, particularly at this time and on an issue in relation to which the principles of open justice have been so undermined, that the Court adopt a strict approach to this request, reflecting its own rules and jurisprudence. The administration of justice, including proceedings before the Court, should in principle be public, visible and subject to scrutiny (e.g., *Diennet v. France, 1995, Martinie v. France, 2006, para 39).* The Court has consistently reiterated that compelling reasons of national security, public order, or the safety of victims and witnesses would be

[146] (Scoppola v. Italy (no. 2) [GC], § 71).

required to justify, on an exceptional basis, departure from these principles (e.g., *P v United Kingdom, 2001 para.37).*

80. As regards documents submitted to the Court specifically, the public nature of such documents is reflected in clear and explicit rules (Rule 33). While the President has the power under those rules to authorize exceptions, exceptions should be interpreted strictly and subject to appropriate safeguards so as not to undermine the rule.
81. First, the onus is on the state to satisfy the Court of the essential nature of any withholding of particular pieces of information from the public. In *Shakhgiriyeva and Others v. Russia*[147] the Court notes that it is the "obligation of the party requesting confidentiality to substantiate its request".[148]
82. Second, solid reasons must be provided by the state as to why withholding public access under Rule 33 is in fact '*required'* by the compelling reasons it advances. It is plainly not enough simply to invoke "national security", for example. In *Abu Zubaydah v Poland*, regarding the defendant Government's failure to produce the material requested due to confidentiality for security considerations, the Court has responded that, in such cases, there is a need to "satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential".[149]
83. Third, there can, in any event, be no basis for the blanket application of confidentiality to a file in its entirety. Confidentiality would need to be justified by the state, and assessed as necessary by the Court, in relation to particular pieces of information, on a document by document, or section by section, basis. The Court has alluded to this in noting that it would assess whether 'particular parts of those documents' may need to remain confidential. Any other approach would violate the principles of necessity and proportionality upheld by the Court.
84. Fourth, if genuine and essential reasons of national security (to which the state refers in correspondence) are found to justify withholding particular facts from public view at that time, the Court has noted in previous case law that this can and should be done in a manner that ensures that the principle of open justice is not unduly compromised. In *Nolan and K. v Russia*,[150] or *Janowiec and Others v Russia*,[151] for example, the

[147] No. 27251/03, 8 January 2009. (hereafter '*Shakhgiriyeva* case')
[148] *Shakhgiriyeva* case, at para 137.
[149] No. 7511/13, 24 July 2014. (hereafter '*Abu Zubaydah* case')
[150] No. 2512/04, 12 February 2009. (hereafter ' *Nolan* case')
[151] Nos. 55508/07 and 29520/09, 21 October 2013. (hereafter '*Janowiec* case')

Court found that there were ways for the state to address 'legitimate State security concerns' such as "...by editing out the sensitive passages or supplying a summary of the relevant factual grounds, whereas in the present case they have done neither".[152]

85. Finally, the Court should react to the Government's claim for confidentiality in a way that takes into account that at the heart of this case is the abuse of state secrecy. As addressed above, the secrecy surrounding the extraordinary rendition program in general, as well as Lithuania's secrecy concerning its involvement in particular, has been the subject of widespread, international condemnation. State secrecy has been manipulated to shroud the truth and prevent access to justice in domestic courts. The Court should ensure that it does not serve the same purpose in proceedings before the Court.

[152] *Nolan* case, at para 56.