<u>IN THE EUROPEAN COURT OF HUMAN RIGHTS</u>

Application No. 6383/17

<u>BETWEEN:</u>

Mustafa Ahmed Adam Al-Hawsawi

<u>Applicant</u>

- and –

Lithuania

<u>Respondent</u>

- and –

Amnesty International
International Commission of Jurists

<u>Interveners</u>

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

Introduction

1. These submissions are presented on behalf of Amnesty International and the International Commission of Jurists ('the Interveners') pursuant to the leave to intervene granted by the President of the Section on 23 May 2019, in accordance with Rule 44 § 3 of the Rules of Court. The Interveners will make submissions on: (A) knowledge imputable to Contracting Parties, in particular, Lithuania, at the relevant times; (B) enforced disappearance as a violation of Article 3 of the Convention; (C) *non-refoulement* obligations; and (D) post-transfer obligations under the Convention.

A. Knowledge imputable to Contracting Parties, including Lithuania, at the relevant times

2. In their submissions to the Court in *Abu Zubaydah v Lithuania ("Abu Zubaydah")*,[1] as well as their submissions in other cases relating to Contracting Parties' involvement in, and complicity with, the CIA's rendition and secret detention programmes,[2] the Interveners showed that as early as the end of 2002, Contracting Parties, including Lithuania, had access to substantial, credible and publicly available evidence that US intelligence agencies and military forces were engaging in torture and other ill-treatment, enforced disappearances, arbitrary detention and secret detainee transfers as part of what the United States has referred to as the "war on terror". The submissions also highlighted concerns raised by the International Committee of the Red Cross (ICRC), for example, in January, February and July 2004, about "the fate of an unknown number of people […] held in undisclosed locations"[3] beyond recognised places of detention in Bagram in Afghanistan and Guantanamo Bay, noting that detainees labelled as "high value" were at particular risk of abuse, including torture.[4] The Interveners further noted that all of Amnesty International's annual reports between 2002 and 2005, distributed widely to government officials, including of Lithuania,[5] and the media, addressed the growing body of evidence of human rights violations within the context of the United States' counter-terrorism operations. References were included not only in the entries on the United States, but also in relation to involvement with or by other countries, and it was noted that violations were continuing.[6]

3. In *Abu Zubaydah*, the Court considered a range of open-source material on the CIA's rendition and secret detention programmes, as well as the involvement of the Lithuanian authorities, de-classified

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[1] *Abu Zubaydah v Lithuania*, no. 46454/11, judgment, 31 May 2018 ("*Abu Zubaydah*").

[2] Enclosed with the present submissions, the Interveners have provided – for ease of reference – their submissions of 22 April 2013 in the *Abu Zubaydah* case available at https://www.icj.org/wp-content/uploads/2013/04/ABU-ZUBAYDAH-v-LITHUANIA-AI-ICJ-AMICUS-220413-Final.pdf ; their submissions to the Court of 17 October 2013 in *Husayn (Abu Zubaydah) v Poland*, no. 7511/13, available at https://www.icj.org/wp-content/uploads/2013/10/AbuZubaydah_v_Poland-AIICJThirdPartyIntervention-ECtHR-Final.pdf ; their submissions and supplementary submissions to the Court of 5 November 2012 and 15 February 2013 in *Al-Nashiri v Poland*, no. 28761/11 available at https://www.icj.org/wp-content/uploads/2012/11/ICJAI-AmicusBrief-AlNashiri_v_-Poland.pdf and https://www.icj.org/wp-content/uploads/2013/02/ICJAI-SupplAmicusBrief-AlNashiri_v_-Poland_15022013.pdf; as well as their submissions to the Court of 13 March 2013 in *Al Nashiri v Romania*, no. 33234/12, available at https://www.icj.org/wp-content/uploads/2013/03/AlNashiri_v_Romania-ICJAIJointSubmission-ECtHR-final.pdf; and their submissions to the Grand Chamber of 29 March 2012 in *El-Masri v "The Former Yugoslav Republic of Macedonia"*, no. 39630/09, available at https://www.icj.org/wp-content/uploads/2012/06/Macedonia-written-submission-legal-submission-2012.pdf.

[3] United States: ICRC President urges progress on detention-related issues, 16 January 2004, https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/5v9te8.htm.

[4] Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation. February 2004, http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

[5] The Interveners noted in their submissions of 22 April 2013 in *Abu Zubaydah* that copies of the annual reports were mailed directly to the President, Prime Minister, Minister of the Interior and Minister of Justice in Vilnius at the time of their publication as confirmed by Integrated Mailing List records held the International Secretariat, Amnesty International, London, UK.

[6] Amnesty International Report 2003 (covering year 2002), published May 2003, full report available at https://www.amnesty.org/en/documents/pol10/0003/2003/en/, entries on, for example, Afghanistan, page 25, Bosnia-Herzegovina, page 53; Amnesty International Report 2004 (covering year 2003), published May 2004, full report available at https://www.amnesty.org/download/Documents/POL1000042004ENGLISH.PDF, entries on, for example, Canada, page 104, Sweden, page 255; Amnesty International Report 2005 (covering year 2004), published May 2005, full report available at https://www.amnesty.org/download/Documents/POL1000012005ENGLISH.PDF, entries on, for example, Afghanistan, page 36, Sweden, page 241, Yemen, page 279; see also, Amnesty International Report 2006 (covering year 2005), published May 2006, noted "continued reports that the US Central Intelligence Agency (CIA) operated a network of secret detention facilities in various countries. Such facilities were alleged to detain individuals incommunicado outside the protection of the law in circumstances amounting to 'disappearances'. […] Allegations of US involvement in the secret and illegal transfer of detainees between countries, exposing them to the risk of torture and ill-treatment continued." USA, page 273.

documents, such as the summary of the US Senate Select Committee on Intelligence 'Study of CIA's Detention and Interrogation Program' ("SSCI summary"), released in 2014,[7] and expert evidence. In its judgment, the Court noted that the Lithuanian Government had not disputed several points made by Abu Zubaydah, including the landing of four CIA planes at Vilnius and Palanga airports between 17 February 2005 and 25 March 2006 and the cooperation of the Lithuanian State Security Department ("SSD") with the CIA in establishing facilities on Lithuanian territory.[8,9] In 2005, Lithuanian authorities attended a NATO-EU meeting with then US Secretary of State Condoleeza Rice, from whose minutes it is clear all States participating knew of what the US termed "enhanced interrogation" techniques.[10] In addition, the Court relied on the findings of a 2009 inquiry of the Lithuanian parliament into allegations that Lithuania had hosted a secret detention facility ("Seimas inquiry"), which refers to witness testimonies from high-ranking SSD officers, such as former Directors General, who confirmed their communications with the Heads of State at the relevant time about CIA requests to participate in the transporting and/or holding of detainees on Lithuanian territory.[11] Based on this evidence, in *Abu Zubaydah* this Court found that it was established beyond reasonable doubt that the Lithuanian authorities knew, at all material times, that the CIA was operating a secret detention facility on its territory for the purposes of detaining and interrogating alleged terrorism related suspects.[12] This Court further held that it was established beyond reasonable doubt that the CIA facility that had been codenamed Detention Site Violet in the SSCI summary was located in Lithuania.[13]

4. According to the unredacted content of the SSCI summary, the CIA transferred detainees to a facility codenamed Detention Site Black in the autumn of 2003. According to the same section, the political leadership of a separate country, as well as an undisclosed entity, granted the CIA approval to establish another detention site. In mid-2003, the CIA sought an expanded facility, as its completed but still unused facility in the country was too small.[14] Consequently, the CIA sought to build a second, new facility and offered officials in Lithuania an undisclosed number of millions of dollars to express appreciation for the country's support for the CIA's programme.[15] This plan "was approved by the [redacted] of [the] Country"[16] and Detention Site Violet eventually opened in early 2005.[17] This is consistent with this Court's findings in *Abu Zubaydah* that Detention Site Violet was the SSCI summary's codename for the second CIA facility established on Lithuanian territory. General availability of information on the establishment of secret CIA detention facilities for host governments, including Lithuania, is further reflected in the SSCI summary's overall conclusions.[18]

5. Shortly after the release of the SSCI summary, Amnesty International noted that the description of Detention Site Violet in the report matched, for example, the details contained in the Seimas inquiry report, despite Lithuania not being named specifically in the SSCI summary.[19] This is also consistent with the Court's assessment in *Abu Zubaydah*.

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[7] Report of the Senate Select Committee on Intelligence (SSCI), Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, together with Foreword by Chairman Feinstein and Additional and Minority Views, 9 December 2014, approved 13 December 2012; updated for release 3 April 2014; declassification revisions 3 December 2014, available at: https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf
[8] *Abu Zubaydah*, op cit. § 499. The Court further noted that these findings were also established in the 2009 investigation by the Committee on National Security and Defence of the Lithuanian Parliament ("Seimas inquiry") and confirmed in the 2010-11 pre-trial investigation.
[9] Ibid, § 575. In light of the flight data before it, the Court further observed that it was "inconceivable that the rendition aircraft could have crossed the country's airspace, landed at and departed from its airports, or that the CIA could have occupied the premises offered by the national authorities and transported detainees there, without the State authorities being informed of or involved in the preparation and execution" of the programme.
[10] Ibid, § 463.
[11] Ibid, §§ 554-555.
[12] Ibid, §§ 572, 576.
[13] Ibid, § 532.
[14] SSCI summary, op cit. page 98.
[15] Ibid, pages 98-99.
[16] Ibid, page 99.
[17] SSCI summary, pages 98-99, 143.
[18] Ibid, page xvi, page xxvi.
[19] Amnesty International, Breaking the conspiracy of silence: USA's European 'Partners In Crime' Must Act After Senate Torture Report (2015), available at: https://www.amnesty.org/download/Documents/212000/eur010022015en.pdf, page 16.

6. Documents summarising interviews with Lithuanian officials collected during a 2010 investigation by the Lithuanian Prosecutor General further confirmed the assistance provided by the SSD to the CIA in setting up and operating the detention facility.[20] According to witness evidence produced by the Lithuanian government and summarised in *Abu Zubaydah*, flights with 'equipment' arrived in Lithuania in 2005 and SSD officers escorted the cargo.[21] Another witness, who had a post with the Intelligence Services and supervised the building of the second CIA facility in Lithuania ('Project 2') with another officer, was reported to have testified that "[i]n the beginning of 2006 the officer received an order from M [who held a leading post in the Intelligence Services at the relevant time] that a cargo had to be delivered to Palanga Airport. […]. They escorted the partners and drove several times to Palanga and back. […] They drove loaded with the cargo and returned unloaded."[22] These dates broadly coincide with the dates established by this Court in *Abu Zubaydah* when the applicant in that case was brought in and out of Lithuania.[23] Disclosure of flight data for rendition aircraft indicated that detainees were held in Lithuania until March 2006. Flight data and related contracting papers have also shown that state authorities filed false flight plans to conceal the true destination of some flights.[24]

7. As noted above, the *Abu Zubaydah* judgment concluded that Detention Site Violet was located in Lithuania and closed in 2006.[25] Evidence is available that at least five detainees experienced medical issues there, for which treatment had to be sought in third countries despite earlier discussions with country representatives on how a medical emergency would be handled.[26] A CIA 'Facility Audit issued in June 2006' and released in heavily redacted form in June 2016 reflects an audit of all CIA-controlled detention facilities in operation between June 2005 and February 2006. According to the audit, guidelines issued by the CIA Office of Medical Services recommended that where a detainee's medical emergency could not be adequately treated at a detention facility, staff and local CIA station personnel should arrange access to the host country's health care system.[27] When CIA officials sought support from host-country officials to provide medical treatment, however, the host-country officials "reneged on previous assurances that they would provide in-patient treatment", [28] or declined to become involved. The audit noted that in March 2006, in-patient treatment for a detainee had to be obtained at a third-country medical facility.[29] Although all country names are redacted from the audit, this information is consistent in dates and details with the description of the medical emergency that led to the closure of Detention Site Violet.

8. After public release of the SSCI summary, Arvydas Anušauskas, a member of Seimas and the former

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[20] The documents formed part of the material the Lithuanian Government had disclosed to this Court in 2015. They were obtained by the Bureau of Investigative Journalism thereafter, between 2015 and 2016. See also, Crofton Black, The Bureau of Investigative Journalism, "Site Violet": How Lithuania helped run a secret CIA prison, 10 October 2016, available at: https://www.thebureauinvestigates.com/stories/2016-10-10/site-violet-how-lithuania-helped-run-a-secret-cia-prison.

[21] *Abu Zubaydah*, op cit., § 333.

[22] Ibid, § 337.

[23] Op cit., § 548.

[24] This material was largely disclosed through legal cases, and the investigatory work of non-governmental organisations and intergovernmental bodies. For example, 'The Rendition Project', a collaborative project between human rights practitioners and academics has, in collaboration with NGO Reprieve, created a database containing flight data relating to those flights suspected of involvement in rendition circuits, secret detention and torture. In 2011 and 2012, Reprieve obtained flight data confirming flights connecting Lithuania with other secret European detention sites. The results of their analysis were published in 2012 enclosing a flights dossier and additional notes dated 4 and 7 September 2012 respectively, available at: https://reprieve.org.uk/cscs-covert-flights-through-lithuania/. Relevant legal cases include the US litigation *Richmor Aviation Inc. v. Sportsflight Air Inc*. In *Abu Zubaydah*, the applicant referred to this litigation in which both parties stated that flights, including those of N787WH and N724CL in February 2005 travelling to Lithuania, had been part of the rendition programme. See *Abu Zubaydah*, op cit., § 451. See also, Annex to the Resolution of the Seimas of the Republic of Lithuania, Findings Of The Parliamentary Investigation By The Seimas Committee On National Security And Defence Concerning The Alleged Transportation And Confinement Of Persons Detained By The Central Intelligence Agency Of The United States Of America In The Territory Of The Republic Of Lithuania, 19 January 2010, available at: http://www.europarl.europa.eu/document/activities/cont/201203/20120326ATT41867/20120326ATT41867EN.pdf, page 5; Sam Raphael, Crofton Black, Ruth Blakeley & Steve Kostas (2016), *Tracking rendition aircraft as a way to understand CIA secret detention and torture in Europe*, International Journal of Human Rights, Volume 20, Issue 1, DOI: 10.1080/13642987.2015.1044772, available at: https://www.tandfonline.com/doi/pdf/10.1080/13642987.2015.1044772?needAccess=true, pages 88-89.

[25] SSCI summary, op cit., page 154.

[26] Ibid.

[27] Report of Audit, CIA-controlled Detention Facilities operated under the 17 September 2001 Memorandum of Notification, 14 June 2006, approved for release 10 June 2016, available at: https://www.cia.gov/library/readingroom/docs/0006541721.pdf, page 8.

[28] Ibid.

[29] Ibid.

head of the parliamentary committee tasked with the Seimas inquiry, told Reuters on 10 December 2014 that the SSCI summary "ma[de] a convincing case that prisoners were indeed held at the Lithuanian site."[30]

9. In January 2019, the Lithuanian Government confirmed that they had transferred to Abu Zubaydah the awarded compensation of non-pecuniary damages and legal costs pursuant to the Court's judgment in *Abu Zubaydah*.[31] In April 2019, the Lithuanian Government confirmed that they had made various diplomatic representations to the US Government to seek "to limit, as far as possible, the effects of the Convention violations suffered by the applicant" and indicated that they were ready to repeat the requests.[32] On 7 June 2019, the Lithuanian Justice Minister Elvinas Jankevičius stated that "Lithuania must close the chapter and give an assessment to this bitter experience so as to prevent similar legal precedents in the future."[33] This further indicates Lithuanian knowledge of and involvement with the violation of Convention rights in its jurisdiction.

10. Based on the above evidence, the Interveners submit that Lithuanian officials must have been aware of CIA detainees being held on Lithuanian territory well in advance of March 2006.

B. Enforced disappearances violate Article 3 of the Convention

11. Enforced disappearances constitute a violation of, and a crime under, international law.[34] The Interveners submit that, in line with accepted practice of interpretation of the Convention in harmony with accepted international norms and standards,[35] the Court should recognise that a multiplicity of Convention violations are inherent to enforced disappearances, including violations of Article 5 and Article 3.

12. International courts and expert bodies have expressly concluded that enforced disappearance constitutes a violation of the prohibition on torture and other cruel, inhuman or degrading treatment. The UN Human Rights Committee (HRC) has summed up its jurisprudence on enforced disappearance as follows:

"The Committee recalls its jurisprudence under which acts leading to enforced

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[30] "Lithuania asks U.S. to say if CIA Tortured Prisoners there," Reuters, 10 December 2014, http://www.huffingtonpost.com/2014/12/10/lithuania-cia-torture_n_6300540.html.

[31] DH-DD(2019)59, 16 January 2019, 1340th meeting (March 2019) (DH) - Action plan (15/01/2019) - Communication from Lithuania concerning the case of Abu Zubaydah v. Lithuania (Application No. 46454/11), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680909676.

[32] DH-DD(2019)396, 9 April 2019, 1348th meeting (June 2019) (DH) - Action plan (08/04/2019) - Communication from Lithuania concerning the case of Abu Zubaydah v. Lithuania (Application No. 46454/11), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168093de2b, pages 2-3.

[33] Justice minister: Lithuania must 'close the chapter' on CIA prison, DELFI EN, 7 June 2019, available at: https://en.delfi.lt/politics/justice-minister-lithuania-must-close-the-chapter-on-cia-prison.d?id=81407775.

[34] The Interveners commend to this Court the Grand Chamber's reliance in its judgment in *El-Masri v "The Former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13.12.2012, on the definition of enforced disappearance in Article 2 of the UN International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED):

> *"For the purposes of this Convention, "enforced disappearance" is considered to be 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.*"

See, also, *inter alia*: Article 7 of the Rome Statute of the International Criminal Court:

> *"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
> *[...]*
> *(i) Enforced disappearance of persons;"*

and Article 2 of the Inter-American Convention on Disappearance:

> *"For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."*

[35] "[T]he Convention [...] should so far as possible be interpreted in harmony with other rules of international law of which it forms part [...]." *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, § 274.

disappearances constitute a violation of many of the rights enshrined in the Covenant, including the right to recognition everywhere as a person before the law (art. 16), the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). They may also constitute a violation or a grave threat to the right to life (art. 6)."[36]

13. Addressing the prohibition of torture and other cruel, inhuman or degrading treatment, the HRC held in *Rafael Mojica v. Dominican Republic* that, "aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7 [of the International Covenant on Civil and Political Rights (ICCPR)]."[37] In its conclusions and recommendations on the United States' second periodic report, in 2006, the UN Committee against Torture found that detaining persons indefinitely without charge was *per se* a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[38]

14. This stance is echoed by the Inter-American Court of Human Rights,[39] as reflected in its judgment in the case *Garcia y Familiares vs. Guatemala*, where the court found it appropriate to:

"recall the legal basis that supports a holistic perspective to the enforced disappearance of persons in light of the plurality of acts which, united by a single aim, breach permanently existing 'legal values' [i.e., bienes jurídicos] protected by the Convention. In this way, the legal analysis of the enforced disappearance must result from the complex violation of human rights that it entails. As a result, when analysing a presumption of enforced disappearance, it must be taken into account that the deprivation of liberty of the individual must be considered only as the beginning of the configuration of a complex violation lasting in time until the fate and whereabouts of the victim are known. The analysis of a potential enforced disappearance must not [be] focused in a fragmented, divided and isolated way merely on the detention, or the possible torture or the risk of death, but the focus must be on the collection of facts presented before the Court [...]."[40]

15. The Inter-American Court has recognised that the "the mere subjection of an individual to prolonged isolation and deprivation of communication", which are inherent to an enforced disappearance, amount, *per se*, to torture or other cruel, inhumane or degrading treatment or punishment.[41]

16. Accordingly, the clear international consensus is that enforced disappearances result in a multiplicity of human rights violations, of which torture or other cruel, inhumane and degrading treatment is an inherent element. Such a consensus is further illustrated in the United Nations Declaration on the

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[36] Human Rights Committee, *Khaled Il Khwildy and others v. Libya*, Communication No. 1804/2008, Views adopted 1 November 2012, § 7.4. Footnote omitted. See similarly, Tahar *Mohamed Aboufaied v. Libya*, Communication No. 1782/2008, Views adopted 21 March 2012, § 7.3.

[37] *Rafael Mojica v. Dominican Republic*, No. 449/1991, UN Doc. CCPR/C/51/D/449/1991 (1994), § 5.7.

[38] Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, § 22.

[39] See also, the finding of the African Commission on Human and Peoples' Rights *in Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, 204/97, § 44.

[40] *Garcia y Familiares vs. Guatemala*, IACtHR, Judgment of the 29 September 2012 (Merits, Reparations and Costs), available only in Spanish (unofficial translation into English provided by the Interveners): *99. El Tribunal estima adecuado recordar el fundamento jurídico que sustenta una perspectiva integral sobre la desaparición forzada de personas en razón de la pluralidad de conductas que, cohesionadas por un único fin, vulneran de manera permanente, mientras subsistan, bienes jurídicos protegidos por la Convención. De este modo, el análisis legal de la desaparición forzada debe ser consecuente con la violación compleja de derechos humanos que ésta conlleva. En este sentido, al analizar un supuesto de desaparición forzada se debe tener en cuenta que la privación de la libertad del individuo sólo debe ser entendida como el inicio de la configuración de una violación compleja que se prolonga en el tiempo hasta que se conoce la suerte y el paradero de la víctima. El análisis de una posible desaparición forzada no debe enfocarse de manera aislada, dividida y fragmentada sólo en la detención, o la posible tortura, o el riesgo de perder la vida, sino más bien el enfoque debe ser en el conjunto de los hechos que se presentan en el caso en consideración ante la Corte [...].*

[41] *Godínez-Cruz v. Honduras*, 20 January 1989, C No. 5, §§ 164, 166 and 197; *Velasquez Rodriguez v. Honduras*, 17 August 1990, C No. 9, §§ 156 and 187.

Protection of Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992, and which affirms in Article 1(2): "Any act of enforced disappearance […] constitutes a violation of the rules of international law guaranteeing, inter alia, […] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. […]." An enforced disappearance is *per se* a violation of Article 3 of the Convention.

17. The Interveners submit that recognising that enforced disappearances constitute *per se* Article 3 violations would be both in line with a reading of the Convention in conformity with international law, and a natural progression of Convention jurisprudence. As regards the latter, the Court has long held that to violate Article 3, ill-treatment need not be physical in nature.[42] In a finding consistent with the approach espoused by other human rights bodies in relation to the suffering endured by the family members of the victims of enforced disappearances,[43] the Court considered, in *Kurt v Turkey*, *inter alia*, that the applicant "has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time."[44] The Court accordingly found that there had been a violation of Article 3 in respect of the suffering endured by the applicant, i.e., the mother of the disappeared. The suffering of family members due to the enforced disappearance of their relatives has clearly been found in certain circumstances to amount to prohibited ill-treatment. Therefore, the Interveners submit that, in turn, the mental harm inflicted on the "disappeared" themselves violates Article 3 of the Convention.

18. Further, the Interveners invite this Court to draw on the Grand Chamber's reliance on the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) definition of enforced disappearance in *El-Masri* as support for a holistic approach to these human rights violations.[45] Such an approach would be premised on considering enforced disappearances as composite and cumulative violations of the Convention of which an Article 3 violation is an inherent element, rather than positing them merely within the confines of Article 5.

19. The Interveners submit that the Court should recognise the multiplicity of Convention violations committed by a State complicit in an enforced disappearance, in which Article 5 and Article 3 violations are inherent. Finding to the contrary would place Convention jurisprudence at odds with other international law and standards, while also failing to recognise the significant gravity of compound human rights violations involved in enforced disappearances.

C. Non-refoulement obligations under the Convention

20. The principle of *non-refoulement* is well established in international human rights law.[46] The Court has consistently found that a number of Convention rights entail, implicitly, an obligation not to transfer (*refouler*) people when there are substantial grounds for believing that they would face a real risk of violations of those rights in the event of their deportation, expulsion, extradition, handover, return, surrender, transfer or other removal from the state's jurisdiction.[47] The principle dictates that,

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[42] *ljina and Sarulienė v. Lithuania*, no. 32293/05, § 47, 15 March 2011; *El-Masri,* op cit., § 202; and *Husayn (Abu Zubaydah) v. Poland*, §§ 509-510).

[43] See for instance *Godínez-Cruz v. Honduras*, 17 August 1990, C No. 10, §§ 48-49; *Velasquez Rodriguez* case, op cit., § 51; *Blake v. Guatamala*, Inter-Am.Ct.H.R. (Ser. C) No. 36 (1998), §§ 96-97; HRC, *Abdelhakim Wanis El Abani (El Ouerfeli) v. Libya*, No. 1640/2007, UN Doc. CCPR/C/99/D/1640/2007 (2010), § 8.

[44] *Kurt v. Turkey*, no. 24276/94, 25 May 1998, § 133.

[45] *El-Masri,* op cit..

[46] Explicitly codified in, *inter alia*, Art 3, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Art 16, ICPPED; Art. 19, Charter of Fundamental Rights of the European Union; Art 33, 1951 Convention relating to the Status of Refugees; and Principle 5, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

[47] This principle was first recognised in the context of Article 3, *Soering v UK*, no. 14038/88, § 88. *Non-refoulement* obligations have arisen equally in respect of Article 2: see, *inter alia*, *Z and T v UK*, Admissibility Decision, no. 27034/05, 28 February 2006. See also, UN HRC, GC No. 31, CCPR/C/21/Rev.1/Add.13, 26/05/2004, § 12. The *non-refoulement* principle extends and applies extraterritorially in circumstances where states exercise jurisdiction: *Hirsi Jaama and Others v Italy*, [GC] no. 27765/09, 23 February 2012, §§ 70-82; *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010; and *Al-Saadoon and Mufdhi*, no. 61498/08, 2 March 2010.

irrespective of all other considerations, states are not absolved from responsibility "for all and any foreseeable consequences" suffered by an individual following removal from their jurisdiction.[48] The *refoulement* prohibition is absolute.[49] Further, as an obligation directed at securing rights in ways that are both practical and effective, the *non-refoulement* principle is thus a fundamental component implicit in other Convention rights beyond Article 3.[50] Since *Soering*, the Court has recognised as much with respect to the right to life under Article 2 and Article 1 of Protocol 6 of the Convention, a flagrant breach of the right to liberty under Article 5 and a flagrant denial of justice under Article 6.[51] The HRC has also recognised that *non-refoulement* is a fundamental component of, *inter alia*, the right to liberty and security of person under Article 9 of the ICCPR,[52] as has the UN Working Group on Arbitrary Detention.[53]

21. This Court has ruled in *Abu Zubaydah* that, when considering the principle of *non-refoulement* in relation to "extraordinary renditions", "the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer [...]. Consequently, by enabling the CIA to transfer the applicant out of Lithuania to another detention facility, the authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention."[54]

22. In light of the above, the Interveners contend that *non-refoulement* obligations under the Convention will be engaged by Contracting Parties' actual or constructive knowledge of a real risk of egregious human rights violations that the rendition and secret detention programme entailed, including under Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 of the Convention. Further, those *non-refoulement* obligations also apply in respect of the Contracting Parties' failure to take steps to prevent any prohibited transfers and the Contracting Parties are responsible under the Convention for any reasonably foreseeable post-transfer violations.

D. Post-transfer obligations under the Convention

Right to a remedy and reparations

23. The right to an effective remedy for violations of Convention rights, protected under Article 13 of the Convention as well as in procedural aspects of substantive Convention rights, imposes positive obligations of review and reparation.[55] Article 13 requires remedies that are "effective" in practice as well as in law, and which are not unjustifiably hindered by the acts or omissions of State authorities. Under international standards, the legal consequence of the breach of an international obligation is an obligation of cessation of the wrongful act and of reparation. The most appropriate

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[48] *Soering,* op cit., §§ 86. See also, *inter alia*, *Hirsi*, op cit., §115; *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, § 126. Further, This Court has found States liable in cases of indirect *refoulement* -- also known as chain *refoulement* (*s*ee, *inter alia*, *M.S.S. v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, §§ 192, 286, 300, 321) -- as well as constructive *refoulement* (see *M.S. v. Belgium*, no. 50012/08, 31 January 2012, where the Court found that the applicant could not be regarded as having validly waived his right to the protection against *refoulement* guaranteed by Article 3).

[49] *Soering*, op cit*.*, § 88; *Ireland v. UK*, no. 5310/71, 18 January 1978, § 163; *Chahal v UK*, no. 22414/93, 15 November 1996, § 79; *Selmouni v. France* [GC], no. 25803/94 28 July 1999, § 95, *Al-Adsani v UK* [GC], no. 35763/97, Judgment, 21 November 2001 § 59; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, 12 April 2005, § 335; *Indelicato v. Italy*, no. 31143/96, 18 October 2001, § 30; *Ramirez Sanchez v. France* [GC], no. 59450/00, 4 July 2006, §§ 115-116; *Saadi*, op cit., § 127.

[50] See, in relation to Article 9, *Z and T v. UK*, op cit. See also, *inter alia*, UN HRC, GC no. 31, § 12, referring as an example to the real risk of harm contemplated by articles 6 and 7 ICCPR as a trigger for *non-refoulement* obligations, thus recognizing that a real risk of different types of harm may give rise to *non-refoulement* obligations.

[51] *Soering*, op cit., § 113. See, also, *inter alia*, *Othman (Abu Qatada) v.UK,* no. 8139/09, 17 January 2012 §§ 231-233, and §§ 281-287. *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005, §§ 90 and 91; *Al-Saadoon and Mufdhi*, op cit., § 149; *Bader and Kanbor v. Sweden,* no. 13284/04, 8 November 2005, § 47; *Al-Moayad v. Germany*, op cit, §§ 100 and 102; *Ahorugeze v Sweden*, no. 37075/09, 27 October 2011 (request for referral to the GC pending), §§ 113-116; *Othman (Abu Qatada),*op cit*.,* §§ 258-285; *Tomic v. UK*, no. 17837/03, Admissibility decision, 14 October 2003.

[52] See *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 December 1997, § 8.7.

[53] Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/4/40, 9 January 2007, § 49, emphasising the need for states to "include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism".

[54] *Abu Zubaydah*, op cit., § 643.

[55] Including Art. 5(4) and (5), Art. 6; Art. 8; Art. 1 of Protocol No. 1: *Iatridis v. Greece*, no. 31107/96, Judgment of 25 March 1999, § 65; see also, *mutatis mutandis*, *Kudla v. Poland*, no. 30210/96, [GC] Judgment of 26 October 2000, §§ 146-160.

forms of reparation must be granted according to the individual circumstances of the case; this may include measures of cessation or non-repetition, as well as measures of restitution.[56] The state should try with all available means to re-establish the situation prior to the breach and through restitution, to "restore the victim to the original situation before the gross violations of international human rights law […] occurred."[57] Within the Convention protection system, these obligations of remedy and reparation are expressed through Article 46.1 and Article 41.[58]

24. The content of the right to a remedy depends on the nature of the substantive right at issue: it carries particular obligations where one of the most fundamental Convention rights is at issue or where there has been a particularly serious violation of the applicant's Convention rights.[59] Following wrongful removal from the territory of a Contracting State to a situation of continuing violation of Convention rights, effective protection of those rights, as well as rights under Article 13, may also require reasonable, appropriate, practical and effective remedial measures, including certain positive obligations and diplomatic representations to the state in which the individuals are held, as addressed below. It should be noted in this regard that the United States has failed to ensure state or individual accountability for the gross human rights violations committed in the context of the rendition and secret detention programme and to provide any meaningful remedy to the victims.

Certain positive obligations apply to post-transfer violations of Convention rights

25. The fact that, in a rendition, elements of the violation(s) of rights typically take place outside the jurisdiction of the state where the individual was initially apprehended, does not preclude the responsibility of that state. In general, under the Convention jurisprudence, positive obligations to prevent, investigate, and provide remedies apply only in regard to acts taking place within the jurisdiction of the state.[60] However, this Court has held that, where an act taking place within the state's jurisdiction has a direct causal connection with acts contrary to the Convention rights, occurring outside the state, then certain positive obligations apply.[61] This will be the case where the rendition and transfer out of the jurisdiction is preceded by a Contracting Party hosting a secret detention site on its territory.[62]

Obligations to make meaningful representations

26. As demonstrated above, Contracting Parties have positive obligations both to prevent or stop violations of human rights, and to make reparation. Where a Contracting Party has co-operated in the violation of Convention rights, the positive obligation to take reasonable, appropriate, practical and effective measures requires the State to make diplomatic representations to the State in which the individuals are held.

27. Consistent with this requirement, in *Hirsi Jamaa and Others v Italy*, following the wrongful transfer of the applicants to Libya in breach of Italy's Convention obligations, the Court, under Article 46 of the Convention, ordered the Italian Government to "take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article

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[56] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Article 31; UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, principles 18, 19, 23.
[57] Principle 19, UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, Human Rights Res. 2005/33, UN Doc. E/CN.4/RES/2005/35; G.A. Res. 60/147, UN Doc. A/RES/60/147 (2006). Principle 19 goes on to state that "Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."
[58] See, most recently, Grand Chamber in *Mammadov v. Azerbaijan*, no. 15172/13, 29 May 2019 (Article 46 ECHR judgment).
[59] *Chahal v. UK*, no. 22414/93, 15 November 1996, § 150.
[60] *Al-Adsani*, op cit, § 38.
[61] Ibid, §§ 39-40. See *Rantsev*, op cit, §§ 207-208.
[62] See, by way of analogous example, *Hirsi Jamaa and Others*, no. 27765/09, 16 November 2016, § 211. See also, for example, UN HRC, *Jimenez Vaca v Colombia*, UN Doc. CCPR/C/74/D/859/1999 (2002), § 9; see also UN Committee against Torture, *Dar v Norway*, UN Doc. CAT/C/38/D/249/2004 (2007), § 16.4, in which it was recognised that the facilitation of the applicant's return to Norway and provision of a residence permit remedied the violation.

3 of the Convention or arbitrarily repatriated."[63] In another case, the Court observed that "[…] even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."[64] In *Al-Saadoon and Mufdhi v UK*, the Court held that, under Article 46 of the Convention, the UK Government must "tak[e] all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty"[65] because of the continuing suffering of the applicants. Similarly, the HRC, in cases where it has found that a previous transfer to face the death penalty has violated obligations under Article 6 or 7 ICCPR, has requested State Parties to "make such representations as might still be possible to avoid the imposition of the death penalty."[66]

28. This Court has consistently held in cases of removal of an applicant from the territory, and *a fortiori* in cases of rendition:[67]

> *"The current state of development of international law and international relations does not make it impossible for the respondent State to take tangible remedial measures with a view to protecting the applicant against the existing risks to his life and health in a foreign jurisdiction […]."*[68]

29. In *Al-Nashiri v Poland,* the Court further held that in that case:

> *"589. […] compliance with [the State's] obligations under Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention requires the Government to seek to remove that risk [of the imposition of the death penalty] as soon as possible, by seeking assurances from the US authorities that he will not be subjected to the death penalty."*[69]

30. The Interveners note that, in this case, the Polish authorities had made diplomatic representations, though to date to no avail, towards the United States. The Committee of Ministers has expressed concern that since 2017 no further efforts have been made.[70]

31. In line with the Court's jurisprudence, the Interveners submit that diplomatic representations are one of the few measures realistically available to a state once a detainee has been transferred out of the jurisdiction of a Contracting Party in breach of the Convention and are, moreover, the least intrusive measures potentially available, and consistent with measures of "retorsion" in line with principles on state responsibility.[71] Further, representations on a remedial basis are increasingly accepted and expected as an appropriate means to secure compliance with human rights obligations, as recognised by, for example, the HRC[72]and the Parliamentary Assembly of the Council of Europe (PACE).[73] The

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[63] *Hirsi Jamaa and Others v Italy*, op cit., § 211.
[64] *Ilascu and Others v. Moldova and Russia,* no. 48787/99, 8 July 2004, § 331.
[65]*Al-Saadoon and Mufdhi v United Kingdom*, no. 61498/08, 2 March 2010, § 171.
[66] *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (7 January 1994), § 18. See also Roger Judge v. Canada ,Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (20 October 2003) § 12.
[67] See *Al-Nashiri v Poland*, no. 28761/11, judgment, 24 July 2014; *Al-Nashiri v. Romania*, no. 33234/12, judgment, 31 May 2018; *Abu Zubaydah,* op cit.
[68] *Al-Nashiri v Poland*, op cit., §588
[69] Ibid, §§ 587-589.
[70] See, Status of Execution, http://hudoc.exec.coe.int/eng?i=004-20624.
[71] I.e. "unfriendly" conduct which is not inconsistent with any international obligation of the state engaging in it, the adoption of countermeasures in order to induce the third State to comply with its obligations and the commencement of judicial proceedings where jurisdiction exists. See ILC, Commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, Introductory Commentary to Part Three, Chapter II, § (3); see ILC Articles on State Responsibility, Arts 49–54.
[72] In its General Comment No 31, § 2, the HRC has recognised diplomatic representations as "a reflection of legitimate community interest."
[73] PACE has called on Member States "[…] to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not", and "[…] to respect the erga omnes nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees." See PACE, Resolution 1433 (2005), "Lawfulness of detentions by the United States in Guantánamo Bay", 26 April 2005, §10 (i) and (viii), at

Interveners submit that such representations must be submitted periodically for as long as there is any possible chance to produce results "with a view to removing or, at the very least seeking to limit, as far as possible, the effects of the Convention violations suffered by the applicant."[74]

32. Thus, the Interveners submit that in a situation where a Contracting Party has co-operated in the secret detention and rendition programme, involving violations of Articles 2, 3, 5, 6 and Article 1 of Protocol No. 6 of the Convention, the Contracting Party has obligations under those provisions, read in conjunction with Articles 13, 41 and 46 of the Convention, to make periodic diplomatic representations in respect of the treatment and detention of the detainee, respect for the fair trial rights of the detainee and protection of the detainee from the death penalty.

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http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17318&lang=EN; see also Recommendation 1699 (2005), http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17319&lang=EN.

[74] *Abu Zubaydah*, op cit., § 681.