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DOMESTIC INVESTIGATION INTO PARTICIPATION OF POLISH OFFICIALS IN THE CIA EXTRAORDINARY RENDITION PROGRAM AND THE STATE RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

Poland has been accused of participation in the extraordinary rendition program established by the United States after the September 11, 2001 attacks. It is believed that a secret CIA detention facility operated on the Polish territory, where terrorist suspects were transferred, detained and interrogated with the use of torture. Currently, Poland has found itself in a unique situation, since, unlike in other countries, criminal investigation into renditions and human right violations is still pending. Serious doubts have arisen, however, as to the diligence of the proceedings. The case was incomprehensibly prolonged by shifting the investigation to different prosecutors. Its proper conduct was hindered due to state secrecy and national security provisions, which have covered the entire investigation from the beginning. This article argues that Polish judicial authorities, along with the government, should undertake all actions aiming at explaining the truth about extraordinary rendition and seeking accountability for human rights infringement. Otherwise, Poland may face legal responsibility for violating the European Convention on Human Rights. This scenario becomes very probable, since one of the

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Guantanamo prisoners has already lodged a complaint against Poland with the European Court of Human Rights.

INTRODUCTION

Poland is one of three Central European countries¹ accused of hosting secret American Central Intelligence Agency (CIA) detention facilities, established within the framework of the “war on terror” commenced by the United States after the September 11, 2001 attacks in order to detain and interrogate suspected terrorists. Though Polish authorities have consistently denied Poland’s involvement in the extraordinary rendition program, there have recently been serious new developments that supplement and, to a great extent, confirm the information previously established by special investigation commissions created by the Parliamentary Assembly of the Council of Europe, the European Parliament and special rapporteurs of the United Nations. There is official information, for instance, about planes associated with the CIA landing at Poland’s Szymany airport in 2002-2003 and transporting passengers, possibly terrorism suspects. Furthermore, two men claiming to be detained and tortured in Poland were granted victim status in a pending criminal investigation, according to the Polish Prosecutor Service. Finally, on March 27, 2012, the daily *Gazeta Wyborcza* disclosed that charges were presented against Mr. Zbigniew Siemiątkowski, a former Polish intelligence head, in connection with existence of CIA prisons in Poland.

Poland may face domestic and international responsibility for its alleged involvement in the CIA extraordinary renditions. Since one of the Guantanamo prisoners has already lodged a complaint against Poland with the European Court of Human Rights (ECtHR), it is highly probable that Poland may be held responsible for violating the European Convention on Human Rights (ECHR) in this particular case, but maybe also in some new upcoming cases.

1. EUROPEAN CONTEXT OF THE WAR ON TERROR

The first information about CIA prisons in Europe was reported by Dana Priest in *The Washington Post* on November 2, 2005.² Subsequently, on November 7, 2005, the human rights organization Human Rights Watch named

¹ Others are Romania and Lithuania.

² D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, *The Washington Post*, November 2, 2005, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (accessed April 10, 2012).

Poland and Romania as the Central European countries involved in extraordinary rendition. Later that year, ABC News released the names of twelve terrorism suspects that had allegedly been held in Polish prisons.³

In the wake of the above disclosures, the issue became the subject of reports by the Swiss Senator Dick Marty, which were published as part of the investigation undertaken by the Parliamentary Assembly of the Council of Europe,⁴ the Report of the Temporary Committee of the European Parliament⁵ and the Report by the UN Special Rapporteurs Manfred Nowak and Martin Scheinin.⁶ These international bodies found the existence of a network of prisons, so-called “black sites”, as well as flights enabling the CIA to illegally transfer detained persons. The CIA created a “global spider’s web” of secret places of detention and other military or intelligence detention facilities where individuals – alleged al-Qaeda members – were interrogated and kept for “intelligence-gathering” purposes. Those suspects in the global war on terror, commenced by the Bush administration, were captured by the CIA or arrested by allied forces, handed over to US military or intelligence personnel and subsequently transferred to one of the secret places of detention for interrogation.

The global spider’s web connected a considerable number of countries around the world. Persons captured on suspicion of involvement in terrorist activities could

³ A. Bodnar, D. Pudzianowska, *Alleged Existence of Secret CIA Facilities on Polish Territory – In Search of Truth and Accountability*, in M. Nowak, R. Schmidt (eds.), *Extraordinary Renditions and the Protection of Human Rights*, Neuer Wissenschaftlicher Verlag/ Intersentia, Wien, Graz: 2010, p. 82.

⁴ D. Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. First Report of June 7, 2006 of the Committee on Legal Affairs and Human Rights PACE, available at: <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf> (“Marty I”); D. Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe Member States*. Second report of June 11, 2007 of the Committee on Legal Affairs and Human Rights PACE, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (“Marty II”).

⁵ European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee (2006/2027(INI)) of July 6, 2006, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0316+0+DOC+XML+V0//EN> (accessed April 10, 2012).

⁶ United Nations, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, available at: <http://www.hfhrpol.waw.pl/cia/images/stories/Rport%20ONZ.doc> (accessed April 10, 2012).

be rendered to prisons in such countries as Syria, Jordan, Egypt and Morocco, where torture interrogation methods are commonly used. Those individuals could also be transferred to one of the secret CIA detention facilities, such as the “Salt Pit” in Afghanistan, or to black sites in other countries, including those in Central and Eastern Europe.

According to findings of international organizations, the northern Polish military base in Stare Kiejkuty, which serves as a school for Polish intelligence, was allegedly a part of such a network. In this and similar secret facilities, detainees were subjected to harsh interrogation techniques, approved by American authorities as “enhanced interrogation techniques” that previously were not legal due to their torturous nature.⁷ Suspects were eventually transferred to military detention facilities at Guantanamo Bay, Cuba, where they were detained *incommunicado*. Many prisoners, such as Abd al-Nashiri and Abu Zubaydah, are still detained there – some for more than eight years – without being charged, prosecuted or granted the opportunity for a fair trial.

A confidential report from the International Committee of the Red Cross (ICRC) was leaked in February 2007,⁸ suggesting that high-value detainees in European countries had been subjected to extremely harsh treatment, including waterboarding, which is a type of interrogation technique. One of the Guantanamo detainees, Khalid Sheikh Mohammed, said in his interview with ICRC that various factors led him to believe he was detained in Poland, including the snow on the ground, buildings with old-fashioned heating systems and a water bottle he received showing email addresses ending in “.pl”.

2. A PARLIAMENTARY INQUIRY

Responding to the aforementioned reports, the lower chamber of the Polish Parliament examined the case of the alleged existence of CIA secret prisons in Poland during a closed meeting of the Intelligence Services Committee (*Komisja do Spraw Służb Specjalnych*) held on December 21, 2005. According to politicians that took part in the meeting, there was no in-depth discussion on the issue.⁹

⁷ The opinion of International Committee of the Red Cross of July 21, 2007 stating that enhanced interrogation techniques constituted torture, available at: <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (accessed April 10, 2012).

⁸ ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA custody, February 2007, available at: <http://www.nybooks.com/icrc-report.pdf> (accessed April 10, 2012).

⁹ Bodnar, Pudzianowska, *supra* note 3, p. 83.

The minutes of the Committee meeting were not disclosed; the public was informed only that there had been no CIA prisons in Poland and that the matter was considered dealt with. The Temporary Committee of the European Parliament underlined that this meeting could not be described as independent or subject to scrutiny. The Parliamentary Assembly of the Council of Europe stated that the Polish Parliament confined itself to an inquiry whose main purpose was to defend the official position of the national authorities.¹⁰

3. INVESTIGATION INTO SECRET CIA SITES IN POLAND

After several years of constant denials by Polish authorities of Poland's involvement in the CIA extraordinary rendition program, the new Polish government, headed by Prime Minister Donald Tusk, finally ordered the launch of an investigation regarding the existence of CIA secret prisons in Poland. As the Polish Prosecutor Service stated,¹¹ proceedings commenced on March 11, 2008. They were initiated before the Appellate Prosecutor's Office 5th Department of Organized Crime and Corruption in Warsaw on the basis of Article 231(1) of the Polish Criminal Code.¹² The investigation seeks to identify whether public officials abused their powers by allowing the establishment of an extraterritorial zone under the control of a foreign state's jurisdiction. The investigation is still pending.

Since the investigation was classified from the beginning as "top secret", most evidence-taking activities are not disclosed and findings of the inquiry have also been classified as state secrets. As a consequence, for approximately two years from 2008 until 2010, the public had been deprived of nearly all information concerning the case. During that time, the Prosecutor's Office made only one disclosure, confirming on February 4, 2009 that CIA planes flew into and out of Polish

¹⁰ See, D. Marty, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Report of 16 September 2011, Committee on Legal Affairs and Human Rights, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12714.pdf> ("Marty III").

¹¹ The letter of the Prosecutor Service of April 9, 2009 is a response to the letter of the Helsinki Foundation for Human Rights concerning the question whether International Committee of the Red Cross' report is included in the investigation's files. The letter is available at: http://www.hfhrpol.waw.pl/cia/file/odp_prokuratura_krajowa_9_04_09.pdf (accessed April 10, 2012).

¹² Recently, the Appellate Prosecutor Office in the letter of December 15, 2010 confirmed that the basis for the investigation has not changed and it is conducted in reference to the Article 231(1) Criminal Code. The letter is available at: http://www.hfhr.org.pl/cia/images/stories/Odpowiedz_Prokuratura_15_12_2010.pdf (accessed April 10, 2012).

territory through Szymany airport. Due to the secrecy, the public knew little beyond that; hardly any information about flight paths, procedural actions, or approximate dates of termination were revealed.

4. RIGHT TO ACCESS INFORMATION AS AN EFFECTIVE INSTRUMENT TO EXPLAIN ENGAGEMENT IN THE EXTRAORDINARY RENDITION

The Helsinki Foundation for Human Rights (HFHR) was one of the few organizations to show continued interest in seeking an explanation of Poland's involvement in the renditions. Since November 2005, the HFHR sent numerous intervention letters and freedom of information requests under the Polish Freedom of Information Act in an attempt to receive the most precise information as possible from state authorities on Polish involvement in renditions. As a result, the HFHR received refusals from the Prime Minister, Ministry of Defense, and Military Intelligence Service, who declined to disclose information regarding the existence of, *inter alia*, secret agreements between the USA and Poland, due to state secrecy.

However, the HFHR did manage to receive other very important information. The majority of information about the CIA secret prisons in Poland that was disclosed to the public was obtained from media reports or through actions taken by the HFHR. For instance, the Foundation, in collaboration with the Open Society Justice Initiative, was able to obtain flight logs from the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*, PANSZA),¹³ which showed CIA planes landing in Poland several times. The logs also revealed attempts by the CIA and its Polish partners to cover up the true destination of rendition flights: several flights that landed in Szymany had declared Warsaw as the official destination, even in filings with pan-European aviation authorities.

The disclosure marked the first time that a Polish government agency, rather than the independent prosecutor conducting the investigation, confirmed that aircrafts associated with the CIA landed repeatedly at Szymany Airport, close to the suspected CIA secret detention and interrogation site for “high-value detainees” in Stare Kiejkuty. It was a crucial disclosure, as the Polish government had, in the past, denied involvement in rendition and failed to provide the flight records to previous investigations conducted by the European Parliament and the Council of Europe.

¹³ Document available at: http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip (accessed April 10, 2012).

In addition, the landing in Poland of planes associated with the CIA was confirmed by a document disclosed in response to the HFHR's request to the Border Guard Service.¹⁴ The document provided supplementary information on the passengers of the CIA planes that allegedly transported individuals suspected of terrorist activity by the US. The data details the border clearance of the crew and passengers of planes landing at Szymany airport in Poland from 2002 to 2005.

According to the letter from the Border Guard Office, seven planes commonly associated with CIA front companies landed at Szymany airport between December 5, 2002 and September 22, 2003. Five came to Poland with passengers but departed with only crew on board, while the last plane flew to Szymany empty but left Poland with five passengers.

The transmission of all the above information indicates that utilizing the right of access to public information may be an effective method of learning and analyzing the serious allegations of Poland's role in renditions.

5. NEW DEVELOPMENTS IN THE INVESTIGATION

Al-Nashiri and Abu Zubaydah, two Guantanamo detainees who claim they were illegally detained and tortured by the CIA in Poland, currently intend to seek justice before the Polish courts.

On October 27, 2010, al-Nashiri was granted victim status in the proceedings conducted by the Appellate Prosecutor's Office in Warsaw.¹⁵ The decision was made after al-Nashiri's lawyers filed a September 2010 motion¹⁶ for punishing those guilty of detaining and torturing their client. The motion included a notification of the commission of a crime and a request for awarding victim status to al-Nashiri. Subsequently, lawyers for Zubaydah also filed a motion that notified the commission of a crime against Zubaydah during his detention in Poland. The alleged crimes include using torture, inhumane and degrading treatment and

¹⁴ Document available at: <http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf> (accessed April 10, 2012).

¹⁵ Article: *Saudyjski więzień CIA otrzymał status poszkodowanego od polskiej prokuratury* (Saudi CIA prisoner was granted status of a victim by Polish prosecutor service), Polish Press Agency, available at: http://wiadomosci.gazeta.pl/Wiadomosci/1,80708,8574539,Saudyjski_wiezien_CIA_otrzymal_status_poszkodowanego.html (accessed April 10, 2012).

¹⁶ The motion available at: <http://www.hfhrpol.waw.pl/cia/images/stories/AI%20Nashiri%20redacted%20application%20PL-3.pdf> (accessed April 10, 2012).

intrusion into bodily integrity. On January 11, 2011, the Prosecutor Service also granted the second Guantanamo prisoner victim status.¹⁷

The motions filed with the prosecutor's office on behalf of both al-Nashiri and Zubaydah were based exclusively on the case files open to the public and that are not classified as state secrets. The decisions of the Appellate Prosecutor Service in Poland to grant victim status to the two detainees gives a solid basis to the assumption that a secret CIA prison was situated in Poland and that the two were detained in that facility. This is undoubtedly a huge step that brings us closer to the disclosure of truth about Poland's involvement in extraordinary rendition.

Additionally, in its December 15, 2010 letter sent to the HFHR,¹⁸ the Appellate Prosecutor's Office provided, for the first time, comprehensive and complete information about the current stage of the proceedings, which marked a shift from the previous attitude of the Polish Prosecutor Service. The Prosecutor confirmed that the Appellate Prosecutor's Office in Warsaw is continuing its investigation of potential violation of Article 231(1) of the Polish Criminal Code, concerning abuse of power by public officials detrimental to the public interest.

Moreover, the Prosecutor revealed that on March 18, 2009, the Appellate Prosecutor's Office in Warsaw submitted a legal assistance request to US judicial authorities regarding the investigation. On October 7, 2009, the US Department of Justice informed Polish authorities that under Article 3(1) (c) of the Mutual Legal Assistance in Criminal Matters Agreement (MLAT) signed by the United States and Poland, the request was refused and American authorities consider the case closed. The Prosecutor did not publicly disclose the content of the mutual assistance request due to state secrecy.

The above developments were subsequently supplemented by comprehensive information provided by the Appellate Prosecutor's Office on February 4, 2011¹⁹ in response to the letter from the HFHR. The Prosecutor again confirmed the current basis for the investigation (Criminal Code, Art. 231(1)) and provided, for the first time, comprehensive information about procedural actions undertaken in the course of the investigation. According to the letter, steps undertaken by the prosecutors were and still are connected to the verification of the landings

¹⁷ See, INTERRIGHTS and REPREIVE press release, *Polish Prosecutor officially recognizes Guantánamo prisoner Abu Zubaydah as a victim in Poland's CIA secret prison investigation; decision should allow former 'high-value detainee' to testify against his US torturers and their allies* available at: <http://www.interights.org/view-document/index.htm?id=609> (accessed April 10, 2012).

¹⁸ Document available at: http://www.hfhr.org.pl/cia/images/stories/Odpowiedz_Prokuratura_15_12_2010.pdf (accessed April 10, 2012).

¹⁹ Document available at: http://www.hfhr.org.pl/cia/images/stories/odpowiedz_PG_4_02_2011.pdf (accessed April 10, 2012).

without clearance by CIA planes between 2002 and 2003 at the Szymany airport. Border guard and custom service officers were interrogated, as were employees of the Szymany airport, flight controllers and a member of the European Parliament's Commission analysing the circumstances under investigation. A document concerning planes landing at Szymany airport, *inter alia*, was obtained from the Polish Air Navigation Service Agency. The reports of international organizations and press releases were also added to the files.

6. ANOTHER LEGAL ASSISTANCE REQUEST FILED WITH US AUTHORITIES

A development of high importance for the criminal investigation was the March 22, 2011 submission of a legal assistance request to the US Department of State, sought under the MLAT by the Polish Public Prosecutor's Office. The Prosecutor did not officially disclose its content, but press reports revealed that Polish prosecutors asked for, *inter alia*, an interrogation of the two men who had been granted victim status in the Polish investigation, al-Nashiri and Zubaydah.

Filing the second MLAT request was an important step toward a full and comprehensive understanding of the truth behind the allegations of Polish cooperation with the CIA's extraordinary rendition program. If they do not grant the Polish request, US authorities will have made it *de facto* impossible to clarify the case concerning grave human rights violations, such as torture, on Polish territory. It is not yet known what the US authorities' answer will be, though it appears that the second request might not be refused. The current circumstances of the case are radically different than they were at the time of the first request, a result of the successful intervention of two former prisoners of secret CIA facilities in Poland into the investigation as well as the different circumstances and scope of information that is now in the public domain regarding Polish-American collaboration on renditions.

Recent developments in the criminal investigation show even more significant changes. The Prosecutor Service has disclosed information regarding the current stage of proceedings, though without including any substantial information regarding the content of the MLAT request or who was interrogated. It is nonetheless an important change, taking into consideration that no information was previously available despite the Foundation's official requests and the media's demands. The decision to file a second MLAT request with US authorities indicates that the Prosecutor Service is treating the case with the utmost seriousness. Due to the multilevel and international character of the case, the request for legal assistance

was indispensable, and the Polish Prosecutor's request will be crucial to preliminary proceedings concerning Polish involvement in extraordinary rendition.

What has not changed, however, is the Prosecutor Service's statement regarding the classified nature of the entire investigation that overrides public interests. The prosecutor seems to believe that the importance of keeping state secrets excuses denials to reveal information about an investigation, even if the case involves human rights violations. It has been stressed that the gathered materials include testimony and documents that are classified as "top secret"; as such, any disclosure of the results of the investigation, its scope or its methodology is impossible, as it would constitute a criminal offence of unauthorized disclosure of classified information (Polish Criminal Code, Art. 265).

Additionally, the length of the investigation was subject to judicial control. The proceedings were commenced in 2008 and, according to press reports, are now prolonged until August 2012. On March 23, 2011, the media reported that lawyers of al-Nashiri filed a complaint on the extensive length of proceedings, since judicial control could be very important for speeding up the proceedings.²⁰ However, in April 2011, the Polish court rejected the complaint.²¹

7. WILL AN UNEXPECTED TWIST CHANGE THE DIRECTION OF THE INVESTIGATION?

On May 20, 2011, Prosecutor Jerzy Mierzewski was removed from the criminal investigation into secret CIA prisons and replaced by Waldemar Tyl, the Deputy of the Appellate Prosecutor in Warsaw.²² Tyl himself made the decision on Mierzewski's removal, though there were no publicly-raised objections to Mierzewski's actions in the course and conduct of the investigation.

Interestingly, this surprising and confusing decision was made just before US President Barack Obama's visit to Poland, raising serious suspicion as to whether

²⁰ Article: *Sprawę więzień CIA powinien skontrolować sąd* (The case should be analysed by the court), Rzeczpospolita, available at: <http://www.rp.pl/artykul/535475,631302-Adwokat-al-Nashiriego--sprawe-powinien-skontrolowac-sad.html> (accessed April 10, 2012).

²¹ Article: „*Polski więzień CIA*” skarży Polskę do Trybunału w Strasburgu (“Polish CIA prisoner” lodged application against Poland to the Tribunal in Strasbourg), Polish Press Agency, available at: <http://www.polskieradio.pl/5/3/Artykul/365263,Polski-wiezien-CIA-skarzy-Polske-do-Trybunalu-w-Strasburgu> (accessed April 10, 2012).

²² Article: *Prokurator odsunięty od śledztwa w sprawie więzień CIA* (Prosecutor put aside from the investigation on CIA prisons), Gazeta Wyborcza, available at: http://wyborcza.pl/1,75478,9638926,Prokurator_odsuniety_od_sledztwa_w_sprawie_wiezien.html (accessed April 10, 2012).

the decision was politically motivated. At that time, it also raised the question whether the next step in the investigation would be the discontinuance of the case, as was the case in Lithuania, where prosecutors dropped that country's investigation into alleged CIA prisons.

Several days after President Obama's visit, the media reported that Jerzy Mierzewski was attempting to pursue charges against officials of the former left wing government regarding violations of the Constitution, unlawful detention and participation in crimes against humanity.²³ The media also reported on questions Mierzewski and others asked a team of legal experts, who were to examine whether the alleged detention of prisoners, named as al-Qaeda terrorism suspects by the CIA, had been a violation of international law. The questions were submitted in February; in May, the legal team sent a fifty-page reply.²⁴ It stated the following: no law exists that allows for the establishment in Poland of a facility, operated by a foreign intelligence agency, which is excluded from the jurisdiction of domestic authorities; operating such a facility or detaining suspects therein amounts to a violation of the Polish Constitution and international treaties; any detainees of such a facility fall within the legal definition of victims of war crimes and crimes against humanity; there are no specific laws directly applicable to al-Qaeda members; US regulations such as those allowing for waterboarding violate international law.

Furthermore, for the first time, Polish President Bronisław Komorowski publicly indicated the importance of the need for an explanation of the case of CIA prisons on Polish soil, saying on May 30, 2011: "[w]hat we need is a thorough investigation instead of talks about loyalty to an ally."²⁵ It was also reported that the Prosecutor Service planned to file a motion requesting the Polish President to release former President Kwaśniewski from his confidentiality obligations.²⁶

²³ W. Czuchnowski, *CIA miało więzienie w Polsce* (CIA held a prison in Poland), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9689626,CIA_mialo_wiezienie_w_Polsce.html (accessed April 10, 2012).

²⁴ Article: *Pytania prokuratorów* (Prosecutors' questions), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html (accessed April 10, 2012).

²⁵ Article: *Komorowski o więzieniach CIA: potrzeba rzetelnego śledztwa* (Komorowski about CIA prisons: need for comprehensive investigation), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9690394,Komorowski_o_wiezieniach_CIA__potrzeba_rzetelnego.html (accessed April 10, 2012).

²⁶ Article: *Komorowski zwolni z tajemnicy Kwaśniewskiego?* (Will Komorowski dismiss Kwaśniewski from the confidential obligation?), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9736855,Komorowski_zwolni_z_tajemnicy_Kwasniewskiego.html (accessed April 10, 2012).

Although President Komorowski had earlier suggested (even before this information was made public) that he would take such an action into consideration, finally in September 2011 he refused to dismiss Kwaśniewski from state secrecy.²⁷

Interestingly, in November 2011, the prosecutor in charge, Waldemar Tyl, provided information that he expected the proceedings to be closed in 2012, possibly in August. However, in February 2012, the Prosecutor Office made another surprising decision. The investigation on the CIA rendition facilities was transferred from the Prosecution Office in Warsaw to the Prosecution Office in Cracow. The decision was very confusing, especially taking into consideration that on February 2, 2012 the Attorney General, Andrzej Seremet, stated in the Polish Parliament that he felt great responsibility for this particular investigation. Unfortunately, due to state secrecy, the reason for Waldemar Tyl's removal from the case and for the shift to Cracow is yet publicly unknown. There was no explanation provided by the authorities that would be persuasive to the public. However, according to the disclosure made by *Gazeta Wyborcza* on March 27, 2012 one can guess that the reason for removal may be of a political nature aiming to prolong investigation.²⁸ According to reporters, this decision had been made after presenting charges against the former head of the Polish intelligence, Zbigniew Siemiątkowski. This decision was presented orally and grounds were not prepared. Subsequently, the case was moved from Warsaw to Cracow. Mr. Siemiątkowski confirmed that charges were presented against him, but he refused – due to state secrecy – to testify in the investigation and in the potential case pending before the court.²⁹ According to the new information provided by the Cracow Appellate Prosecutor, the investigation is prolonged until August 11, 2012. The prosecutor responsible for the case is Katarzyna Płończyk. The case-file consists of 20 volumes and 62 witnesses have been interrogated.³⁰

²⁷ Article: *Kwaśniewski nie opowie o więzieniach CIA w Polsce* (Kwaśniewski will not talk about CIA prisons in Poland), RMF 24, available at: <http://www.rmfm24.pl/fakty/polska/news-kwasniewski-nie-opowie-o-wiezieniach-cia-w-polsce,nId,359493> (accessed April 10, 2012).

²⁸ W. Czuchnowski, A. Krzykowski, *Zarzuty za polskie więzienie CIA* (Charges for Polish CIA prisons), *Gazeta Wyborcza*, March 27, 2012.

²⁹ Article of W. Czuchnowski and A. Krzykowski published in “*Gazeta Wyborcza*” on March 27, 2012 was reported by the New York Times: N. Kulish, S. Shane, *Polish ex-spy chief charged in case of secret CIA prison, report says*, New York Times, March 28, 2012.

³⁰ See information provided to the Helsinki Foundation for Human Rights on April 4, 2012, available at http://www.hfhr.pl/wp-content/uploads/2012/04/odpowiedz_prokuratura.pdf (accessed April 10, 2012)

8. IMPACT OF INFORMATION DISCLOSED BY US AUTHORITIES ON THE POLISH CASE

Upon President Barack Obama's entrance to office, he prohibited the use of "enhanced interrogation techniques"³¹ and publicly announced that the Guantanamo detention centre would be closed.³² Increasingly, information on the practices of the Bush administration and its allies in the war on terror was at least partially declassified and is now available in the public domain.

Although most of the information is relevant only for internal accountability within the US, there is some information that is of great importance for the case of Polish involvement in the CIA program. In combining that information with other data found – for example, in international reports or HFHR freedom of information litigation cases – the probability that Poland cooperated with the CIA in the war on terror and in the abusive treatment of terrorism suspects on Polish soil is extremely high.

The most important disclosure in this respect is the internal CIA report of May 7, 2004 prepared by the CIA Inspector General and titled, "Special Review 'Counterterrorism Detention and Interrogation Activities' (September 2001 – October 2003)."³³ It provides information concerning, *inter alia*, interrogation techniques used with detainees suspected of terrorism. According to the report, Khalid Sheikh Mohammed was subjected to waterboarding 183 times in March 2003.³⁴ Data regarding the place of interrogation or the identity of personnel involved remains classified. However, the analysis of other publicly available information leads to the possible conclusion that Khalid Sheikh Mohammed was waterboarded in Poland. Such a conclusion arises when comparing the flight logs and analysis in Dick Marty's second report,³⁵ the flight data disclosed by the Polish Air Navigation Services Agency³⁶ and the assessment of the detainees' profiles recently disclosed

³¹ Executive Order Ensuring Lawful Interrogations of January 22, 2009 available at: http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

³² Executive Order Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities of January 22, 2009 available at: http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities (accessed April 10, 2012). The Guantanamo facility is, however, still operating.

³³ CIA Special Review, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, May 7, 2004, available at: <http://www.aclu.org/oigreport> (accessed April 10, 2012).

³⁴ *Ibidem*, p. 91.

³⁵ Marty II, *supra* note 4, p. 36.

³⁶ PANSA flight logs, *supra* note 13.

by American authorities.³⁷ It thus appears that March 7, 2003 was the possible landing date of a CIA plane transporting Khalid Sheikh Mohammed.

9. EXTRAORDINARY RENDITIONS AND HUMAN RIGHTS VIOLATIONS

In general, in relation to the above, the practices performed within the extraordinary rendition program aroused considerable controversy due to the serious violations of basic human rights. Illegal transfers, secret detention, torture for interrogation purposes, breaches of *non-refoulement* to torture obligations, abduction and long detention *incommunicado*, and infringement of private and family life are all practices that represent the most serious violations of basic human rights.

States' responsibility for the above-mentioned practices should be analyzed on the basis of national law, the ECHR and general international law.³⁸

As regards the domestic level, it should be considered whether a particular state applied national law, following the rule of law. In Poland, for instance, two types of responsibility might be taken into consideration: constitutional liability before the State Tribunal for acts against constitutional order as well as liability for crimes committed in connection to renditions.³⁹

In reference to international law, legal responsibility might be considered within the framework of several international instruments, such as the International Covenant of Civil and Political Rights, the UN Convention Against Torture, the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, the ECHR or the Statute of the International Criminal Court. It may also be analyzed from the perspective of customary international law, for example as embodied in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁴⁰

³⁷ Memorandum of Department of Defense of December 8, 2006 regarding Combatant Status Review Tribunal Input and Recommendation for Continued Detention Under Department of Defense Control for Guantanamo Detainee, Khalid Sheikh Mohammed, available at: <http://wikileaks.ch/gitmo/pdf/ku/us9ku-010024dp.pdf> (accessed April 10, 2012).

³⁸ The issue of state responsibility was broadly discussed in *The Transcript of the Debate: State Responsibility for the CIA's Secret Prisons in Third States (Outside the US)*, 30 Polish Yearbook of International Law 275 (2010).

³⁹ *Ibidem*.

⁴⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report

Within the framework of the war on terror, it must be remembered that one of the most severe violations is the use of torture for interrogation purposes. The prohibition of torture is recognized as a peremptory rule of international law and no exception is applicable. Furthermore, there are no reservations stemming from international conventions that deal with this issue.

In general, it is also well established that according to international obligations, states have positive obligations to exercise “due diligence” to prevent violations on their territory, protect against them and investigate, prosecute and provide redress in the event of a breach.⁴¹ Each country accused of participating in the CIA rendition program is therefore under a positive obligation to establish independent investigations into possible human rights violations and to hold any and all guilty persons responsible. The level of fulfillment of this obligation further determines states’ responsibility in the light of international law.

10. STATE SECRECY AS A SERIOUS OBSTACLE TO EXPLAIN HUMAN RIGHTS VIOLATIONS

Focusing on domestic level, according to all information and facts on rendition presented above, there is little doubt whether such a CIA “black site” was located in Poland and whether Poland acted against the prohibition of torture. There is a strong likelihood that Poland violated binding international agreements as well as Constitutional provisions and may, therefore, face both international and domestic responsibility. Poland is thus under positive obligation to explain these allegations. However, the investigation into CIA secret detention facilities on the Polish territory does not address this problem. In fact, it might be perceived as an example of a case in which state secrecy, apart from other factors such as political will, becomes a serious obstacle to the explanation of serious human rights violations and the disclosure of some information to protect the public interest.⁴²

Such a situation is consistent with the tendency appearing in other states during the course of criminal and civil proceedings concerning extraordinary renditions. According to the latest report of the Parliamentary Assembly of the Council of Europe: “[i]n combating terrorism, governments are increasingly invoking

covering the work of that session (A/56/10), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed April 10, 2012).

⁴¹ E.g., H. Duffy, *Extraordinary Rendition and International Law*, 16(1) Interights Bulletin (2010), p. 5.

⁴² Marty III, *supra* note 10, pp. 2, 18-22.

‘state secrecy’ or ‘national security’ in order to ward off parliamentary or judicial scrutiny of their actions.”⁴³ Additionally, it states, “[i]n some countries, in particular the United States, the notion of state secrecy is used to shield agents of the executive from prosecution for crimes such as abduction and torture, or to stop victims from suing for compensation.”⁴⁴

11. OTHER CRIMINAL PROCEEDINGS CONCERNING THE RENDITION CASES AND ACTIONS FOR DAMAGES BROUGHT BY VICTIMS

Several cases were pending before the judicial authorities in Italy, Germany, Lithuania, the United States and Great Britain, concerning the criminal responsibility for the state’s involvement in the war on terror.⁴⁵

Investigations in Italy and Germany were both remarkable. In Italy, for instance, it led to convictions *in absentia* of 25 persons, including 22 CIA agents and an American military officer, for illegal rendition of Usama Mostafa Hassan Nasr (known as Abu Omar). Nasr is an Egyptian national who, while residing in Italy, was abducted from a street in Milan in February 2003 and transferred by the CIA to Egypt, where he was held in secret and allegedly tortured. Charges against five high-level officials of the Italian intelligence agency, however, were denied since evidence gathered against them was classified. Therefore, it could not be admitted to the trial.⁴⁶

In the case of the German citizen Khaled El-Masri, who claimed to be rendered and tortured in a black site in Afghanistan,⁴⁷ German prosecution authorities also conducted a comprehensive investigation. It resulted in arrest warrants against 13 CIA agents who, however, were never transmitted to American authorities since the US had announced from the outset that any extradition request would be refused on national security grounds.⁴⁸

In 2010, the British government announced an extrajudicial inquiry chaired by Sir Peter Gibson. However, human rights groups boycotted the investigation

⁴³ *Ibidem*, p. 2.

⁴⁴ *Ibidem*.

⁴⁵ Marty III, *supra* note 10, pp. 7-12.

⁴⁶ See, Amnesty International Public Statement, *Italy: Court Upholds Convictions in Abu Omar Kidnapping Case*, December 17, 2010, available at: <http://www.amnesty.org/ar/library/asset/EUR30/010/2010/en/bdfb8db9-f1e6-4e0e-a9f9-bbf5e1858624/eur300102010en.pdf> (accessed April 10, 2012).

⁴⁷ Marty I, *supra* note 4, pp. 25-32.

⁴⁸ Marty III, *supra* note 10, p. 8.

out of fears that it would be hampered by extensive application of the state secrets privilege. It was brought to a halt after Scotland Yard declared a criminal investigation into the renditions of two Libyans.⁴⁹ Lithuanian prosecutors discontinued their investigation in 2011, a move which was subject to the criticism, *inter alia*, of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).⁵⁰ In the United States, however, until now no criminal proceedings have been brought against perpetrators of acts of torture.⁵¹

Interestingly, in the United States, civil actions for damages brought by victims of renditions also proved unsuccessful, again, due to the state secrets privilege claimed by the government.⁵² They could not seek justice before courts due to state secrecy, although it was the Bush administration that was the main architect of the extraordinary rendition program implemented within the post 9/11 war on terror. For instance, the US Supreme Court refused to review the case of Khaled El-Masri after a lower court dismissed his complaint, since President Obama had invoked the doctrine of state secrets privilege.⁵³ The case was rejected despite the US Secretary of State admitting that the US had made an “error” in El-Masri’s case.⁵⁴ The same happened in the case of Maher Arar, a Canadian who was abducted and rendered by the CIA to Syria, where he was subjected to torture. No accusation was ever made against him. The US Supreme Court refused to consider the case⁵⁵ after he complained for damages against the former US Attorney General and other representatives of the Bush administration; it was dismissed again on the grounds of national security. Five other victims of rendition – Binyam Mohamed, Abu Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi – brought an action against the Jeppesen Dataplan Inc., a private company whose planes were allegedly used by the CIA to circumvent international

⁴⁹ Article: *UK investigations into torture and rendition – a guide*, February 13, 2012, The Guardian, available at: <http://www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide> (accessed April 10, 2012).

⁵⁰ Article: *Litwa musi ujawnić prawdę o więzieniach CIA* (Lithuania has to reveal the truth about CIA prisons) Amnesty International, May 19, 2011, available at: http://amnesty.org.pl/no_cache/archiwum/aktualnosc-strona-artykulu/article/7350/589/category/5/neste/6.html (accessed April 10, 2012).

⁵¹ Marty III, *supra* note 10, p. 11.

⁵² *Ibidem*, p. 13.

⁵³ The judgment of the United States Supreme Court refusing to review the case: *El-Masri v. United States*, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007).

⁵⁴ See statement of the Open Society Justice Initiative: *Extraordinary Renditions: The Right to the Truth*, available at: <http://www.soros.org/initiatives/justice/litigation/macedonia> (accessed April 10, 2012).

⁵⁵ Article: *High court rejects appeal in rendition case*, Washington Post, June 14, 2010, available at: <http://archive.feedblitz.com/637402/~3849694> (accessed April 10, 2012).

aviation law. Invoking the state secrets privilege, the US Supreme Court rejected the request to hear the lawsuit in May 2011.⁵⁶

Thus, the need for accountability for the CIA's extraordinary rendition program has shifted to Europe. Currently, in the United Kingdom, the British authorities are reaching friendly settlements with rendition victims. The government decided to pay significant financial compensation to avoid the court proceedings brought by former Guantanamo prisoners. It still continues to officially deny its role in the secret transfer of terror suspects and its responsibility in this respect.⁵⁷ Therefore, a situation has arisen, in which victims are granted damages in order to prevent judiciary authorities from dealing with information concerning legitimate secrets and from disclosing this data.⁵⁸

12. IN SEARCH OF ACCOUNTABILITY

Analysis of the course of proceedings mentioned above leads to an unpromising conclusion. It shows that the domestic investigations into the states' involvement into the war on terror, even those of remarkable quality, at some point cannot break through the barrier of state secrecy and national security extensively invoked by states.⁵⁹ As a result, judicial authorities cannot provide a comprehensive explanation of all of the allegations of grave human rights violations to the public opinion. Importantly, prosecution and judicial authorities thus cannot effectively seek for accountability and liability of states' officials – the perpetrators of international law violations.

Due to the state secret privilege invoked by the government, US courts seem to close their doors to victims of renditions and tortures who seek to claim

⁵⁶ See, American Civil Liberties Union Statement *Mohamed et al. v Jeppesen Dataplan, Inc*, November 15, 2012, available at: <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc> (accessed April 10, 2012).

⁵⁷ Article: *Guantanamo payout deal is climax of years of denials of UK role in rendition*, November 16, 2012, The Guardian, available at: <http://www.guardian.co.uk/world/2010/nov/16/guantanamo-payout-deal-climax-years-official-denials> (accessed April 10, 2012).

⁵⁸ Rendition victim, Binyam Mohamed, in a course of the court's proceedings intended to obtain an order that the government release to him "the seven paragraphs" confirming his torture in American facility in Pakistan. This was to supplement the case brought before US court. Although the British Government claimed "public interest immunity", the court finally published the paragraphs in February 2010. See article: *In seven paragraphs, the proof of MI5 complicity in torture of Binyam Mohamed* of February 10, 2010, The Guardian, available at: <http://www.guardian.co.uk/world/2010/feb/10/binyam-mohamed-torture-seven-paragraphs> (accessed April 10, 2012).

⁵⁹ Marty III, *supra* note 10, pp. 7-14.

damages in civil cases for their ill-treatment. In the United Kingdom, on the other hand, damages are granted to victims, including those who unsuccessfully sought justice in the US, based on the fact that the UK aided in the victims' transfer abroad for torture. It seems, however, that the financial contribution is a price for evading the explanation of Britain's role in the war on terror, which will remain secret.

Therefore, the situation of ineffective domestic instruments, despite pressure of other countries or the international community (i.e. the European Parliament, Council of Europe or UN bodies), resulted in a necessity to take into consideration other ways of seeking justice and accountability.

First, countries like Poland, Lithuania, and Macedonia became crucial in this process since, according to all publicly available information, they were actively involved in, and linked to, the extraordinary rendition program. Moreover, Poland – where the investigation is still pending – creates a considerable potential for litigation and thus for investigating the truth.

Second, in this respect, application to the ECtHR against European countries becomes a highly important and useful instrument. For instance, the proceedings in Lithuania and Macedonia appeared to be ineffective and gave grounds for lodging complaints with the ECtHR. Such a strategy may bring real effects in the explanation of the circumstances of the war on terror and in accountability, due to the findings of the ECtHR as well as the highly developed system of execution of ECtHR judgments. There are already three rendition cases in Strasbourg and more victims have declared their intention to follow this strategy.

13. RENDITION CASES IN THE EUROPEAN COURT OF HUMAN RIGHTS

In general, the jurisdiction of the ECtHR extends to human rights violations committed not only within the territory of the Council of Europe Member States. It is well-established that a state's obligations also arise when affected individuals are subject to its jurisdiction, through its agents acting abroad.⁶⁰ This is crucial due to the transboundary nature of renditions. In the landmark judgment in the case *Al-Skeini and Others vs. the United Kingdom*,⁶¹ the ECtHR expressed the rule of extraterritorial application of human rights law, and in particular of the ECHR. The ECtHR found that the UK's human rights obligations apply to its acts in Iraq,

⁶⁰ Duffy, *supra* note 39, p. 4.

⁶¹ *Al-Skeini and Others v. the United Kingdom* (55721/07), Grand Chamber, ECtHR, July 7, 2011, all cited judgement of ECtHR available at: <http://www.echr.coe.int>

where the UK was an occupying power. It also stated that the UK had violated the ECHR by failing to investigate the circumstances of the killings of Iraqi civilians by its soldiers in 2003.

Also, the ECtHR determines whether a state is under a positive obligation to act and to prevent violations on their territory, protect against them and investigate, prosecute and provide redress in the event of breach. States are under a positive obligation when “the authorities knew or ought to have known at the time of the existence of a real and immediate risk ... from the criminal acts of a third party and ... failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁶² It was also held that, in the event of a serious violation, the state must act with “exemplary diligence” in discharging its obligations to investigate.⁶³

The first rendition case brought to the ECtHR was the case of Khaled El-Masri against the Macedonian government on July 20, 2009.⁶⁴ The case concerns Macedonian agents who captured El-Masri in a bus at the border with Macedonia and Germany and held him without charge for 23 days, accusing him of being a member of Al-Qaida. El-Masri was then handed to the CIA and rendered to Kabul, where he was detained for four months. The government of Macedonia denied any involvement in his abduction and did not take any investigative steps. The case was brought to the ECtHR after a criminal complaint was unsuccessfully filed with the Skopje Public Prosecutor’s Office on October 6, 2008. The request alleged that personnel of the Macedonian Ministry of the Interior were responsible for the deprivation of his liberty and for his torture and other ill-treatment. The prosecutor took no action until the statutory time limit for commencing a criminal case expired in early 2009. Additionally, in 2009, El-Masri filed a civil lawsuit for damages, which is still pending. The civil proceedings, however, are not capable of providing effective remedies for the violation of El-Masri’s rights under the ECHR.⁶⁵

In the complaint El-Masri indicated a violation of Article 5 ECHR due to illegal detention without charges and without an appearance before a judge, as well as to his handover to the CIA rendition team. He also claimed infringement of Article 3 ECHR in both substantive and procedural aspects. He was handed over despite a real risk that he would be detained in conditions that were inhumane

⁶² *Osman v. Great Britain* (23452/94), ECtHR, October 28, 1998.

⁶³ *Isayeva, Yusupova and Bazayeva v. Russia* (57947/00, 57948/00, 57949/00), ECtHR, February 24, 2005.

⁶⁴ Application to the ECtHR in case Khaled El-Masri against the former Yugoslav Republic of Macedonia of July 20, 2009 (39630/09) is available at: <http://www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf> (accessed April 10, 2012).

⁶⁵ Marty I, *supra* note 4, pp. 25-32.

without trial and that he would be tortured. There was also never an investigation regarding his detention in Macedonia and thus, in violation of Article 13, he was unable to effectively get to the court.⁶⁶

On October 8, 2010 the ECtHR formally communicated the case to Macedonia, and asked the government to respond to El-Masri's claims. Interestingly, on January 24, 2012 the case was transferred to the Grand Chamber of the ECtHR. This means, that the ECtHR not only acknowledged all the information provided in the application as credible enough to officially communicate the case to the Government and deliver judgment in the case, but also that the ECtHR will treat the rendition case with utmost importance and scrutiny.

Another case was brought to the ECtHR by Abu Zubaydah against Lithuania on October 28, 2011.⁶⁷ He is a Guantanamo detainee who was captured in 2002 and transferred to Poland and Lithuania to secret facilities where he was unlawfully detained and tortured. He was the first "high value detainee" and the person around whom the CIA developed their notorious "enhanced interrogation" system. In total, he spent four and a half years in secret detention, and until now remains in Guantanamo, although there have never been any charges pressed against him. Similar to the case of El-Masri, Abu Zubaydah claimed violation of Articles 3, 5, 6, 8 and 13 ECHR. As of the time of this writing, the ECtHR has not decided on the communication of the case to the Lithuanian government.

14. POLISH RENDITION CASES IN STRASBOURG

As regards the current state of the Polish investigation, two Guantanamo prisoners claiming to be unlawfully detained and ill-treated in secret CIA facilities on Polish territory – Al-Nashiri and Abu Zubaydah – were already granted victim status in the pending national investigation. Since the cases brought before the US judicial authorities were unsuccessful for the victims, they are now seeking justice in Polish proceedings. This is crucial because of the fact that the investigation is not terminated and more former prisoners may intend to intervene in it. At the beginning of 2012 media reported that the lawyers of the next person, Walid bin Attash, intend to obtain his victim status.⁶⁸

⁶⁶ *Ibidem*.

⁶⁷ Application to the ECtHR in case of Abu Zubaydah against Lithuania of October 28, 2011 is available at: http://www.reprive.org.uk/media/downloads/2011_10_27_AZ_v_Lithuania_ECHR_Application_Final.pdf (accessed April 10, 2012).

⁶⁸ A. Krzykowski, *Kolejny pozew za tajne więzienia* (Another suit for the Polish prisoners), "TVP Info" television, available at <http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554> (accessed April 10, 2012).

This implies serious consequences for Poland. If the criminal proceedings are not prompt and effective, it seems that the next natural step in the intervention of all Guantanamo prisoners would be the submission of a complaint against Poland to the ECtHR to seek responsibility before the ECtHR.

One of the interveners has already brought a case against Poland to the ECtHR.⁶⁹ The case concerns Al-Nashiri, a Saudi national, who in 2002 was captured in Dubai and secretly transferred to a CIA prison in Afghanistan, and later Thailand, where he was waterboarded. He was also transported to yet another secret prison in Poland where he was subjected to ill-treatment such as mock executions with a power drill. Subsequently, Poland assisted the US in secretly flying al-Nashiri out of Poland, despite the grave risk of his being subjected to further torture, incommunicado detention, and the death penalty while in US custody.⁷⁰

In their application, lawyers of Al-Nashiri claimed violation of Articles 3, 5, and 8 ECHR for unlawful detention and torture. Moreover they indicated the infringement of Articles 2, 3, and Protocol 6 to the ECHR due to the transfer out of Polish territory despite a real risk that he would be subjected to the death penalty, an unfair trial, further ill-treatment in US custody or incommunicado detention. They also argued the violation of Articles 2, 3, 5, 8 and 13 ECHR for lack of an effective investigation. As of the time of this writing, there has been no decision of the ECtHR as to its communication to Polish government.

The case of Al-Nashiri and other potential rendition cases before the ECtHR, may have real, grave consequences for Poland. Looking at the El-Masri case, it is very probable that the Strasbourg court will decide to examine the case and to deliver a judgment. In view of ECtHR jurisprudence, Poland could be found directly responsible for violations of the above provisions.

One of the obligations possibly violated by Poland in the practice of extraordinary rendition is the right to life (Art 2 of the ECHR); states are under positive obligation to undertake actions to protect life of all persons within their jurisdiction.⁷¹ Furthermore, the ECHR prohibits torture and other inhuman or degrading treatment (Art. 3 of the ECHR); the prohibition is of an absolute nature, meaning that under no circumstances can it be derogated or justified. When states engage in torture or other ill treatment, alone or in collaboration with

⁶⁹ Application to the ECtHR in case of Al-Nashiri against Poland of May 6, 2011 is available at: <http://www.soros.org/initiatives/justice/litigation/nashiri/echr-al-nashiri-application-20110506.pdf> (accessed April 10, 2012).

⁷⁰ More information in the facts of the case see: Open Society Justice Initiative statement *Poland Complicit in Rendition, Detention, and Torture at CIA Black-site Prison*, available at: <http://www.soros.org/initiatives/justice/litigation/nashiri> (accessed April 10, 2012).

⁷¹ *L.C.B. v United Kingdom* (23413/94), ECtHR, June 6, 1998.

other states, they are responsible for violating the prohibitions of such treatment in human rights law.⁷²

It is possible that the ECtHR could find Poland in violation of Article 3 of the ECHR, even without directly carrying out torturous treatment. Such responsibility may happen when a state transfers an individual from its territory or control to another state where there is a real risk of serious rights violations. The obligation of *non-refoulement* prohibits the transfer of an individual to a state where there are “substantial grounds” on which to assume there is a real and foreseeable risk of serious rights violations.⁷³ According to ECtHR case law, Poland could have violated human rights by not preventing extradition to a country in which the person is in danger of being sentenced to death and when the death penalty is likely to be imposed following unfair proceedings, such as those conducted by the Guantanamo military commissions. The *non-refoulement* obligation also covers other serious violations such as the right to life (Article 2 of the ECHR) and the right of access to justice (Art. 6 and 13 of the ECHR).⁷⁴ In the context of extraordinary rendition, *non-refoulement* is established as an absolute obligation of a state party.⁷⁵

Other violations for which Poland may be held responsible are the infringements of the rights to liberty and to the security of the person (Art. 5 of the ECHR). These rights ensure that detentions have a lawful basis and that procedural guarantees are respected. Furthermore, *incommunicado* detention may seriously violate the right to challenge illegal practices – for example, detention or use of torture – before a court in accordance with fair trial rights (Art. 6 of the ECHR).

If the ECtHR finds Poland as a perpetrator of human rights enshrined in the ECHR, Poland must take into account particular consequences. First, the ECtHR may order significant financial compensation as just satisfaction. Second, it is possible that Poland will be obliged to reopen its investigation, following the Recommendations No. R (2000) 2 of the Committee of Ministers.⁷⁶ The document encourages states to provide in their domestic legislation adequate possibilities for re-examination of a case, including reopening of proceedings, in instances where the Court has found particular violations of the Convention.

⁷² Duffy, *supra* note 39, p. 4.

⁷³ *Ibidem*.

⁷⁴ *Soering v United Kingdom* (14038/88), ECtHR, July 7, 1989.

⁷⁵ *Saadi v. Italy* (37201/06), ECtHR, February 28, 2008.

⁷⁶ Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights Adopted by the Committee of Ministers on January 19, 2000 at the 694th meeting of the Ministers’ Deputies, available at: <https://wcd.coe.int/ViewDoc.jsp?id=334147&Site=CM> (accessed April 10, 2012).

Finally, at the forum of the international community Poland would be seen as a grave violator of human rights that failed to perform its international obligations and did not prove its commitment to the democratic values.

CONCLUSION

Currently, Poland has found itself in a unique situation. The criminal investigation into renditions is still pending and two former prisoners were granted victim status (a third is contemplating submission of relevant motion), while other countries seem to be closing their proceedings. Such a situation strengthens the role of the Poland and underlines the importance of the investigation. Poland now has the chance to examine and disclose to the public, the truth about the war on terror conducted by President George W. Bush, the alleged human rights violations connected with it, and the role that Poland played in the extraordinary rendition program. The investigation may effectively allow victims of this rendition program to seek justice at the domestic level or potentially at the ECtHR level and it may even influence the indefinite nature of Guantanamo detention and/or pending death penalty proceedings in the US.

There is international pressure coming from different directions to investigate the rendition case. In June 2009, Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, singled out Poland as a state that needed to conduct an independent inquiry in which state secrets may not be raised to justify a refusal to disclose information about human rights violations. In its recommendations published October 29, 2010, the United Nations Human Rights Committee also said that Poland should conduct a thorough investigation concerning extraordinary rendition, the results of which should be made public. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, in September 2011, urged Polish prosecuting authorities to persevere in seeking to establish the truth about the allegations of secret CIA detentions⁷⁷. Finally, on March 27, 2012 the LIBE Committee of the European Parliament organized a special follow-up hearing devoted to this issue.⁷⁸ This means that international community will remain alert as regards potential developments of the case and investigation in Poland. Interestingly in this context, the recent

⁷⁷ Marty III, *supra* note 10, p. 3.

⁷⁸ See program of the hearing, available at: <http://www.europarl.europa.eu/document/activities/cont/201203/20120320ATT41327/20120320ATT41327EN.pdf> (accessed April 10, 2012).

information on putting charges against Mr. Siemiątkowski shows that there is a real interest in explaining the case in Poland, as compared to other CEE countries.

However, taking into consideration the course of the investigation and its latest developments, serious doubts arise as to the diligence of the investigation. First of all, it seems as though the proceedings were incomprehensibly prolonged by removing from the investigation the following prosecutors: firstly, Jerzy Mierzeński, shortly after the media disclosed information that he was willing to bring charges against high-ranking officials and secondly, Waldemar Tyl, after the media stated that he is willing to close the investigation in 2012. Finally, the case was transferred to Cracow. All of this happened without providing any explanation to the public. The recent decision in particular – coupled with press leak of putting charges against former Polish intelligence agency head Zbigniew Siemiątkowski – raises doubts with regard to political independence of the investigation.

Second, serious obstacles, as previously mentioned, to the proper conduct of the case have emerged due to the state secrecy and national security provisions, which have covered the entire investigation from the beginning. Additionally high-ranking officials, like the president of Poland at the time, cannot testify due to the state secrecy. There is a real threat that, even if the court will consider the case, the proceedings and their findings will be also classified and not disclosed to the public. Such a solution will definitely not meet the standards of a fair trial as stipulated by Strasbourg jurisprudence.

Third, following the recent decision to bring charges against Mr. Siemiątkowski, there is a lot of discussion in Poland as regards closing the investigation as it allegedly threatens the Polish state interest. In the opinion of many politicians, Polish authorities, including prosecutors' office, should not undertake any further action, as it might be detrimental to the state security. Certainly such views – completely ignoring the norms of the Constitution or international obligations, including the ECHR – do not help in proper explanation of the case.

Polish judicial authorities, along with the government, should, therefore, undertake all actions aiming at explaining the truth about extraordinary rendition and seek the responsibility of those who were involved in human rights violations. Additionally, it is in the interest of Poland to initiate declassification of parts of the investigation, such as evidence gathered in its course. It is important that state secrecy and national security are obeyed. They cannot, however, hinder the proper conduct of the investigation. Otherwise, Poland may be held responsible the ECtHR and bear all the connected consequences stemming from violations of the ECHR.

