

# UNLOCK THE TRUTH

POLAND'S INVOLVEMENT  
IN CIA SECRET DETENTION

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*Cover photo:* Polish Intelligence Agency Training Centre in Stare Kiejkuty the alleged site of a secret CIA prison, September 2011, Poland.  
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4 Unlock the Truth  
Poland's Involvement in CIA Secret Detention

# INTRODUCTION

“Of course, everything took place with my knowledge. The President and the Prime Minister agreed to secret service co-operation with the Americans, because that is what was required by national interest... The decision to co-operate with the CIA carried a risk, that Americans would use unacceptable methods. But if a CIA agent brutally treated a prisoner in a Marriott hotel in Warsaw, would you charge the directors of that hotel for the actions of that agent?”

Aleksander Kwaśniewski, former President of Poland, 2001-2005. <sup>1</sup>

The Polish government is in a quandary. As evidence mounts that Poland hosted a secret detention site operated by the US Central Intelligence Agency (CIA) from 2002-2005, the administration, politicians, and the Prosecutor General lurch from admission to inconsistency to paralysis. Key high-level officials have claimed that Poland was subservient to the USA but now is the only European Union (EU) member state to have initiated a criminal investigation into the secret site allegations; others deplore the ongoing investigation, serving up categorical denials that any such activities took place on Polish territory. In February 2013, the Minister of Justice publicly questioned the reliability of the evidence underpinning reported charges against the former head of Polish intelligence for unlawfully depriving foreign nationals of their liberty. His statement raised obvious concerns about how he got access to the evidence in order to arrive at that conclusion, especially since the Prosecutor General's office is supposed to be completely independent from the executive. Later in February, the Polish daily, *Gazeta Wyborcza*, published the rumor that the charges had been dropped. The prosecutors have remained virtually silent throughout, with the investigation – now over five years old -- shrouded in secrecy; apparently the time-honored tactic of “delay” has been embraced, seemingly in an effort to make the “problem” of the secret site go away.

The troubles that plague the on-going criminal investigation into the presence in Poland of a CIA secret detention site clearly reflect an internal struggle regarding how to deal with a shameful period in Polish history, a period in which – there is now little room for doubt – the Polish government colluded with the USA and other states in the unlawful apprehension of individuals in the aftermath of the 11 September 2001 attacks in the USA and their transfer to places where they were tortured and subjected to enforced disappearance in secret CIA “black sites”. Two victims – Abd al-Rahim al-Nashiri and Zayn al-Abidin Muhammed Hussein (Abu Zubaydah) -- and their lawyers are now searching in Poland for the truth about what happened to them while in CIA custody, hoping for justice and an effective remedy for the violations they say they suffered. But five years of delays and the sense that the investigation is vulnerable to political influence have sent them onward to the European Court of Human Rights for that remedy.

It is precisely because the Polish government understands well that it has a legal obligation to conduct an effective investigation, hold perpetrators accountable in fair trials, and deliver justice to victims of these practices that it remains in something of a “limbo”. If trials commence, the likelihood exists that, depending on admissible evidence, high-level officials and former officials could be convicted, resulting in political embarrassment at home and trouble with the USA abroad; but, as this report illustrates, there is far too much information already known about the secret site to halt the investigation, refrain from laying charges and call it a day. Too many people appear to know too much.

This report is about the search for accountability in Poland for complicity in the CIA rendition and secret detention programmes. It questions the motives of a state apparatus that repeatedly invokes “national security” as a justification for keeping secret a reported mass of credible evidence of serious human rights violations, and it documents the halting progress and periodic regressions in a criminal investigation almost completely shrouded in secrecy. It is a paradoxical situation because, despite the secrecy, a great deal of information is already in the public domain; many say more than enough to lay charges against former officials and intelligence operatives. The report essentially explores the state’s duty to investigate and, where there is sufficient admissible evidence, to prosecute and bring to justice the alleged perpetrators of crimes under international law such as torture and enforced disappearance, including for complicity in such crimes. With regard to cases where the state declines to prosecute, it discusses the relevant authorities’ duty to explain and justify that decision fully to those persons who have alleged that they were victims of crimes committed in Poland.

The purpose of this report is not to document further the US government’s rendition and secret detention programmes; as noted below, much has already been written on those operations. It is also not intended as an exhaustive rendering of what is already known about Poland’s complicity in the CIA programmes; again, intergovernmental, nongovernment, and media reports from 2005 up to the present adequately cover that terrain.

The report begins with a note on methodology, which acknowledges the difficulties of researching covert counter-terrorism operations. The next sections summarize in general terms what is known about the US rendition and secret detention programmes and Poland’s involvement, citing the large number of credible reports that document the execution of these operations and noting that this ever-mounting pile of information lends legitimacy to the call

for accountability for the human rights violations attendant to them. A detailed section follows on the course of the Polish criminal investigation, which commenced in March 2008, and includes information on the layers of secrecy that have been superimposed on the process. The next section profiles a third potential victim of rendition to and from secret detention in Poland: Walid bin Attash, a Yemeni national currently detained at Guantánamo Bay and subjected to a trial by military commission for alleged complicity in the 11 September 2001 attacks in the USA. A separate section details Poland's attempt to understand and comply with its legal obligation under domestic and international law to investigate and prosecute crimes under international law committed on its territory. The next section documents Poland's response to two cases pending at the European Court of Human Rights, having been lodged in 2011 and 2013 by the victims of rendition who have alleged that they were held in secret detention in Poland: Abd al-Rahim al-Nashiri and Abu Zubaydah. A penultimate section contains a detailed analysis of Poland's domestic and international legal obligations with respect to conducting an effective investigation and initiating prosecutions where appropriate. Finally, a concluding section ends with recommendations to the Polish government and to the Prosecutor General and the Polish Commissioner for the Protection of Civil Rights, also known as the Polish Ombudsman.<sup>2</sup>

It is important to note that the Polish government has grappled with some of these issues – the search for truth and the obligation to conduct an effective investigation in pursuit of that truth – in another context: its attempts to uncover the facts of the 1940 “Katyń massacre”, during which over 20,000 Polish prisoners of war and others were systematically killed by Stalin's secret police. The Russian government's refusal to release information to the European Court of Human Rights about its own investigation into that tragic affair has frustrated the Polish government's ability to uncover the full truth about the event. The Polish authorities themselves have questioned the Russian government's claim that the 2004 report of the investigation must be kept secret.<sup>3</sup>

In its own response to the European Court of Human Rights in September 2012 regarding its involvement in the CIA rendition and secret detention operations, the Polish government has claimed that it has an independent, robust, on-going investigation that must be permitted to complete its work. Amnesty International calls on the relevant Polish authorities to honor the promise to the European Court to conduct an effective, human rights-compliant investigation; to refrain from invoking “state secrecy” to shield itself from embarrassment for serious human rights violations; to lay charges against and conduct fair trials of any suspected perpetrators complicit in these practices; and to provide the victims of these practices the remedy and reparation to which they have a right.

# METHODOLOGY

Researching human rights violations attendant to covert counter-terrorism operations presents particular challenges. The US-led rendition and secret detention programmes were hatched and executed in secret; any attempts to uncover key details of these operations have been met with the invocation of “state secrecy” by the US and other governments, and/or flat out denials of complicity by many of the states alleged to have assisted the USA. The US government, however, has acknowledged the existence of the CIA-led rendition and secret detention programmes, released memoranda documenting the faulty legal reasoning underpinning so-called “enhanced interrogation techniques”, and admitted employing those techniques on individuals. But US authorities, including the administration of President Barack Obama, have consistently blocked any attempt in US courts – and refused to answer any information requests from foreign governments -- to reveal the details of where secret CIA detention sites were located, the identities of those detained therein, or the flights on which the detainees were ferried to and from the secret sites. Moreover, a draconian “protective order” issued by the authorities at Guantánamo Bay prohibits any statements made by detainees about their experiences in secret CIA detention from being made public.

The USA, however, would not have been able to conduct these operations without the help of other governments, which provided aviation clearance, landing permission, refueling opportunities, intelligence co-operation, and, as has been alleged in Poland, actual infrastructure and support for the creation and operation of CIA-run secret detention sites on their territories.

European complicity in the CIA operations has been well-documented and -- as with the commission of many crimes -- vital information often comes from those complicit in them.

Amnesty International’s work on Poland’s involvement in the CIA rendition and secret detention programmes began in early 2006, in the immediate aftermath of the 2005 revelations alleging that Poland had hosted a secret detention facility. Between 2006 and 2011, Amnesty International released a number of reports that included information about Poland’s involvement in rendition operations and as an alleged location for a secret CIA detention facility.<sup>4</sup> This report builds on that previous work, including desk research on the issue from 2005 to date.

The information in this report was collected during two research trips: one in September-October 2012 and one in November 2012; more recent information, gathered after November 2012, has been gleaned from follow-up interviews, reports by nongovernmental organizations, and media reports.

Amnesty International representatives met with the prosecutors in Krakow currently conducting the criminal investigation into the secret site, and separately with representatives from the Prosecutor General’s Office in Warsaw responsible for supervising the investigation. As detailed below, the vast majority of questions posed were met with the response from Polish prosecutors that the information sought could not be disclosed because it was secret information. This included, among many other basic things, the scope and general terms of reference for the



investigation, the conduct of the investigation (e.g. whether forensic evidence was gathered from the alleged site of the detention facility), and whether charges had been brought against any person. As well, the Polish lawyers representing victims in the criminal investigation were bound by a confidentiality protocol derived from the many layers of secrecy superimposed on the investigation. While some confidentiality in the course of criminal investigations may be required in the interests of justice, for example, to protect the rights of the accused or to ensure attorney-client privilege, the degree of secrecy surrounding the Polish criminal investigation appears to go far beyond what is strictly necessary under these circumstances.

Others in Poland interviewed included a prosecutor who previously worked on the criminal investigation (also bound by secrecy), an investigative journalist, former Szymany airport personnel, and officials from the Polish Ministry of Foreign Affairs. Some government actors declined to meet with Amnesty International.

In addition to testimonies from interviews conducted during the September-October and November 2012 research trips, data and other information was gathered from a wide range of public sources, both primary and secondary, including US and Polish court filings; official data sets documenting the flight paths of aircraft associated with the rendition programme and, in some cases, the number of passengers and crew aboard; media reports; reports from nongovernmental and intergovernmental organizations; applications to the European Court of Human Rights; and submissions to the United Nations.

Despite the shroud of secrecy surrounding the CIA programmes and European, including Polish, involvement in them, a great deal of information is now in the public domain, making the fact of European complicity in them, if not all the specific details, more or less an open secret.

# SUMMARY: THE US-LED RENDITION AND SECRET DETENTION PROGRAMMES

**“[I]t is indisputable that the United States engaged in the practice of torture.”**

Constitution Project Bipartisan Task Force on Detainee Treatment, April 2013<sup>5</sup>

In the aftermath of the 11 September 2001 attacks in the USA, the US government – with indispensable help from its allies – created and implemented global counter-terrorism operations that included the CIA-led rendition and secret detention programmes. These operations involved the apprehension without due process or abduction of persons suspected of involvement in terrorism-related acts and their unlawful transfer (rendition) to countries where they were at risk of torture or other ill-treatment, or to CIA secret prisons where they were interrogated using techniques that amounted to torture or other ill-treatment. In many cases these operations amounted to enforced disappearance. Some people were sent to countries where they were not only tortured and ill-treated in custody, but were also subjected to patently unfair trials. The human rights violations attendant to these operations were many; indeed, the programmes were designed specifically to subject people to such violations and keep them outside the protection of the law.

Much has been documented about these operations, including a number of US government admissions regarding their existence.<sup>6</sup> A stream of reports by intergovernmental and nongovernmental organizations, the media, professional associations and academics between 2005 and 2013 has revealed that – although these programmes were meant to operate under veil of secrecy – paper trails, leaks, accessible flight data, court records, and first person testimony from many individuals, including airport personnel right up to high-level political officials, in combination provided an accurate picture of how the rendition system had worked and what countries had been involved.<sup>7</sup> According to the April 2013 report by the Constitution Project's Bipartisan Task Force on Detainee Treatment, the rendition programme “was conceived and operated on the assumption that it would remain secret. But that proved a vain expectation which should have been apparent to the government officials who conceived and ran it. It involved hundreds of operatives and the co-operation of many foreign governments and their officials, a poor formula for something intended to remain out of public view forever.”<sup>8</sup>

The “co-operation of many foreign governments” included special assistance from the Polish authorities.

# POLAND'S INVOLVEMENT IN THE CIA OPERATIONS

“Poland is no longer 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... Poland is the political victim of the indiscretion of some members of the US administration a few years ago...”

Polish Prime Minister Donald Tusk, March 2012<sup>9</sup>

The spotlight first turned on Poland in November 2005 after the *Washington Post* reported that the CIA was holding detainees in secret detention facilities in “Eastern European” countries.<sup>10</sup> On request of the Bush administration, the newspaper declined to name the specific countries, but within a few days the nongovernmental organization Human Rights Watch publicly identified them as Poland and Romania.<sup>11</sup> The ensuing media frenzy resulted in vigorous denials of complicity in the CIA rendition and secret detention programmes by the Polish and Romanian governments, denials by some government officials that, despite mounting credible evidence over the last eight years, continue to date.<sup>12</sup>

Following the initial media allegations that Poland had hosted a secret CIA detention facility, the Polish Parliamentary Special Services Commission (Komisja do Spraw Służb Specjalnych) conducted an inquiry in 2005 under cover of secrecy: neither the terms of reference nor its final report were ever made public. A statement issued in December 2005 categorically denied Poland’s involvement in the CIA’s rendition and secret detention programmes; the matter was considered “closed”.<sup>13</sup>

Initial press and nongovernmental organization reports were eventually coupled with reports in 2006 and 2007 from intergovernmental organizations, including the Council of Europe and the European Parliament of the European Union, which included detailed allegations, including from unnamed US sources, that Poland had been embedded in the rendition network and had hosted a secret detention facility at Stare Kiejkuty.<sup>14</sup> As more information came into the public domain, it became clear that Poland’s original categorical denials would

be sorely tested, not least from information that Polish government agencies themselves released, indicating Poland's complicity in the CIA rendition programme.

In compliance with Poland's Act on Access to Public Information, the Polish Air Navigation Services Agency (PANSa) released pages of raw flight data to the Polish Helsinki Foundation for Human Rights (HFHR) and the Open Society Justice Initiative (OSJI) in December 2009.<sup>15</sup> The data revealed not only that planes operating in the context of the US rendition and secret detention programmes had landed on Polish territory – mainly at Szymany Airport, near the alleged site of a CIA-operated secret detention facility at Stare Kiejkuty – but also that PANSa had actively collaborated with the CIA to create “dummy” flight plans to cover up the true destinations of some of the flights: some flight plans listed Warsaw as the destination when in fact the plane had landed at Szymany.<sup>16</sup> According to the data, PANSa also assisted in navigating aircraft into Szymany on two occasions without having received any official flight plans at all.<sup>17</sup>

After years of consistent and often vehement denials of any involvement in CIA counter-terrorism operations, the release of the flight data from PANSa marked the first time that a Polish government agency officially confirmed the allegations of Polish involvement in the CIA's rendition programme.<sup>18</sup>

Further confirmation of Polish involvement in these operations came in July 2010 with information released to the HFHR from the Polish Border Guard Office indicating that between 5 December 2002 and 22 September 2003 seven aircraft operating in the context of the CIA's rendition programme had landed at Szymany airport.<sup>19</sup> On five of the flights, passengers were aboard on arrival, but on departure only the crew remained on board. Another plane arrived with seven passengers, but departed with four. A plane that arrived on 22 September 2003, landed at Szymany with no passengers, but departed with five passengers on board and continued on to Romania.<sup>20</sup>

The official information about passenger numbers partially resolved the question raised in an interview on Polish radio in February 2009 during which prosecutors publicly acknowledged that they had evidence that 11 flights had landed in Poland, but also stated that they had no evidence that any passengers were aboard.<sup>21</sup> It was also consistent with the claims of unnamed Polish intelligence officials who told the Polish daily *Dziennik* in September 2008 that the CIA had operated a secret prison inside a military intelligence training base in Stare Kiejkuty in north-eastern Poland near Szymany airport.<sup>22</sup>

A key staff person at the Szymany Airport had always maintained that suspicious flights, without proper landing authorization or border checks, had landed at the airport under mysterious circumstances beginning in December 2002. Mariola Przewłocka, the former manager of Szymany Airport, had been interviewed by the Council of Europe and the European Parliament in 2006 regarding these unusual flights and had also spoken with the media.<sup>23</sup> In a September 2012 interview with Amnesty International, Przewłocka explained the normal procedure for flights landing at the airport, but that in December 2002, “things changed”:

*“We got a call from the Border Guard headquarters in Warsaw informing us that a plane was going to land at Szymany Airport and we should be ready to accept them, but the Border*

*Guard would conduct the passport control and we should not inform customs... It was not normal. The airport was closed that day as it was snowing and we wanted to re-route the plane due to the de-icing costs, but the Border Guards refused and said all costs would be paid by the air company... It was strange because the cost for the landing was much higher than the normal fee... Staff at the airport had to be as small as possible. No one should leave the building, but there would be two people in the control tower. After the plane landed, Border Guards drove out to meet it; they weren't ordinary guards, but officials. They didn't even get on the plane. When they drove away, two mini-buses from Stare Kiejkuty, approached the plane (I knew that from the license plates). Stare Kiejkuty was a top secret base. After some time they drove away and the aircraft departed... The next day a man who spoke Polish came and paid us in cash. This is not normal."<sup>24</sup>*

Mariola Przewłocka also noted that the flight registry in which this flight would have been logged had gone missing at one point. According to investigative journalist, Adam Krzykowski, of Panorama TVP 2, when he questioned airport officials, not including Mariola Przewłocka, about the flight logs, they said that the airport computers were struck by lightning and the hard discs were erased. "It was all a lie," Krzykowski told Amnesty International.<sup>25</sup> Eventually, Krzykowski obtained both the registry and a computer disc, which contained information about CIA rendition aircraft landing at Szymany Airport in 2002 and 2003; Krzykowski submitted the registry and computer disc to the prosecutors for their consideration.<sup>26</sup>

Some commentators have analyzed the Border Guard Office information and concluded that the flight landing dates in Poland coincided with the capture and/or transfer of so-called "high value detainees" who the US government had acknowledged were held in secret prisons abroad.<sup>27</sup> Intergovernmental, nongovernmental and press reports had previously identified persons that unnamed CIA sources claimed were held in a Polish secret detention facility. Those names included Abu Zubaydah, Khalid Sheikh Mohamed, and Ramzi bin al-Shibh, among others (see also section below on Walid bin Attash).<sup>28</sup>

Analysis contained in the February 2010 UN Joint Study on Secret Detention, supported by the statements of confidential sources as cited in that report, gave credence to the notion that one of the secret detainees held in Poland was Abd al-Rahim al-Nashiri, a Saudi national alleged to have masterminded the bombing of the USS Cole, and who is currently detained at Guantánamo Bay and subjected to a trial by military commission.<sup>29</sup>

The UN Joint Study on Secret Detention specifically linked information contained in the CIA Inspector General's (IG) report of May 2004, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003),"<sup>30</sup> – the unclassified version of which was issued in August 2009 – regarding Abd al-Rahim al-Nashiri's questioning in a secret facility under "enhanced interrogation techniques", including "waterboarding" and stress positions, with information given directly to the authors of the UN study by unnamed US sources:

*"Two US sources with knowledge of the HVD programme informed the [UN] Experts that a passage [of the IG report] revealing that the '[e]nhanced interrogation of al-Nashiri continued through 4 December 2002' and another, partially redacted, which stated, 'However, after being moved [redacted] al-Nashiri was thought to have been withholding information',*

*indicate that it was at this time that he [al-Nashiri] was rendered to Poland. The passages are partially redacted because they explicitly state the facts of al-Nashiri's rendition – details which remain classified as 'Top Secret'".<sup>31</sup>*

The CIA IG's report included graphic descriptions of how between 28 December 2002 and 1 January 2003 – during the time it has been alleged that Adb al-Rahim al-Nashiri was held in secret detention in Poland – one “debriefing” (interrogator) threatened al-Nashiri by racking an unloaded handgun near his head and a separate time by holding a bitless power drill up to his head, while al-Nashiri stood naked and hooded, and revving up the drill.<sup>32</sup> In another instance, the debriefer threatened to bring Abd al-Rahim al-Nashiri's family to the detention facility believing that al-Nashiri would infer that this meant that women family members would be sexually assaulted.<sup>33</sup> The IG's report labelled these techniques as “unauthorized” and referred the case to the criminal division of the US Department of Justice, which declined to prosecute.<sup>34</sup>

Advocates for Zayn al-Abidin Muhammad Husayn, also known as Abu Zubaydah, have also alleged that he was held in Poland from December 2002 until September 2003; he was the first so-called “high value detainee” to be captured and interrogated by the CIA. As with Abd al-Rahim al-Nashiri, documents released by the US government have described the use of US-authorized and unauthorized interrogation techniques on Abu Zubaydah, and US authorities have publicly acknowledged inflicting extreme physical pain and psychological pressure on him, including “waterboarding” (mock execution by simulated drowning).<sup>35</sup> The International Committee of the Red Cross (ICRC) has concluded he was subjected to all of the US-authorized so-called “enhanced interrogation techniques.”<sup>36</sup> A former intelligence official familiar with Abu Zubaydah's treatment has described him as “an experiment. A guinea pig ... There were many enhanced interrogation [methods] tested on him that have never been discussed[.]”<sup>37</sup> Videotapes of some of Abu Zubaydah's interrogations have since been destroyed by US authorities.<sup>38</sup> (See section below on European Court of Human Rights for more on these cases.)

# CRIMINAL INVESTIGATION IN POLAND

“They (the government) are in a sandwich between opening this issue up and the pressure from the hard core of the Polish state, the secret service, the prosecutor's office, who say: 'Let's keep this secret'”.

Polish Senator Józef Pinior, January 2013<sup>39</sup>

“The [Polish] investigation is taking a long time and there is no information about when it will end. Also worrying is that the prosecution does not explain, does not deny or confirm media reports, for example about bringing charges, which makes us ask ourselves more questions.”

Hélène Flautre, MEP, rapporteur on September 2012 European Parliament report on accountability for European complicity in CIA rendition and secret detention<sup>40</sup>

A criminal investigation in Poland opened in March 2008 and is now over five years running. Repeated delays in the investigation's progress have been punctuated by several changes in prosecution personnel staffing the investigation, a change in the base location of the investigation from Warsaw to Krakow in February 2012, and complaints from the victims that they have not been able to participate fully in the proceedings as mandated by Polish law. Critics have thus concluded that the process is not independent or effective, opining that the length of the investigation is not merely an unfortunate byproduct of a complex process, but a tactic employed by the prosecutors at the behest of the government to delay as long as possible any accountability for Polish involvement in the CIA programmes.<sup>41</sup>

A key moment in the investigation came in October 2010 when then Warsaw-based prosecutors Jerzy Mierzewski and Robert Majewski granted formal status as an “injured person” to Abd al-Rahim al-Nashiri.<sup>42</sup> (This event resulted in the widely reported development that al-Nashiri had been granted “victim status” in the investigation.)<sup>43</sup> In January 2011, the same status was conferred on Abu Zubaydah.<sup>44</sup> In an interview with Amnesty International in September 2012, Janusz Śliwa, Deputy of the Appellate Prosecutor’s office in Krakow, said that there must be a “likelihood” that a person suffered a crime in Poland in order for him or her to be considered a victim in a criminal proceeding.<sup>45</sup>

Many observers in Poland believe that Jerzy Mierzewski’s eventual removal in early May 2011 from the prosecution team conducting the investigation was fallout, in part, from the bold move to grant the two men injured person status. According to Robert Majewski, who was teamed with Mierzewski at the time of Mierzewski’s removal, they were never informed of an official reason for his partner’s reassignment and replacement by Waldemar Tyl (nor was Majewski notified or given a formal reason for his own removal from the investigation when he was replaced by Prosecutors in Krakow in February 2012; see below).<sup>46</sup>

It was apparently during the tenure of Waldemar Tyl and Robert Majewski that the Warsaw prosecutors petitioned Polish President Bronisław Komorowski to relieve former President Aleksander Kwaśniewski of his duty to keep state secrets and allow him to give testimony in the criminal investigation.<sup>47</sup> That request was rejected in September 2011.

Despite such setbacks, a confidential source leaked information to the media in March 2012 that the former head of Polish intelligence, Zbigniew Siemiątkowski, had been charged in the case.<sup>48</sup> The charges against Siemiątkowski, of which apparently he had first been informed in January 2012, reportedly included exceeding his authority and violating Polish law for involvement in “unlawfully depriving persons of their liberty” and “corporal punishment” against persons held in Poland.<sup>49</sup> Rumors have abounded that charges could also have been laid against Siemiątkowski’s deputy, and possibly former Prime Minister Leszek Miller, who has been reported as having been “well informed” about the site.<sup>50</sup> Siemiątkowski himself told the media that “While in the prosecutor’s office I refused to answer questions and I shall continue to do so at every stage of the proceedings.”<sup>51</sup> The prosecutors refused to confirm publicly that any charges had been laid, invoking state secrecy; Marzena Kowalska, deputy Prosecutor General of Poland, told Amnesty International in September 2012: “We know nothing about Siemiątkowski’s statement in the media. We know nothing about any charges against him.”<sup>52</sup>

In February 2012, before the charges against Siemiątkowski were made public, the base of the investigation was moved from Warsaw to Krakow. Adam Krzykowski, the investigative journalist who had been closely following the case, noted that the earlier “shuffle in prosecutors” and change of location were “meant to cause delay.”<sup>53</sup>

Marzena Kowalska, deputy Prosecutor General, has claimed that the decision to change the locale of the investigation to Krakow was based on the interest of investigation and was for the good of the process, but declined to say precisely what anticipated positive net effect the change would have because “I am bound by state secrecy.”<sup>54</sup> Kowalska also defended her office against the charge that the shift was intended to further delay the proceedings: “This decision absolutely did not change the direction or subject matter of the investigation. It also



didn't cause any delay. It isn't true that the goal was to hide or conceal any information. Media speculations aren't true."<sup>55</sup>

The prosecution team in Krakow also assured an Amnesty International delegation in September 2012 that the newly assigned prosecutors would simply be carrying forward the work already started by the Warsaw team. When questioned about the sudden shift of the investigation's locus, the Krakow prosecutors responded that "In practical terms, there is no significance" and "the scope of the investigation remains exactly the same."<sup>56</sup> According to Katarzyna Płończyk, Head of the Department for Corruption and Organized Crime from the Appellate Prosecutor's Office in Krakow, "investigations are very formal, it is not possible for evidence to be lost."<sup>57</sup> Investigative journalist Adam Krzykowski, however, took a more negative view of the location shift: "The new prosecutors can review the evidence and change the charges."<sup>58</sup>

In an April 2013 media interview, Andrzej Seremet, Poland's Prosecutor General, commented that the shift to Krakow was a positive move because the "Warsaw prosecutors did not see some factual and legal issues that are important for the case, which the Krakow prosecutors see. That's all I can say."<sup>59</sup> Thus, while it may be the case that no evidence has been "lost", a valid concern could be that the evidence is being "re-evaluated" and "re-analysed" in a manner that deviates from the legal standards applied by the former prosecutors in Warsaw, which resulted in acknowledging the two victims and the reported laying of charges against Siemiątkowski, both viewed as positive developments in the search for accountability for human rights violations in Poland.

The claim by prosecutors that the scope of the investigation would remain the same is not one that can be independently verified; when questioned by Amnesty International about the scope and terms of reference for the investigation, the Krakow prosecutors responded that that information was a secret.<sup>60</sup> (No one interviewed for this report knew that information or if they did, they refused to discuss it.) In January 2013, frustrated by continuing delays in the investigation nearly a year after it had been relocated to Krakow, Mikołaj Pietrzak, al-Nashiri's lawyer, told Reuters that "The image is of a complete lack of action...The case is obviously, in my opinion, under political control ... The most convenient thing politically is for the case to drag on."<sup>61</sup>

Delays in the investigation notwithstanding, two events in February 2013 signaled a possible *regression* in the investigation and appeared to lend support to concerns resulting from the fact that the Krakow prosecutors are not formally bound by decisions made by the previous Warsaw-based prosecution team. In an interview on 5 February 2013, then Polish Minister of Justice Jarosław Gowin told Polish Radio 1: "Let me remind the audience that Poland is the only country in which the allegations of hosting CIA secret prisons were investigated with formal charges having been lodged by the prosecution service. It seems that a decision was taken hastily because once the investigation was taken over by the Appellate Prosecutor's Office in Krakow, these initial accusations against, for instance, Mr Siemiątkowski, proved to be ill-grounded. This is also an indication that this case needs be addressed with extreme restraint".<sup>62</sup>

With obvious concerns regarding the independence of the Prosecutor General, the Helsinki Foundation for Human Rights wrote to then Minister Gowin on 14 February 2013 requesting

information regarding his access to the evidence amassed in the investigation and how he arrived at the conclusion that it did not support the charges allegedly laid against Zbigniew Siemiątkowski. At the time of writing, HFHR had not received a response from the Justice Ministry.<sup>63</sup> When queried in April 2013 about charges having been laid, Prosecutor General Andrzej Seremet reiterated that there had been “no official confirmation that they [the prosecutors] had charged anybody.”<sup>64</sup> Regarding former Minister Gowin's apparent public confirmation that such charges had been brought against Siemiątkowski, Seremet demurred: “Everyone has better and worse days.”<sup>65</sup>

The former Justice Minister's comments, however, foreshadowed a 19 February 2013 news item in the Polish daily national newspaper, *Gazeta Wyborcza*, which reported that a single, confidential source had leaked information to a journalist that the charges against Zbigniew Siemiątkowski, the former head of Polish intelligence, would in fact be dropped.<sup>66</sup>

Polish officials declined to respond further and the Krakow-based prosecutors also refused to comment publicly, leading some, including Adam Bodnar of HFHR, to conclude that the changes and delays in the investigation, coupled with the report that charges once contemplated may now be dropped, “are so irrational from the point of view of the effectiveness of the investigation [that] it is realistic to assume there is some political interference.”<sup>67</sup>

In response to a separate 1 March 2013 letter from HFHR to the Prosecutor General's office requesting information about the investigation's timeline and requests for information from the USA,<sup>68</sup> the prosecutors stated that the investigation had been extended to 11 June 2013. In addition, the prosecutor pointed out that two people had recently been interviewed “and evidence [in the case] was enriched by the results of the examination and analysis of many documents and information relevant to the investigation from other state bodies and international organizations.”<sup>69</sup> The prosecutors also claimed that “further requests for international legal assistance were in the final stage”, but no charges had been brought by the Krakow prosecutors against any person; further, specifying a date for the end of the investigation “was not possible at this time.”<sup>70</sup>

# NO CO-OPERATION FROM THE US GOVERNMENT

**“Anyone claiming that it is necessary to have evidence from the USA and without it, it is impossible to proceed in Polish courts would not be saying the full truth. Evidence not only in the classified file, but in the non-classified file would trigger a prosecution.”**

Bartłomiej Jankowski, lawyer for Abu Zubaydah, October 2012<sup>71</sup>

The US government has consistently refused to co-operate with European governments that have attempted to secure information regarding CIA rendition and secret detention operations on their territories.<sup>72</sup> In general, such co-operation would come in the form of a detailed response to a “request for mutual legal assistance” under a bilateral Mutual Legal Assistance Treaty (MLAT), negotiated by two governments in order to facilitate the sharing of information with respect to the investigation, prosecution and prevention of criminal offences. The USA and Poland are bound by an MLAT that came into force in the USA in 1999.<sup>73</sup> Although the treaty is legally binding on both parties, there is a limitation on the execution of the request for information if it “would prejudice the security or similar essential interests of the Requested State.”<sup>74</sup>

It is apparently on the basis of this national security exception that the US government has refused to provide any information to the Polish authorities regarding the CIA rendition and secret detention programmes. According to representatives from the Warsaw Prosecutor General's office, which oversees the Krakow prosecution team conducting the investigation, Poland has transmitted at least two MLAT requests to the USA, and has been rebuffed or ignored each time, with US authorities invoking the national security exception under the treaty.<sup>75</sup>

According to Marzena Kowalska, Poland's deputy Prosecutor General, refusal by the US authorities to co-operate could result in the Polish criminal investigation being “hampered or even impossible.”<sup>76</sup> Janusz Śliwa, Deputy of the Appellate Prosecutor's office in Krakow, told Amnesty International that “the length of the investigation relies upon a response from the USA...lawyers need evidence for their work.”<sup>77</sup> In an April 2013 interview, Prosecutor

General Andrzej Seremet also blamed delays in the investigation on the USA, claiming that “waiting for legal assistance from the United States consumes a lot of time.”<sup>78</sup>

The lawyers for the two named victims, among others, however, argue that there is more than enough evidence in the possession of the Polish prosecutors to trigger a prosecution now. Both Bartłomiej Jankowski and Mikołaj Pietrzak have told Amnesty International that under “normal circumstances” a prosecution would have already commenced in a case where unlawful detention and the ill-treatment of a prisoner were at issue.<sup>79</sup> In a March 2013 press report, Mikołaj Pietrzak, who is al-Nashiri’s lawyer and has viewed a significant amount of classified and non-classified information in the case files, said, “This case is going to be very difficult to overturn, because there is *a lot* of evidence, and you simply cannot pretend that what is there in the prosecutors’ file doesn’t exist.”<sup>80</sup>

# SECRECY AS A SHIELD

**“The system of classification in Poland was meant to serve a totalitarian state.”**

Mikołaj Pietrzak, lawyer for Abd al-Rahim al-Nashiri, OSCE, Warsaw, September 2012<sup>81</sup>

**"It is a travesty to claim 'state secrets' to perpetuate impunity. The EU must have the guts and self-respect to enforce accountability for its own members' involvement in human rights abuses."**

Baroness Sarah Ludford, MEP, September 2012<sup>82</sup>

The secrecy surrounding the Polish criminal investigation has allowed the authorities and prosecutors to say whatever they want about the nature and quality of the evidence in the case; and to routinely invoke “national security” as a justification for the secrecy without having to state precisely how Poland’s security would be threatened by the disclosure of evidence that it may have facilitated torture and enforced disappearance. Surely the argument can be made that Poland seeks to shield itself from the embarrassment of having been complicit in these crimes and from having to provide redress to victims of these operations.

Criminal investigations in general almost always involve some level of secrecy. As noted below, in the “interest of justice”, prosecutors may refrain from naming witnesses or disclosing evidence in a manner that could compromise the integrity of a process meant to lead to justice and accountability. But in the Polish criminal investigation into the CIA secret site, there is an apparent conflation of the ordinary criminal justice restraints on an investigation and the invocation of national security to conceal government wrong-doing. This conflation also leads to confusion regarding what information must be made available to the victims and their lawyers and what information should be disclosed to the public. Victims of human rights violations have a right to an effective remedy, which includes the right to know

the truth about what happened to them (see sections on European Court of Human Rights and international legal standards below).<sup>83</sup> With respect to the public, while information regarding national security may be kept secret in certain narrow circumstances, evidence that the state was complicit in human rights violations and/or state actors committed crimes under international law – such as torture and enforced disappearance -- should never be kept secret strictly to shield the state or specific individuals from accountability for such violations.<sup>84</sup>

In response to the vast majority of questions posed by Amnesty International in meetings held in September 2012, Polish prosecutors in Warsaw and Krakow claimed that they could not provide answers because the information was “top secret” or because they were bound by “state secrecy.” According to Bartłomiej Jankowski, the lawyer for Abu Zubaydah, the levels of secrecy superimposed on the investigation are so many and so deep that the lawyers representing the victims – let alone the public -- do not even know the precise scope or terms of reference for the investigation.<sup>85</sup> This vacuum of information with respect to the parameters of the investigation leaves the victims of these operations at a distinct disadvantage in terms of full participation in the proceedings. Under Polish law, victims should have access to the case files, including all evidence; notification of hearings or other measures of progress in the investigation; and the right to file motions on specific procedural matters and appeal in instances where such motions are denied, among other things.<sup>86</sup> But how can the victims meaningfully engage in an investigation when they do not know precisely what is being investigated and how?

The layers of secrecy surrounding the process fall roughly into four separate categories, according to Bartłomiej Jankowski, lawyer for Abu Zubaydah. The following “layers” reflect Jankowski’s understanding, given his experience in engaging with the prosecutors in the criminal investigation. (Articles of the Polish penal code and code of criminal procedure providing for secrecy and penalties for disclosing secret information underpin these layers.)<sup>87</sup> First, there is the information labeled as “top secret” by the Polish government and its various agencies, which is classified under a national security exception. The rationale for such a classification is that disclosure of such information to the general public would threaten the security of the Polish state.<sup>88</sup> Second, the Prosecutor General has discretion to keep information confidential and beyond the public’s purview “in the interest of justice”; that is, in order to preserve various lines of inquiry and/or to protect a specific person or persons. The third type of secrecy involves information that the prosecutors themselves can subject to secrecy; that is, information that is not necessarily classified by the government, but has been collected and analyzed separately by the prosecutors investigating the case; the prosecutors thus have discretion to shield from public scrutiny information they themselves deem sensitive. Finally, it appears that procedural information regarding the investigation can also be kept secret. Thus, to date, the Prosecutor General will not confirm whether: anyone has been charged; a forensic sweep of the alleged secret detention facility has been conducted; or why precisely the investigation’s location was changed from Warsaw to Krakow.<sup>89</sup> The seemingly unrestricted ability of the government and the prosecutors to keep secret much of the information regarding the substance and procedure of the investigation can be summed up in one sentence, which Robert Majewski – former prosecutor on the case – offered: “The entire investigation is completely covered by secrecy... I cannot comment.”<sup>90</sup>

# PROFILE: WALID MOHAMMAD BIN ATTASH

**“US and Polish authorities have refused to disclose documents as to where our client was kept after his arrest... however, our investigation has led us to Poland.”**

Cheryl Bormann, lawyer for Walid bin Attash, Warsaw, February 2012<sup>91</sup>

As their cases have progressed in Poland and at the European Court of Human Rights, Abd al-Rahim al-Nashiri and Abu Zubaydah have garnered the lion's share of attention in the context of Poland's complicity in the CIA rendition and secret detention programmes (see below section on the European Court).<sup>92</sup> Media reports and other documents, however, have identified several other detainees linked to a secret detention facility in Poland, among them Walid Mohammad bin Attash, a Yemeni national, currently in detention at Guantánamo Bay and facing trial by military commission.<sup>93</sup> Walid bin Attash is charged with crimes connected to the 11 September 2001 attacks in the USA.<sup>94</sup> The charges against him carry the death penalty, and the prosecution has been authorized to seek it, but Walid bin Attash's lawyers believe that what happened to him while he was in secret CIA detention might mitigate any potential sentence.<sup>95</sup>

Walid bin Attash's advocates have claimed that he was held in secret detention in Poland in 2003. During a February 2012 visit to Poland, Captain Michael Schwartz, Walid bin Attash's court-appointed military defense counsel, told journalist Adam Krzykowski: “We believe that our client ended up here, probably in June 2003. We know about the secret flights and we know that detainees landed in Szymany.”<sup>96</sup>

Walid bin Attash was arrested by Pakistani rangers in Karachi on 29 April 2003, as reported by *Time* magazine:<sup>97</sup>

*“A Pakistani police roundup of al-Qa'ida figures in Karachi Tuesday has netted a Bin Laden bagman who funneled nearly \$120,000 to ringleader Mohammed Atta and other 9/11 hijackers to finance their flight lessons and living expenses in the US, according to FBI and U.S. intelligence officials. Ali Abd al-Aziz (also known as Ammar al-Baluchi), a nephew of captured al-Qa'ida operations boss Khalid Shaikh Mohammed and first cousin of 1993 World Trade Center bombing mastermind Ramzi Yousef, was arrested with a higher-ranking al-Qa'ida lieutenant, Walid Ba 'Attash [sic], aka "Khallad" or Tawfiq Bin Attash an Osama bin*

*Laden intimate who is believed to have organized the October 2000 bombing of the USS Cole in Yemen.*"<sup>98</sup>

As Amnesty International pointed out in October 2004, although the US authorities allowed the 9/11 Commission, in its July 2004 report, to identify Walid bin Attash and another nine named detainees as being held in US custody<sup>99</sup>, this acknowledgement was not enough to clarify the detainees' fates and whereabouts, leaving them as victims of enforced disappearance.<sup>100</sup> The organization subsequently included the case of Walid bin Attash's enforced disappearance, presumably in CIA secret custody, in a report on rendition and secret detention issued in April 2006.<sup>101</sup> Although then President George W. Bush had announced on 30 April 2003 that Walid bin Attash had been apprehended by the Pakistani authorities,<sup>102</sup> his whereabouts were not disclosed by the USA until President Bush confirmed publicly for the first time on 6 September 2006 that the USA had been operating a secret detention programme and that 14 men had been transferred from secret CIA detention to military custody at Guantánamo Bay.<sup>103</sup> Walid bin Attash turned out to be one of the 14.<sup>104</sup>

After his arrival in Guantánamo, Walid bin Attash was interviewed by the International Committee of the Red Cross (ICRC) and some of his statements were included in a confidential report that the ICRC sent to the CIA, and which was subsequently leaked to the public.<sup>105</sup> This report, and other public documents, indicate that between 29 April 2003 and 4 September 2006 Walid bin Attash was held by the CIA, in secret, in a variety of locations around the world, and that he was subjected to torture and other ill-treatment, in addition to enforced disappearance, during that time.

Walid bin Attash told the ICRC that after his capture in Karachi he was transferred to Afghanistan. He estimated that he arrived in Afghanistan in mid-May 2003 and that he was held there for about three weeks.<sup>106</sup> He was then transferred to "a subsequent place of detention", where he was held starting in June 2003.<sup>107</sup> Walid bin Attash described the process of transfer to the ICRC, which he maintains was aboard a military aircraft:

*"After approximately three weeks in Afghanistan I was transferred to another place. I was blindfolded and earphones were placed over my ears. I was transported in a sitting position, shackled by the ankles and by the wrists with my hands in front of my body. I think that the flight lasted probably more than eight hours. On this occasion the transfer was done using a military plane. If I shifted my position too much during the journey somebody hit me by hand on the head."*<sup>108</sup>

Another of the 14 detainees transferred to Guantánamo in September 2006, Khaled Sheikh Mohammed, told the ICRC that he believed that he was held in Poland between 6 March 2003 and 22 September 2003.<sup>109</sup> According to the *Associated Press*, reporting on the movements of another detainee, Ramzi bin al-Shibh -- who allegedly was transferred to the Polish secret detention facility in March 2003 -- Walid bin Attash and Ramzi bin al-Shibh crossed paths at the secret detention site in Poland sometime in 2003.<sup>110</sup> Other sources have placed Walid bin Attash in Poland for at least part of the time he was in CIA secret detention.<sup>111</sup>

Flight records released by the Polish Air Navigation Services Agency (PANSNA) corroborate Walid bin Attash's account to the ICRC. On 5 June 2003, a Gulfstream jet, registration



number N379P, flew from Kabul, Afghanistan, to Szymany airport in Poland. The aircraft continued on to Rabat, Morocco, on 6 June.<sup>112</sup> Flight records also show that although the aircraft had landed at Szymany, the plane formally filed its route as to and from Warsaw, apparently in an attempt to conceal its true destination.<sup>113</sup> This aircraft (N379P) was operated by Stevens Express Leasing, a company known to have served as a front for CIA activities. The aircraft was firmly embedded in rendition operations and has been the subject of much public reporting.<sup>114</sup> Gulfstream N379P had even been casually labeled by some of those investigating the rendition network as “the torture taxi”.<sup>115</sup>

The ICRC reported that in July 2003, while being held in his “second place of detention”, alleged to have been Poland, Walid bin Attash, who has a right-side below knee amputation and wears a prosthetic leg, was exposed to a series of abusive interrogation techniques and conditions of detention, including forced nudity, injurious stress positions, daily dousing with cold water, continual shackling, and complete lack of access to exercise.<sup>116</sup> Walid bin Attash also maintained that he was detained underground in that second place of detention because he had to walk down stairs to get to his cell, which was four meters by five meters in size.<sup>117</sup> According to him, he was “kept chained by [his] ankle shackles to a pin fixed to the floor,” “not allowed to shower,” and subjected to loud music that played 24 hours a day. He was given adequate food and for the first month “not subjected to any torture.”<sup>118</sup>

In the following passage, the ICRC documented Walid bin Attash’s own account of his treatment in this second place of detention after that first month:

*“After about one month the torture began again. I was stripped naked and remained naked throughout the month of July. Also during this time I was again kept for several days in a standing position with my arms above my head and fixed with handcuffs and a chain to a metal ring in the ceiling. My lower leg was examined on a daily basis by a doctor using a tape measure for signs of swelling. I do not remember for exactly how many days I was kept standing, but I think it was about ten days. The doctor finally ordered that I be allowed to sit on the floor, I was still kept with my arms extended above my head. This was very painful on my back. During the standing I was made to wear a diaper. However, on some occasions the diaper was not replaced and so I had to urinate and defecate over myself. I was washed down with cold water everyday. In this place of detention they were rather more sophisticated than in Afghanistan because they had a hose-pipe with which to pour the water over me. After having been washed down with cold water in my cell I was taken for interrogation. On one occasion I heard sounds of a person being tortured next door. In this place of detention, female interrogators were again present while I was naked. One of them was particularly aggressive in her questioning. [He would not go further into detail on this subject]. However, I was not subjected to any more beatings.”<sup>119</sup>*

A number of detainees were allegedly transferred out of Poland and on to other secret prison sites in September 2003. The manner of onward transfer is described in Abu Zubaydah’s application to the European Court of Human Rights, filed on 26 March 2013. That application alleges that Walid bin Attash was in Poland at the same time as Abu Zubaydah and would have been a witness to Abu Zubaydah’s transfer out of Poland.<sup>120</sup> Information from the European Organization for the Safety of Air Navigation (Eurocontrol), PANSA, and the Polish Border Guard has indicated that five passengers were taken on board a Boeing 737, registration number N313P, operated by Stevens Express Leasing, on 22 September 2003;

the last legs of the flight path were Kabul, Afghanistan to Szymany, Poland (22 September); Szymany to Constanta, Romania (22 September); Constanta to Rabat, Morocco (23 September); Rabat to Guantánamo Bay, Cuba (24 September 2003).<sup>121</sup> Abu Zubaydah has alleged he was on that flight out of Poland and other sources claim that Walid bin Attash was also on the same aircraft, headed to a secret detention site in Romania.<sup>122</sup>

According to Mariola Przewłocka, manager of the Szymany Airport in September 2003, staff was told by the Polish Border Guard Service that the Boeing 737 would be taking five American businessmen aboard. At the time, she was perplexed as to what five American businessmen were doing in the region, unusual in itself.<sup>123</sup> Moreover, “everybody at the airport was upset” because it was neither normal nor safe for such a large plane to land at such a small airport:<sup>124</sup> “I was told ‘it must’ land. The plane landed in the evening. I was prepared to get arrested if something happened and was very stressed. Two Border Guard officers approached the plane, then two mini buses from Stare Kiejkuty drove to the plane and after some time they drove away.”<sup>125</sup>

Cheryl Bormann, a civilian defense lawyer for Walid bin Attash, told Polish television that her team had had no co-operation from either the US or Polish authorities in the attempt to find out the truth about what happened to her client.<sup>126</sup> She complained that there appears to be an agreement between the two governments not to facilitate accountability with respect to the secret detention allegations: “Whether it is a formal agreement or understood, I am convinced that such an agreement exists. There must be a reason for the fact that prosecutors in Poland have been dealing with this issue for so many years.”<sup>127</sup> Another of bin Attash’s lawyers, William Hennessy, expressed surprise that the Polish prosecutors had refused to provide information. “These people were tortured here,” he told Polish television.<sup>128</sup>

When Amnesty International queried people familiar with the criminal investigation in Poland, including the current prosecutors, about whether Walid bin Attash had been held in secret detention there, they all declined to answer.

# POLAND FAILS TO RESPOND FULLY TO THE EUROPEAN COURT OF HUMAN RIGHTS

“The right to the truth is not a novel concept in our case-law, and nor is it a new right... For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned ... establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.”

El-Masri v Macedonia, Concurring Opinion<sup>129</sup>

Frustration with repeated delays in the progress of the Polish criminal investigation and obstacles to full participation in the process eventually led Abd al-Rahim al-Nashiri and Abu Zubaydah to appeal to the European Court of Human Rights.<sup>130</sup> The European Court had previously issued judgments related to the CIA rendition programme,<sup>131</sup> and on the phenomenon of rendition in other contexts, including unlawful transfers among the former Soviet states of the Confederation of Independent States (CIS),<sup>132</sup> but at the time that al-Nashiri had lodged his application in May 2011, the European Court had yet to rule on a case involving the CIA secret detention programme implemented in the wake of the 11 September 2001 attacks in the USA.<sup>133</sup> The proceedings in the *al-Nashiri v Poland* case, the first of the two Polish cases, presented a set of procedural challenges to the European Court that mirrored in key aspects the problems arising from the invocation of “state secrecy” in domestic proceedings.

Abd al-Rahim al-Nashiri alleged in his application that Poland had violated Article 3 (prohibition of torture), Article 5 (liberty and security of person) and Article 8 (right to privacy/family life) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) by Polish state actors' involvement in facilitating al-Nashiri's torture and other ill-treatment, and secret detention on Polish territory.<sup>134</sup> He further alleged that Poland violated his rights under ECHR Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial) and Protocol 6 (prohibition on death penalty) by facilitating his transfer out of Poland despite a real risk that he would be subjected to the death penalty; on-going ill-treatment in US custody; and a flagrantly unfair trial in the US military commissions system at Guantánamo Bay.<sup>135</sup> The application to the European Court also alleged that Poland had failed to conduct an independent, impartial, thorough and effective investigation, and that the failure to investigate and disclose details of his enforced disappearance and torture and other ill-treatment violated al-Nashiri's right to an effective remedy for the abuses he suffered and also violated his and the public's right to know the truth about what happened to him.<sup>136</sup>

Amnesty International and the International Commission of Jurists submitted a third party intervention in the *al-Nashiri v Poland* case. The intervention outlined developments with respect to the principle of *non-refoulement* (prohibition on transferring a person to a place where he or she would be at real risk of torture or other-ill treatment); on the human rights violations associated with rendition and secret detention operations, including enforced disappearances; on the international law of state responsibility both for human rights violations occurring on the territory of a High Contracting Party committed by another State and following return of a person to a third State; and on the right to a remedy and to reparation.<sup>137</sup>

Exceptional measures have been applied to the *al-Nashiri v Poland* case, including the Court's offer to receive information from both the applicant and the government on a confidential basis as provided by article 33(2) of the Rules of Court.<sup>138</sup> That is, the information would have been accessible to the two parties but would not have been accessible to the public. In its response to a set of questions about al-Nashiri posed by the Court, including whether he had ever been held in secret detention in Poland, the Polish government originally suggested that, in addition to its general observations, it was willing subsequently to submit classified information to the Court. However, "due to the need to protect the secrecy of the investigation" that information would be submitted *ex parte* -- that is, only to judges specifically named by the Polish government, but not to other judges, the applicant or the public.<sup>139</sup> There is no public information available that indicates how the Court responded to the Polish government's extraordinary offer, but subsequent events indicate that the Polish government did not end up submitting information *ex parte*, but under the confidentiality procedure originally implemented by the Court.

In its response to the Court, which was filed confidentially in September 2012 but made accessible to the public in January 2013, the Polish government claimed that the domestic investigation into al-Nashiri's allegations was independent, robust and continuing.<sup>140</sup> Thus, al-Nashiri had not exhausted domestic remedies, a requirement for an applicant to seek a remedy from the European Court. The Polish authorities claimed that the secrecy surrounding the criminal investigation was necessary to protect the reputation of any accused, the legal interest of the victims, and national security.

On request of the al-Nashiri legal team, the European Court lifted the confidentiality measures governing all submissions in the case.<sup>141</sup> Al-Nashiri's team argued that the Polish government had only submitted information that was already in the public domain and general information about the nature and progress of the criminal investigation, including legal argumentation as to why it would not disclose documentation requested by Court. In light of the government's failure to respond in full to the Court's questions, al-Nashiri argued that there was no justification for the continuing imposition of the confidentiality procedure. The Court in January 2013 decided to lift the confidentiality measures originally imposed, noting that should the Polish government submit classified information in the future, the Court could re-impose the confidentiality measures. In response, the Polish government claimed that lifting the confidentiality procedure and making its observations available to the public posed a "security threat" and would force Poland to reconsider its co-operation with the Court.<sup>142</sup>

Poland's failure to co-operate with the European Court itself presents a threat to the integrity of the Court. The government has sent a signal that it is willing to ignore the Court's authority, particularly in matters where it appears to be shielding itself from criticism for human rights violations under the cloak of national security.<sup>143</sup>

The Polish government's attempt to submit information *ex parte*,<sup>144</sup> its subsequent refusal to engage the confidentiality procedure by failing to transmit any classified information to the Court, and its claim that the Court, by eventually lifting the confidentiality measures, had somehow compromised Poland's security ring hypocritical in light of the legal arguments presented by the Polish government in another European Court case, *Janowiec v Russia*.<sup>145</sup> That case, currently pending at the European Court's Grand Chamber, involves the 1940 "Katyń massacre", during which over 20,000 Polish prisoners of war and others were systematically killed by Stalin's secret police. Invoking national security considerations, the Russian government had refused to release information to the victims' family members and subsequently to the European Court of Human Rights about its own 2004 decision to discontinue its investigation into the massacre. The Polish government intervened in the *Janowiec* case as the Russian reluctance to disclose information had frustrated the Polish government's ability to uncover the full truth about the event. In its submission to the Grand Chamber, the government of Poland stated:

*"The Court has held in its judgments many times that unless the facts of a case prove otherwise, a continued and actual public interest cannot be assumed to exist in restricting access to classified documents concerning past events. The selection of documents and their disclosure are in the power of today's authorities. If a party whose interests are affected by classified materials is deprived of access to all or most of the said documents, his or her possibilities of finding out the actual circumstances of events that interest him or her and of opposing the version of events presented by the authorities will be seriously limited [ . . . ] In the case at hand, the fact that the applicants have been denied access to [a] decision dated 21 September 2004, on discontinuation of investigation no. 159 [Katyń massacre] and to other source materials means that the applicants are not permitted to know the evidence established in the course of the investigation instituted by Russian authorities into the circumstances of the death of their closest family members. Failure to submit a copy of the decision to the Court by the Russian authorities certainly hinders effective proceedings, the purpose of which is to assess the fairness of the Russian authorities' proceedings with regard to the applicants."<sup>146</sup>*

The legal reasoning in the Polish government's submissions in the *Janowiec* case is no less relevant for the effective investigation and realization of the rights of the victims of the CIA's rendition and secret detention programmes.

In a separate intervention, the Open Society Justice Initiative (OSJI) -- drawing from UN and other international standards, and the jurisprudence of the Inter-American system and the European Court of Human Rights -- catalogued the development of the "right to truth" as separate and distinct from the right to an effective investigation into human rights violations.<sup>147</sup> The intervention maintained that "[c]ore information about the circumstances of the violations and those responsible can never be withheld. This would strip the right to truth of its very essence and thus cannot be 'necessary in a democratic society'."<sup>148</sup>

Abu Zubaydah lodged his own application with the European Court on 26 March 2013 alleging virtually the same set of violations by Polish state actors as those alleged in the al-Nashiri case.<sup>149</sup> The Zubaydah case has yet to be communicated to the Polish government.

# DOMESTIC LAW AND INTERNATIONAL OBLIGATIONS

**“No one may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.”**

Constitution of the Republic of Poland, Article 40

In the interest of understanding the scope and severity of the human rights violations attendant to the US rendition and secret detention programmes, the first team of prosecutors in Warsaw commissioned a legal opinion from three noted Polish jurists. As with most of the information associated with the criminal investigation, that opinion officially remains secret.

A leak in 2011 to the Polish daily national newspaper, *Gazeta Wyborcza*, provided a window into the thinking of the prosecutors regarding the crimes that may have been committed on Polish territory.<sup>150</sup> In addition to confirming that torture is illegal under both Polish and international law, the legal experts were reported to have stated that there were no provisions under international law that would allow a detention center for suspected terrorists to operate outside the jurisdiction of the state: “Setting up such a centre would violate the [Polish] constitution and would be a crime against the sovereignty of the Republic of Poland.”<sup>151</sup> The legal opinion labeled the mode of apprehension leading to detention as “kidnapping” and stated that the regulations governing the USA’s detention of terrorism suspects were “often in contradiction with international law and human rights.”<sup>152</sup> The opinion also stated that detention with no judicial oversight or access to a court is unlawful “and should be prosecuted.”<sup>153</sup>

The questions posed to the legal experts by the prosecutors, coupled with the media reports in March 2012 regarding charges laid against Zbigniew Siemiątkowski, have indicated that the prosecutors clearly understood that the alleged crimes committed in Poland with respect to the CIA rendition and secret detention programmes involved arbitrary and incommunicado detention, torture and other ill-treatment, and enforced disappearance.

## DOMESTIC LAW

Relevant articles of the Polish penal code provide a sound basis for prosecuting crimes by Polish and foreign state actors committed in the context of the US rendition and secret detention programmes. The Polish penal code not only contains provisions criminalizing acts that amount to the unlawful detention and torture and other ill-treatment of persons held on Polish territory, but the code also contains provisions regarding the non-applicability of any statute of limitations for such crimes. (Concerns about the statute of limitations have arisen in the context of the criminal investigation with regard to “abuse of authority” charges; see below).

Although the Polish penal code regrettably does not expressly adopt the definition of torture contained in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), to which Poland is a state party, Articles 246 and 247 of the penal code clearly encompass torture-related crimes. They are thus particularly applicable to the cases of persons who have alleged that they were held in secret detention sites and interrogated with methods and/or suffered under conditions that amounted to torture and other ill-treatment. Article 247 would apply to both Polish and non-Polish state actors, allowing for charges to be brought not only against Polish agents and officials, but also against any foreign actor alleged to have committed such crimes on Polish territory:

*“Article 246: A public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement, [who] uses force, unlawful threat, or otherwise torments another person either physically or psychologically shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.*

*Article 247 (1) Whoever torments either physically or psychologically a person deprived of liberty shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.*

*(2) If the perpetrator acts with aggravated cruelty, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.*

*(3) A public official who, despite his duties, allows the act specified in (1) or (2) to be committed, shall be subject to the penalty specified in these provisions.”<sup>154</sup>*

With respect to statutes of limitations, the Polish penal code at Articles 101-104 does include statutes of limitations on a range of crimes based on their associated sentences, and qualifications to such limitations.<sup>155</sup> Article 105 (2), however, provides for the non-applicability of a statute of limitations for particularly egregious crimes, which would include those associated with the US rendition and secret detention programmes, whether or not they are characterized as war crimes:

*“Article 105 (1) The provisions of Articles 101 through 103 shall not be applied to crimes against peace, crimes against humanity or war crimes.*

*(2) The provisions of Articles 101 through 103 shall not be applied either to the intentional offence of: homicide, inflicting serious bodily harm, causing serious detriment to health or deprivation of liberty connected with particular torture, perpetrated by a public official in connection with the performance of official duties.”<sup>156</sup>*



The human rights violations attendant to the rendition and secret detention programmes fall squarely within Article 105 (2), which prohibits a statute of limitations on crimes by state actors related to the detention and torture of an individual, or other serious bodily harm or detriment to health at the hands of public officials.

Moreover, the fact that a fully independent inquiry and/or criminal investigation were not initiated earlier than 2008 as a result of political decisions to conceal and deny involvement in the CIA operations and to prevent prosecutions for manifestly political reasons, is a legitimate concern covered by another Constitutional provision. If for some reason the criminal investigation and any potential prosecutions were thought not to fall within the scope of Article 105 (2) of the Penal Code, Article 44 of the Polish Constitution would still be applicable:

*“The statute of limitation regarding actions connected with offences committed by, or by order of, public officials and which have not been prosecuted for political reasons, shall be extended for the period during which such reasons existed.”<sup>157</sup>*

Whether under article 105 (2) of the Penal Code, or under article 44 of the Constitution, then, limitation periods should be no obstacle to investigating and prosecuting the human rights violations attendant to the rendition and secret detention programmes.

## INTERNATIONAL LAW

Article 9 of the Polish Constitution states that “the Republic of Poland shall respect international law binding upon it”.<sup>158</sup> Moreover, Article 91 of the Constitution expressly states that ratified international treaties should be applied directly and that they take precedence over domestic legislation.<sup>159</sup> Thus if there is any conflict between domestic law and Poland’s international legal obligations, international law should be privileged.

In its May 2012 report to the UN Committee against Torture, which supervises the implementation by states parties of the UN Convention Against Torture (CAT), the government of Poland submitted that “[a]ll the characteristic elements provided for in the definition of torture under CAT are penalised in Poland as constitutive elements of different offences set out by the Penal Code”.<sup>160</sup> The report specifically referenced Articles 246 and 247 of the penal code as encompassing the constitutive elements of torture<sup>161</sup> and concluded that expressly adopting the UN Convention Against Torture definition is “immaterial from the point of view of human rights protection in Poland because...it would only be a reiteration of the already binding legal provisions.”<sup>162</sup>

If, therefore, the criminal investigation into complicity in the CIA operations is based on provisions of the penal code not associated with the human rights violations attendant to the rendition and secret detention programmes (especially as regards torture and enforced disappearance), this would leave Poland in direct violation of its obligations under the UN Convention Against Torture, the International Covenant on Civil and Political Rights, and the ECHR. These treaties collectively require states parties to criminalize acts of torture and other cruel, inhuman or degrading treatment, as well as enforced disappearance or other forms of unacknowledged detention, and complicity in such acts; effectively investigate allegations of such acts; prosecute those individuals in relation to whom there is sufficient evidence of responsibility for committing the acts; and

afford victims effective redress.<sup>163</sup> Under the UN Convention against Torture, the obligation to investigate all acts of torture occurring on the territory of the state extends not only to agents of the territorial state, but also to anyone else who is alleged to have committed, attempted to commit, been complicit or to have participated in any act of torture.<sup>164</sup> The treaty provides the machinery for extradition and other forms of mutual legal assistance to ensure that persons accused of responsibility for torture but who are no longer in the territory of the state do not escape justice.<sup>165</sup>

Therefore, if there is sufficient admissible evidence to warrant charges against Polish or other state actors for torture or complicity in torture, it would not be adequate for the Prosecutor General's office to lay charges only under Article 231 (1) of the Polish penal code, which states that "A public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest shall be subject to the penalty of deprivation of liberty for up to 3 years."<sup>166</sup> A maximum sentence of three years for such "abuse of power" also would fall exceedingly short of the requirement under article 4(2) of the UN Convention Against Torture that "Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."<sup>167</sup>

In the same May 2012 report to the Committee Against Torture, however, the Polish government responded to the Committee's request for information about the on-going criminal investigation into Polish involvement in the CIA rendition and secret detention programmes by referring only to charges possibly being laid against Polish state actors under Article 231.<sup>168</sup>

There is an apparent logical gap between the Polish government's claim that the Polish penal code encompasses and criminalizes acts amounting to torture as defined by the UN Convention Against Torture and the government's failure to respond accordingly to the Committee that the alleged crimes committed by Polish or other state actors in the context of CIA rendition and secret detention programmes would be investigated and, where appropriate, prosecuted based on Poland's obligations under the Convention as incorporated in Polish law. Such narrow terms of reference, based solely on "abuse of authority" under Article 231, for a criminal investigation of counter-terrorism operations that have involved the abduction, illegal transfer, secret detention, torture and ill-treatment, and enforced disappearance of persons would signal a manifest failure on the part of Poland to implement its obligations under the UNCAT, ICCPR, and ECHR.

## INTERNATIONAL HUMANITARIAN LAW

The Polish legal scholars commissioned by the Warsaw-based prosecutors to draft the legal opinion also reportedly stated that persons suspected of terrorism-related activity who were arrested outside Polish territory and have alleged that they were subsequently held in a secret detention facility in Poland can be categorized under Article 123 (1-4) of the Polish penal code as persons protected by the 1949 Geneva Conventions. That is, the opinion reportedly concluded that they would qualify as "members of armed forces who have laid down their arms, or as the wounded, sick, shipwrecked, medical personnel, priests, prisoners of war or civilians from the territory occupied, seized or on which an armed conflict is or has taken place or other persons protected by international law during an armed conflict".<sup>169</sup>

On the basis of available information, Amnesty International believes that the theory that a global armed conflict between the USA and al Qa'ida is or was taking place cannot serve to underpin the entirety of the on-going criminal investigation into Polish involvement in the CIA's rendition and secret detention operations. In particular, not all individuals suspected of terrorism-related activity who were arrested outside Polish territory and have alleged that they were subsequently held in a secret detention facility in Poland would necessarily be persons detained in connection with an armed conflict.

An examination of the facts of each such individual and the scope of the overall programmes would be necessary to determine to what extent individuals detained in Poland or any detention facility operated in Poland were connected to an armed conflict.

Amnesty International has categorically rejected the notion that international humanitarian law is applicable to the whole of the US's global counter-terrorism operations, including the rendition and secret detention programmes. Indeed, this is the view of a broad coalition of reputable human rights organizations and international legal scholars.<sup>170</sup> At the same time, Poland's obligations to bring to account those responsible for torture, enforced disappearance, and/or other human rights violations which amount to crimes under international or Polish law apply no matter the circumstances in which the acts occurred, and do not in any way depend on their having occurred in relation to an armed conflict.

Since the 11 September 2001 attacks, the USA has been a party to a number of specific armed conflicts, both of an international and non-international character, on the territory of several states (Afghanistan and Iraq, among others). However, international law does not support the US government's treatment of the entire world as a global battlefield in a potentially endless armed conflict between the USA and various armed groups. And there is no basis in international humanitarian law or international human rights law for the USA's contention that it may use detention powers and lethal force against individuals anywhere in the world at any time, whenever the USA deems it appropriate. Propagating such a theory of a global "war", whether on "terror" or on "al Qa'ida and associated groups" distorts international humanitarian law, human rights law, and other basic rules of public international law, and fundamentally undermines the crucial protections of civilians in armed conflict that have been painstakingly developed over more than a century of international law-making.

The ICRC has agreed that:

*"There is considerable controversy on the legal qualification of the 'global war on terror'. The ICRC does not hold the view that a global war is being waged. It prefers a case-by-case approach. The ICRC believes it is dangerous and unhelpful to try to apply IHL to situations that do not amount to war."<sup>171</sup>*

The ICRC thus has also rejected the claim that a global "war on terrorism" as proclaimed by the USA permits the USA to invoke international humanitarian law as the international legal standard applicable to all actions it undertakes in countering al Qa'ida, regardless whether connected to a specific conflict. Even taking into account the ICRC's preference for a case-by-case approach, it is clear that IHL does not apply to the two individuals who have been

named victims in the on-going criminal investigation in Poland, Abd al-Rahim al-Nashiri or Abu Zubaydah. Abd al-Rahim al-Nashiri was apprehended in Dubai in October 2002 and Abu Zubaydah was apprehended in Pakistan in 2002. Neither man was taken into custody in the context of a recognized war or other armed conflict, and neither was transferred to US custody from a recognized battlefield or conflict zone. No available information suggests that either man directly participated in hostilities in Afghanistan or any other armed conflict. As such, there does not appear to be any nexus between armed conflict and the men's apprehensions, transfers, and detentions.

Thus, if the war crimes provisions in Polish criminal law specifically require a nexus to armed conflict, then they would not provide a firm legal foundation for the investigation and prosecution of Polish or other state actors accused of direct involvement or complicity in crimes committed in the context of the US government's rendition and secret detention programmes in so far as it relates to individuals who have no nexus to a recognized armed conflict. Instead, as noted above, the investigation and prosecution should rely on the Polish criminal law provisions that implement Poland's obligations to criminalize torture and other such violations under international human rights law.

## REQUIREMENTS OF AN EFFECTIVE INVESTIGATION

### DUTY TO INVESTIGATE

The duty to investigate human rights violations and prosecute perpetrators of such violations is not subject to dispute. The European Court of Human Rights jurisprudence on the obligation to investigate a range of violations is well-settled. It directs that any such investigation must be effective in practice as well as in law; be prompt and thorough; be independent in law and in practice; allow for the participation of the victim; and be initiated *ex officio* and with no requirement that there be a criminal complaint lodged by the victims or their relatives.<sup>172</sup>

The UN Committee against Torture has noted, in connection with the obligation to ensure redress under article 14 of the UN Convention against Torture that "[a] State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a *de facto* denial of redress and thus constitute a violation of the State's obligations under article 14."<sup>173</sup> More recently, the European Court of Human Rights held in *El Masri v Macedonia* – a CIA rendition case -- that the duty to investigate alleged renditions arises under Articles 3 (torture) and 5 (deprivation of liberty) and that an investigation must be, among other things, "capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth."<sup>174</sup>

In cases of rendition or enforced disappearances<sup>175</sup> in which the State authorities may be implicated, the European Court's Grand Chamber has emphasized that "an adequate response by the authorities in investigating allegations of serious human rights violations [...] may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful

acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".<sup>176</sup>

The Convention principle that the investigation should be effective in practice as well as in law requires that the authorities make a serious attempt to find out what has happened, by taking active and thorough steps to secure potential evidence relating to the alleged crimes, including eyewitness testimony and forensic evidence.<sup>177</sup> The investigation may fail to meet the requisite standard of thoroughness where the authorities fail to interview, or to attempt to interview, relevant witnesses<sup>178</sup> or explore the background circumstances that may shed light on a particular incident.<sup>179</sup> The authorities must not rely on hasty or ill-founded conclusions to close their investigation or rely on assumptions unsupported by evidence.<sup>180</sup>

Criminal proceedings are a critical element of ensuring an effective remedy for such violations.<sup>181</sup> Criminal proceedings will also usually be the main avenue by which the victims' right to truth can be realised, which requires identification of the perpetrators.<sup>182</sup> The Inter-American Court of Human Rights has underlined that the state must take "every necessary step [...] to know the truth and punish those responsible."<sup>183</sup> Where state authorities or agents have been complicit in unlawful acts, the obligation to bring prosecutions, where there is sufficient evidence, extends also to accessories and to those who may have been negligent.<sup>184</sup> Similarly, the European Court of Human Rights has stated that an investigation into allegations of torture "must be conducted diligently and with the required determination to identify and prosecute those responsible."<sup>185</sup>

#### THE DUTY TO PROSECUTE

The Council of Europe Committee of Ministers in its Guidelines on Eradicating impunity for serious human rights violations (the CoE Guidelines), approved on 30 March 2011, also provide that "States have a duty to prosecute where the outcome of an investigation warrants this."<sup>186</sup> Similarly the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Impunity Principles) have noted the state's duty to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."<sup>187</sup> The Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law contain similar provisions.<sup>188</sup>

The CAT has held that lack of investigations and prosecutions by the authorities who "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed" incurs the responsibility of the State since "the State's indifference or inaction provides a form of encouragement and/or de facto permission."<sup>189</sup>

The failure to investigate and prosecute situations where security forces are alleged to have been involved in unlawful acts can foster a general sense of impunity of members of security forces for their actions or omissions and is not compatible with the European Convention guarantees.<sup>190</sup>

The Inter-American Court of Human Rights has underscored that States have an obligation to identify, prosecute, and punish those responsible for crimes under international law. It has also specifically required states to “remove all obstacles, de facto and de jure, which maintain the case in impunity.”<sup>191</sup> These notions were developed in the context of large-scale impunity for systemic human rights violations in the Americas. Such a context has much resonance in connection with the requirement that Poland carry out an effective investigation with the view to ensuring meaningful accountability for its involvement in the CIA's rendition and secret detention programmes.<sup>192</sup>

It is critical to note that the failure to initiate prosecutions where appropriate will seriously and perhaps irreparably undermine public confidence in Poland's adherence to the rule of law.

#### SCOPE OF THE INVESTIGATION

Any criminal investigation into Poland's involvement in the CIA's rendition and secret detention programmes must be comprehensive in its scope and must address all aspects of the human rights violations concerned. In *Oneriyildiz v Turkey*, for example, the Grand Chamber of the European Court of Human Rights found a violation of the investigative obligation under Article 2, having regard to the scope of the criminal proceedings in the case, which addressed only the negligence of relevant officials, and did not relate to the right to life or to life-endangering activities at issue in the case, or allow for the establishment of responsibility for the deaths.<sup>193</sup> In its General Comment No. 2, the CAT confirmed that, in light of the obligation to prosecute crimes of torture under Article 4 of the Convention, it would be a violation of that obligation to prosecute a crime of torture solely as ill-treatment where elements of torture were also present.<sup>194</sup>

In the case of *Alzery v Sweden*, concerning the CIA-led rendition of the applicant from Sweden to Egypt, the UN Human Rights Committee (HRC) underlined Sweden's obligation under ICCPR article 7 to “ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence.”<sup>195</sup> The HRC criticised the fact that “neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences.”<sup>196</sup>

In the context of the Polish criminal investigation, an inappropriately restrictive focus on the part of the prosecutors – for example, one that addresses only an alleged “abuse of authority” thus deliberately constraining their ability to address all relevant possible crimes under domestic and international law – will not satisfy Poland's international legal obligations.

## STATUTES OF LIMITATIONS

In situations where the authorities have chosen deliberately to focus only on offences that are subject to limitation periods under domestic law when the allegations relate to crimes under international law that carry no such limitations, the state will violate its investigative and other obligations. The European Court of Human Rights has ruled “where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred.”<sup>197</sup> These findings reflect wider principles of international human rights and international criminal law, as affirmed by the CAT,<sup>198</sup> the ICTY,<sup>199</sup> the HRC,<sup>200</sup> and the Convention on Enforced Disappearance,<sup>201</sup> which require that, in crimes involving gross violations of human rights, either time bars should be removed altogether, or should be proportionate to the gravity of the crime.<sup>202</sup>

Where an investigation or prosecution into allegations of crimes under international law – which are either imprescriptible or subject to longer periods of limitation – is limited to national law crimes for which the statute of limitations is short or close to expiry, it will clearly not be effective and thus in violation of international law. Such an investigation will not be effective if limited in this way at the outset, but also if it is closed because of a limitation period.

## INVOLVEMENT OF VICTIMS AND EXPLANATION FOR FAILURE TO PROSECUTE

To be effective, an investigation must involve the victim of an alleged human rights violation or his or her next-of-kin “to the extent necessary to safeguard his or her legitimate interests”.<sup>203</sup> Information must be promptly<sup>204</sup> provided on all significant developments in the investigation<sup>205</sup> and victims must be heard by the investigative authorities and must be provided with relevant documents and decisions.<sup>206</sup>

These duties extend to providing the victims with reasons explaining why a prosecution has not been pursued.<sup>207</sup> EU Member States are also now separately obliged to ensure that victims enjoy the right to a review of a decision not to prosecute.<sup>208</sup> Under European Court of Human Rights jurisprudence, the right to such review derives from the requirement of a “sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts”.<sup>209</sup>

In *Ramsahai v The Netherlands*, the Court did not find a violation because the applicants were allowed full access to the investigation file, were able to participate effectively in the investigation and were provided with a reasoned decision regarding the decision not to prosecute. In particular, the Court stated that victims must be given sufficient access to the investigation to allow them to “participate effectively in proceedings aimed at challenging the decision not to prosecute.”<sup>210</sup> Accordingly, the decision not to prosecute must be reasoned and contain enough detail to allow for an effective challenge to that decision.

The issue of public confidence will be especially at stake in the context of allegations relating to a large-scale cross-border system operating in disregard of international legal and national

legal obligations. In such situations, a state should be required to provide a detailed, public decision setting out the reasons why a prosecution has not been pursued.

The Council of Europe Guidelines recommend that States provide “information to the public concerning violations and the authorities’ response to these violations”.<sup>211</sup> Furthermore, the right to reparation, as recognised in the Guidelines, requires public disclosure of the truth regarding serious violations of human rights as an essential element of measures of satisfaction and guarantees of non-repetition.<sup>212</sup> This is consistent with the Grand Chamber’s recognition in the *El-Masri* judgment of the importance of the right to truth where it “underline[d] the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.”<sup>213</sup>

The right to an effective investigation under international law entails a right to truth concerning the violations perpetrated in the context of the CIA’s rendition and secret detention programmes, including reasonable public disclosure of the conduct and results of any investigation into allegations of such violations. This is so not only because of the scale and severity of the human rights violations concerned but also in light of the widespread impunity for these practices, and the suppression of information about them, which has persisted in numerous countries. Where US-led renditions or secret detentions have taken place with the co-operation of other governments, in violation of those states’ positive obligations of prevention, those states are required to take all reasonable measures open to them to disclose to victims, their families and the public as a whole, information about the human rights violations those victims suffered within the renditions system, including by giving reasons why a prosecution has not been pursued.



# CONCLUSION

Poland has been in the spotlight since 2005, long accused of hosting a secret detention facility operated by the CIA where suspects were held and tortured between 2002 and 2005. As this report has documented, a stream of credible reports by the media, intergovernmental, and non-governmental organizations – coupled with official data from Polish governmental agencies – leaves little room for doubt that Poland is implicated. The lawyers of both of the named victims – Abd al-Rahim al-Nashiri and Abu Zubaydah – maintain that the information now available is enough to trigger prosecutions, but the on-going Polish criminal investigation, shrouded in secrecy, drags on. Since its inception in 2008, the investigation has been plagued by sudden personnel changes, an unexplained shift from Warsaw to Krakow, and complaints by al-Nashiri's and Abu Zubaydah's representatives that prosecutors have frustrated their attempts to participate fully in the Polish proceedings. Other potential victims, such as Walid bin Attash, may be waiting in the wings, searching as well for justice in Poland.

Yet accusations abound of delay in the investigation as a deliberate tactic as a result of political influence on the process. Attempts to get answers from the Polish authorities are met with cryptic acknowledgements that “something happened” in Poland; or denials of knowledge of or wrong-doing in relation to the operations; or . . . with silence. Meanwhile, the government's failure to respond adequately to the European Court of Human Rights in pending cases involving the alleged secret site in Poland signals a startling regression in Poland's commitment to the Court.

The search for accountability for Poland's involvement in the US-led rendition and secret detention programmes would be easy if the Polish authorities would comply in full with their international legal obligations. Those obligations provide a tried and true formula for such accountability: conduct an independent and effective investigation; identify and prosecute in fair trials perpetrators of crimes under domestic and international law; afford victims full and effective redress; and ensure in the future that violations such as torture and enforced disappearance do not happen again with either direct or indirect Polish involvement.

What is absent in Poland at the moment is the political will – perhaps better said, the political courage – to follow that formula. But the government will have to take a decision eventually: either engage in an authentic truth-telling and accountability process or shun those obligations and forever be seen as having hidden behind claims of “national security” and “state secrecy” to shield the government from embarrassment for helping the USA to torture and disappear people. Poland can choose to permanently repress the truth, thereby irreparably damaging the rule of law, or it can take measures now to unlock the truth and bring perpetrators of torture and enforced disappearance to justice.

## RECOMMENDATIONS

### To the Government of Poland

- Express publicly support for the on-going criminal investigation by the Prosecutor General into Poland's involvement in the US CIA's rendition and secret detention programmes and the disclosure of the full truth regarding that involvement.

- Decline to invoke national security-related exceptions to the disclosure of information – or other justifications for secrecy -- regarding Poland's involvement in the CIA rendition and secret detention programmes and/or in the course of the criminal investigation in order to shield the state from criticism or embarrassment about state and foreign actors' complicity in human rights violations such as torture and enforced disappearance.
- Safeguard the independence and impartiality of the on-going criminal investigation by declining to exert – or being perceived to exert – any political influence on any aspect of the process.
- Co-operate in full with the European Court of Human Rights as it considers the pending US-led rendition and secret detention cases against Poland, including by reaffirming support for the Court and Poland's intention to abide fully by its obligations as a state party to the European Convention on Human Rights and Fundamental Freedoms.
- Report in full on the progress of the domestic criminal investigation and co-operation with the European Court to the intergovernmental bodies that have expressed concern about Poland's involvement in the CIA rendition and secret detention programmes, including the European Parliament and relevant UN periodic reviews, treaty bodies, and special procedures.

#### **To the Prosecutor General of Poland**

- Conduct a fully independent, impartial, prompt, thorough and effective investigation into Poland's involvement in the CIA rendition and secret detention programmes.
- Charge, prosecute and bring to justice in fair trials all actors responsible for human rights violations attendant to these programmes – including torture and enforced disappearance -- where there is sufficient admissible evidence.
- Resist any attempts by domestic or foreign political actors to influence the criminal investigation and undermine the independence of your office.
- Grant the victims of these operations who allege that they were held in secret detention in Poland full participation in the criminal investigation as provided under Polish law and in accordance with the right to effective remedy for victims of crimes under international law.
- Avoid invoking the lack of co-operation from the USA as a justification to delay the progress of the criminal investigation.

#### **To the Polish Ombudsman (Commissioner for the Protection of Civil Rights)**

- Utilize your good offices to be an effective public voice for accountability for Poland's involvement in the CIA rendition and secret detention programmes.

- Declare publicly that torture and enforced disappearance are crimes under Polish and international law and that Poland must abide by its obligation not to commit or be complicit in such crimes, must hold accountable perpetrators, and must offer victims of the CIA operations effective redress.
- Request information from the Prosecutor General on the status of the criminal investigation and demand access to the maximum extent possible to the investigation's files, in particular to information regarding the commission of crimes under international law, such as torture and enforced disappearance.

Encourage the Polish government and the Prosecutor General to release information to the public regarding the progress of the investigation in order to build public confidence in the process and in Poland's commitment to the rule of law.

## ENDNOTES

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- <sup>1</sup> Agata Nowakowska and Dominika Wielowieyska, "Kwaśniewski: Nie składam broni", 30 April 2012, <http://m.wyborcza.pl/wyborcza/1,105402,11639609.html?as=4> accessed 16 May 2013.
- <sup>2</sup> Commissioner for the Protection of Civil Rights (Rzecznik Praw Obywatelskich). See The Ombudsman Act (Act of 15 July 1987 on the Human Rights Defender), [www.brpo.gov.pl/en/content/ombudsman-act](http://www.brpo.gov.pl/en/content/ombudsman-act) accessed 16 May 2013.
- <sup>3</sup> *Janowiec and others v Russia*, European Court of Human Rights, Judgment of 16 April 2012, Applications Nos. 55508/07 and 29520/09, paras. 97-98. The case was referred to the Grand Chamber of the European Court of Human Rights on 24 September 2012.
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EUR 45/014/2012), 15 October 2012, <http://www.amnesty.org/en/library/info/EUR45/014/2012/en>, accessed 16 May 2013. See also, Open Society Justice Initiative, Global Principles on National Security and the Right to Information (Draft), 8 April 2013, Principle 10.A.1: "There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and other violations when they are perpetrated on a systematic basis; such information may not be withheld on national security grounds in any circumstances." While the principles are not yet finalized they reflect an emerging consensus that information related to crimes under international law should not be subjected to national security exemptions.

<sup>85</sup> Interview with Bartłomiej Jankowski, Warsaw, 1 October 2012.

<sup>86</sup> Polish Code of Criminal Procedure, respectively, Articles 49 §1 (The Injured Person), 156 §1-5 (Inspection of Files), 117 (Notification of Procedural Action); 116 and 315 §1-2 (Submission of Motions), <http://www.legislationline.org/documents/id/8912>, accessed 16 May 2013. See also European Court of Human Rights, *al-Nashiri v Poland*, Application No. 28761/11, Observations on the Admissibility and Merits Submitted by the Government of Poland, Ministry of Foreign Affairs, 5 September 2012, para. 7 ("lawsuit rights" of the applicant as a party to criminal investigation), on file with Amnesty International.

<sup>87</sup> See for example, Polish Criminal Code (6 June 1997), Articles 265-266 (Penalties for Disclosing State Secrets), [https://www.imolin.org/doc/amlid/Poland\\_Penal\\_Code1.pdf](https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf), accessed 16 May 2013; and Polish Code of Criminal Procedure, Articles 179-181, 184, 360 and 362, <http://www.legislationline.org/documents/id/8912>, accessed 16 May 2013.

<sup>88</sup> See Adam Bodnar and Irmina Pachó, "Polish Law on Right to Information and Classification," Helsinki Foundation for Human Rights, May 2011, [http://www.right2info.org/resources/publications/national-security-expert-papers/Bodnar\\_PachóPolishlawonclassification.pdf](http://www.right2info.org/resources/publications/national-security-expert-papers/Bodnar_PachóPolishlawonclassification.pdf), accessed 16 May 2013, (four levels of government classified information).

<sup>89</sup> Interviews with prosecutors in Krakow and Warsaw, 26 and 27 September 2012, respectively.

<sup>90</sup> Interview with Robert Majewski, Warsaw, 26 November 2012.

<sup>91</sup> "Yemeni Claims He was Held at CIA Prison in Poland," Polish Radio 1, 15 February 2012, <http://www.thenews.pl/1/10/Artykul/90331,Yemeni-claims-he-was-held-at-CIA-prison-in-Poland>, accessed 16 May 2013.

<sup>92</sup> Abd Al Rahim Hussayn Muhammad al-Nashiri v Poland, Statement of Facts, Application No. 28761/11, lodged on 6 May 2011, communicated on 10 July 2012, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302>, accessed 16 May 2013; Abu Zubaydah v Republic of Poland, lodged on 26 March 2013, <http://www.interights.org/document/269/index.html>, accessed 16 May 2013.

<sup>93</sup> See Andy Worthington, "New Evidence about Prisoners Held in Secret in CIA Prisons in Poland and Romania," 4 August 2010, <http://www.andyworthington.co.uk/2010/08/04/new-evidence-about-prisoners-held-in-secret-cia-prisons-in-poland-and-romania/>, accessed 16 May 2013. See also, Open Society Justice Initiative, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition", 6 February 2013, <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>, accessed 16 May 2013. Others alleging or claimed by media reports to have been held in Poland include: Abd al-Rahim al-Nashiri, Abu Zubaydah, Ramzi bin al-Shibh, Khalid Sheikh

Mohammed, Abu Bakr Muhammad Boulghiti (Abu Yassir al-Jaza'iri), Mohammed Omar Abdel-Rahman, Hassan Ghul, and Ahmed Khalfan Ghailani.

<sup>94</sup> See Amnesty International, *Aiming for Execution, Denying Fair Trial: Government Wants Death Penalty Option at Upcoming Military Commission Trials in Guantánamo*, 3 June 2011, (Index: AMR 51/049/2011), <http://www.amnesty.org/en/library/info/AMR51/049/2011/en>, accessed 16 May 2013; and *Wrong Court, Wrong Place, Wrong Punishment: Five Alleged '9/11 Conspirators' to be Arraigned for Capital Trial by Military Commission at Guantánamo*, 3 May 2012, (Index: AMR 51/032/2012), <http://www.amnesty.org/en/library/info/AMR51/032/2012/en>, accessed 16 May 2013.

<sup>95</sup> Telephone interview with Captain Michael Schwartz, 29 September 2012. Capt. Schwartz cannot discuss the details of his client's case with the public, in particular Walid bin Attash's experiences while he was held in secret CIA custody, as such information is classified at the highest levels of secrecy. In addition, a protective order issued in December 2012 by the military commission judge overseeing the trial of the alleged "9/11 conspirators" applies to all those who have access to or come into possession of classified information connected to the men's cases and prohibits them from disclosing such information. The information protected under the order expressly includes "information that would reveal or tend to reveal the foreign countries" where the detainees were held prior to their transfer to Guantánamo in September 2006 and the interrogation techniques and conditions of detention to which they were subjected during this time. Captain Schwartz discussed with Amnesty International only the fact that Walid bin Attash's defence team was interested in pursuing relevant information that could potentially serve to mitigate the severity of any sentence – including the death penalty -- that might be imposed as a result of a conviction in the military commission trial. All details in this report related to Walid bin Attash's case and the allegation that he was held in secret detention in Poland and subsequently in Romania are derived strictly from sources in the public domain. Amnesty International has condemned the USA's continued use of top secret classification to obscure details of the treatment of detainees held in secret CIA custody as itself a flagrant violation of international law, infringing the detainees' rights to freedom of expression and an effective remedy for human rights violations, including the crimes under international law of torture and enforced disappearance. See Amnesty International, *Truth, Justice and the American Way? Details of Crimes under International Law Still Classified Top Secret*, (Index: AMR 51/099/2012), 19 December 2012, <http://www.amnesty.org/en/library/info/AMR51/099/2012/en>, accessed 16 May 2013.

<sup>96</sup> Adam Krzykowski, "Kolejny pozew za tajne więzienia", TVP.INFO, 15 February 2012, <http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554>, accessed 16 May 2013, (translation by Amnesty International).

<sup>97</sup> In 2006, the military authorities at Guantánamo recorded his arrest date as 27 April 2003. JTF-GTMO Detainee Assessment for Walid Muhammad Salih Bin Attash, 8 December 2006.

<sup>98</sup> Elaine Shannon, "Al-Qa'ida Moneyman Caught", *Time*, 1 May 2003, <http://www.time.com/time/nation/article/0,8599,448922,00.html>, accessed 16 May 2013.

<sup>99</sup> The 9/11 Commission Report, July 2004, p. 146 and note, <http://govinfo.library.unt.edu/911/report/911Report.pdf>, accessed 16 May 2013.

<sup>100</sup> See Amnesty International, *Human Dignity Denied. Torture and Accountability in the 'War on Terror'*, pp. 111-112 (including note 479), (Index: AMR 51/145/2004), October 2004, <http://www.amnesty.org/en/library/info/AMR51/145/2004/en>, accessed 16 May 2013.

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<sup>101</sup> Amnesty International, *Below the Radar: Secret Flights to Torture and 'Disappearance'*, (Index: AMR 51/051/2006), Section 1.5, 4 April 2006, <http://www.amnesty.org/en/library/asset/AMR51/051/2006/en/3edf2253-d447-11dd-8743-d305bea2b2c7/amr510512006en.html>, accessed 16 May 2013.

<sup>102</sup> "The Pakistan authorities have detained Waleed bin Attash... He is one less person that people who love freedom have to worry about. I want to thank our friends in Pakistan. I want to thank the Agency, the CIA, for working hard to continue to win the war against terror". President George W. Bush, 'Remarks Prior to discussions with President Alvaro Uribe of Colombia and an exchange with reporters', 30 April 2003. Public Papers of the Presidents of the United States.

<sup>103</sup> The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, 6 September 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>, accessed 16 May 2013. See also, Amnesty International, *Government Must End All Secret Detention and Guarantee Fair Trials*, (Index: AMR 51/143/2006), 6 September 2006, <http://www.amnesty.org/en/library/info/AMR51/143/2006/en>, accessed 16 May 2013.

<sup>104</sup> See Office of the Director of National Intelligence, Summary of the High Value Terrorist Detainee Program, <http://www.defense.gov/pdf/thehighvaluedetaineeprogram2.pdf>, accessed 16 May 2013, issued together with <http://www.defense.gov/pdf/detaineebiographies1.pdf>, accessed 16 May 2013.

<sup>105</sup> International Committee of the Red Cross, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, accessed 16 May 2013.

<sup>106</sup> International Committee of the Red Cross, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, accessed 16 May 2013, p. 31.

<sup>107</sup> International Committee of the Red Cross, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, accessed 16 May 2013, p.31.

<sup>108</sup> International Committee of the Red Cross, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, accessed 16 May 2013, p. 32.

<sup>109</sup> International Committee of the Red Cross, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, accessed 16 May 2013, p. 35.

<sup>110</sup> Adam Goldman, "Secret Jails: Terror Suspect's Odyssey Through CIA's Black Sites", Associated Press, 2010, interactive map: <http://hosted.ap.org/specials/interactives/wdc/binalshibh/content.swf>, accessed 16 May 2013.

<sup>111</sup> See Brian Ross and Richard Esposito, "EXCLUSIVE: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons", ABC News, 5 October 2005 (places Walid bin Attash in Poland); and Parliamentary Assembly Council of Europe, "Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report", 7 June 2007, p. 24 fn 85 (claims Walid bin Attash was held in Poland, although the dates in this report appear to be incorrect), [http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf), accessed 16 May

2013.

<sup>112</sup> Helsinki Foundation for Human Rights, Third Party Intervention, *al-Nashiri v Poland*, Application No. 28761/11, 16 October 2012, p. 6,

<http://www.hfhrpol.waw.pl/cia/images/stories/file/HFPC%20amicus%20curiae%20AI-Nashiri.pdf>,

accessed 16 May 2013. This intervention includes a compilation of information received by HFHR from Polish government agencies – including PANSAs and the Polish Border Guard Service – which resulted from a series of “freedom of information” requests lodged with the agencies.

<sup>113</sup> Helsinki Foundation for Human Rights, Third Party Intervention, *al-Nashiri v Poland*, Application No. 28761/11, 16 October 2012, p. 6,

<http://www.hfhrpol.waw.pl/cia/images/stories/file/HFPC%20amicus%20curiae%20AI-Nashiri.pdf>,

accessed 16 May 2013.

<sup>114</sup> See, for example, University of North Carolina School of Law, “The North Carolina Connection To Extraordinary Rendition and Torture”, January 2012,

<http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf>, accessed 16 May

2013.

<sup>115</sup> John Goetz and Britta Sandberg, “Europe’s ‘Special Interrogations’: New Evidence of Torture Prison in Poland”, 18 August 2009, <http://www.spiegel.de/international/world/europe-s-special-interrogations-new-evidence-of-torture-prison-in-poland-a-621450.html>, accessed 16 May 2013.

<sup>116</sup> ICRC Report, p. 33.

<sup>117</sup> ICRC Report, p. 32.

<sup>118</sup> ICRC Report, pp. 32-33.

<sup>119</sup> ICRC Report, pp. 32-33.

<sup>120</sup> *Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) v Poland*, application lodged on behalf of Abu Zubaydah by Interights on 26 March 2013, paras. 102 and 115, respectively,

<http://www.interights.org/abu-zubaydah/index.html>, accessed 16 May 2013.

<sup>121</sup> *Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) v Poland*, application lodged on behalf of Abu Zubaydah by Interights on 26 March 2013, paras. 104-109, <http://www.interights.org/abu-zubaydah/index.html>, accessed 16 May 2013.

<sup>122</sup> Adam Goldman and Matt Apuzzo, “AP Exclusive Inside Romania’s Secret CIA Prison”, Associated Press, 8 December 2011, <http://news.yahoo.com/ap-exclusive-inside-romania-s-secret-cia-prison-050239912.html>, accessed 16 May 2013.

<sup>123</sup> Interview with Mariola Przewłocka, Szczytno, 30 September 2012.

<sup>124</sup> Interview with Mariola Przewłocka, Szczytno, 30 September 2012.

<sup>125</sup> Interview with Mariola Przewłocka, Szczytno, 30 September 2012.

<sup>126</sup> Adam Krzykowski, “Kolejny pozew za tajne więzienia”, TVP.INFO, 15 February 2012, <http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554>, accessed 16 May 2013, (translation by Amnesty International).

<sup>127</sup> Adam Krzykowski, “Kolejny pozew za tajne więzienia”, TVP.INFO, 15 February 2012,

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<http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554>, accessed 16 May 2013, (translation by Amnesty International).

<sup>128</sup> Adam Krzykowski, "Kolejny pozew za tajne więzienia", TVP.INFO, 15 February 2012, <http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554>, accessed 16 May 2013, (translation by Amnesty International).

<sup>129</sup> *Khaled el-Masri v The Former Yugoslav Republic of Macedonia*, Joint Concurring Opinion of Judges Tulkens, Spielman, Sicilianos and Keller, Application No. 39630/09, 13 December 2012, p. 82, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>, accessed 16 May 2013.

<sup>130</sup> Abd al-Rahim al-Nashiri submitted his application on 6 May 2011 after the Appellate Court in Białystok, 2nd Criminal Division, dismissed his complaint on the subject of the undue delay in the pending criminal investigation on 20 April 2011. See *al-Nashiri v Poland*, Application to ECHR, paras. 267-268, <http://www.opensocietyfoundations.org/sites/default/files/echr-al-nashiri-application-20110506.pdf>, accessed 16 May 2013; Abu Zubaydah claimed in his 26 March 2013 application to the European Court that the ninth extension of the investigation, bringing it to over five years running, indicated that Abu Zubaydah could not get an effective remedy in Poland. See *Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) v Poland*, Application to the ECHR, paras. 336-337, <http://www.interights.org/document/269/index.html>, accessed 16 May 2013.

<sup>131</sup> *A. and Others v United Kingdom*, Application No. 3455/05, 19 February 2009, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#\[{"itemid":\["001-91403"\]}\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403#[{), accessed 16 May 2013.

<sup>132</sup> *Abdulkhakov v Russia*, Application No. 14743/11, 2 October 2012, para. 156: "[A]ny extra-judicial transfer or extraordinary rendition, by its deliberate circumvention of due process, is an absolute negation of the rule of law and the values protected by the Convention. It therefore amounts to a violation of the most basic rights guaranteed by the Convention".

<sup>133</sup> In December 2012, however, the Court did decide against Macedonia in the Khaled el-Masri CIA rendition case. See *Khaled el-Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, 13 December 2012, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>.

<sup>134</sup> *Abd al-Rahim Hussayn Muhammad al-Nashiri v Poland*, Statement of Facts, Application No. 28761/11, lodged on 6 May 2011, communicated on 10 July 2012, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302>, accessed 16 May 2013.

<sup>135</sup> *Abd al-Rahim Hussayn Muhammad al-Nashiri v Poland*, Statement of Facts, Application No. 28761/11, lodged on 6 May 2011, communicated on 10 July 2012, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302>, accessed 16 May 2013.

<sup>136</sup> *Abd al-Rahim Hussayn Muhammad al-Nashiri v Poland*, Statement of Facts, Application No. 28761/11, lodged on 6 May 2011, communicated on 10 July 2012, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302>, accessed 16 May 2013.

<sup>137</sup> Amnesty International and International Commission of Jurists, Third Party Intervention in the Case of *al-Nashiri v Poland*, (Index: EUR 37/002/2012), 5 November 2012, <http://www.amnesty.org/en/library/info/EUR37/002/2012/en>, accessed 16 May 2013.

<sup>138</sup> *al-Nashiri v Poland*, Statement of Facts, Application No. 28761/11, lodged on 6 May 2011, communicated on 10 July 2012, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302>,

accessed 16 May 2013, (see questions to the parties). See also, Article 33 (1) (2) of the Rules of Court, <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/>, accessed 16 May 2013.

<sup>139</sup> Letter from Justyna Chrzanowska, Government Agent of Poland, to T.L. Early, Registrar of the Fourth Section, European Court of Human Rights, 5 September 2012, on file with Amnesty International.

<sup>140</sup> Polish Government's Observations, on file with Amnesty International.

<sup>141</sup> *al-Nashiri v Poland*, Applicant's Request to Reconsider Status of Confidential and *Ex Parte* Submissions in *al-Nashiri v Poland*, 31 October 2012.

<sup>142</sup> Jan Cienski, "Polish Dismay Over CIA 'Torture' Papers," FT.com, 5 February 2013, <http://www.ft.com/cms/s/0/7d645ca4-6fa1-11e2-b906-00144feab49a.html#axzz20I9I2U1p>, accessed 16 May 2013.

<sup>143</sup> Adam Bodnar, "Poland's Damaging Failure to Respond to CIA Black Site Case," Open Society Foundations Voices, 21 March 2013, <http://www.opensocietyfoundations.org/voices/polands-damaging-failure-respond-cia-black-site-case>, accessed 16 May 2013.

<sup>144</sup> See in this regard, Amnesty International and International Commission of Jurists, Written Supplementary Submissions in *al-Nashiri v Poland*, Application No. 28761/11, pursuant to the Grand Chamber's decision to invite interveners to submit supplementary comments in the light of the judgment of the Court's Grand Chamber in the case of *El-Masri v the former Yugoslav Republic of Macedonia* (no. 39630/90), (Index: EUR 37/003/2013), 15 February 2013, paras. 29-31, <http://www.amnesty.org/en/library/info/EUR37/003/2013/en>, accessed 16 May 2013.

<sup>145</sup> *Janowiec and others v Russia*, European Court of Human Rights, Judgment of 16 April 2012, Applications Nos. 55508/07 and 29520/09, paras. 97-98.

<sup>146</sup> Submission to the Grand Chamber from the Ministry of Foreign Affairs of the Republic of Poland, *Janowiec and others v Russia*, Application Nos 55508/07 and 29520/09, 30 November 2012, p. 24, on file with Amnesty International.

<sup>147</sup> Open Society Justice Initiative, Third Party Intervention, *Janowiec and others v Russia*, Application Nos 55508/07 and 29520/09, 13 January 2013, on file with Amnesty International.

<sup>148</sup> Open Society Justice Initiative, Third Party Intervention, *Janowiec and others v Russia*, Application Nos 55508/07 and 29520/09, 13 January 2013, para. 37, pp. 8-9, on file with Amnesty International.

<sup>149</sup> *Abu Zubaydah v Republic of Poland*, lodged on 26 March 2013, <http://www.interights.org/document/269/index.html>, accessed 16 May 2013.

<sup>150</sup> *Pytania prokuratorów: Pełna treść pytań przesłanych zespołowi ekspertów przez Prokuraturę Apelacyjną w Warszawie. Kursywą opisano stanowisko ekspertów*, Gazeta Wyborcza, 30 May 2011, [http://wyborcza.pl/1,75402,9689932,Pytania\\_prokuratorow,,ga.html#ixzz2C7wHum8C](http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html#ixzz2C7wHum8C), accessed 16 May 2013.

<sup>151</sup> *Pytania prokuratorów: Pełna treść pytań przesłanych zespołowi ekspertów przez Prokuraturę Apelacyjną w Warszawie. Kursywą opisano stanowisko ekspertów*, Gazeta Wyborcza, 30 May 2011, [http://wyborcza.pl/1,75402,9689932,Pytania\\_prokuratorow,,ga.html#ixzz2C7wHum8C](http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html#ixzz2C7wHum8C), accessed 16 May 2013.



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<sup>152</sup> *Pytania prokuratorów: Pełna treść pytań przesłanych zespołowi ekspertów przez Prokuraturę Apelacyjną w Warszawie. Kursywą opisano stanowisko ekspertów*, Gazeta Wyborcza, 30 May 2011, [http://wyborcza.pl/1,75402,9689932,Pytania\\_prokuratorow,,ga.html#ixzz2C7wHum8C](http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html#ixzz2C7wHum8C), accessed 16 May 2013.

<sup>153</sup> *Pytania prokuratorów: Pełna treść pytań przesłanych zespołowi ekspertów przez Prokuraturę Apelacyjną w Warszawie. Kursywą opisano stanowisko ekspertów*, Gazeta Wyborcza, 30 May 2011, [http://wyborcza.pl/1,75402,9689932,Pytania\\_prokuratorow,,ga.html#ixzz2C7wHum8C](http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html#ixzz2C7wHum8C), accessed 16 May 2013.

<sup>154</sup> Polish Penal Code, [https://www.imolin.org/doc/amlid/Poland\\_Penal\\_Code1.pdf](https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf), accessed 16 May 2013.

<sup>155</sup> Polish Penal Code, articles 101-104, [https://www.imolin.org/doc/amlid/Poland\\_Penal\\_Code1.pdf](https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf), accessed 16 May 2013.

<sup>156</sup> Polish Penal Code, article 105, [https://www.imolin.org/doc/amlid/Poland\\_Penal\\_Code1.pdf](https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf), accessed 16 May 2013.

<sup>157</sup> Constitution of the Republic of Poland, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, accessed 16 May 2013.

<sup>158</sup> Constitution of the Republic of Poland, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, accessed 16 May 2013.

<sup>159</sup> Constitution of the Republic of Poland, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, accessed 16 May 2013. Article 91: (1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. (2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. (3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

<sup>160</sup> Fifth and Sixth Periodic Reports of the Republic of Poland on the Implementation of the Provisions of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 2012, para. 7, <http://www2.ohchr.org/english/bodies/cat/cats51.htm>, accessed 16 May 2013.

<sup>161</sup> Fifth and Sixth Periodic Reports of the Republic of Poland on the Implementation of the Provisions of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 2012, para. 9, <http://www2.ohchr.org/english/bodies/cat/cats51.htm>, accessed 16 May 2013.

<sup>162</sup> Fifth and Sixth Periodic Reports of the Republic of Poland on the Implementation of the Provisions of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 2012, para. 10, <http://www2.ohchr.org/english/bodies/cat/cats51.htm>, accessed 16 May 2013.

<sup>163</sup> See UNCAT; and Human Rights Committee General Comment No. 31, including para 18; European Court of Human Rights, *Assenov and others v Bulgaria*, App no 90/1997/874/1086, 28 October 1998, para 102-106; *M.C. v Bulgaria*, App no 39272/98, 4 December 2003, para 153; *Macovei and others v Romania*, App no 5048/02, judgment of 21 June 2007, para 46; *Bureš v. the Czech Republic*, App no 37679/08, 18 October 2012, paras 121-127; [Grand Chamber], *El-Masri v the Former Yugoslav Republic of Macedonia*, App no 39630/09, 13 December 2012, paras 182-194.

<sup>164</sup> See article 4 (1) "The same shall apply to ... an act *by any person...*" [emphasis added], article 12.

<sup>165</sup> See articles 6-9.

<sup>166</sup> Rodley and Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", 2006, E.H.R.L.R 115, pp.119-120.

<sup>167</sup> Rodley and Pollard, "Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", 2006, E.H.R.L.R 115, pp. 128-129.

<sup>168</sup> Fifth and Sixth Periodic Reports of the Republic of Poland on the Implementation of the Provisions of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 2012, para. 185, <http://www2.ohchr.org/english/bodies/cat/cats51.htm>, accessed 16 May 2013.

<sup>169</sup> Pytania prokuratorów. Pełna treść pytań przesłanych zespołowi ekspertów przez Prokuraturę Apelacyjną w Warszawie. Kursywą opisano stanowisko ekspertów, Gazeta Wyborcza, 30 May 2011, [http://wyborcza.pl/1,75402,9689932,Pytania\\_prokuratorow,,ga.html#ixzz2C7wHum8C](http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html#ixzz2C7wHum8C), accessed 16 May 2013.

<sup>170</sup> See for example Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law?" *2004 British Yearbook of International Law*, vol. 75, issue 1, pp. 87-88; Noam Lubell, "The War (?) against Al-Qaeda", in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts*, 2012, pp. 441 and 452; Jelena Pejic, "Armed Conflict and Terrorism: There is a (Big) Difference", in Ana María Salinas de Frías, Katja LH Samuel, Nigel D White (eds), *Counter-Terrorism: International Law and Practice*, 2012, pp. 201-202; Silvia Borelli, "Casting light on the legal black hole: International law and detentions abroad in the 'war on terror'", vol. 87, no. 857, *International Review of the Red Cross* 39, March 2005, pp. 45-46; Chairperson-Rapporteur of the United Nations Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, "Report on the situation of detainees at Guantánamo Bay", UN Doc E/CN.4/2006/120, 27 February 2006, paras. 21 and 25; UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, "Study on targeted killings", UN doc A/HRC/14/24/Add.6 (28 May 2010), para 53. Indeed, explicit endorsement of the "global war" theory has been largely confined to current and former officials of the US government, the lower domestic US courts, and American scholars based at universities in the United States.

<sup>171</sup> International Committee of the Red Cross, "Contemporary Challenges for IHL", 29 October 2010, <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/overview-contemporary-challenges-for-ihl.htm>, accessed 16 May 2013. See also ICRC, "IHL and the Challenges of Contemporary Armed Conflicts", 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 30IC/07/8.4, October 2007, pp 7-8, <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf>, accessed 16 May 2013.

<sup>172</sup> Including for violations to articles 2, 3, 4, 5, 8 and 14; see *McCann and others v United Kingdom* [GC], App No.18984/91, 27 September 1995, §§ 160-164; *Assenov and others v Bulgaria*, Case No. 90/1997/874/1086, 28 October 1998, §§ 101-106; *Mentes and others v Turkey* [GC], App No.

23186/94, 28 November 1997, §§; *Nachova and others v Bulgaria* [GC], App. No. 43577/98, 6 July 2005, §§ 110-113. Further, the Convention's jurisprudence directs that any such investigation must: a) be effective in practice as well as in law (*Aksoy v. Turkey*, App No. 21987/93, 18 December 1996, §95); b) be prompt and thorough (*El-Masri*, §183; *Assenov and Others*, § 103 and *Bati and Others v. Turkey*, App. Nos. 33097/96 and 57834/00, 3 June 2004, § 136, ECHR 2004-IV); c) be independent in law and in practice (*El-Masri*, § 184; *Oğur v. Turkey*, App No.21594/93, 20 May 1999, §§ 91-92; *Mehmet Emin Yüksel v. Turkey*, App No. 40154/98, 20 July 2004, § 37); and d) allow for the participation of the victim (*El-Masri*, §§ 185; see, mutatis mutandis, *Oğur*, § 92; *Ognyanova and Choban v. Bulgaria*, App No. 46317/99, 23 February 2006, § 107, 23 February 2006; *Khadzhaliyev and others v. Russia*, App. No. 3013/04, 6 November 2008, § 106; *Denis Vasilyev v. Russia*, App No. 32704/04, 17 December 2009, § 157; and *Dedovskiy and Others v. Russia*, App No. 7178/03, § 92, 15 May 2008, ECHR 2008). Further, investigations must be initiated ex officio, and it is not required that there be a criminal complaint lodged by the victims or their relatives (*El-Masri*, § 186. See, mutatis mutandis, *Gorgiev v. the former Yugoslav Republic of Macedonia*, App. No. 26984/05, 19 April 2012, § 64). See also, Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies), Principle V; UN Commission on Human Rights, 61st sess., provisional agenda item 17, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (2005) (UN Impunity Principles), Principle 19. As highlighted in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles on the Right to a Remedy), adopted by the UN General Assembly on 21 March 2006, Resolution 60/147: the obligation to investigate is a key component of the states' international legal obligations to "respect, ensure respect for and implement international human rights law and international humanitarian law", Principle 3.

<sup>173</sup> UN Committee against Torture (CAT), General Comment No 3: Implementation of article 14 by States parties, 13 December 2012, UN Doc. CAT/C/GC/3, (GC 3), § 17.

<sup>174</sup> *El Masri v Macedonia*, § 193.

<sup>175</sup> See also, the UN Working Group on Enforced or Involuntary Disappearances (WGEID), which has equated "suspension or cessation of an investigation into disappearance on the basis of failure or inability to identify the possible perpetrators" to measures similar to an amnesty law, and as such prohibited under the UN Declaration on Enforced Disappearance and, implicitly, the International Convention for the Protection of All Persons from Enforced Disappearances (ICED), WGEID, General Comment on article 18, 27 December 2005, § 3(a), UN Doc. E/CN.4/2006/56 at § 49. The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by UN General Assembly resolution 55/89 of 4 December 2000, specify that the "investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry", § 3(a).

<sup>176</sup> *El-Masri*, §§ 181 and 192; *Assenov v Bulgaria*, § 102; *Labita v Italy* [GC], App. No. 26772/95, 6 April 2000, § 131; *Mentes and others*, § 89. See also, *Varnava and others*, §§ 191, citing *McKerr v. the United Kingdom*, App. No.28883/95, 4 May 2001, §§ 111 and 114; and *Brecknell*, §§ 65 and 193.

<sup>177</sup> *El-Masri*, § 183; *Gul v Turkey*, App. No. 22676/93, 14 December 2000, §§ 89-91; *Boicenco v Moldova*, App. No. 41088/05, 10 June 2008, § 123.

<sup>178</sup> *Assenov v Bulgaria*, § 103; *Tanrikulu v Turkey* [GC], App. No.23763.94, 8 July 1999, § 104-110; *Zelilof v Greece*, App. No. 17060/03, 24 May 2007, § 62.

<sup>179</sup> *Gul vs. Turkey*, § 91.

<sup>180</sup> *Assenov v Bulgaria*, § 103; *El-Masri*, § 183.

<sup>181</sup> See, *Brecknell*, § 66; *Bazorkina v Russia*, App. No. 69481/01, 27 July 2006, § 117; *El Masri*, § 140: "The Court notes that it has already found in cases against the respondent State that a criminal complaint is an effective remedy which should be used, in principle, in cases of alleged violations of Article 3 of the Convention (see *Jasar v. the former Yugoslav Republic of Macedonia*, No. 69908/01, 15 February 2007; *Trajkoski v. the former Yugoslav Republic of Macedonia*, No. 13191/02, 7 February 2008; *Dzeladinov and Others v. the former Yugoslav Republic of Macedonia*, No. 13252/02, 10 April 2008; and *Sulejmanov v. the former Yugoslav Republic of Macedonia*, No.69875/01, 24 April 2008)", and § 261 under Article 13 ECHR. This point was also underlined, for example, by the Inter-American Commission on Human Rights in the case of *Masacre Las Hojas v. El Salvador*, Case 10.287, Report No. 26/92, 24 September 1992, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993).

<sup>182</sup> *El-Masri*, §§191-193; Inter-American Court of Human Rights, *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232, § 170; UN Human Rights Council Resolution 9/11 of 24 September 2008, Article 1; Resolution 12/12 of 1 October 2009, Article 1.

<sup>183</sup> Inter-American Court of Human Rights, *La Cantuta v Peru* (Merits, Reparations and Costs), C No. 162, 29 November 2006.

<sup>184</sup> *Oneriyildiz v Turkey*, App. No. 48939/99, 30 November 2004, § 93; Inter-American Court of Human Rights, *Las Palmeras v Colombia*, § 65.

<sup>185</sup> *Velev v. Bulgaria*, App. No. 43531/08, 16 April 2013, § 53. *Shishkovi v. Bulgaria*, App. No. 17322/04, 25 March 2010, § 38.

<sup>186</sup> Article VIII.

<sup>187</sup> UN Impunity Principles, Principle 19.

<sup>188</sup> Principle 4 states: "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

<sup>189</sup> CAT General Comment 2, § 18. See also, CAT General Comment 3, § 7; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Istanbul Protocol, Article 2; ICJ, *Hissene Habre cas*, § 115.

<sup>190</sup> *Mahmut Kaya v Turkey*, Application No. 22535/93, § 99. The President of the Republic of Italy recently pardoned one of the US citizens convicted for the rendition of Abu Omar. The ICJ called this pardon a blow to the rule of law and the fight against impunity in Europe, see ICJ, "Italy: Presidential pardon for rendition a blow to the rule of law, says ICJ", <http://www.icj.org/italy-presidential-pardon-for-rendition-a-blow-to-the-rule-of-law-says-icj/>, accessed 16 May 2013. See also Julia Hall (Amnesty International expert on counter-terrorism and human rights), "Italian Pardon of US Officer Sets Stage for Impunity", Al-Jazeera, 18 April 2013, <http://www.aljazeera.com/indepth/opinion/2013/04/20134148255211215.html>, accessed 16 May

2013.

<sup>191</sup> *Las Dos Erres Massacre v Guatemala*, C. No. 211, § 233.

<sup>192</sup> Indeed, the state reaction across Europe has been characterized by resort to secrecy, deployment of doctrine of state immunity, and other measures designed to block accountability. See, for example, Amnesty International, *Chronicle of Immunity Foretold: Time for change on counter-terrorism violations after another year of blocking truth, remedy and accountability*, (Index: AMR 51/003/2013), 17 January 2013, <http://www.amnesty.org/en/library/info/AMR51/003/2013/en>, accessed 16 May 2013; Amnesty International, *Open secret: Mounting evidence of Europe's complicity in rendition and secret detention*, (Index: EUR 01/023/2010), 15 November 2010, <http://www.amnesty.org/en/library/info/EUR01/023/2010>, accessed 16 May 2013; Amnesty International, *Unlock the truth in Lithuania: Investigate secret prisons now*, (Index: EUR 53/002/2011), 29 September 2011, <http://www.amnesty.org/en/library/info/EUR53/002/2011>, accessed 16 May 2013; European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0309+0+DOC+XML+V0//EN&language=EN>, accessed 16 May 2013, especially §§ 7-8, 10-20; Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: *Framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*, 1 March 2013, UN Doc. A/HRC/22/52, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf), accessed 16 May 2013.

<sup>193</sup> *Oneryildiz*, §§ 116-117.

<sup>194</sup> CAT, General Comment No 2: Implementation of article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, (GC 2), § 10.

<sup>195</sup> *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006, §11.7.

<sup>196</sup> *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006, §11.7.

<sup>197</sup> *Abdulsamet Yaman v Turkey*, App. No. 32446/96, 2 November 2004, §55 and §59-60.

<sup>198</sup> General Comment 2, § 5: “other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violated the principle of non-derogability”. See also General Comment 3, § 38, and § 40: “[o]n account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them”.

<sup>199</sup> The International Criminal Tribunal for Yugoslavia (ICTY), in *Prosecutor v Anto Furundzija* (Trial Judgement), Case No IT-95-17/1-T, ICTY Trial Chamber II, 10 December 1998, has stipulated that “torture may not be covered by a statute of limitations”, see paragraph 157.

<sup>200</sup> General Comment no. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, § 18: “unreasonably short periods of statutory limitation in cases where such limitations are applicable” should be removed in respect of

“those violations recognized as criminal under either domestic or international law, such as torture and cruel, inhuman and degrading treatment; summary and arbitrary killing; and enforced disappearance”. See also HRC, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), § 15.

<sup>201</sup> ICED, Article 8, requires that any statute of limitations that may apply to crimes of enforced disappearance is long and proportionate to the gravity of the crime.

<sup>202</sup> Basic Principles on the Right to a Remedy provide in Principle IV that: “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.” The UN Impunity Principles state in principle 23 that “prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible.”

<sup>203</sup> *McKerr v UK*, § 115; *Oğur v Turkey*, § 92; *Ognyanova and Choban v. Bulgaria*, App. No. 46317/99, 23 February 2006, § 107.

<sup>204</sup> *Denis Vasilyev v. Russia*, App. No. 32704/04, 17 December 2009, § 157.

<sup>205</sup> *Khadzhiyev and Others v. Russia*, App. No. 3013/04, 6 November 2008, § 106.

<sup>206</sup> *Dedovskiy and Others v. Russia*, App. No. 7178/03, 15 May 2008, § 92. These principles are also reflected in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance which states that “[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.” See also § 4 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Recommended by General Assembly resolution 55/89 of 4 December 2000, establish that “[a]lleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.”

<sup>207</sup> *Hugh Jordan v. the United Kingdom*, App. No. 24746/94, 4 May 2001, § 109.

<sup>208</sup> Article 11, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>209</sup> *Ramsahai and others v. The Netherlands*, [GC], App. No. 52391/99, § 353; *Isayev and Others v. Russia*, App. No. 43368/04, 21 June 2011, § 140; *Al-Skeini and Others v. UK*, [GC], App. No. 55721/07, 7 July 2011; *McKerr v. UK*, § 114. See also *mutatis mutandis*, *Bucur and Toma v Romania*, on Article 10 and disclosure of information held by secret services, App. No. 28883/95, 4 May 2001, § 115; *Khamzayev and Others v. Russia*, App. No. 1503/02, 3 May 2011, § 196.

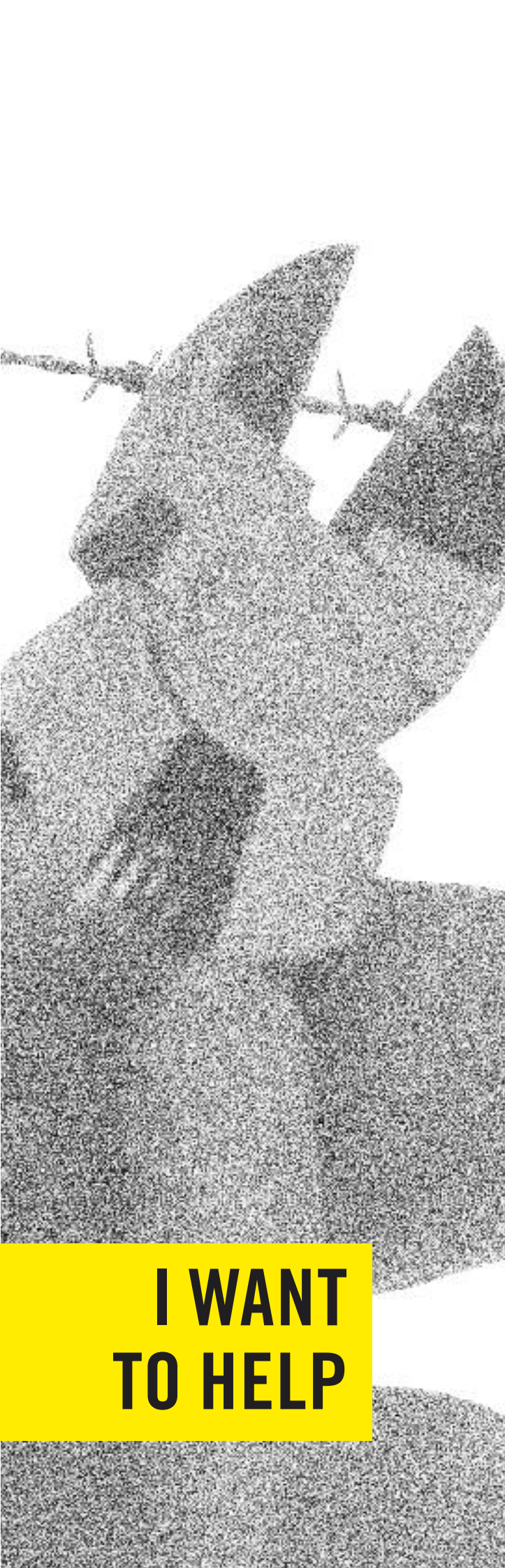
<sup>210</sup> *Ramsahai and others v. The Netherlands*, [GC], App. No. 52391/99, § 349.

<sup>211</sup> Article III.3 and Article VI. The Guidelines stress that “States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system”, Article I.3. Also, “impunity for those

responsible for acts amounting to serious human rights violations inflicts additional suffering on victims” (*ibid*, Preamble).

<sup>212</sup> Article XVI.

<sup>213</sup> *EI-Masri*, § 191.



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## **UNLOCK THE TRUTH**

### **POLAND'S INVOLVEMENT IN CIA SECRET DETENTION**

Poland has been in the spotlight since 2005, accused of hosting a secret prison operated by the US Central Intelligence Agency (CIA) where terrorism suspects were held and tortured between 2002 and 2005. A stream of credible reports by the media, intergovernmental, and non-governmental organizations – coupled with official data from Polish governmental agencies – has supported those allegations.

An ongoing Polish criminal investigation, shrouded in secrecy, drags on. Started in 2008, the investigation has been plagued by sudden personnel changes, an unexplained shift from Warsaw to Krakow, and complaints by two victims that prosecutors have frustrated their attempts to participate fully in the Polish proceedings. Accusations abound of delay as a deliberate tactic as a result of political influence on the investigation.

This report documents the search for accountability for Poland's complicity in the CIA's rendition and secret detention programmes. It focuses on Poland's duty to investigate and bring to justice any Polish and foreign agents and officials responsible for crimes under international law such as torture and enforced disappearance. It is time to unlock the truth in Poland.

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The report informs Amnesty International Poland's campaign "Unlock the Truth in Poland", which urges the Polish government to conduct an effective investigation, identify perpetrators involved in torture and enforced disappearance, and bring them to justice.

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