



Statement by Kyra Hild, The Redress Trust

Szczytno District Court

14 September 2015

I. Introduction

Thank you Your Honour, I appreciate the opportunity to address the Court today in this very important case; for Poland, for our client, and for the protection of human rights.

My organisation, the Redress Trust, is an international organisation with a mandate to assist survivors of torture and related international crimes to access justice and other forms of reparation for the harm they suffered. I am speaking to you today about Mr. Mustafa al-Hawsawi. REDRESS represents Mr. al-Hawsawi in relation to his claims outside the United States of America (USA).¹

Mr. al-Hawsawi was abducted in Rawalpindi, Pakistan in March 2003. He was immediately transferred to the custody of the USA and was initially held in Afghanistan. From this point forward Mr. al-Hawsawi entered what has been referred to as a “spider’s web’ of illegal transfers of detainees woven by the CIA”.² This Spider’s Web was the USA’s Central Intelligence Agency’s (CIA) Rendition, Detention and Interrogation Programme, which spanned the globe and encompassed a vast array of countries. Mr al-Hawsawi is categorised by USA authorities as a High Value Detainee (HVD), and as such was subject to a specific CIA programme of secret detention and interrogation.³ His detention was only acknowledged by the USA authorities in 2006 when he was transferred to Guantanamo Bay, Cuba, where he remains until this day.

Proceedings are also ongoing regarding Mr. al-Hawsawi’s detention in Lithuania. In Lithuania an investigation which had been closed in 2011 was reopened earlier this year after the publication of the redacted Executive Summary of the Senate Select Committee on Intelligence’s Study of the Central Intelligence Agency’s Detention and Interrogation Programme (‘the SSCI Summary’). This investigation has now been combined with the investigation regarding Mr. al-Hawsawi, which was commenced in 2014. The investigation regarding Mr. al-Hawsawi was opened in 2014 after the Vilnius Regional Court overturned the decision of the Prosecutor not to open an investigation on the basis of our complaint on Mr. al-Hawsawi’s behalf.

¹ Mustafa Al-Hawsawi, Authority Form, (Tab A)

² Parliamentary Assembly Council of Europe (PACE), Committee on Legal Affairs and Human Rights (CLAHR), "Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report", 11 June 2007, Doc. 11302 rev., ("PACE, CLAHR Report 2007") para. 1. (Tab B)

³ International Committee of the Red Cross (ICRC), "Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody", February 2007, ("ICRC HVDs Report"), p. 5 (Tab C)

Furthermore, decisions regarding Mr. al-Hawsawi's detention have been handed down by the United Nations Working Group on Arbitrary Detention regarding the USA and Cuba⁴ and by the Inter-American Commission on Human Rights regarding the USA.⁵

- **The USA's Classification regime**

Information about Mr. al-Hawsawi and other HVDs' whereabouts prior to their arrival at Guantanamo Bay in 2006 has been carefully guarded.⁶ Mr. al-Hawsawi is prevented from speaking publicly about his rendition, detention and ill-treatment as the USA Government has classified this information.⁷ Mr. al-Hawsawi and his military counsel have been precluded by a highly restrictive classification regime from participating in proceedings outside the USA, as any information from Mr. al-Hawsawi (and therefore his military counsel) on these matters is automatically classified, accessible only to those with high-level security clearance.⁸ For example, my organisation is prohibited from meeting or speaking with Mr. al-Hawsawi to discuss his case and his military counsel are prohibited from confirming or denying any information that details aspects of the CIA's Rendition, Detention and Interrogation Programme and that has not been explicitly declassified by the USA Government.

The European Court of Human Rights (ECtHR) in the cases of *Al Nashiri* and *Abu Zubaydah* recognised the difficulties of the applicants in bringing their cases while subjected to a similar classification regime.⁹ The Court noted that these circumstances:

inevitably had an impact on the applicant's ability to plead his case before this Court. Indeed, in his application the events complained of were to a considerable extent reconstructed from threads of information gleaned from numerous public sources.¹⁰

Similarly, the information which we have previously presented, and are presenting today, is based on "information gleaned from public sources." The publication of the SSCI Summary in December 2014 has confirmed some of the information that we were previously aware of regarding Mr. al-Hawsawi, while also identifying new and troubling information, in particular regarding his treatment

⁴ UN Working Group on Arbitrary Detention (WGAD), Communication addressed to the Government of the United States of America on 25 August 2014 and to the Government of Cuba on 15 September 2014, Concerning Mustafa al Hawsawi, UN Doc. A/HRC/WGAD/2014, 23 Jan 2015 ("WGAD decision re al-Hawsawi")

⁵ Inter-American Commission on Human Rights (IACHR), Resolution 24/2015, Matter of Mustafa Adam Al-Hawsawi regarding the United States of America, Precautionary Measure No. 422-14, July 7, 2015 ("IACHR, precautionary measures re al-Hawsawi")

⁶ 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, para. 19.

⁷ WGAD decision re al-Hawsawi, above n. 4

⁸ See United Nations, "Communication addressed to the United States of America by the Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", USA 31/2012, 30 November 2012, pp. 1-2.

⁹ ECtHR, *Al Nashiri v. Poland*, App. No. 28761/11, 24 July 2014 ("*Al Nashiri*"), paras 399-400 (Tab D). ECtHR, *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, 24 July 2014 ("*Abu Zubaydah*"), paras 399-400 (Tab E).

¹⁰ *Al Nashiri*, above n. 9, para 400.

in detention, as well as causing us to re-examine some of our previous understandings as to his precise trajectory in 'secret' detention facilities.

II. Mustafa al-Hawsawi in Poland

The CIA established secret detention sites (also known as black sites), where the detainees in the programme were held and interrogated, often using so-called "enhanced interrogation techniques" and other forms of torture and ill-treatment. The SSCI Summary assigned each site a particular colour. While the redacted Summary does not identify the countries in which the sites were located, publicly available information has indicated their locations. Of relevance here are; DETENTION SITE BLUE, which was in Poland, and DETENTION SITE COBALT, which was in Afghanistan.¹¹

Mr. al-Hawsawi was held in secret CIA detention from 2003 until 2006 and subjected to the regime which was applied to HVDs in CIA custody. The ECtHR has noted that this regime

'included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention.' The transfers to unknown locations and unpredictable conditions of detention were specifically designed to deepen their sense of disorientation and isolation. The detainees were usually unaware of their exact location.¹²

Consequently, it is unlikely that Mr. al-Hawsawi would be able to identify exactly where he was held throughout his years in secret detention even if he were able to communicate it to us.¹³ However, several public documents identify the patterns of the rendition programme and shed light on the locations of Mr. al-Hawsawi's detention. Analysis of these documents indicates that Poland enabled the CIA to transfer Mr. al-Hawsawi from its territory on Flight N313P in September 2003 and that prior to this flight it is likely that he was held in secret detention in the CIA detention site in Poland for some time after April 2003. We know that the first CIA black site that Mr. al-Hawsawi was detained in was in Afghanistan.¹⁴ An examination of relevant flight data indicates a number of rendition flights which could have transferred Mr. al-Hawsawi from his detention in Afghanistan to Poland for further detention in the CIA programme before his transfer from Poland in September 2003.

II.1 Transfer to Poland

The SSCI Summary has caused us to re-assess some of our previous understandings regarding Mr. al-Hawsawi's transfer to Poland. On the basis of the SSCI Summary, it appears likely that Mr. al-Hawsawi was not transferred with Khalid Sheikh Mohammed in March 2003 because the SSCI Summary indicates that Mr. al-Hawsawi was tortured in Afghanistan, in April 2003. However, the

¹¹ See for example, Amnesty International, *Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' Must Act after Senate Torture Report*, 2015 (Press release, Tab F); Reprieve, *Briefing and Dossier for the Lithuanian Prosecutor General: CIA Detention in Lithuania and the Senate Intelligence Committee Report*, 11 January 2015, para 18.

¹² *Abu Zubaydah*, above n. 9, para 398; *Al Nashiri*, above n. 9, para 398.

¹³ See also, *Al Nashiri*, above n. 9, para 410; ICRC HVDs Report, above n. 3, p. 7.

¹⁴ ICRC HVDs Report, above n. 3, p. 7.

SSCI Summary still raises a reasonable suspicion that Mr. al-Hawsawi was held in DETENTION SITE BLUE, in Poland.¹⁵

It is our assessment that Mr. al-Hawsawi was most likely transferred to Poland after April 2003. Analysis of relevant flight data indicates that on 5 June 2003 the rendition plane, N379P, flew from Kabul to Szymany.¹⁶ It is widely suggested that this flight carried Walid Bin-Attash to Poland but it may also have carried Mr. al-Hawsawi. It is generally accepted that Mr. Bin-Attash was also on the same Flight N313P that took Mr. al-Hawsawi out of Poland.¹⁷

On 30 July 2003, another rendition flight left Kabul, Afghanistan and flew to Szymany.¹⁸ Gulfstream V - N379P – involved in both the June and July flights was identified by the ECtHR as the “Guantanamo Express”¹⁹ and “the most notorious CIA rendition plane.”²⁰ A letter from the Polish Border Guard Office indicates that the July flight carried one passenger into Poland. Like other rendition flights this flight was filed under a “dummy flight plan”. Landing permits were requested and issued for Warsaw airport, although the intended destination of the aircraft was Szymany.²¹ Like flight N313P, which took Mr. al-Hawsawi out of Poland in September 2003, this flight used the designation STS/STATE.²²

In examining other rendition cases regarding Poland the ECtHR has noted that

in addition to granting the CIA rendition aircraft overflight permissions and navigating the planes through Poland’s airspace, the Polish authorities, including PANSA, accorded them special status, various exemptions and authorisations. They also cooperated with the CIA in disguising the aircraft’s actual routes and validated incomplete or false flight plans which served to cover-up the CIA activities in Poland, in contravention of international aviation regulations.²³

PACE’s second report on Secret detentions and illegal transfers of detainees found that:

¹⁵ Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, December 3, 2014 (“SSCI Summary”), p. 96. (Tab G)

¹⁶ Letter from Komenda Główna Straży Granicznej, 2010 (Tab HI); Poland FOI, letter from PANSA to Helsinki Foundation for Human Rights (HFHR) and Open Society Justice Initiative (OSJI), 16 Sep 2009 (“Poland FOI letter”) (Tab JK); OSJI and HFHR, Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency, (“Explanation of Rendition Flight Records”) (Tab L); PACE, CLAHR Report 2007, above n.2, para 182; Centre for Human Rights and Global Justice, NYU School of Law, Data String Analysis Submitted as Evidence of Polish Involvement in U.S. Extraordinary Rendition and Secret Detention Program, (“Data String Analysis”) (Tab M)

¹⁷ See for example, The Rendition Project, Rendition Circuit: 20-25 September 2003, Rendition of ‘High-Value Detainees’ between Afghanistan, Poland, Romania, Morocco and Guantanamo Bay, (“Rendition Project, Circuit 20-25 September”) (Tab N)

¹⁸ Letter from Komenda Główna Straży Granicznej, 2010 (Tab HI); PACE, CLAHR Report 2007, above n.2, para 182; Data String Analysis, above n. 16; Poland FOI letter, above n. 16; Explanation of Rendition Flight Records, above n. 16.

¹⁹ *Al Nashiri*, above n. 9, para 408.

²⁰ *Abu Zubaydah*, above n. 9, para 414.

²¹ Explanation of Rendition Flight Records, above n. 16, pp. 3-4; Poland FOI letter, above n. 16, pp. 9-10.

²² Poland FOI letter, above n. 16; PACE, CLAHR Report 2007, above n.2

²³ *Al Nashiri*, above n. 9, para. 419.

These sources corroborate one another and provide the first verifiable records of a number of landings of 'rendition planes' significant enough to prove that CIA detainees were being transferred into Poland. I can now confirm that at least ten flights by at least four different aircraft serviced the CIA's secret detention programme in Poland between 2002 and 2005. At least six of them arrived directly from Kabul, Afghanistan during precisely the period in which our sources have told us that High-Value Detainees (HVDs) were being transported to Poland. Each of these flights landed at the same airport I named in my 2006 report as a detainee drop-off point: Szymany.²⁴

Both flight N379P on 30 July 2003, and flight N313P on 22 September 2003 are identified in this report in the list of the "most significant of these flights."²⁵

II.2 Detention, including torture and ill-treatment

Senator Marty identified that "Poland housed what the CIA's Counterterrorism Centre considered its 'most sensitive HVDs'."²⁶ As Mr. al-Hawsawi is one of only 5 HVDs who is currently on trial before a military commission for his alleged participation in the 9/11 attacks it is highly likely that he fell into this 'most sensitive' category.

The SSCI Summary makes a clear link between specific black sites and individuals detained and tortured there, stating that "17 [detainees] were subject to [enhanced interrogation] techniques between January 2003 and August 2003. The CIA's enhanced interrogations during that time were primarily used at DETENTION SITE COBALT and DETENTION SITE BLUE."²⁷ The relevant footnote refers to the detainee reviews and reports of these 17 individuals, including Mustafa Ahmad Al-Hawsawi. The full reviews remain classified. It is our assessment that Mr. al-Hawsawi was subjected to enhanced interrogation techniques in both DETENTION SITE COBALT and DETENTION SITE BLUE during this time. The SSCI Summary's Appendix listing "CIA Detainees from 2002-2008" confirms that Mr. al-Hawsawi was subjected to enhanced interrogation techniques while detained.²⁸

The conclusions of the SSCI Summary found that "the interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others."²⁹ The International Committee of the Red Cross, which interviewed a number of the 17 detainees referenced in relation to DETENTION SITES COBALT and BLUE, stated that it "clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment."³⁰

²⁴ PACE, CLHR Report 2007, above n.2, para 181.

²⁵ Ibid, para 182.

²⁶ Ibid paras 126. In preparing his report Senator Marty spoke about the HVD programme with "multiple well-placed sources in the governments and intelligence services of several countries, including the United States [and] Poland..." , para 119.

²⁷ SSCI Summary, above n. 15, p. 96.

²⁸ SSCI Summary, above n. 15, p. 459 (Names identified in Bold were subjected to Enhanced Interrogation Techniques).

²⁹ Senate Select Committee on Intelligence, Committee Study of the CIA's Detention and Interrogation Program, Findings and Conclusions, 2014, #3.

³⁰ ICRC HVDs Report, above n. 3, p. 5.

II.3 Transfer from Poland

Our position remains that Mr. al-Hawsawi was transferred out of Poland on flight N313P in September 2003.³¹ According to a letter from the Polish Border Guard Office this flight entered Poland with no passengers and left with five.³²

On 22 September 2003 Flight N313P flew from Kabul to Szymany.³³ The flight stayed in Szymany for around an hour before it flew on to Romania and then to Guantanamo Bay where it brought Mr. al-Hawsawi and three other High Value Detainees to a secret CIA detention site, separate from the main Guantanamo site.³⁴ Abu Zubaydah, whose case against Poland was decided by the ECtHR last year, was transferred from Poland on this same flight.³⁵ The ECtHR considered the circumstances regarding this specific flight in its decisions in *Al Nashiri* and *Abu Zubaydah*.³⁶ In those cases the Court focused on a number of specific factors which indicated the liability of the State, including special procedures for rendition flights landing at Szymany airport.³⁷

The ECtHR noted that the landing of plane N313P on 22 September 2003 at Szymany took place despite the fact that the airport did not have the necessary technical conditions for receiving such a large aircraft, in particular the facilities to refuel it, and the fact that the airport fire brigade was not adequately equipped for that purpose. In the view of the airport manager at the relevant time, “there must have been some very pressing reasons” for allowing that landing.³⁸

The Marty Report shed further light on the extent of complicity regarding flights arriving in Poland noting that:

... the WSI’s assistance depended to a large extent on its covert penetration of other state and parastatal institutions through its collaboration with undercover ‘functionaries’ in their ranks. Our sources have indicated to us that WSI collaborators were present within institutions including the Polish Air Navigation Services Agency ((Polska Agencja Żeglugi Powietrznej)), where they assisted in disguising the existence and exact movements of incoming CIA flights; the Polish Border Guard (Straż Graniczna), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA

³¹ See for example, The Report of the Constitution Project’s Task Force on Detainee Treatment, 2013, (“Constitution Project Report”), p. 169 (Tab O); Rendition Project, Circuit 20-25 September, above n. 17. For a summary of public source data on this plane’s movements on these dates, see *Abu Zubaydah v. The Republic of Poland*, Application to the ECtHR, 23 March 2013, paras 104-115 (available at <http://www.interights.org/document/269/index.html>); Adam Goldman, Associated Press, ‘CIA Flight Carried Secret from Gitmo’ (7 August 2010), available at http://www.boston.com/news/nation/washington/articles/2010/08/07/ap_exclusive_cia_flight_carried_secret_from_gitmo/

³² Letter from Komenda Główna Straży Granicznej, 2010 (Tab 7)

³³ Letter from Komenda Główna Straży Granicznej, 2010 (Tab 7); Rendition Project, Circuit 20-25 September, above n. 17; Data String Analysis, above n. 16; Explanation of Rendition Flight Records, above n. 16; PACE, CLAHR Report 2007, above n.2; *Abu Zubaydah*, above n. 9, para 408; *Al Nashiri*, above n. 9, para 438.

³⁴ Rendition Project, Circuit 20-25 September, above n. 17; PACE, CLAHR Report 2007, above n.2; Constitution Project Report, above n. 31, p. 169.

³⁵ *Abu Zubaydah*, above n. 9, para 112; *Al Nashiri*, above n. 9, para 438 ; *Abu Zubaydah v. The Republic of Poland*, Application to the ECtHR, 23 March 2013, paras 104-115.

³⁶ *Abu Zubaydah*, above n. 9, paras 108-116

³⁷ *Al Nashiri*, above n. 9, para 418.

³⁸ *Abu Zubaydah*, above n. 9, para 440; *Al Nashiri*, above n. 9, para 438.

flights landed; and the national Customs Office (Główny Urząd Celny), where they resolved irregularities in the non-payment of fees related to CIA operations.³⁹

III. Obligations on Poland

III.1 Poland's Obligations to investigate allegations concerning breaches of Mr. al-Hawsawi's fundamental rights on Polish territory

The 17 detainees identified as having been subjected to enhanced interrogation techniques in DETENTION SITES COBALT and BLUE, including Mr. al-Hawsawi, were subjected to the most serious violations of human rights including, the prohibition of torture,⁴⁰ the right to liberty and security,⁴¹ and the right to a fair trial.⁴²

Further, even if the Prosecutor is correct in her assessment that Mr. al-Hawsawi was not held in Poland for an extended period of time, in that case it is our continued assessment that Mr. al-Hawsawi was transferred from Poland on flight N313P – in this case as a stop-over.⁴³ In such a case, the State would still be responsible for enabling the US authorities to transfer Mr. al-Hawsawi from its territory despite the existence of a real risk that he would be subjected to treatment contrary to the ECHR.

The ECtHR's case law makes clear that the State is "responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities."⁴⁴ In a series of cases, including those considering the CIA's rendition, detention and interrogation programme (e.g. *Al-Nashiri*, *Abu Zubaydah* and *El-Masri*), the ECtHR has noted that

According to the Court's settled case-law, 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.⁴⁵

The ECtHR has specifically considered State obligations in the context of "extraordinary rendition" noting that

Where it has been established that the sending State knew, or ought to have known at the relevant time, that a person removed from its territory was subjected to 'extraordinary rendition', that is, 'an extra-judicial transfer of persons from one jurisdiction or State to

³⁹ PACE, CLahr Report 2007, above n.2, para 171. See also: *Al Nashiri*, above n. 9, Para 435.

⁴⁰ ECHR, Article 3, UN Convention against Torture, International Covenant on Civil and Political Rights (ICCPR), Article 7. See also, *Abu Zubaydah*, above n. 9, p. 212; *Al Nashiri*, above n. 9, p. 217

⁴¹ ECHR, Article 5, ICCPR, Article 9. See for example, *Abu Zubaydah*, above n. 9, p. 212; *Al Nashiri*, above n. 9, p. 217.

⁴² ECHR, Article 6, ICCPR, Article 14. See for example, *Abu Zubaydah*, above n. 9, p. 212; *Al Nashiri*, above n. 9, p. 217.

⁴³ See for example, Rendition Project, Circuit 20-25 September, above n. 17, Data String Analysis, above n. 16; Constitution Project Report, above n. 31, p. 169.

⁴⁴ See for example, *Abu Zubaydah*, above n. 9, para 449 ; *Al Nashiri*, above n. 9, Para 452.

⁴⁵ *Abu Zubaydah*, above n. 9, para 450 (See also p. 212); *Al Nashiri*, above n. 9, para 453-459 and p. 217; ECtHR, *El-Masri v The Former Yugoslav Republic of Macedonia*, App. no. 39630/09, 12 December 2012, ("*El Masri*") para 212. The ECtHR has found violations of Articles 3, 5, 6, and Protocol 2, in this regard. See also, *ECtHR, Rantsev v Cyprus & Russia* (2010) 51 EHRR 1.

another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment', the possibility of a breach of Article 3 is particularly strong and must be considered intrinsic in the transfer.⁴⁶

In Mr. al-Hawsawi's case his exposure to the real and foreseeable risk that he would be subjected to further violations of his Convention rights indeed led to such further and ongoing violations. After September 2003, when he was transferred from Poland, Mr. al-Hawsawi was subjected to a further three years of secret detention in the CIA's programme. The UN Working Group on Arbitrary Detention has held that his ongoing detention remains in violation of the ICCPR.⁴⁷ After his transfer from Poland the SSCI Summary suggests that Mr. al-Hawsawi was subjected to torture contrary to ECHR Article 3⁴⁸ and even today his current conditions remain a serious concern and would likely be held to constitute an ongoing violation of Article 3. The Inter-American Commission on Human Rights recently called for the US Government to urgently provide Mr. al-Hawsawi with adequate medical care in Guantanamo Bay.⁴⁹

Furthermore, contrary to ECHR, Article 6 Poland enabled the US authorities to transfer Mr. al-Hawsawi into a situation where he has not had access to his right to a fair trial. Contrary to Articles, 2 and 6 as well as Protocol 2, he is now facing capital charges in a military commission whose rules do not protect his right to a fair trial.⁵⁰ This constitutes a violation of the requirement under international human rights law that in any case where an accused may face the death penalty fair trial rights must be stringently adhered to.⁵¹

In 2006 the European Commission for Democracy through Law (Venice Commission) noted that:

The requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk.⁵²

The European Parliament referred to this report expressing regret:

⁴⁶ *Al Nashiri*, above n. 9, para 454. See also, *Babar Ahmad et al v. UK*, ECtHR, Admissibility decision 8 July 2010, at para 114.

⁴⁷ WGAD decision re al-Hawsawi, above n. 4

⁴⁸ See for example, SSCI Summary, above n. 15, p. 154.

⁴⁹ IACHR, precautionary measures re al-Hawsawi, above n. 5

⁵⁰ Council of Europe, *Al Nashiri v. Poland* and *Abu Zubaydah v Poland*, 12 March 2015 (Tab PQ)

⁵¹ See for example, ECtHR, *Öcalan v. Turkey*, No.46221/99, (12 March 2003), para 166: "the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible."

⁵² European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, Strasbourg, 17 March 2006, para 143. See also, UN General Assembly, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Sheinin; The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, 19 Feb 2010, UN Doc. A/HRC/13/42, ("UN Joint Study"), p. 132.

that European countries have been relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees, and recalls their positive obligations arising out of the case law of the European Court of Human Rights, as reiterated by the European Commission for Democracy through Law (Venice Commission)⁵³

Article 16 of the Articles on Responsibility of States for internationally wrongful acts, reflecting a rule of customary international law,⁵⁴ provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.⁵⁵

Furthermore, the UN Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism explained that under the rules of State responsibility, where one State is in ‘serious breach’ of its obligations under peremptory norms of international law – as would be the case if a State were to be torturing detainees – other States have a duty to cooperate to bring such a serious breach of the prohibition against torture to an end, and are required not to give any aid or assistance to its continuation.⁵⁶

III.2 Mr. al-Hawsawi has met the necessary standard of proof required to trigger the State’s obligation to investigate

The UN Committee against Torture has stressed that “States parties shall undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction as the result of its actions or omissions.”⁵⁷

The ECtHR has similarly explained that

Where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of agents of the respondent State, or likewise, as a result of acts performed by foreign officials with that State’s acquiescence or connivance, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined ... in [the] Convention”, requires by implication that there should be an effective official investigation.⁵⁸

⁵³ European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 14 February 2007, para 43.

⁵⁴ UN Joint Study, above n. 52, para 41.

⁵⁵ Articles on the Responsibility of States for internationally wrongful acts, UN Doc. A/RES/56/83

⁵⁶ UN Joint Study, above n. 52, para 42.

⁵⁷ Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3 (2012), para 23.

⁵⁸ *Abu Zubaydah*, above n. 9, para. 479. See also, *Al Nashiri*, above n. 9, para 485; *El Masri*, above n.45, para 182. Similar positive obligations to investigate have also been recognised in the context of ECHR, see for example, Article 5, *El Masri*, para 233.

The obligation to investigate will also be engaged where there are credible allegations that a state's agents have transferred a person to another state's jurisdiction where substantial grounds exist to believe that there is a real risk that the person will be tortured or subjected to unacknowledged detention.⁵⁹ Such obligations will also arise under international law where a state's agents are alleged to have been complicit in or have participated in torture or unacknowledged detention by another state, regardless of where the violations occur.⁶⁰

The ECtHR has recognised that European Convention on Human Rights proceedings “do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation).”⁶¹ In certain circumstances, the Court will draw “inferences” or “presumptions” of fact, and shift the burden of proof to the state.⁶²

The ECtHR takes a flexible approach that enables the Court to rely on “evidence of every kind”,⁶³ including “circumstantial evidence, based on concrete elements.”⁶⁴ A flexible approach to evidentiary matters is particularly critical where the nature of the case is such that it would otherwise pose insurmountable difficulties for applicants in their pursuit of justice.

In another case concerning the rendition of an individual as part of the CIA’s interrogation programme the ECtHR found that the applicant’s description of events and available material were sufficient to raise “at least a reasonable suspicion that the said Convention grievances could have been imputed to the State authorities” and he had “thus laid the basis of a *prima facie* case of misconduct on the part of the security forces of the respondent State, which warranted an investigation by the authorities in conformity with the requirements of Article 3 of the Convention.”⁶⁵

The evidence we have provided in this case, including the SSCI Summary, relevant flight data, and public documents regarding the CIA’s secret detention programme, has without doubt raised the necessary “arguable claim” or “reasonable suspicion” that Mr. al-Hawsawi’s Convention rights were indeed violated by Poland.

Furthermore, given the small number of individuals (17) identified in the SSCI Summary as having been subjected to enhanced interrogation techniques in either Afghanistan or Poland, or both, and

⁵⁹ On torture or ill-treatment see ECtHR, *Soering v United Kingdom* (1989) 11 EHRR 439, para. 90. On unacknowledged detention through extraordinary rendition see ECtHR, *Babar Ahmad & Others v United Kingdom* (2010) 51 EHRR SE6, para. 114; on removal to a flagrant breach of Article 5 see *Othman (Abu Qatada) v. United Kingdom*, app. no. 8139/09, 17 January 2012, para. 233

⁶⁰ See UN Joint Study, above n. 51, paras. 39-41 and 159. The obligations to establish jurisdiction over a state's own nationals for complicity in torture under Article 5 of the Convention Against Torture, including the obligation to investigate credible allegations of such complicity, is engaged regardless of whether the torture took place within the state's jurisdiction: see Manfred Nowak, Elizabeth McArthur, and Kerstin Buchinger, *The United Nations Convention Against Torture: a Commentary* (Oxford: Oxford University Press, 2008), pp. 254-5. Similarly, the obligation to establish jurisdiction over an accomplice to or participant in enforced disappearance who is a national of a state under Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance (signed by Poland in 2013) is engaged regardless of where the enforced disappearance occurred.

⁶¹ ECtHR, *Khudoyorov v. Russia*, app. no. 6847/02, 12 April 2006, para. 113; See, *El Masri*, above n.45, para. 152.

⁶² *El Masri*, above n.45, para. 152. *Abu Zubaydah*, above n. 9, para 396 ; *Al Nashiri*, above n. 9

⁶³ ECtHR, *Ireland v. United Kingdom*, app. no. 5310/71, 18 January 1978, para. 209.

⁶⁴ ECtHR, *Çakici v. Turkey*, app. no. 23657/94, 8 July 1999, para. 85. *Abu Zubaydah*, above n. 9, para 400.

⁶⁵ *El Masri*, above n.45, para 186.

the gravity of the violations of Convention rights involved, these facts give rise to an obligation on the Prosecutor to investigate whether each of these individuals was subjected to enhanced interrogation techniques in Poland and to identify those involved in these crimes. Any of the 17 individuals listed who apply for victim status in this investigation should be granted such status.

Finally, if Mr. al-Hawsawi was held in secret detention in Afghanistan until September 2003 and then transferred to further ill-treatment and illegal detention by the CIA via Poland on flight N313P, Poland still failed in its substantive obligations to protect his rights and is still required, pursuant to its procedural obligations, to investigate these circumstances.

III.3 Obligations regarding an effective investigation

For an investigation to be considered effective the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened. The authorities should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.⁶⁶

The State has been aware of the allegations regarding rendition flights in general and specifically flight N313P for many years.⁶⁷ In the case of Mr. Al-Hawsawi the State has been aware of these allegations at least since our complaint was filed in 2013. The obligation to conduct an effective investigation has thus long been triggered.

The Prosecutor has not indicated what she has done to assess information regarding these highly suspicious flights, including to determine whether Mr. al-Hawsawi was on one of the CIA flights which entered Poland, and to consider whether Poland fulfilled its obligations to ensure that its territory was not used to facilitate torture and secret detention.

In discussing the Prosecutor's obligations concerning a suspicious flight in *El Masri*, the ECtHR stated:

...the investigating authorities remained passive and decided not to follow up on that lead. It is surprising that they took no notice of that information and failed to investigate the identity of the passenger who boarded the aircraft that night. An investigation of the circumstances regarding the aircraft and the passenger would have revealed information capable of rebutting or confirming the well-foundedness of the applicant's account of events.⁶⁸

An effective investigation should be capable of leading to the identification and punishment of those responsible.⁶⁹ It must be capable of establishing the truth, allowing the victim to be "informed of what ... happened, including of getting an accurate account of the suffering ... allegedly endured and

⁶⁶ *Al Nashiri*, above n. 9, para 486.

⁶⁷ See for example, UN Human Rights Committee, Concluding Observations regarding Poland, 2010, para 15; PACE, CLHR Report 2007, above n.2; *Al Nashiri*, above n. 9.

⁶⁸ *El Masri*, above n.45, para 188.

⁶⁹ See for example, *Abu Zubaydah*, above n. 9, para 479.

the role of those responsible for [the] alleged ordeal".⁷⁰ Thus, the established case law of the Court has long held that in order for an investigation to be considered effective it is essential that "the victim should be able to participate effectively in the investigation in one form or another."⁷¹ To date, Mr. Al-Hawsawi has been denied this right to participate.

It is relevant in this regard to recall that the ECtHR has noted that

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 a right to know what has happened.⁷²

- **Scope of the investigation**

Poland has maintained that the "prosecutors who conduct the investigation are bound by the confidentiality of the case. In this connection, it is impossible to present any information regarding the findings of the investigation."⁷³ Yet, concerns have been expressed about the lack of transparency in the investigation.⁷⁴ In 2014, the ECtHR, speaking about the investigation stated that:

In the present case only sparse and vague information as to the terms of reference or scope of the proceedings, including the offences suspected or possibly involved, has so far been disclosed to the victims' representatives and the general public.⁷⁵

Without question the illegal transport of detainees through Poland as part of the CIA's interrogation programme, thereby exposing them to further illegal detention and ill-treatment and breaches of their Convention rights, should be a part of the investigation. If this is not the case already then a separate investigation should consider these grave violations, including regarding Mr. al-Hawsawi.

IV. Conclusion

Mr. al-Hawsawi was held in CIA Secret detention for 1280-1282 days from March 2003 until September 2006. While in detention he was subjected to torture including through so-called "enhanced interrogation techniques". Though the redacted version of the SSCI Summary does not explicitly state where Mr. al-Hawsawi was held throughout his detention, this lack of specificity does not remove the obligation on the Prosecutor to investigate his case and to allow Mr. al-Hawsawi to participate effectively in this investigation. As discussed, the SSCI Summary refers to Mr. al-Hawsawi in the context of DETENTION SITES BLUE and COBALT and we have referenced a number of highly suspicious rendition flights which could have transported Mr. al-Hawsawi to Poland after the SSCI Summary places him in Afghanistan. Finally, even if Mr. al-Hawsawi was not detained for a long period in Poland, sources indicate that he was transferred through Poland in September 2003 on

⁷⁰ *El Masri*, above n.45, para. 192. These requirements have been explicitly affirmed by the Committee of Ministers of the Council of Europe, in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies.

⁷¹ *Ibid*, para 185.

⁷² *Al Nashiri*, above n. 9, para 495. See also, *El Masri*, above n.45, para 191.

⁷³ UN Joint Study, above n. 52, para 118.

⁷⁴ *Ibid*.

⁷⁵ *Al Nashiri*, above n. 9, para 496.

flight N313P, a flight whose passage through Poland as part of the CIA's programme was facilitated by the State's complicity.

The evidence that we have presented meets the evidentiary threshold required by the ECtHR in order to necessitate an effective investigation by the Polish State, which has been aware of these allegations for a significant period of time now.

Your Honour, in relation to the State's fulfilment of its procedural obligations, this Court's decision today, will be an important part of the assessment made by the ECtHR in any future potential proceedings before that Tribunal.

The Grand Chamber of the ECtHR has stressed the crucial nature of investigations into allegations of European complicity in extraordinary rendition by the CIA, both from the perspective of the individual victim, and for society as a whole and in terms of its impact on the right to the truth. In the *El Masri* case, the Grand Chamber stated that

The Court considers that the prosecuting authorities of the respondent State, after having been alerted to the applicant's allegations, should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. The Court does not underestimate the undeniable complexity of the circumstances surrounding the present case. However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.⁷⁶

Your decision today is of vital importance, for the protection of Mr. al-Hawsawi's human rights, his right of access to justice and to the truth, as well as, very importantly to ensure that these most serious human rights violations do not happen again. We urge you to grant this appeal and to insist that the State's obligation to investigate is effectively fulfilled.

⁷⁶ *El Masri*, above n.45, para. 192.