



RULE 9 SUBMISSIONS

to the COMMITTEE OF MINISTERS of the COUNCIL OF EUROPE

Regarding the Implementation of European Court of Human Rights cases

Abu Zubaydah v. Poland (2014)

and Abu Zubaydah v. Lithuania (2018)

Introduction and Recommendations

These submissions are presented to the Committee of Ministers (COM) in relation to the implementation of the judgments Husayn (Abu Zubaydah) v Poland (2014) and Husayn (Abu Zubaydah) v Lithuania (2018), which became final on 16 February 2015 and 8 October 2018 respectively.

In its judgments, the European Court of Human Rights (ECtHR) established beyond reasonable doubt each state's responsibility under the Convention for our client's undisclosed arbitrary detention and torture or inhuman treatment on their territories, as well as for his subsequent transfer to a serious risk of continued violations. The ECtHR found that Abu Zubaydah was detained in Poland from 5th December 2002 to 22nd September 2003 and in Lithuania from either 17 or 18 February 2005 until 25 March 2006.¹ It found that without the participation of such States, the rendition programme would not have been possible. Both States had enabled the US authorities to transfer Abu Zubaydah to another secret CIA detention site and on to Guantanamo where, in the Court's words, he continues to face a '*flagrant denial of justice*'.² The authorities of both States were found to have failed to carry out an effective investigation, to have violated the right to truth of the applicant and society more broadly and there was a lack of effective remedies in respect of our client's complaints.³ Poland was found in violation of Articles 3, 5, 6, 8 and 13 and Lithuania of Articles 3, 5, 8 and 13 of the Convention.

In light of the violations mentioned above, the ECtHR found that respondent States must take a series of significant steps:

- 1) Pay the specified amount of just satisfaction, and legal expenses, within three months from the date on which the judgments become final.⁴
- 2) Make representations to the US authorities with a view to removing or, at the very least seeking to limit, as far as possible, the effects of their violations.⁵ In the words of the Poland judgement: "*Poland should secure, through diplomatic or other means, the*

¹ Abu Zubaydah v Poland, para 100.

² Ibid., para 552.

³ Abu Zubaydah v Lithuania, para 610.

⁴ Abu Zubaydah v Poland, Decision, 10 (a), pg. 213; Abu Zubaydah v Lithuania, Decision, 10 (a), pg. 295.

⁵ Abu Zubaydah v Lithuania, Para 681.

cooperation and assistance of the United States Government in order to establish the full and precise details of the applicant's treatment at the hands of the CIA, and it should make such representations and interventions, individually or collectively, as are necessary to bring an end to the ongoing violations of his rights".⁶

- 3) Without delay, conduct an effective investigation capable of leading to the identification of those responsible. In the words of the Lithuania judgment: "*The criminal investigation should be brought to a close as soon as possible, once, in so far as this proves feasible, the circumstances and conditions under which the applicant was brought into Lithuania, treated in Lithuania and thereafter removed from Lithuania have been elucidated further, so as to enable the identification and, where appropriate, punishment of those responsible*".⁷ The Court added that: "*On the basis of the elements in the case file, there appear to be no insurmountable practical obstacles to the hitherto lacking effective investigation being carried out in this manner*".⁸
- 4) Acknowledge the wrongs: "*The State should formally recognize the violations of the applicant's rights and acknowledge its wrongdoings and responsibility for those violations, and its contribution to his current circumstances*".⁹
- 5) Carry out necessary measures such as legal or policy reform to prevent similar violations of fundamental rights in the future: "*The State should provide suitable guarantees of non-repetition to ensure that violations committed against the applicant will not be repeated in the future and that its cooperation will be consistent with its human rights obligations under the Convention*".¹⁰

These submissions provide the COM with information in relation to the current state of implementation of the ECtHR judgements on each of these five points. They seek to respond to available 'Action Plans'¹¹ presented by the States. The Lithuanian plan was presented on 6 January 2020 and the Polish plan on 4 February 2020.

These submissions conclude with suggestions as to concrete measures that the COM should recommend in order to give meaningful effect to the Court's judgements. As detailed below, we would urge the COM to make recommendations: 1) to secure the payment to the applicant of the just satisfaction awarded by the Court, without imposing additional undue burden on him and mindful of the reality of the circumstances created by his on-going arbitrary detention; 2) to ensure Poland and Lithuania take all possible steps to bring to an end his on-going arbitrary detention through individual and collective measures; 3) to highlight the inadequate progress on criminal investigations, transparency and truth within Poland and Lithuania, and ensure rigorous and prompt investigation, cooperation and accountability; 4) to ensure

⁶ Abu Zubaydah v Poland, Para 563(d).

⁷ Abu Zubaydah v Lithuania, Para 682; similarly in Abu Zubaydah v Poland, para 563 (a-b).

⁸ Abu Zubaydah v Lithuania, Para 683.

⁹ Abu Zubaydah v Poland, Para 563(c); Abu Zubaydah v Lithuania, Para 678(c).

¹⁰ Ibid. Paras 563 and 678.

¹¹ The latest Lithuanian plan of action in relation to implementation of the ECtHR judgement was submitted to the Committee on 6 January 2020. Previously, Lithuania submitted action plans on 9 April 2019 and 16 January 2019, Poland submitted action plans on 17 November 2015, 19 February 2015, 13 May 2016, 20 October 2016, 23 March 2017, 28 September 2017, 21 June 2018 and 4 February, 2020.

acknowledgement of responsibility and apology to the applicant; 5) to identify and implement general measures directed at ensuring non-repetition of the serious violations in this case.

As reflected below, we acknowledge steps that have been taken to date, particularly Lithuanian indications of commitment to meaningful implementation and non-repetition, and remain committed to working with the authorities of both states towards implementation. However, the situation to date in both states falls very far short of full and meaningful implementation. If the states cannot take urgent steps to remedy this, and to follow the COM's previous recommendations, at a certain point the Committee should consider adopting an interim resolution. Such a stage has been reached in relation to Polish non-implementation, in light of the factors outlined below. At a minimum, the significance of these cases calls for the COM to remain actively engaged and to exert its authority until full implementation is achieved.

The Applicant's Current Situation

In its review of the judgment of 4-6 December 2018 (December 2018 meeting),¹² the COM noted that: "*The situation of the applicant is of deep concern. Mr. Abu Zubaydah has been detained since 2002 without ever being charged with a criminal offence, which in itself amounts to a flagrant denial of justice*"¹³. It concluded that: "*The authorities should therefore urgently clarify the current situation of the applicant and seek assurances from the US authorities that an end will be put to the applicant's continued arbitrary detention: that is either that he will be released from arbitrary detention or charged with a criminal offence in a procedure which will not amount to a flagrant denial of justice. The authorities should also seek guarantees that the applicant does not continue to be subject to the inhuman treatment criticized by the European Court.*"¹⁴ The COM in its 1348th meeting, 4-6 June 2019 (DH)¹⁵ recalled that the violations of the Convention found by the ECtHR have not been remedied as Mr. Abu Zubaydah remains in 'indefinite detention' in Guantanamo Bay and at risk of further inhuman treatment.

With regret, until today, the situation remains unchanged. Eighteen years since he was first transferred into secret black site detention, our client is still being detained arbitrarily with no judicial review of the lawfulness of his detention or realistic prospect of release.

The Lithuanian and Polish States referred in their Action Plans to a series of untenable assertions advanced by the United States as to the lawfulness of the applicant's ongoing detention without charge or trial at Guantanamo.¹⁶ The Action Plans cite US referenceto the power to detain pursuant to discredited notions of unending global conflict. It cites the US reliance on the fact that the applicant's *habeas corpus* proceedings in the District Court for the District of Columbia are still pending. This hardly mitigates unlawfulness given that Abu Zubaydah filed his Petition on 6 August 2008,¹⁷ and twelve years later the fully briefed the

¹² Regarding Abu Zubaydah v. Lithuania.

¹³ Supra n. 1; Para 559.

¹⁴ 1331st meeting, 4-6 December 2018 (DH), H46-36 Abu Zubaydah v. Lithuania.

¹⁵ Regarding Abu Zubaydah v. Lithuania.

¹⁶ 1369th meeting, March 2020 (DH), Updated action plan (24 January 2020) Lithuania, Updated action plan (03 February 2020) Poland.

¹⁷ Docket No. 1:08-cv-1360.

application languishes unresolved, with at least 24 motions filed by counsel remaining undecided.¹⁸

Moreover, the Polish and Lithuanian Plans of Action¹⁹ refer also to the US's reference to the Periodic Review Board (PRB), an administrative interagency process to review whether to continue the detention of individuals held at Guantánamo Bay Naval Base to protect against threats to US security. The last PRB review of the applicant's situation was held in August 2016. Although his US-approved attorney's spouse was critically ill, and died the week of the hearing, the Board refused to reschedule and the hearing proceeded without legal counsel. In vague and unsupported terms, it decided to approve his continued detention on the basis of the potential danger he may pose to the US if released. The decision was described by the UN Ombudsperson - in her decision to delist the applicant on the basis that he was not a member of al Qaeda (below) - as "*total speculation as to the Petitioner's current state of mind.*"²⁰ The UN Ombudsperson's report noted that "*In her view, steps (e.g. Petitioner's cooperation) that would be considered positive in any other environment are held against him based on unsubstantiated suspicions. The Ombudsperson found it difficult in these circumstances to imagine what he could possibly do to obtain a fully positive statement.*"²¹

The PRB process therefore not only falls far short of the independent legal review required by law and in no way mitigates the flagrant denial of justice facing Abu Zubaydah. Although another PRB hearing takes place this week, and as ever the applicant and his counsel will do their best to be heard, US counsel inform us that the nature of these proceedings and their lack of independence from the CIA mean that they offer little real prospect of fair hearing or meaningful opportunity to seek to secure the client's release, and should not be relied on.²² As one US commentator recently noted, "*The [PRB] appears to be broken. Since President Trump's inauguration...the PRB...has become a one-way ratchet, only recommending continued detention and never recommending release....*"²³ No new detainees have been approved for transfer since President Trump assumed office.²⁴

Finally, the Lithuanian and Polish Plan of Action cites US statements that the applicant continues to be treated humanely in accordance with domestic law, the Geneva Conventions and the applicable provisions under UNCAT. This is patently not so after 18 years of substantially incommunicado and arbitrary detention.

These proceedings concern implementation by European States of judgments of the ECtHR, but it remains important not to give credence to US justifications for conduct that has been

¹⁸ On 5 October 2018, Abu Zubaydah's habeas counsel felt compelled to take the unusual step of filing a notice "to alert the Court...that all pending motions are fully briefed and await action by the Court. Some have been fully briefed for several years." Case no. 1:08-cv-1360, Doc. no. 526.

¹⁹ 1324th meeting (September 2018) (DH); 1348th meeting (June 2019) (DH).

²⁰ 24 Jan. 2018, U.N. Security Council ISIL and al Qaeda Sanctions Committee, "Annex—Summary of the analysis, observations, arguments and recommendations set out in the Ombudsperson's report," at 6.

²¹ Ibid.

²² IACHR, Report "Towards the closure of Guantanamo", 3.06.2015, para 265, available at: <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>.

²³ B. Farley, "Who Broke Periodic Review at Guantánamo Bay?," <https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay#>; see also Human Rights First report at <https://www.humanrightsfirst.org/blog/guantanamo-periodic-review-board-hearings-fail-meaningfully-review-detention>

²⁴ Human Rights First 29 Sept. 2019 report, *ibid.*

found unequivocally to constitute a grave violation of the applicant's rights. It is a matter of some concern, in the context of this particular case, that Lithuania and Poland sets out the US views apparently unquestioningly, given the US's categorical condemnation of the European Court as well as other international courts and bodies. To do so runs counter to the ECtHR requirements to acknowledge European States shared responsibility for his victimization and take all steps to bring the unlawfulness of his current situation to an end (discussed further below).

1) Individual Measures: Just Satisfaction

In both judgements, the Court awarded the applicant 100,000 Euros plus any tax that may be chargeable, in respect of non-pecuniary damage. These sums have not yet been transferred to Abu Zubaydah or his designated beneficiary, and both states should ensure that the damages awards proceed to his designated beneficiary without delay.

Poland

Following the 2014 judgment, the Polish government committed itself to pay the damages and legal fees awarded by the Court. The legal fees were transferred to Interights. However, the Polish government explains in its communication to the COM dated 19th March 2019 that after the ECtHR judgement, the damages award of 100,000 Euros could not be paid to the applicant due to domestic legislation, which prohibits payments to persons on the UN and EU sanctions lists.²⁵ The Polish Ministry of Foreign Affairs therefore submitted an application to a domestic court, the Regional Court for Warszawa Śródmieście, to create a deposit account. It asserts that it could not serve the decision on Abu Zubaydah as he was in Guantanamo and explains that a curator was therefore appointed and on the 11th January 2018 the Ministry of Foreign Affairs transferred the sum to that deposit account.²⁶

The difficulties caused by the applicant's then listing on the UN and EU sanctions list are understood. The applicant has now been delisted, however, and any impediment to the transfer of funds to our client has therefore been removed. On 26th December 2017 Abu Zubaydah was removed from the UN Sanctions List by the Security Council, following a report by the UN Ombudsperson finding that he is not a member of al Qaeda and does not currently pose any risk that would justify his inclusion on that list.²⁷ He was accordingly also removed from the EU list.²⁸ Information in respect of both delistings is publicly available, and is attached for the Committee's information. We furnished the government with this information almost a year ago, along with information on the applicant's next of kin who should receive the funds.

The government has refused to make the transfer on the basis that it has established a court deposit which it considers sufficient; in their communication to the COM of the 7th March 2019

²⁵Reply from the authorities (07/03/2019) following a communication from the applicant in the case of Husayn (Abu Zubaydah) (Al Nashiri Group) v Poland (Application No. 7511/13), accessible at: [https://hudoc.exec.coe.int/eng#{"fulltext":\["zubaydah"\],"EXECIdentifier":\["DH-DD\(2019\)297E"\],"EXECDocumentTypeCollection":\["obs"\]}](https://hudoc.exec.coe.int/eng#{)

²⁶ Ibid; Polish Ministry of Foreign Affairs, Report on execution of ECtHR judgements in Poland for 2018, p. 108-109, available at: <https://www.gov.pl/web/dyplomacja/raporty-roczne-rzadu-na-temat-wykonywania-orzeczen-etpc>.

²⁷ UN Security Council press release - <https://www.un.org/press/en/2017/sc13144.doc.htm>.

²⁸ Supra n. 15.

Polish authorities indicate that a motion must be brought by the applicant before Polish courts. However, this is at odds with the obligation on the government to ensure that the damages award is paid to the applicant or his designated beneficiary. He had not consented to a transfer of the award due to him into a depository account. To the author's knowledge, no effort appears to have been made to reach out to the applicant via his counsel. The unilateral decision to transfer the applicant's damages award to such an account, irrespective of the intention behind it, is not one that meets the basic obligation to pay damages to the victim.

This is particularly so as, in practice, there are myriad obstacles to pursuing the domestic court process to release the funds suggested by the government. The government itself makes clear that this requires at least a power of attorney and a deposition to the Court regarding the withdrawal, in a context where the release of such documentation is extremely difficult, and has not been possible to date. The applicant remains subject to a secrecy regime whereby any information from or about him must go through an opaque declassification system which, although somewhat more flexible than before, remains strict and unpredictable. The applicant's US attorney, while limited in the information he may provide, has confirmed that many requests continue to languish in the declassification process; if they are released at all, it may take years. It was plain from the terms of the ECtHR judgment itself, and difficulties experienced throughout the ECtHR process, that the applicant could not and should not be expected to meet normal requirements of documentation for legal proceedings. Similarly, it is not feasible or reasonable for Abu Zubaydah to be expected to now lodge proceedings in Polish courts for the release of these funds.

The payment of just satisfaction in this case reflects Polish responsibility for the applicant's torture and arbitrary detention. It cannot shift the burden on to the victim of on-going arbitrary detention to take further domestic legal action in the responsible state. We would respectfully request that the Committee of Ministers reject the government's contention in its 2020 plan that it has fulfilled its obligation in respect of just satisfaction. It should urge the government to transfer the funds to the applicant's designated family member, and facilitate releasing the funds, without requiring him to engage in further legal action. We remain at the disposal of the government to once again provide the relevant information and to assist it to find an adequate solution.

Lithuania

The Lithuanian government's January 2020 Plan of Action reflects that the awarded compensation of non-pecuniary damages and legal costs, in the total amount of EUR 130,000, has been transferred from the government to a notary's depository account in Lithuania. As it also acknowledges, as the applicant's representative, we have been in touch with the notary in the hope of clarifying the procedure and conditions for the release of the funds and facilitating transfer.

However, it has become clear that these requirements fail to take into account the extent and nature of the obstacles facing the applicant as a victim of on-going arbitrary detention in Guantanamo. US counsel have informed us that several aspects of the requirements set down will be impractical, if not impossible, to meet. The inability to release legal documents, unreasonable requirements with respect to notarization, legalization and withdrawal of the

relevant sums of money, combine to a situation where, despite our best efforts and through no fault of the applicant's, there has as yet been no transfer of just satisfaction.

First, as clarified for us by the relevant notarial office, transfer will require a detailed and specific power of attorney from the client to specified counsel for the specific purpose of this transfer.²⁹ We are informed that existing general powers of attorney in favor of US counsel, which sufficed for ECtHR purposes as a link to confer authority on European counsel, would not suffice here. US counsel have informed us that it has not been possible to release a new and specific power of attorney of the type required. The Court referred to '*the unprecedented restrictions on communication*' which "*precluded the presentation of information or evidence directly from or in relation to the client*"³⁰ and rejected attempts by the government during ECtHR proceedings to insist on formal requirements such as the usual signed power of attorney. Just as such requirements were set aside by the ECtHR as impediments to just resolution of the case, they should not impede implementation of the damages award in relation to that judgment.

In addition to specifications regarding the precise content of the POA, additional legal requirements imposed by the government-appointed Lithuanian notary compound the problem. These include the requirements that, as the notary clarified "*It [the POA] has to be notarized according to the laws of the state in which it is signed; It has to be apostilled (or legalized if the country in question is not a member of the Hague convention) and translated into Lithuanian; A physical copy of the document will have to be presented to the notary before/during the signing of the official request for the transfer of funds.*"³¹

These legal formalities are plainly unworkable in the '*legal black hole*' that is Guantanamo Bay. It is highly unclear how the requirement regarding '*the laws of the state*' would be interpreted and given effect, and where or how a POA and instructions signed in Guantanamo (if eventually declassified) could be '*legalized*', translated to Lithuanian and apostilled. US counsel inform us that securing the presence of a notary, and even witnesses, is challenging for Guantanamo detainees. Moreover, suggesting that if these documents could be secured the client should appear in person in Lithuania is plainly fanciful and recognition that the undersigned legal representative must appear in person in Lithuania to collect the funds on his behalf is not an adequate solution either.

Unlike in the Polish case where the legal fees were paid directly to Interights, the legal fees have still not been paid either and the notary has clarified that legal fees "*cannot be withdrawn separately from the full amount deposited, which means that the notary is able to transfer only the full amount and only to the concerned party ...*"³². There is no basis for the payment of such fees to be withheld, and also made dependent on satisfying the impossible requirements specific above.

We have asked the notary by phone and email whether it might be possible to show some flexibility in respect of the content, form and formalities of the POA and transfer, as the ECtHR indicated was necessary. Unfortunately, we have been told that is not possible. As such, neither the legal fees nor the damages award have been paid.

²⁹ E-mail communication from the notary office to the legal representative's office on 11th December 2019.

³⁰ Abu Zubaydah v Lithuania, Para 90.

³¹ E-mail communication from the notary office to the legal representative's office on 11th December 2019.

³² Ibid.

While we understand the requirements on notarizing and authenticating documents may be normal procedure in other circumstances, they are simply infeasible in the (extra-legal) context of detention by the US in Guantanamo Bay. As these impediments are a direct result of the ongoing violations of the applicant's rights at Guantanamo - to which Lithuania and Poland contributed - it is imperative that the government does not allow them to deny him payment of damages. It cannot be allowed, through formal requirements, to impose an impossible, and in any event an unreasonable, burden on the applicant.

The Ministry of Justice of the Republic of Lithuania statement that "*Lithuania has already fulfilled its obligation to pay damages to Abu Zubaydah in a CIA prison case*"³³ is therefore currently untrue, but we are confident this can be remedied with the government's cooperation.

Both governments should now make the payment of the relevant sums to the applicant, and in the case of Lithuania legal costs. If they continue to fail do so, it will have failed to meet its obligation to pay the damages awards to the victim with immediate effect.

2) Representations seeking assurances from the United States

It is recognized that both governments have made multiple representations to the US authorities seeking diplomatic guarantees on behalf of Abu Zubaydah. These must continue, and every effort should be made to ensure they are more targeted and effective.

Representations to date:

Poland: The Polish Ministry of Foreign Affairs reports that it has sent multiple diplomatic notes on Abu Zubaydah and Al Nashiri since 13th May 2015.³⁴ The Polish Ministry of Foreign Affairs also claims to have made efforts to include the topic of diplomatic guarantees for the applicant in agendas of all consecutive meetings with their American counterparts,³⁵ that officials at the highest political level have been involved including the President's Office, while talks took place with the American Embassy, Deputy Legal Counsel in the U.S. Department of State and the Deputy Secretary of State. In its latest Action Plan, the government informed that it has undertaken efforts to renew its request to the US authorities for the diplomatic assurances for the applicant; a diplomatic note has been prepared and it is planned to be handed to the US Embassy in Warsaw at the beginning of February 2020. We would ask that the representations made by Poland be made available publicly, or at the very least disclosed to the Committee and the client's legal representatives.

Lithuania: Our client appreciates the interventions by the Lithuanian authorities to the US authorities, set out in its updated Action Plan to the COM.³⁶ We are told that diplomatic notes from the Embassy of Lithuania were presented to the US in February 2019 and November 2019, requesting diplomatic assurances to put an end to Abu Zubaydah's continued arbitrary detention and to guarantee that he is not subject to further inhuman treatment. However, the exact

³³ The Ministry of Justice report after the meeting with the Committee on the progress of the CIA prison decision implementation, available at: <https://tm.lrv.lt/lt/naujienos/et-ministru-komitetas-uzbaige-bylos-pries-lietuva-vykdyimo-prieziura>

³⁴ 1324th meeting (September 2018) (DH) - Action plan (21/06/2018) - Communication from Poland concerning the case of AL NASHIRI v. Poland (Application No. 28761/11), Updated action plan 03 February 2020

³⁵ Supra n. 26, p. 85.

³⁶ 1369th meeting, March 2020 (DH).

representations made by Lithuania have not been made available publicly, and we urge the COM to ask the government to disclose them.

Response: We note, with regret, the US refusal to cooperate and to give such diplomatic guarantees. As noted above, the US response contains incredible assertions regarding the lawfulness of the applicant's ongoing arbitrary detention without charge or trial after 18 years. They lack any legal, or moral basis and defy the reasoning and outcome of the Court's judgments which for example refer to the '*flagrant denial of justice*' to which the applicant is subject. They should be clearly repudiated by the relevant states, and the COM itself.³⁷ Despite the US response, European states are obliged to continue to take all possible measures to bring the injustice to an end, and the COM oversight will be crucial in this regard.

Renewed collective efforts:

In their latest decision of 6th June 2019 following the 1348th COM meeting, the COM "*strongly urged the Polish authorities to deploy new efforts at the highest levels to fulfil their obligation under Article 46 of the Convention to ensure that the applicants will no longer be subjected to treatment that is contrary to the Convention and urged them to regularly inform the Committee of the steps taken*". The COM's June 2019 meeting likewise emphasized the importance of the Lithuanian authorities actively continuing diplomatic efforts and pursuing all possible means to seek to put an end to the applicant's continued arbitrary detention.

It is imperative that the COM continue to insist on diplomatic representations, and effective methods of pressuring to address our client's on-going arbitrary detention. Poland and Lithuania should be urged to make such representations directly, but also to seek to do so collectively with other States, including through appropriate international institutions of which the states form a part. This includes continuing to make representations, individually and collectively, that:

- seek guarantees from the US government that our client will be not be detained indefinitely, but will be tried or released.
- explore concrete alternatives, such as facilitating our client's release and rehabilitation.
- seek assurances that communications from Abu Zubaydah with the outside world and the silencing of our client, an aspect of the ongoing flagrant denial of justice, will be lifted.

Vague references, as in the latest Action Plan of Lithuania to '*considering*' continuing necessary dialogue in Washington on the issue insofar as it might contribute to the process of the execution of the Court's judgement are insufficient. The Polish failure to indicate any plans that differ from measures undertaken so far, is equally unsatisfactory. Concrete individual and

³⁷ Ibid. These include that:

- The European Convention of Human Rights does not reflect the obligations that international law puts upon the United States.
- That in the US view, military commissions are suitable fora to try detainees held in the Guantanamo Bay and that such proceedings meet and exceed fundamental procedural guarantees required by Art. 3 and Art. 15 of the Convention Against Torture and II Protocol to Geneva Convention 1949.
- that 'based on the law of war the United States is entitled to capture members of Al-Qaeda, Taliban or related forces until the end of hostilities'.
- that the detainees have a right to challenge the legality of their detention at a U.S. court through an application for habeas corpus (despite still having had no such determination after 18 years of arbitrary detention and twelve since the "right" was upheld by US courts).

collective action, with like-minded States and those who share responsibility for contributing to those wrongs, are required with a view to finally bringing the on-going injustice to an end.

Finally, we recognize and reiterate the COM's June 2019 invitation to the Secretary General to bring to the attention of the US authorities the decision of the COM in the case at issue, seeking reconsideration of diplomatic assurances requested by Poland and Lithuania.³⁸ We look forward to news of continued direct engagement at the highest level within the Council of Europe.

3) Investigation, truth and accountability

We note with regret the lack of progress in the investigation of the serious crimes at the heart of the case and the need for greater transparency in Poland and Lithuania. Rather than relying on notorious US non-cooperation, they should seize the investigative and collaborative opportunities that are available to press forward with the rigorous independent investigations and accountability required by the ECtHR judgment. Specific information and recommendations in relation to the processes in each state are set out below.

Poland

The criminal investigation into allegations concerning the CIA's secret detention in Poland was initiated on the 11th March 2008. It is still ongoing after almost 12 years, with few concrete indications of progress and no charges whatsoever having been filed. The investigation has been repeatedly extended, most recently until 31 March 2020.³⁹ Even taking at face value the Prosecutor's Office's claims as to the complexity of the case, the lack of concrete progress is irreconcilable with the excessive passage of time.

We acknowledge the information provided by the government as to steps which have been taken, including: translation of documents, processing of digital evidence including records from the police and mobile operators, obtaining expert opinions and the hearings of witnesses,⁴⁰ including a high-ranking Officer of the Foreign Intelligence Agency.⁴¹ The government should be urged to provide as concrete information as possible as to information emerging from these enquiries, given the importance of the right to truth and to learning from the past underscored by the Court. It should be made clear how these procedural steps contribute to the progress of the investigation and, so far as possible, what further actions are pending and planned. Blanket refusal based on need for 'accuracy' of the investigation are insufficient. The Polish authorities should also be asked to indicate the resources and personnel dedicated to the investigation in light of the purported complexity of the case and its investigative plans.

The ineffectiveness of the investigation to date is clear from impediments imposed upon the investigation. Reports that testimony from a former President and Prime Minister was blocked by the public authorities responsible for the protection of classified information are cause for serious concern.⁴² In a case such as this, an effective investigation requires access to witnesses from all arms of the States, including intelligence agencies and those at the highest level of

³⁸ 1348th meeting, 4-6 June 2019 (DH)

³⁹ Updated action plan 03 February 2020.

⁴⁰ Supra n. 26, p. 102., Updated action plan 03 February 2020

⁴¹ Supra n. 34, p. 23.

⁴² Supra n. 26, p. 101.

government. The COM should request undertakings by that States that these witness hearings will proceed without impediments.

Both governments appear to justify the lack of progress of their investigation by reference to the applications for international legal assistance that have been submitted and refused. It is recognized that Poland has sought information from the US, as set out in its 2018 (and in notably similar terms) in the latest 2020 Action Plan, specifically: documentation concerning high level meetings between Polish and American authorities for the period 2001-2003; information regarding companies catering flights to Poland; requests to hear Abu Zubaydah and Al Nashiri as witnesses; request to hear as witnesses other US citizens who have visited Poland in the relevant period and might be connected to the case; full and uncensored version of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program as well as the minority's report and CIA's comments.⁴³

While US non-cooperation is undoubtedly an impediment, cooperation is not imperative in order to pursue an investigation and accountability. Progress, however hampered, in Italy's investigation of CIA crimes on its territory provides evidence of this fact. The government should not be allowed to hide behind US non-cooperation but should proceed actively pursue other opportunities that do exist to move towards accountability.

- Most obviously, thorough evidence-gathering within Poland should be able to access much of the evidence in question, including for example the first category of information sought from the US (meetings between the US and Poland). It is, as the ECtHR found, inconceivable that high-level officials were entirely unaware of the programme and the Polish black sites, and as noted above unacceptable that they are precluded from providing evidence.
- There is also a growing body of publicly available information as to the role of multiple individuals and states in the rendition programme. As acknowledged in the most recent Polish action plan in a limited way, several have written books, and some have recently given testimony publicly, as occurred last week when psychologists James Mitchell and John Jessen gave evidence in proceedings before a Military Tribunal in Guantanamo Bay.⁴⁴
- Other states and international organisations may provide a source of information and collaboration. The ICC prosecutor has recently conducted a preliminary examination in respect of Afghanistan, including the rendition programme which unfolded in part in that state, and concluded there is sufficient evidence to officially open an investigation, approval of which remains pending before the Court.⁴⁵ Her office and other international entities may be willing to render assistance to domestic prosecutors if so requested.⁴⁶ Active cooperation from other states should be pursued. Applications for legal assistance from Italy, Lithuania, Romania, and United Arab Emirates, have been answered, and should be followed up on.⁴⁷

⁴³ Supra n. 34, p. 25.

⁴⁴ <https://www.npr.org/2020/01/22/798561799/architect-of-cias-torture-program-says-it-went-too-far>.

⁴⁵ ICC website, "The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan", <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> .

⁴⁶ See e.g., The ICC Prosecutor's Strategic Plan 2019, goal 6, on supporting national efforts at accountability.

⁴⁷ Supra n. 34, p. 25, Updated action plan 03 February 2020, pg. 9

- Information continues to emerge as to the role of other states, including within the Council of Europe, such as the UK's role - as exposed by the UK parliamentary report of the Intelligence and Security Committee published on 28 June 2018 – and the matter is currently before the UK Crown Prosecution Service. Both States should vigorously pursue international cooperation and ensure that practical and institutional arrangements are put in place to support effective cooperation between states.
- Finally, within the US itself, it is significant that a US Court of Appeals, in a decision dated 18th September 2019, upheld the possibility of their subpoena power being used in respect of witnesses - in that case the US psychologists responsible for designing the torture techniques – and that the 'state secrecy' doctrine did not apply.⁴⁸ We would welcome comments from the authorities on how the Prosecutor wishes to proceed taking into account this new opportunity for obtaining evidence.

We appreciate that when the US refused to cooperate, the Secretary General intervened directly by a letter to the Consul General at the Office of the Permanent Observer in Strasbourg.⁴⁹ We would urge it to take robust follow up measures to expose and challenge the interference by the US with the implementation of European States obligations, and to facilitate the international investigation and cooperation.

As the ECtHR judgements made clear, it is essential that the prosecutor's office engage actively with the victim and report to the public. The Polish government reports that the prosecutor's office keeps the applicants in the proceedings fully informed and responds to inquiries of the Ombudsman and NGOs, but communication from the prosecutor's office is more limited than the report suggests.⁵⁰ Contrary to government's claims, a report by the Helsinki Foundation for Human Rights, indicates that the Prosecutor's Office does not inform the public on the progress of the investigation.⁵¹

The applicant's counsel is committed to seeing an effective investigation and to assisting in any way we can with the extension of a meaningful investigation. It is noted however that constant extensions without concrete action and which do not bear fruit paralyze legal action by Abu Zubaydah's legal representative and civil society, since an ongoing investigation cannot be appealed.

⁴⁸ *Husayn v. United States*, No. 18-35218 (9th Cir. 2019), case summary available at: <https://cases.justia.com/federal/appellate-courts/ca9/18-35218/18-35218-2019-09-18.pdf?ts=1568826120>
Background information: Mr. Zubaydah and his American counsel filed an ex parte application for discovery pursuant to 28 U.S.C. § 1782, and sought an order to subpoena James Mitchell and John Jessen for their depositions for use in the criminal investigation in Poland. The district court originally granted the discovery application, but later quashed the subpoenas after the U.S. government asserted the state secrets privilege. The case has been successfully appealed. The Court concluded for the first time that the treatment of our client amounted to 'torture'. It also held that "the district court erred in quashing the subpoenas rather than attempting to disentangle nonprivileged from privileged information", p. 5. In the latest Polish action plan p. 6-7, the government acknowledges that it is aware of this decision.

⁴⁹ Communication from the Secretariat, 1348th meeting (June 2019) (DH) of the Committee of Ministers.

⁵⁰ *Supra* n. 26, p. 107.

⁵¹ Helsinki Foundation for Human Rights report on the execution of ECtHR's judgements in Poland "Wyrok w Strasburgu to nie koniec!", Warsaw November 2019, p. 16, available at <http://www.hfhr.pl/wp-content/uploads/2019/11/Wykonywanie-wyroków-ETPC-2019-FIN-web.pdf>.

Lithuania

The finding of violations of the rights to truth and the duty to investigate are key elements of the judgement in this case and must be key elements of any implementation plan. Yet since the judgement, there has been little apparent progress in the Lithuanian investigation, transparency or truth-telling.

During the June 2019 meeting,⁵² the COM noted encouragingly that: “*the investigation team has approved a plan of investigation and has access to all relevant information including classified information*”. We also note with appreciation the Minister of Justice’s press statement following that meeting of the necessity “*to adhere to the principle of zero tolerance towards any violation of human rights*” and to take preventive action for the future.⁵³

However, the Lithuanian government in their most updated Action Plan indicates few concrete developments, and many justifications for its failure to do so. Referring to the fact that “*complexity of the investigation is predetermined by the fact that the main evidentiary material is in the possession in foreign jurisdictions,*” the authorities rely on US non-cooperation to justify the lack of progress in the investigation. It is recognized that on September 2018 a request for international legal assistance was sent to the US Department of Justice and on 2 October 2018 it was refused. However, as noted above in relation to Poland, there are numerous other avenues and developments, that provide new avenues for cooperation from within the US and beyond.

The states has thus far fallen far short of the Court’s requirements regarding transparency. The last official communication from the Office of the Prosecution on our client’s case was published on its website on 8 October 2018 and is very limited in nature.⁵⁴ The findings of the investigation in Lithuania remains classified from the public. The suggestion in the most updated Action Plan to COM, that at this stage of the investigation it is ‘*premature*’ to provide an outline of remaining investigative steps is difficult to reconcile with the excessive passage of time. Likewise, excuses based on the ‘*confidentiality of the pre-trial investigation material*’ are insufficient, as the Court noted when criticizing an investigation ‘*shrouded in secrecy*’.

However, the Lithuanian government’s requalification of the crimes under investigation is encouraging. It has indicated that the pre-trial investigation, initially executed under Article 292 (3) of the Criminal Code concerning an unlawful transportation of a person across the State border and Article 228 (1) providing for the liability for abuse of power, was re-qualified in 2019 to Article 100 of the Criminal Code on treatment of human beings prohibited by international law, which applies no statute of limitations⁵⁵. The Lithuanian authorities have also expressed determination to take sufficient investigative measures in accordance with the law to establish criminal liability of those responsible.

⁵² 1348th meeting, 4-6 June 2019 (DH).

⁵³ [Supra n. 33.](#)

⁵⁴ It states that the US is not in a position to provide the requested data and answers to questions from Lithuanian prosecutors; the internal investigation is ongoing, available here: <https://www.prokuraturos.lt/lt/naujienos/ikiteisminiai-tyrimai-ir-viesojo-intereso-gynimas/tyrime-del-spejamo-neteiseto-zmoniu-gabenimo-per-valstybes-siena-gautas-atsakymas-is-jav/6098>

⁵⁵ Lithuania set aside 130 thousand euro payment to CIA prisoner, retraining investigation, asking for US guarantee, available here: <https://www.15min.lt/naujiena/aktualu/lietuva/lietuva-atidejo-100-tukst-euru-czv-kaliniui-perkvalifikavo-tyrima-praso-jav-garantiju-56-1088562>; June 2019 Action plan, Domestic investigation part.

At present, however, the government refers in only vague terms to investigative steps taken. There is little evidence to support the conclusion that the authorities are doing everything in their power to pursue a rigorous investigation and accountability. As noted in relation to Poland there are many leads that can be pursued, and forms of cooperation and support that can be sought. We would urge the COM to ask the Lithuanian government to provide more detailed, specific indications in line with the commitment it has expressed and the transparency required by the Court's judgement.

As with Poland, the COM is urged to seek concrete indications as to institutional support and resources to be dedicated to pursuing international cooperation with national and international partners for the more effective investigation of these cases. The '*European Investigation Order to the Romanian competent authorities*' is significant but in itself insufficient, as set out in relation to Poland above.

The Lithuanian government (the Ministry of Justice) is responsible for the translation of the ECtHR judgement in the Lithuanian language, but almost two years later only the summary of the judgement has been published.⁵⁶ We urge to advise the Lithuanian government to finalize the translation at the earliest convenience as a small part of the public's right to know the truth.

4) Acknowledgment

The acknowledgment of the underlying facts and the violations of our client's rights, and Poland and Lithuania's responsibility for them, constitute a critical step in this process. We recognize statements by high level officials, such as the former Polish prime minister, on the importance for the future of ensuring that 'nothing like this will happen in Poland again.'⁵⁷

Even though the final judgements of the ECtHR were delivered in 2014 and 2018, the States in question have still not clarified or confirmed the facts related to our client's detention or publicly admitted the existence of CIA prisons on their territory. Crucially, despite the underlying facts now being firmly in the public domain, the states have offered no acknowledgment or apology to the applicant.

We urge the COM to recommend that the governments of Poland and Lithuania issue an official acknowledgement and recognize their responsibility for the violations of our client's rights. In this respect, a public apology would represent an important step towards meaningful implementation.

⁵⁶The ECtHR found that Lithuania has infringed four articles of the Convention in the CIA case on a secretly detained person, available here: <http://lrv-atstovas-eztt.lt/naujienos/lietuva-pripazinta-pazeidusia-konvencijos-reikalavimus-byloje-del-czv-slaptai-ikalinto-asmens>

⁵⁷ Donald Tusk, prime minister from 2007 to 2014, spoke critically on the issue: "Let there be no doubt about it either in Poland or on the other side of the ocean," he said harshly. "Poland will no longer be a country where politicians, even if they are working arm-in-arm with the world's greatest superpower, could make some deal somewhere under the table and then it would never see daylight," he said in reference to the ongoing investigation which is meant to ensure that "nothing like this will happen in Poland again." <https://www.rt.com/news/poland-cia-secret-prison-968/>.

5) General Measures: Reform

Meaningful implementation of a judgement of this nature requires a process of reflection and reform to ensure non-repetition. The Action Plans that have been submitted notably fail to indicate any meaningful reckoning with institutional responsibility and reform. Polish failure to grapple with a long-standing legal and institutional deficit in terms of oversight of intelligence agencies is cause for particular concern.

Poland

In its most recent decision of 6th June 2019, the COM “*deeply regretted the lack of progress in the adoption of necessary general measures and urged the authorities to intensify without any further delay their work to introduce measures to strengthen supervision over the intelligence services and to ensure unhindered communication and exchange of documents with the European Court, and to inform the Committee about the concrete results.*”

The urgent need for reform of the intelligence services has long been a matter of concern in Poland. The few reforms that have taken place to date have been criticized for lack of clarity as to competencies, structure and oversight, and the lingering lack of institutional and judicial oversight and control.⁵⁸ In its 2018, Action Plan the government referred to a long, ongoing process towards systemic change, without specific indications or plans.⁵⁹ The 2020 plan provides no real indication of legal or policy reform.⁶⁰

The conclusions of the inter-ministerial working group on the European Court of Human Rights, to the effect that the Internal Security Agency should consider amending the Law on the Protection of Classified Information, have been rejected by the agency and apparently set aside.⁶¹

Likewise, in September 2019, a working group of experts from different fields convened by the Polish Ombudsperson, indicated a range of necessary legislative changes to reform the intelligence services.⁶² Inter alia, the experts concluded that better oversight, more transparent structures and access to information were essential to ensure a balance between public safety and human rights. According to their report, the previous 2016 legislative reform, far from improving the situation, had further eroded human rights: for example the amended Police Act allowed for almost unlimited access to Internet data, a new Antiterrorist Act granted the special forces an array of additional competencies and practically excluded foreigners from

⁵⁸ Pulaski Foundation, Report on the reform of intelligence services from a 15 years perspective, 7.05.2017, available at: https://pulaski.pl/wp-content/uploads/2015/02/Raport_reforma_sluzb_FKP.pdf

⁵⁹ Poland’s Action Plan 21.06.2018, p. 36 refers to the meeting of the 27th of March 2018.

⁶⁰ P. 13 notes that the need to amend the Code of Criminal Procedure was excluded and the law on the protection of classified information was deemed sufficient, while drafting rules on the treatment of the classified information is ongoing.

⁶¹ 1348th meeting (June 2019) (DH) - Rule 8.2a Communication from the authorities (26.04.2019) in the AL NASHIRI group of cases v. Poland (Application No. 28761_11). The ISA apparently considers that “the current provisions of the above-mentioned act, together with its implementing provisions, regulate the issue of granting access to a classified information in a sufficient manner”.

⁶² Ombudsperson’s Office, Proposal of a reform of intelligence services “Osiodłać Pegaza - Przestrzeganie praw obywatelskich w działalności służb specjalnych - założenia reformy”, Sept. 2019, available at: <https://www.rpo.gov.pl/pl/content/powolajmy-niezalezna-instytucje-do-nadzoru-sluzb-specjalnych-propozycja-ekspertow-i-rpo>

constitutional protection from surveillance, while the amendment of the Criminal Code, Art. 168a, allowed for admission of evidence unlawfully obtained.⁶³ An opinion of the Venice Commission confirms that the reform is insufficient to prevent an “*excessive and unjustified interference with the privacy of the individuals*”.⁶⁴

Shortcomings of the legislative framework regulating intelligence services have been a matter of concern for many years. The period of 5 years since the publication of the ECtHR’s judgement seems more than sufficient time to develop and implement reform that is necessary to ensure non-repetition of the violations at the heart of this case. The failure to take any measures of meaningful reform should be robustly criticized by the COM.

Lithuania

It is recognized that there has been significant legislative reform in Lithuania related to the implementation of this and other rendition cases. On 27 July 2019, the Criminal Code of Lithuania was changed to criminalise torture (art. 100(3)). It also provides that statutory limitation is not applicable to this crime.⁶⁵ As mentioned above,⁶⁶ our clients’ case was re-qualified under this article of the Criminal Code in 2019.⁶⁷ A new Law on Intelligence governing regulation, coordination and control of intelligence institutions was introduced while the case was pending at the ECtHR.⁶⁸

However, recent developments suggest regressive steps, inconsistent with the *Abu Zubaydah v. Lithuania* judgement. In January 2020, Lithuanian President registered amendments to the Intelligence Law, the Criminal Intelligence Law and the Code of Administrative Offenses, which appear to broaden the powers of the intelligence services to summon people to ‘*preventive interviews*’, verify personal documents and conduct administrative detention. The President and head of the State Security Department have suggested further expansion of the powers of the intelligence services are required. The COM should call on Lithuania to ensure that reform is rule of law driven and comprehensive, with effective safeguards and oversight to avoid rights violations by the security and intelligence services in the future.⁶⁹

Conclusion and recommendations

In light of the submission above, we urge the Committee of Ministers to remain actively engaged in the oversight of implementation in these crucial cases.

⁶³ Ibid p.8-9.

⁶⁴ Opinion no 839/2016 on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), CDL-AD(2016)012-e, para 132, available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29012-e>.

⁶⁵ 1369th meeting (March 2020) (DH) (Updated Action Plan, under General Measures)

⁶⁶ Under the “*Investigation, truth and accountability*” part of this report, pg. 13.

⁶⁷ 1348th meeting (June 2019) (DH), Action plan (08 April, 2019); it aimed at strengthening coordination and control of intelligence services, and the participation of the highest-level officials in decision-making and accountability of the secret services.

⁶⁸ 1369th meeting (March 2020) (DH)

⁶⁹ E.g., the Head of the Republic of Lithuania on the intelligence authorities’ insufficient powers:<https://www.lrt.lt/naujienos/lietuvoje/2/1130713/vsd-vadovas-jauniskis-ramina-del-zvalgybos-istatymo-masinio-pilieciu-sekimo-tikrai-nebus>;
https://m.respublika.lt/lt/naujienos/lietuva/lietuvos_politika/gnauseda_teikia_zvalgybos_istatymo_pataisas/.

It is urged to consider adopting a resolution on the failure of the Polish state, almost 6 years since the judgment against it, to meet their obligations in this respect.

Serious concern should also be expressed as to the inadequacy of Lithuanian implementation to date and the need for urgent concrete steps to be taken and notified to the COM, the applicant and the public.

We ask the COM to engage actively and robustly with other States, including the United States, to release the applicant from the '*flagrant denial of justice*' he is now subject to, as a result of shared responsibility of several States including Poland and Lithuania, and to facilitate international cooperation in the stagnant investigations within both States.

We recognize and encourage the steps that have been taken, particularly as outlined in relation to Lithuanian legislative reform to incorporate the crime of torture and to classify the crimes committed against Abu Zubaydah as among the most serious crimes, which do not permit of statutes of limitation. However, both States fall far short of effective implementation.

We would recommend that the governments of Poland and Lithuania be called on to take the following steps in execution of the ECtHR judgements:

- to transfer the awarded compensation of non-pecuniary damages (and in the case of Lithuania the legal costs awarded) without delay, and without imposing additional burdens such as judicial and notarial requirements that should not be imposed to give effect to an ECtHR judgment and which are unreasonable in the circumstances;
- to remind the States that they are liable for payment of interest for delay or refusal to do so;
- to ask the governments to disclose the representations made to the US to date and to engage robustly and actively, individually and collectively, with other States, to make every effort to ensure that Abu Zubaydah is tried or released, and his rights respected without further delay;
- to pursue rigorously the investigative opportunities that increased public information and international engagement on the issue provide; establish effective investigative collaborations with other states and international entities; provide a clear roadmap with a timeline for outstanding investigative steps and a final deadline for the conclusion of the investigations;
- to publicly recognise the egregious violations of our client's rights on their territories, and to provide full acknowledgement of and apology for Polish and Lithuanian involvement;
- to identify concrete legislative and institutional plans to reform the intelligence agencies and other measures necessary to guarantee non-repetition;
- to notify the public of developments and keep the COM more fully informed, in detail, of concrete developments and plans.

6 February, 2020

On behalf of Abu Zubaydah
6 February 2020