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SOME REMARKS ON POLAND'S POTENTIAL RESPONSIBILITY FOR THE TREATMENT OF DETAINEES IN A CIA PRISON IN POLAND

Abstract

Secret detentions, renditions, torture and other forms of cruel treatment cannot be considered as humane treatment in any situation. A State that performs such acts can obviously be held responsible, as can any other States which aid, assist, facilitate, and offer their airports or prisons. All these violations of international law were connected with the American and European counter-terrorism actions in the context of their "global war on terror". Detaining prisoners without the consent of a competent court, without informing their families, interrogating them, torturing them and other examples of using "enhanced techniques" amount to a violation of international law and can lead to either the legal responsibility of the state, the criminal responsibility of state officials, or both. This article analyzes the scope of Poland's potential responsibility for violations of both international and domestic law connected with the question of the detainment of American secret prisoners on Polish soil.

INTRODUCTION

A few years ago the international press and international nongovernmental organizations began to inform the public about the alleged rendition and detention of American secret prisoners in some countries in Europe, i.e. Romania, Poland and Lithuania. A few other states, such as Germany and the UK, were accused of being involved in interrogations while others, such as Sweden, Macedonia, and Italy, were accused of allowing the USA to use their territory for abduction

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and rendition. The governments of these countries continuously denied the accusations, until the moment the detained prisoners began to confirm revealed facts. In 2007 Dick Marty – the Special Rapporteur of the Council of Europe – confirmed in his report that "secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland,"[1] and were part of the "global war on terror" announced after the September 2001 terrorist attack on the World Trade Center in New York. According to the report, eight high-value detainees, including Abu Zubaydah, Khalid Sheikh Mohamed, Ramzi bin al-Shibh, Tawfiq [Waleed] bin Attash and Ahmed Khalfan [al-] Ghailani, were allegedly held between 2003 and 2005 in the village of Stare Kiejkuty in Poland. Two of those prisoners, Abd al-Rahim al-Nashiri and Abu Zubaydah, accused Poland of unlawful detention and torture. They were both granted the status of victim by the Prosecutor's office.

The aim of this article (mainly based on the reports of international organizations) is twofold. First, it intends to analyze the scope of Poland's potential responsibility for violations of international and domestic law connected with the issue of US secret prisons. Second it also attempts to examine Polish law relating to the prohibition of torture and war crimes. Although the issue is very serious and complex its discussion in public in Poland has been muted by political considerations and alleged issues of national security. While it is virtually established that Poland participated in the American activities connected with detaining the prisoners, up until now Poland has yet to explain the scope of its cooperation and who bears responsibility for making the decisions which led to the violation of prisoners' rights.

The first section of this article discusses the issue of the war on terror, the legal status of "unlawful combatants" and the scope of protection of the Common Article 3 of the Geneva Conventions. Next the article focuses on the reports of international organizations describing Poland's activities in the context of the "war on terror" and the claims of detainees (in particular Abu- Zubaydah and Al-Nashiri) directed against Poland. The following section is focused on state responsibility for violations connected with secret detentions of prisoners. Next the article discusses Poland's responsibility in the context of the general rules of the law of state responsibility, and the responsibility of state officials in the context of Polish domestic law and international rules. The last section is devoted to the

[1] Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Council of Europe, doc. 11302 rev., 11 June 2007. Available at: http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (accessed August 20, 2011).

possible remedies available to the detained persons. This section also formulates some general remarks on the question of Poland's potential responsibility for the CIA prisons if its participation is confirmed.

1. THE WAR ON TERROR

Following the attack on the World Trade Center the Government of the United States declared a war on terror. In February 2002 the President of the USA, in his memorandum entitled "Humane Treatment of Taliban and Al Qaeda detainees,"[2] declared that the Third Geneva Convention does not apply to the detainees as it applies to conflicts between states and al-Qaeda is not a state, and additionally that the Common Article 3 of the Geneva Conventions[3] does not

[2] Memorandum of the President of the United States, *Humane Treatment of Taliban and al Qaeda detainees*, 7 February, 2002, www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed February 28, 2012).

[3] Geneva Conventions of 1949 (entered into force August 12, 1949), 75 UNTS 287, available at: http://www.unhcr.org/refworld/docid/3ae6b36d2.html, (specifically: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War).

Common Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

apply to the Taliban detainees and Al Qaeda members as it refers to the conflicts which are not of an international character. The memorandum also described the detainees as "unlawful combatants," not eligible for qualification as prisoners of war under Article 4 of the Third Geneva Convention. At the same time, President Bush declared that the detainees would be treated humanely to the extent appropriate and consistent with military necessity and applicable law.

In the course of the war on terror many people were arrested in the USA and abroad, and some of them are still detained in the American prison located in Guantanamo Bay, Cuba. In September 2006 President Bush also confirmed the existence of CIA detention centers around the world, and the fact that high-value detainees were kept in CIA custody.[4] Although the detainees were to be treated humanely, the Director of the CIA Leon Panetta confirmed that the CIA used "enhanced interrogation" techniques, including waterboarding, on the detainees in the CIA detention centers.[5]

The USA's initial position, declaring that the detained al-Qaeda members are unlawful combatants and are not entitled to the protection of the Geneva Conventions, leads to the question of the scope of protection of the Common Article 3 of the Geneva Conventions and the legal status assigned to the unlawful combatants, i.e. whether they remain outside the scope of the Geneva Conventions.

1.1. The scope of Common Article 3 and the issue of unlawful combatants

The discussion concerning the Common Article 3 is focused on the fact that its provisions apply to conflicts of a non-international character, and the question arises whether it can be applied in the case of al-Qaeda members. At the time of the formulation of Common Article 3, the *travaux préparatoires* indicated that the scope of its applicability was intended to be narrower,[6] but it is no longer interpreted according to the terms of the *travaux* anymore. As has been noted in the legal doctrine, the provisions of Article 3, as a set of minimum standards, should be adhered in every situation.[7] According to the commentary to the Convention on

[4] D. Gonyea, *Bush Concedes CIA Held Suspects in Secret Prisons*, September 6, 2006, available at: http://www.npr.org/templates/story/story.php?storyId=5776968 (accessed February 28, 2012).

[5] *CIA Director Leon Panetta confirms that waterboarding / enhanced interrogation techniques led to Osama Bin Laden*, MSNBC interview, available at: http://winteryknight.wordpress.com/2011/05/04/cia-director-leon-panetta-confirms-that-waterboarding-led-to-osama-bin-laden/ (accessed February 28, 2012).

[6] A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge: 2010, p. 60.

[7] *Ibidem*, p. 59.

the issue, "This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."[8] Also the case law makes clear that provisions of Article 3 are so fundamental that they apply to both international and internal conflicts[9] and they are part of customary law binding all the parties to a conflict.[10]

"Unlawful combatant" as a notion is not used in the text of Geneva Conventions.[11] The Geneva Conventions refer to civilians, prisoners of war, and medical personnel, and there is nothing about the status of so-called unlawful combatants. The commentary to the Fourth Geneva Convention stresses that: "there is no 'intermediate status'; nobody in enemy hands can be outside the law."[12] As nobody should be left outside the scope of protection of the Geneva Conventions, it becomes critical to settle the legal status of an unlawful combatant. In the discussion on the legal status of alleged terrorists two groups should be considered: the Taliban, and al-Qaeda members. The Taliban were part of the effective government of Afghanistan and should be treated as prisoners of war according to the Third Geneva Convention.[13] Al-Qaeda on the other hand must be defined as an organization composed of persons of differing nationalities. It is not a party of Geneva Conventions and cannot be considered as a subject of international law.[14]

Antonio Cassese confirms the prevailing opinion that there is no category between civilians and combatants, adding that the notion of unlawful combatant

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[8] Commentary to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, p. 14, on line at: http://www.icrc.org/ihl.nsf/COM/380-600002?OpenDocument (last visited February 2012).

[9] *Prosecutor v. Z. Delalic, Z. Mucic, H. Delic, E. Landzo, Judgement*, IT-96-21-A, 20 February 2001, paras. 143-145; *Prosecutor v. M. Mrksic, V. Sljivancanin, Judgement*, IT-95-13/1-A, 5 May 2009, para. 70.

[10] *Prosecutor v. D. Kunarac, R. Kovac, Z. Vukovic, Judgement*, IT-96-23&IT-96-23/1-A, 12 June 2002, para. 68.

[11] Geneva Conventions of 1949, *supra* note 3.

[12] Commentary to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, p. 51, available at: http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument (accessed February 28, 2012).

[13] A. Cassese, *International law*, Oxford University Press, Oxford: 2005, p. 410; J. Barcik, *Status prawny Talibów i członków al-Qaedy zatrzymanych przez władze USA* (Legal status of Taliban and al-Qaeda members detained by the USA powers), 1 Państwo i Prawo 91 (2003), p. 93.

[14] G. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 4 Humanitäres Völkerrecht – Informationsschriften 202 (2002), p. 203, available at: http://www.pegc.us/archive/Journals/aldrich_illegal_combatants.pdf (accessed February 28, 2012).

can only be used as a descriptive category.[15] According to the doctrine, unlawful combatants are al-Qaeda members who have been combatants in hostilities and are not entitled to the status of prisoner of war.[16] This definition leads to the conclusion that unlawful combatants are not protected by the Third Geneva Convention. As indicated by Cassese however, al-Qaeda members must be regarded as civilians who participated in criminal activities.[17] In that situation it must be underlined that they are at least entitled to the protection ensured by the Common Article 3 of the Geneva Conventions and Article 75 of the Additional Protocol I to the Conventions[18] (although it is not clear whether the United States, which is not a state party to the Additional Protocol I is bound by the provisions of Article 75 as a rule of customary law[19]). The provisions of Article 75 relate to persons who are under the power of a Party to a conflict and who do not benefit from more favorable treatment under the Conventions or under the Protocol. According to the text they "shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria". What is of key importance in context of further considerations under Article 75 is that the person arrested or detained should be informed why such measures were taken, and also that any sentences and penalties relating to the detained person can be pronounced only by a regularly constituted court.

The Fourth Geneva Convention applies to unlawful combatants if they fulfill the nationality criteria mentioned in the Article 4 of that convention.[20] In any case detained persons are protected by the Common Article 3 and Article 75 of Additional Protocol I, irrespective of whether they fulfill the nationality criteria or not.

In dealing with lawsuits filed by the detainees, the United States Supreme Court challenged the attempts of its government to limit the scope of the Geneva

[15] Cassese, *supra* note 13, p. 409.

[16] *Cf.*, Aldrich, *supra* note 14, p. 203; K. Doermann, *The legal situation of "unlawful/unprivileged combatants"*, 85(849) RICR Mars IRRC March 45 (2003), p. 46, available: http://www.pegc.us/archive/Journals/irrc_849_Dorman.pdf (accessed February 28, 2012); E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford: 2010, p. 58.

[17] Cassese, *supra* note 13, p. 410.

[18] Doermann, *supra* note 16, p. 50, Aldrich, *supra* note 14, p. 203.

[19] See the discussion: http://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/ (accessed February 28, 2012).

[20] Doermann, *supra* note 16, p. 66.

Conventions. In the case of *Hamdan v. Rumsfeld* the Court, interpreting the Common Article 3 of the Geneva Conventions, noted that "the term 'conflict not of an international character' is used (in the Convention) in contradistinction to a conflict between nations," adding that the provisions of Article 3 are applicable "even if the relevant conflict is not one between signatories."[21] This judgment confirming the applicability of Common Article 3 to any detainees in any armed conflict must be treated as a landmark decision, as it determines the minimum protection and the legal status of military detainees, especially when the US is not a party to Additional Protocol I (the Court in the case of *Hamdan v. Rumsfeld* observed that the although US declined to ratify Additional Protocol I, government's objection to the protocol was not to Article 75; this however is not enough to confirm its customary status as a rule of law).

These considerations lead to the conclusion that unlawful combatants cannot be deprived of all their rights. At a minimum they should be treated humanely, should be informed about their rights, and should be judged by a regular court. This article however focuses not on the responsibility of the US for the illegal treatment of prisoners, but on the potential responsibility of Poland as a state which took part in the American activities in its war on terror.

2. SECRET PRISONS IN POLAND ACCORDING TO THE REPORTS OF INTERNATIONAL ORGANIZATIONS AND CLAIMS OF DETAINEES.

In June 2006 Dick Marty – Rapporteur of the Committee on Legal Affairs and Human Rights of the Council of Europe – issued his first report concerning the issue of the existence of secret detention centers in Poland and Romania. The report confirmed that at that particular stage there was no formal evidence of the existence of such centers, but that an "unspecified number of persons, deemed to be members or accomplices of terrorist movements, were arbitrarily and unlawfully arrested and/or detained and transported under the supervision of services acting in the name, or on behalf, of the American authorities. These incidents took place in airports and in the European airspace, and were made possible either by seriously negligent monitoring or by the more or less active participation of one or more government departments of Council of Europe

[21] *Salim Ahmed Hamdan, petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 548 U.S. 557 (2006), p. 67, available at: http://www.supremecourt.gov/opinions/05pdf/05-184.pdf (accessed February 28, 2012).

member states."[22] In his second report (2007) Dick Marty confirmed that there was enough evidence to confirm that secret detention centers, run directly and exclusively by the CIA, existed in Poland and Romania from 2003 – 2005.[23] Marty mentioned eight high-value detainees kept in a detention center in Poland who were subjected to special treatment called "enhanced interrogation techniques". According to the second report, the detainees were subjected to inhuman and degrading treatment, including "enhanced" interrogation methods based on the imposition of physical and psychological pain, including beatings, waterboarding, stress positions, sleep deprivations and so on. All those techniques, and even lesser ones, fulfill the definition of torture and inhuman and degrading treatment as provided by Article 3 of the European Convention on Human Rights[24] and the United Nations Convention against Torture.[25]

As to Poland, in his second report Marty gathered evidence from different sources (for example from civil aviation records) confirming landings of American airplanes at the airport in Szymany (Poland), with vans leaving the airport in the direction of an intelligence training base in Stare Kiejkuty. He confirmed the existence of a secret detention center in Poland, and also that local officials performed only logistical functions, without having contact with the detainees. Marty also confirmed that only a few people in Poland – all high ranking officials – actually knew about existence of these centers of detention for high value detainees. Although they did not know the specific number of detainees, they were aware of the illegal activities of the CIA in Poland. Marty mentioned, among other persons, the former President of Poland, the chief of the National Security Bureau (also Secretary of the National Security Committee) and the Minister of National Defense.

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[22] Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Doc. 10957, 12June2006,availableat:http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.htm?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm (accessed August 20, 2011).

[23] Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Doc. 11302 rev., June11,2007,p.7,availableat:http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (accessed August 20, 2011).

[24] [European] Convention for the Protection of Human Rights and. Fundamental Freedoms (adopted November 4,1950, entered into force September 3, 1953), 213 UNTS 222.

[25] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted December 10, 1984, entered into force June 26, 1987), 1465 UNTS 85.

The Report of the Human Rights Council of the UN from February 2010[26] repeated many of the findings of Dick Marty[27] and also added new information already in the public domain concerning the secret flights and the proceedings instituted by the Office of Prosecutor in Warsaw in the case of "the alleged existence of so-called secret CIA detention facilities in Poland, as well as the illegal transport and detention of persons suspected of terrorism". According to the report: "[a]fter 18 months, still nothing is known about the exact scope of the investigation. The experts expect that any such investigation would not be limited to the question of whether Polish officials had created an 'extraterritorial zone' in Poland, but also whether officials were aware that 'enhanced interrogation techniques' were applied there."[28] In other words, at that moment almost nothing was known about the proceedings undertaken by the Polish prosecutors as they were kept confidential. On February 4, 2011 the Office of Prosecutor sent a letter to the Helsinki Foundation for Human Rights (HFHR) confirming that an investigation concerning public officials exceeding their powers was still pending, and that recently it had been moved from Warsaw to Cracow.[29]

Following the request of the HFHR, and acting in accordance with the Polish Act concerning access to public information,[30] the Polish Air Navigation Services Agency (PANSA) revealed[31] that planes had landed in Poland. PANSA also took part in actions to cover up the true destination of certain flights and

[26] Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development. Joint study on global practices in relation to secret detention in the context of countering terrorism, of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, A/HRC/13/42, 19 February 2010, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf (accessed August 20, 2011).

[27] *Ibidem*, paras. 115-116.

[28] *Ibidem*, para. 118.

[29] The letter presented by the Prosecutor's office, available at: http://www.interights.org/userfiles/Documents/20110204ProsecutorlettertoHFHRreFOIPolish.pdf (accessed March 12, 2012); information about the status of the investigation available at: http://www.reprieve.org.uk/press/2012_03_02_Poland_ CIA_cover_up/ (accessed March 12, 2012).

[30] Ustawa o dostępie do informacji publicznej (Act concerning access to the public information), Dziennik Ustaw (Journal of Laws), 2001, No. 112, item 1198.

[31] Cited data available at: http://www.soros.org/sites/default/files/disclosure-20100222_0.pdf (accessed February 10, 2012).

assisted the Americans in navigating aircraft.[32] Further information was obtained by the HFHR from the Polish Border Guard Office, indicating that landings and departures differed in the number of passengers on board, which could be evidence that there existed a secret prison in Poland where certain passengers were left off and detained.

Two Guantanamo detainees, specifically Al-Nashiri and Abu-Zubaydah (acting via their attorneys as both are currently detained in Guantanamo Bay) filed motions which constituted notifications on suspicion of criminal offences committed against them in Poland.[33] They claim that they were illegally transported to Poland, where they were tortured and abused, and that Polish state officers were aware of those activities and raised no objections to them. The Polish Prosecutor officially recognizes both claimants as potential victims in its CIA prison investigation.[34]

The above reports, and information gathered by HFHR, strongly support the claim that secret CIA detention centers were located in Poland. The proceedings initiated by the Polish Prosecutor's office also provide additional support to this assumption. Consequently, one should seriously consider whether the above actions, if proven, could potentially give rise to legal responsibility on the part of Poland. If the answer is affirmative, one needs to analyze the scope of such responsibility and question of possible remedies.

The following section starts with an investigation into the issue of state responsibility, with the aim of focusing on possible Polish responsibility in context of its international obligations and domestic law. Attention will be paid to two specific issues with regard to state responsibility: the responsibility of state officials, and possible legal remedies available to victims.

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[32] *See*, Report of Amnesty International, *Open secret: Mounting evidence of Europe's complicity in rendition and secret detention*, p. 27 available at: http://amnesty.org.pl/uploads/media/Open_Secret_CIA_ rendition_report.pdf (accessed August 20, 2011).

[33] Al-Nashiri's motion available at: http://www.hfhrpol.waw.pl/cia/images/stories/Al%20Nashiri%20redacted%20application%20PL-3.pdf, Abu-Zubaydah's motion, available at: http://www.interights.org/userfiles/Documents/20101216AbuZubaydah ApplicationforVictimStatusinPolishArticle231InvestigationEnglishTranslation.pdf (accessed February 20, 2012)

[34] *Cf.,* press releases: http://www.interights.org/document/13/index.html, http://wyborcza.pl/1,76842,11138133,Sledztwo_w_sprawie_wiezienia_CIA_przeniesione_do_Krakowa.html (both accessed March 12, 2012).

3. STATE RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL LAW – AN OVERVIEW. THE ISSUE OF POLAND'S ROLE IN THE US SECRET PRISON SYSTEM

State responsibility is a crucial issue when it comes to violations of international law, which are attributable to a state as the subject of international law. The question of state responsibility has been addressed by the International Court of Justice ("ICJ") and International Law Commission ("ILC"), as well as in the scholarly literature.[35] Before focusing on the potential responsibility of Poland, certain general observations must be made.

In the case of *Corfu Channel*[36] the ICJ stated that it cannot be deduced, from the mere fact of control exercised by a state over its territory (including territorial waters), that the state knew or should have known about illegal acts that were taking place on its territory, but that the knowledge of the state can be established from the fact of "exclusive territorial control exercised by the state" within its borders. In its conclusion the ICJ pointed out that every state has an obligation "not to knowingly allow its territory to be used for acts contrary to the rights of other States". Therefore the question of knowledge is the *sine qua non* condition for establishing state responsibility. Judge Alvarez, in his individual opinion to the judgment, developed this observation by saying that a "State which fails to exercise this vigilance, or is negligent in its exercise, will find its responsibility involved in case of injury caused in its territory to other States or to their nationals." Further in the opinion Alvarez pointed that it is a consequence of a state's sovereignty that a State must know and has a duty to know of prejudicial acts committed in parts of its territory. The responsibility of a state can be limited only in one situation: "by the fact that the State was acting in the general interest, or that it took all proper precautions to prevent other States or their nationals from suffering injury in its territory."[37]

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[35] J. Crawford, *The International Law Commission's articles on state responsibility. Introduction, Text and Commentaries,* Cambridge University Press, Cambridge: 2002, M. Fitzmaurice, D. Sarooshi (eds.), *Issues of state responsibility before international judicial institutions*, Hart Publishing, Oxford: 2004, I. Brownlie, *International law and the use of force by states*, Clarendon Press, Oxford: 1963, H.P. Aust, *Complicity and the law of State Responsibility*, Cambridge University Press, Cambridge: 2011, p. 269, G. Lysen, *State responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, Iustus Forlag, Uppsala: 1997.

[36] *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, pp. 18-22.

[37] Opinion of Judge Alvarez attached to the Judgement on merits in case of *Corfu Channel*, available at: http://www.icj-cij.org/docket/files/1/1649.pdf (accessed February 20, 2012), p. 44.

In order for a state to be held responsible for violations of international obligations two elements must be established. There must be a breach of international law, and this breach must be caused by the state. This fundamental idea is reflected, for example, in the judgment of the ICJ concerning diplomatic and consular staff in Tehran: "First, it must determine how far, legally, the acts in question may be regarded as imputable to the (…) State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable."[38] Additionally the ICJ underlined that the Iranian authorities took no action to prevent the violations, and that "this inaction of the Iranian Government by itself constituted a clear and serious violation of Iran's obligations to the United States."[39]

These principles are reflected both in the literature[40] and in the works of the ILC.[41] The ILC does not mention the primary obligations of states, as they are contained in the treaties, but "general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom". According to the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"), which can also in some ways be considered as a reflection of customary international law, every internationally wrongful act of a State entails its international responsibility (Article 1). The elements of such an internationally wrongful act are a breach of international law which is attributable to a state. The breach may be the result of either an action or an omission (Article 2).

A breach of international law however is also often a result of cooperation between States, rather than by one state acting alone. This means that responsibility for the violation(s) can be attributable to several states. Under Article 16 of the Draft Articles a state which aids and assist in the commission of a wrongful act is responsible if it is acting with knowledge about wrongfulness of the act and

[38] *United States Diplomatic and Consular Staff in Tehran (USA v. Iran) (Judgement)* [1980] ICJ Rep 3, available at: http://www.icj-cij.org/docket/files/64/6291.pdf (accessed February 28, 2012)

[39] *Ibidem*, p. 32.

[40] I. Brownlie, *System of law of nations: state responsibility*, part I, Oxford University Press, Oxford: 1983, p. 38; M. Shaw, *International Law,* 5th ed., Cambridge University Press, Cambridge: 2003, p. 697.

[41] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 32, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed February 12, 2012).

the act would be wrongful if committed by that state. This means that a state must be aware of the wrongful conduct of another state, and there must be a link connecting the acts or omissions of that state and the state committing the wrongful act. A State assisting and aiding a state committing a wrongful act will not be responsible to the same extent as a state committing the act; its responsibility will depend on its contribution to the wrongful act.[42] There are three crucial elements required to attribute responsibility to a cooperating state: 1) existence of a wrongful act; 2) aid or assistance to the state committing the wrongful act; and 3) knowledge by the aiding state that it is aiding or assisting in the commission of a wrongful act. The ICJ, interpreting the provisions of Article 16, stated that it reflects the rule of customary law.[43]

Articles 40 and 41 of the Draft Articles regulate the issue of violation of a peremptory norm, but it seems disputable whether they can be used in the context of the violations described in this article, as Articles 40 and 41 relate only to violations which are systematic and gross. The ILC has not elaborated any test for determining whether a particular violation is of a gross and systematic character. Leaving the decision in this regard to the Security Council does not seem to be a good idea, as its permanent members are often involved in such violations, as for example the US in the case of extraordinary renditions.

The result of the attribution of responsibility to a state obviously should involve legal consequences. According to Article 30 of the Draft Articles, a State should cease the wrongful act and offer appropriate assurances and guarantees of non-repetition, for example by way of satisfaction. Moreover, in accordance with Article 31 "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

Full reparation may take the form of restitution, compensation, or satisfaction, and these types of reparation can be implemented separately or jointly. The question of reparations in the case of secret prisons, renditions, and torture should mainly be connected with compensation for the personal injuries suffered by the detainees. There are two obvious problems with the effective enforcement of such reparations, the first of which concerns potential claimants. While a state could seek compensation in respect of the injuries caused to its nationals, to the best of our knowledge so far neither Afghanistan, Pakistan nor Iraq has claimed

[42] *Ibidem,* p. 38.

[43] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* [2007] ICJ Reports, p. 43, para. 420, available at: http://www.icj-cij.org/docket/files/91/13685.pdf (accessed February 28, 2012).

compensation from Poland in the name of its nationals. Second, the problem arises of allocating the responsibility, i.e. how it should be shared between the responsible subjects (for example between Poland and the United States). There are no criteria defined yet, as international law is not yet developed enough in this regard.[44]

As to the Polish responsibility, in context of detaining the prisoners there is a high probability that Poland bears some responsibility for the acts of the CIA. Dick Marty, in his second report (presented above), confirmed that American airplanes landed in Poland, that Poland allowed American officials to use its intelligence training base, and that the Polish local officials performed some logistical functions, although they were not aware of the character of the CIA activities. According to the report a few high ranking state officials knew about the illegal activities of the CIA in Poland. Torture, enforced disappearances, or inhuman and degrading treatment constitute acts which can be described as internationally wrongful acts. The question arises as to the extent of contribution of a state which allowed the prisoners being tortured and abused to be transported on and through its territory and airspace?

From the above considerations a few conclusions can be drawn in the context of Poland's alleged actions. Firstly, a state is internationally responsible if it knew or should have known about illegal acts that were taking place on its territory. While we are not aware of the scope of Poland's knowledge as to the conduct of the CIA in Poland (since we do not know the provisions of the agreement between Poland and the USA), certainly one can assume that Poland should have known about illegal acts concerning detainees conducted by the US, as it effectively controlled its own territory and could not have been unaware of the nature of the US's military operations.

Secondly, a state which is prevented from exercising its authority (for example, by a *de facto* military occupation by another state, or acts of rebellion or actions of separatists) still has jurisdiction over its territory and therefore is obliged to guarantee the freedoms and rights defined in the ECHR[45] or other international instruments, as such a situation does not suspend their enforcement. Following the *a minori ad maius* argument – if in the situation of a *de facto* regime a State preserves its jurisdiction concerning the Convention, then all the more so it preserves its competence in a situation of a *de jure* regime (probably defined in

[44] Aust, *supra* note 35, p. 276.

[45] *Ilaşcu and Others v. Moldova and Russia* (48787/99) Judgement, ECHR 8 July 2004, para. 333, all the cited judgements of ECHR are available at: www.echr.coe.int.

the agreement between Poland and the US). No agreement can exclude the responsibility of a state in a situation concerning the violation of a *jus cogens* norm (such as the prohibition of torture). Therefore, Poland was obliged to protect human rights and particularly to take the necessary measures to prevent the crime of torture.

Certainly there is a difference between the responsibility of a state which performs illegal activities like torture or inhuman and degrading treatment, and a state which only aided and assisted in performing those activities and played only a supporting role. Poland was not a main actor in the American war on terror. According to the presented reports, Poland's responsibility could be assessed as complicity.[46] In the light of the report of Dick Marty, the three elements defined in Article 16 of the Draft Articles are fulfilled however: 1) the existence of a wrongful act (violation of international obligations such as torture, illegal transports), 2) aid or assistance to the state committing the wrongful act (Polish provision of airspace, airports, and performing some logistical functions), and 3) knowledge that the state is aiding or assisting in the commission of wrongful act – under the condition that Polish state officials knew or should have known about the illegal activities of the CIA.[47]

When assessing the legal consequences of such complicity, it must be taken into account that the assisting state is only responsible to the extent of harm that its conduct caused. According to the commentary to the Draft Articles: "Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself."[48] In other words, a state will only be responsible for its own acts and will not be held responsible for indemnifying the victim for all the consequences of the illegal act, but only those which are caused by its own acts.

There are some acts in the international law that can be attributed both to the state and the individual,[49] for example acts of torture. Taking into account the facts presented above – in context of Poland as a State it is exposed to responsibility

[46] It should be noted that the notion of "complicity" is not used in the current terminology of the law of state responsibility, but is used by the ICJ, which has observed that this notion is similar to the category of "aid and assistance" used in the Draft articles, *supra* note 41, para. 419.

[47] According to the judgment of the ICJ in case of Bosnian genocide, if an organ of the State, or a person or group whose acts are legally attributable to the State, commits the crime international responsibility is incurred by that State, *supra* note 43, par. 179.

[48] Draft articles, *supra* note 41, Art. 16, para. 1, p. 66

[49] A. Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 (03) International and Comparative Law Quarterly 615 (2003), p. 617, R. Cryer, H. Friman, D. Robinson, E. Wilmhurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2010, p. 15.

for complicity in acts of torture. As the International Criminal Tribunal for former Yugoslavia stressed: "[u]nder current international humanitarian law, in addition to individual criminal responsibility, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility."[50]

The next section examines the potential responsibility of state officials in the context of international and domestic law.

4. RESPONSIBILITY OF STATE OFFICIALS IN CONTEXT OF DETENTION AND TORTURE OF PRISONERS

"Classical" international law was focused on the responsibility of states, and acts of individuals acting as state officials were traditionally attributed to the state.[51] The responsibility of the individual was left to the national law.[52] The establishment of tribunals *ad hoc,* and later the International Criminal Court, has led to the situation where the individual can now be prosecuted before an international court. A. Nollkaemper, commenting on this radical change, stated: "[i]nternational law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and now directly confronts individuals with the legal consequences of their acts."[53] Consequently, taking into account the allegations of Al Nashiri and Abu Zubaydah, the responsibility of Polish state officials must also be taken into consideration.

4.1. Domestic law

Killing, torture or other inhuman treatment against prisoners of war, including the deprivation of liberty of such prisoners, is treated as a violation of the Polish Criminal Code ("CC")[54] and is punishable by imprisonment. These acts are criminal offences under Polish law, and anyone committing them can be judged and imprisoned.

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[50] *Prosecutor v. Anto Furundzija, Judgement*, IT-95-17/1-T, 10 December 1998, para. 142.
[51] Nollkaemper, *supra* note 49, p. 616.
[52] *Ibidem*.
[53] *Ibidem*.
[54] Kodeks karny (Criminal Code), Dziennik Ustaw (Journal of Laws), 1997, No. 88, item 553, as subsequently amended.

The motions filled by the detainees Al-Nashiri and Abu Zubaydah contain several allegations within the context of acts performed by public officials. They accuse public officials of committing the following offenses: under CC Article 231 § 1 – a public official misusing his or her powers or exceeding their duties to the detriment of public or private interests; under CC Article 189 § 3 – deprivation of liberty with a special torment; under CC Article 240 § 1 – the crime of failing to report or give notification about the commission of forbidden acts, specifically the violation of the prohibition against torture and other inhuman and degrading treatment or punishment; under CC Article 246 – using violence, illegal threats or other misconduct in order to obtain evidence or testimony; under CC Article 247 § 3 – mental and physical abuse of an imprisoned person. Additionally, Al-Nashiri has made accusations concerning the infringement of: Article 123 § 2 CC – maltreatment of prisoners of war; Article 156 § 1 CC – causing permanent damage to health; Article 190 § 1 CC – using threats and violence to force a person to perform certain acts or omissions. These accusations are directed against both those persons who performed interrogations using enhanced techniques, and those persons which facilitated the performance of those acts by providing the infrastructure and resources. The latter of course concerns the services provided by Polish officials, which according to the motions filed facilitated the performance of illegal acts.

By taking into account one of the allegedly violated provisions of the CC, this article will now focus on the problems connected with its applications to the situations of those detained persons. In particular, Article 123 § 2 of the Polish CC states that whoever, in violation of international law, causes the prisoners of war to suffer serious detriment to their health, subjects such persons to torture, or cruel or inhuman treatment, makes them the objects of cognitive experiments (even with their consent), uses their presence to protect a certain area or facility or armed units from warfare, or keeps such persons as hostages, shall be subject to the penalty of deprivation of liberty. These provisions are a reflection of the provisions set forth in the Geneva Conventions.

The problem with applying the above provisions is that no Polish state official appears to have directly taken part in the inhumane treatment of prisoners. The reports confirm that Polish officials performed logistical functions, gave their consent to CIA actions, and provided the infrastructure. It is not clear to what extent they were aware of the illegality of the CIA actions. Based on the documentation known so far, they could only be accused of aiding and abetting the commitment of a crime. According to Article 18 § 3 of the CC

> whoever, with an intent that another person should commit a prohibited act, facilitates by his behavior the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be

> liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty to prevent a prohibited act, through his omission facilitates its commission by another person, shall also be liable for aiding and abetting.

The problem with using this particular provision is that it must be proved that the aider and abettor had the requisite intent to commit a crime. Mere knowledge of American activities does not make the state official criminally responsible for aiding and abetting if the requisite intent is not proven.

Because the investigation in the case is still pending, it is difficult to draw any general conclusions, which is why further considerations will be focused on other possible ways to find a state official responsible under domestic law.

According to Article 40 of the Polish Constitution[55] "no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited." The prisoners of the CIA were illegally transported to Poland where they were subjected to torture and other degrading treatment, including enhanced interrogation techniques. One may legitimately assume that this violated the provisions of Article 40 of the Polish Constitution. The consequences of an infringement of the Constitution can include the responsibility of state officials before the Polish Tribunal of State (in the case of the President, on the request of the entire Parliament; in other situations on the request of the lower house of Parliament (the Sejm). What this actually means in practice is that this decision is highly political and depends on the composition of Parliament. Constitutional responsibility is connected with those acts violating the Constitution which took place while the state official charged held the office (Article 3), and concerns only high level officials such as the president and ministers (compare Article 1).[56]

So far, according to the press releases,[57] the former head of the intelligence service has confirmed that he has been charged with violation of international law and exceeding his powers by "unlawful deprivation of liberty" connected with the setting up of a secret CIA detention center. This is probably the most important message communicated to the public since the investigation started

[55] Konstytucja Rzeczpospolitej Polskiej (The Constitution of the Republic of Poland), Dziennik Ustaw (Journal of Laws), 1997, No. 78, item. 483, English version available at: http://www.trybunal.gov.pl/eng/index.htm

[56] Ustawa o Trybunale Stanu (Act concerning the Tribunal of State), Dziennik Ustaw (Journal of Laws), 2002, No. 101, item 925, as subsequent amendmented.

[57] *See*, http://wiadomosci.gazeta.pl/wiadomosci/1,114884,11425315,Siemiatkowski_z_zarzutami_za_ wiezienia_CIA__To_potwierdza_.html (accessed March 28, 2012), also: http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html (accessed 28 March 2012).

in 2008, and particularly surprising considering that for a long time public officials at various levels and from various parties have been denying that such prisons existed in Poland.

4.1. The international responsibility of a state official

Besides responsibility at the national level, the potential international responsibility of state officials should also be taken into consideration. Since Poland is a state party of the Rome Statute[58] of the International Criminal Court ("ICC"), the Polish Head of State and other high-ranking officials can be accused by the prosecutor of the ICC. The ICC has, *inter alia,* jurisdiction over war crimes (grave breaches of the 1949 Geneva Conventions) and crimes against humanity.[59] The Rome Statute demands that crimes against humanity be committed as a part of a widespread and systematic attack. As to war crimes – the ICC will have jurisdiction "in particular when [a crime is] committed as part of a plan or policy or as part of a large-scale commission of such crimes." This may be interpreted to mean that the ICC will have jurisdiction over those crimes which achieve certain high degree of gravity.[60] On the one hand, this can constitute an obstacle to the prosecution of state officials (and the "impunity gap" could materialize if a national system will similarly not prosecute a responsible official[61]), while on the other hand this approach obviously limits number of cases before the ICC, and by so doing improves its operability and effectiveness.

The provisions of the Rome Statute are clear that a "person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; or contributes to the commission of the crime" (Article 25). It is critical to determine whether the acts or omissions of such a person were intentional, as a person will be criminally liable only if acting with intent and knowledge. In other words, a person engaging in said criminal conduct must be aware that certain consequences will occur as a result of his or her actions or omissions.

In context of the potential responsibility of Polish state officials it would need to be proven that they acted with intent and knowledge of the wrongful acts that occurred in the course of their actions. It must be proven that they knew that

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[58] Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force on 1 July 2002) 2187 UNTS 3.

[59] *Ibidem,* Articles 7-8.

[60] Nollkaemper, *supra* note 49, p. 619.

[61] N. N. Jurdi, *The International Criminal Court and national courts. The contentious relationship*, Ashgate Publishing, London: 2011, p. 57.

acts of torture, secret renditions, or cruel and inhuman treatment would occur and meant to cause such consequences. In fact it is doubtful that their acts or omissions achieved such a degree of gravity that the prosecutor of the ICC would initiate an investigation in this case. While such a possibility exists in theory, it is quite hard to imagine in practice.

Additionally there is the problem of collecting evidence. In the case of state responsibility, we can deduce its responsibility from the mere fact of control over the territory. The state at least should have known of the illegal conduct taking place on its territory. In case of the responsibility of an individual, the facts must be certain. The "beyond reasonable doubt" standard must be met to convict a person,[62] thus it must be directly established that any state official charged possessed both the knowledge and intent that a certain consequence in violation of international law would occur. This makes the process of collecting evidence much more complicated, if not impossible, in the situation analyzed herein.

5. POSSIBLE LEGAL REMEDIES FOR THE DETAINEES

5.1. Domestic law

One of the possible remedies for the illegally detained persons is based on their constitutional claim. It will be recalled that the Polish Constitution provides that "no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited."[63] Moreover, the Constitution states that "anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation" also the person deprived of liberty shall be treated in a humane manner and everyone should be informed about the reasons for his or her detention, and that the family should also be notified of the deprivation of liberty. Every person deprived unlawfully of his or her liberty has the right to obtain compensation.[64] The Polish Constitution is the most fundamental source of protection of the rights and freedoms of all the individuals under the authority of the Polish State (Article 37). Its provisions should be applied directly (Article 8). This means that every person on Polish territory has the same rights and freedoms, and Poland has to provide for the effectiveness of these provisions. Additionally:

[62] T. Buckles, *Laws of evidence*, The West Legal Studies Series, 2001, p. 30.
[63] The Constitution, *supra* note 55.
[64] *Ibidem,* Article 41.

> everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 (1)).

It must also be underscored that the compensation can be obtained via proceedings in civil courts, as according to the provisions of Article 417 of the Polish Civil Code the Treasury of the State bears responsibility for the illegal acts of its organs committed during the performance of official powers.[65]

5.2. Human rights violations in the course of operation of the secret detention centers

Poland is bound by all the major international obligations protecting human rights, and is a state party to the majority of fundamental treaties for the protection of human rights. It has ratified, *inter alia,* the International Covenant on Civil and Political Rights ("ICCPR"),[66] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"),[67] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT"),[68] and the European Convention on Human Rights ("ECHR"), as well as the series of accompanying protocols.

According to the above-mentioned acts torture is defined as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1 of UNCAT).

This definition should not be used as the definition of torture to punish an individual for the criminal offence, inasmuch as it lacks clarity – it does not explain

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[65] Kodeks cywilny (Civil Code), Dziennik Ustaw (Journal of Law) 1963, No. 16, item 93, as subsequently amended.

[66] International Covenant on Civil and Political Rights (adopted December 16, 1966; entered into force on March 23, 1976), 99 UNTS 171.

[67] UNCAT, *supra* note 25.

[68] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (adopted November 6, 1987; entered into force on March 1, 2002).

the meaning of the notions used in its construction of the definition, and the acts of torture are not exhaustively listed. Nonetheless it can serve as an indicator of what can be called acts of torture. It lists the most fundamental elements of torture: it must involve pain or suffering; it must be caused with the certain intent (to force, to obtain information, to punish); it must be performed by a state and against a person who is deprived of his/her liberty.

In addition to the definition of torture, the above treaties also contain concrete provisions concerning the situation of the individual and obligations imposed on the state. The treaties prohibit torture and inhuman or degrading treatment (Article 7 of the ICCPR and Article 3 of the ECHR), and moreover the state is obliged to prevent all acts of torture under its jurisdiction (Article 2 UNCAT).

As is apparent even in the titles of the treaties, there is a difference between torture and degrading, inhuman treatment, but neither the ICCPR, UNCAT nor the ECHR contain definitions of these concepts, so sharp distinctions cannot be identified. The European Court of Human Rights has addressed this issue, indicating the distinction between torture and degrading, inhuman treatment in its 1978 judgment in the case of *Ireland v. The United Kingdom,* which concerned the issue of five interrogation techniques used by the British security forces on IRA suspects. According to the Court the "distinction derives principally from a difference in the intensity of the suffering inflicted."[69] In that case the Court stressed that while the five interrogation techniques did constitute inhuman and degrading treatment, "they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood." The Court's judgment indicates that torture must be interpreted as more intense and cruel than inhuman and degrading treatment, i.e. as its aggravated form.[70] It should also be kept in mind that the prohibition against torture is universally recognized as a norm of international customary law, and moreover it has the status of a peremptory norm.[71]

The UNCAT, in Article 3, states that "no State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds

[69] *Ireland v. The United Kingdom* (5310/71) Judgment, ECHR, 18 January 1978, para. 167.

[70] Two decades later, in the case *Selmouni v. France,* the Court called the European Convention a "living instrument which must be interpreted in the light of present-day conditions" pointed out that "certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future". Although the Court underlined the development of human rights and the standards of protection of human rights, it retained the difference between torture and inhuman and degrading treatment. *Selmouni v. France*, 25803/94, Grand Chamber, ECHR, 28 July 1999, para. 101.

[71] E. de Wet, *The prohibition of torture as an international norm of jus cogens and its implications for national and customary law*, 15 (1) European Journal of International Law 97 (2004), p. 98.

for believing that he would be in danger of being subjected to torture". This *non-refoulment* rule was reflected in the judgment in the *Soering* case before the European Court of Human Rights. The Court confirmed that the decision to extradite a fugitive may violate Article 3 of the ECHR (prohibition of torture and other cruel and degrading treatment), and "engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country." The responsibility of a state in such a case is a "direct consequence of the exposure of an individual to the proscribed ill-treatment."[72]

Under Article 4 of UNCAT a State party shall criminalize acts of torture, attempts to commit torture, and acts constituting complicity and participation in acts of torture. Such offences should be punishable by appropriate penalties.

Furthermore the above-mentioned treaties also contain prohibitions concerning the deprivation of liberty. Deprivation of liberty can only be the result of a lawful detention in prison following a judgment of a court, or lawful detention in arrest, in which case the person detained should be promptly informed of any charges against him/her (Article 5 of ECHR, Article 9 of ICCPR).

All these treaties contain special enforcement mechanisms providing for certain proceedings such as reports, individual complaints,[73] communications, or the complaint of a state. Any individual whose rights or freedoms were violated in Poland can act in accordance with the procedures provided for by said mechanisms. As long as these mechanisms are effective, general rules on state responsibility are excluded.[74] Additionally it must be emphasized that the Draft Articles on state responsibility are limited only to states. Only a state can invoke other state's responsibility. Mechanisms devoted to the protection of individuals by international treaties are of a different nature, as "[A]rticles on state responsibility are concerned with the legal consequences of concrete breaches. Reporting procedures before treaty bodies are not. Their function is to provide a comprehensive critique of the human rights situation in a particular member state."[75] This does not mean however that if a special regime of human rights' protection fails to protect human rights, the individual will be left without any remedy. The probable solution would

[72] *Soering v. The United Kingdom* (14038/88), Judgement, ECHR, 7 July 1989, para. 91.

[73] The scope of protection of UNCAT or ICCPR is similar, but ICCPR, for example, provides more mechanisms of protection as it includes state responsibility for violations of the rights of an individual.

[74] B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law,* 17 (3) European Journal of International Law 483 (2006), p. 525.

[75] *Ibidem*, p. 525.

be to commence an action based on general rules of state responsibility, as nothing could relieve the states from their obligation to "induce compliance with obligations under human rights treaties, once the collective enforcement mechanisms of the treaty have failed."[76]

In discussing state responsibility for the violation of human rights in terms of the concrete cases of Abu-Zubaydah's and Al-Nashiri's detentions, it must be mentioned that they should primarily exercise their rights through the provisions of the domestic law. If they do not succeed they can file a claim to the European Court of Human Rights indicating the violations of certain rights provided for in the European Convention on Human Rights (or in the case of rights arising under other international treaties, to other international bodies). Consequently, the most effective mechanism for obtaining compensation is the mechanism provided by the European Court of Human Rights. In contrast to mechanisms provided by other human rights' treaties, this mechanism is a judicial procedure, but it can be activated only after all available national procedures have been exhausted. Currently there are two proceedings pending in Poland (as mentioned above, Abu Zubaydah and Al Nashiri).

CONCLUSION

On the basis of the above considerations, some general remarks may be made concerning the potential scope of Poland's responsibility, and that of Polish state officials.

Poland presumably allowed CIA flights to land in Poland, allowed the use Polish territory to transport detainees, and Polish crew navigated these aircrafts. This means that Poland permitted the violation of human rights on its territory. One may apply a presumption, resulting from the fact that Poland enjoys effective control over its territory, that it must have known about the scope of the American activities.

The agreement between Poland and the USA is not publicly known, so we can only hypothetically postulate that Poland facilitated (aided and assisted) in the commission of crimes by the CIA. Poland delegated its local officials to assist the CIA functionaries. Although it is alleged that they performed only logistical functions without having contacts with detainees, this can also be held to be facilitating the commitment of a crime.

[76] *Ibidem*, p. 528

Furthermore Poland violated its primary human rights obligation to prevent acts of torture in the territory under its jurisdiction (Article 2 of UNCAT, Article 3 of ECHR, Article 7 of ICCPR), and the *non-refoulment* rule, as it allowed for transports to the territory of a state where there was a risk that a detainee might be tortured or subjected to other cruel, inhuman, or degrading treatment (Article 3.1. UNCAT).

Poland has so far neither punished the perpetrators of torture or other cruel, inhuman, or degrading treatment, nor even properly and effectively investigated the allegations relating to violations of human rights. But proceedings are still pending. So far one person has been charged with violating international law and exceeding his powers.

Consequently, one may argue that Poland, through its acts and omissions, aided and assisted in the commission of an internationally wrongful act (Article 16 of the ILC draft). It must be underscored that the scope of Poland's potential responsibility will depend on the scope of its knowledge about the wrongfulness of the committed acts, i.e. whether officials knew about the interrogations, application of enhanced techniques, torture, etc. Their actions, which led to the result of illegal detentions, torture and other inhuman acts, are also contrary to the Polish Constitution and other domestic acts such as the criminal code.

At the moment Polish international authority is at issue. It needs to sufficiently explain the extent of its acts and who bears the responsibility for any illegal acts. It is not only the legal but also the moral duty of the assisting state to reveal all that facts concerning its cooperation that led to torture, inhuman and degrading treatment, or extraordinary renditions.