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Committee of Ministers
Council of Europe

Al Nashiri v. Poland (application No. 28761/11)

The Helsinki Foundation for Human Rights submits this communication to the Committee of Ministers in respect of the implementation of the European Court of Human Rights (hereinafter: ECHR) judgement *Al Nashiri v. Poland* of 24 July 2014. The Helsinki Foundation for Human Rights (hereinafter: HFHR) is a non-profit NGO based in Warsaw, Poland. Within the proceedings, HFHR submitted an *amicus curiae* brief to the European Court of Human Rights concerning the ongoing investigation on an alleged CIA secret detention facility in Poland.[1]

Since February 2015 when the judgement in *Al Nashiri v. Poland* became final, the Committee of Ministers of the Council of Europe has held proceedings aimed at the supervision of the execution of the Court's judgment. HFHR would like to present its comments concerning the ongoing investigation, its independence from political influences as well as certain issues concerning effective democratic oversight of special security services in Poland.

1. Effective investigation concerning the alleged CIA secret detention facility

The Court found in the Al Nashiri judgement a violation of Article 3 in its procedural aspect due to the lack of an effective investigation concerning the applicant's illegal detention and alleged torture he had been subjected to when in detention. The Court found that "securing proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the Polish State institutions' adherence to the rule of law and the Polish public has a legitimate interest in being informed of the investigation and its results".

An updated versions of the action plan submitted by the Government[2] shows that motions for legal assistance issued by the prosecutor's office were refused by the U.S. authorities. The most important actions undertaken by the prosecutor's office were interviews with the applicant's lawyer and gaining new documents from the office of the President of Poland.

This brought the Committee to the conclusion that "concrete results have still not been achieved."[3] The same concern was formulated by the European Parliament in its resolution adopted on 8 June 2016. The European Parliament expressed "its serious concerns about the apathy shown by Member

1 *Al Nashiri v. Poland*, 24 July 2014, application no. 28761/11, para. 477-478.
2 Updated action plan as to the measures to comply with the judgments in the cases of Al Nashiri and Abu Zubaydah v. Poland (18 May 2016, DH-DD(2016)627).
3 Committee of Ministers, 1259th meeting – 7-8 June 2016, Item H46-21.

00-018 Warszawa, ul. Zgoda 11; tel.: (48 22) 556-44-40, fax: (48 22) 556-44-50; e-mail: hfhr@hfhr.org.pl, www.hfhr.pl
NIP: 525-12-61-255, konto: PKO BP SA I O/Centrum 58 1020 1013 0000 0502 0002 9165, swift: BPKOPLPW

States" with regard to investigating gross human rights violations related to the existence of CIA secret sites. Thus the Parliament urged e.g. Poland "to conduct, as a matter of urgency, transparent, thorough and effective criminal investigations into CIA secret detention facilities."

Even though the investigation has been prolonged until 11 October 2016, it is highly probable it will be discontinued without providing basic information about the person responsible for the existence of the secret detention site operated by the U.S. authorities on the Polish territory.

On 16 March 2016 the RMF FM radio reported that the investigation conducted by the Prosecutor's Office in Cracow would be discontinued.[4] According to the radio's press release, the prosecutor's office was to discontinue the proceedings due to the lack of new evidence or information relevant for the investigation. It suggested that the prosecutor's office would confirm in its decision that the secret CIA site detention was present in Poland.

According to information submitted by the Prosecutor's Office in Cracow, one person is formally suspected within the investigation.[5] However, according to media information, the evidence is not strong enough to charge this person. The media informed that the written reasoning of the decision might be "controversial," since it would confirm the existence of CIA secret prison in Poland. Moreover, in April 2016 the media reported that one aspect of the investigation, concerning the negligence of the previous Prosecutor General who did not initiate an investigation in 2006 after he was informed about the secret detention in Poland, had been discontinued.[6] The reason for this decision is unknown.

In November 2013, an application to the Appellate Prosecutor's Office in Cracow was submitted seeking victim status in the ongoing investigation for Mustafa al-Hawsawi. He was captured in 2003 in Pakistan and then placed under custody of the United States of America. Mustafa al-Hawsawi was tortured and detained in secret Central Intelligence Agency (CIA) black sites in the CIA's Rendition, Detention, and Interrogation (RDI) Programme until September 2006. In September 2006, Mr. al-Hawsawi was transferred to Guantánamo Bay, Cuba and U.S. officials finally acknowledged his detention.[7] The complaint of Mr. al-Hawsawi relied on an analysis of publicly available evidence, including flight data and suspected movement of other detainees of a similar profile. According to REDRESS, London-based NGO representing Mr. al-Hawsawi, the evidence points to a strong likelihood that he was secretly held in, and/or transferred through, Poland.[8] In March 2014, the prosecutor's office rejected the application for victim status. The prosecutor found there was no evidence that Mustafa al-Hawsawi was present in Poland, thus refused to provide him a status of a "victim" in the investigation. The appeal was submitted, but the District Court in Szczytno refused it arguing there was no evidence that Al-Hawsawi was present on the territory of Poland.[9] In March 2016, an application was submitted to the European Court of Human Rights.[10]

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4 *Śledztwo w sprawie więzień CIA w Polsce do umorzenia. Treść uzasadnienia wzbudzi kontrowersje* (16 March 2016), available (in Polish) at: http://www.rmf24.pl/fakty/polska/news-sledztwo-w-sprawie-wiezien-cia-w-polsce-do-umorzenia-tresc-u,nId,2163348.

5 Information from the Appellate Prosecutor in Cracow – available at: http://www.hfhrpol.waw.pl/cia/images/stories/file/prokuratura.pdf.

6 *Pierwsze umorzenie w śledztwie ws. tajnych więzień CIA na terenie Polski* (22 April 2016), available (in Polish) at: http://www.tvn24.pl/wiadomosci-z-kraju,3/tajne-wiezenia-cia-w-polsce-pierwszy-umorzony-watek,637940.html.

7 Details of the case: http://www.redress.org/case-docket/al-hawsawi-case-1.

8 Application is available at: http://www.redress.org/downloads/application-to-appellate-prosecutor---english-translation.pdf.

9 Decision of the District Court in Szczytno of 28 September 2015, case no. II Kp 397/14.

10 Available at: http://www.redress.org/downloads/16poland.pdf.

2. Independence of the prosecutor's office

In the *Al Nashiri* judgement, the Court did not analyse the argument brought by the applicant that the investigation lacked independence. It found, however, that the decision of the Prosecutor General (for example to transfer the investigation from Warsaw to Cracow) "unavoidably contributed to the prolongation of the proceedings."[11] According to the Court's case-law, the standards concerning effective investigation cover also its independence. In the *Al Nashiri* judgement, the Court underlined that "the investigation should be independent of the executive. Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms."[12]

On 4 March 2016, the new Law on the Prosecution entered into force.[13] As a result of amendments to the structure of prosecution units, the investigation is currently pending in the Regional Prosecutor's Office in Cracow, which has replaced the former Appellate Prosecutor's Office in Cracow. Apart from the structural reorganization of the Prosecution, the Law on the Prosecution amended the rules on the competences and appointment of the Prosecutor General.

Until 2009, the Minister of Justice acted also as the Prosecutor General. Such a convergence of roles posed a potential (or sometimes real) danger of subjecting prosecutors' work to political influences. In 2009, the reform of the Prosecution was introduced. In the light of this reform, these two offices were separated and the Prosecutor General's office became independent, although the Prosecutor General was obliged to present annual summaries of its work to the Parliament. The Law of 2016 has reversed this reform. After 4 March 2016, the office is held by the Minister of Justice who is an active politician and who does not necessarily need to meet the requirements for the office of a prosecutor candidate (*asesor prokuratorski*).

According to the CoE Commissioner for Human Rights, these amendments raise important human rights concerns.[14] The new law widened the competences of the Prosecutor General and did not establish any safeguards against undue political influence on each investigation or against abuse of his/her power.

The Prosecutor General has the power to intervene at each stage of legal proceedings led by any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases.[15] The Prosecutor General can also revoke or modify decisions taken by prosecutors.[16] Individual instructions might be reviewed by a higher-level prosecutor who, however, was directly appointed by the Prosecutor General without any competitive process on the basis of a discretionary decision.[17] Thus, it is highly doubtful it this review will be effective.

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11 *Al Nashiri v Poland*, para. 493

12 *Al Nashiri v. Poland*, para. 486.

13 Act of 28 January 2016 - Law on Prosecutor Office, Official Journal of Laws of 2016, position no. 177.

14 Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Poland, from 9 to 12 February 2016, CommDH(2016)23.

15 Article 7.2. of Law on Prosecutor Office.

16 Article 7.4. of Law on Prosecutor Office.

17 Article 7.3. of Law on Prosecutor Office in conjunction with Article 15.1 of Law on Prosecutor Office. The Rome Charter (Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors) recommeds that "the recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law

On the one hand it allows to intervene in each investigation, on the other – it gives a competence to decide (directly or indirectly) which prosecutor will conduct a particular investigation. Thus the political involvement of the Prosecutor General undermines the trust in the independence of each investigation conducted by the Prosecution. It contravenes the rules of the Rome Charter which states that "Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of the separation of powers and accountability."[18]

The new competences assigned to the Prosecutor General have direct influence on the investigation conducted by the Cracow Regional Prosecutor. According to Article 57 para. 7 in particularly justified cases the Prosecutor General is entitled – for the purpose of pre-trial proceedings – to declassify or amend the classification of a document previously classified under Law of 2010 on protection of classified information. Before making this decision, the Prosecutor General is obliged to obtain an opinion of a relevant authority which classified the information, and has to inform the Prime Minister about it. Such a competence constitutes an important exception from the general rules on classification which require a consent of a relevant special security service to declassify information. It gives the government a new tool to gather new information for the purpose of investigation which might be available even if they are classified. A decision to declassify depends fully on the Prosecutor General and is not followed by judicial review.

3. Intelligence oversight

Apart from the ongoing investigation, the Committee of Ministers is also analysing of the oversight mechanisms of intelligence services which failed in cases of *Al Nashiri v. Poland* and *Abu Zubaydah v. Poland*. Thus, the Committee of Ministers at its 1259th meeting (7-8 June 2016) asked the Government to address the root causes of violations found by the Court in *Al Nashiri* case, such as scrutinising the process of high-level decision making in the field of intelligence and international intelligence cooperation.

The Court found that the *Al Nashiri* case "points out (...) to a more general problem of democratic oversight of intelligence services." It concluded that the Convention "requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations."[19]

The system of intelligence oversight was established in Poland in the 90s as a result of democratic transition that Poland underwent after 1989. The challenges concerning the new threats to public security after 9/11, new competences of special services concerning mass surveillance as well as technological development did not influence the oversight system in Poland. Thus, the CoE Commissioner for Human Rights highlighted that in Poland there is no expert oversight body „that would have the required expertise and the necessary competencies and powers to place the activities of special services under review."[20]

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and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review".

18 Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, Principle V.

19 *Al Nashiri v. Poland*, para. 498.

20 Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Poland, from 9 to 12 February 2016, CommDH(2016)23, p. 12.

The same criticism in relation to the provisions on surveillance was expressed by the Venice Commission in its opinion concerning recent amendments to Act on the Police.[21] The Venice Commission recommended that an effective mechanism of oversight should be provided. An independent body established for this purpose should have "necessary investigative powers and expertise and be able to use appropriate legal remedies."

In HFHR's opinion, establishment of such independent expert body with access to classified information and investigative competences is crucial to ensure the rule of subsidiarity and prevent future complaints against the abuse of powers by secret services. The CoE Commissioner for Human Rights recommended that "oversight bodies should also have access to all information, regardless of its level of classification, which they deem to be relevant to the fulfilment of their mandates." The lack of access to classified information is one of the major obstacles to an effective *ex post* oversight of alleged existence of CIA secret detention sites in Poland. Thus, the European Parliament in its recent resolution expressed its "concerns regarding the obstacles encountered by national parliamentary and judicial investigations into some Member States' involvement in the CIA programme, and the undue classification of documents leading to de facto impunity for perpetrators of human rights violations."

Such a mechanism is particularly important in the light of the recently adopted Anti-terrorism Law which allows wire-tapping of a foreigner, without the need to obtain a judicial warrant. The competence to initiate the so-called operational control (*kontrola operacyjna*) depends fully on the Head of the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*, ABW). It violates the standard expressed recently by the European Court of Human Rights in *Zakharov v. Russia*[22] and *Szabo and Vissy v. Hungary.*[23] According to the Court's case-law, national legislation on surveillance needs to provide for adequate and effective safeguards and guarantees against abuse.[24] Thus, the Court in *Szabo and Vissy*, two cases concerning the Hungarian anti-terrorism law allowing for wire-tapping only on the basis of a decision of the Minister of Interior, found a violation of Article 8 of the Convention.

Furthermore, the statutory regulation concerning international intelligence cooperation does not provide any standards and limits for such cooperation. According to Article 8.2 of the Act on the Internal Security Agency and Intelligence Agency,[25] the Head of Agency might initiate cooperation with foreign services after receiving the authorization from the Prime Minister. This provision does not require that such cooperation be based on a written agreement, which could constitute a guarantee against any abuse of power and secure future oversight.[26] Furthermore, the law does not envisage any limitations (e.g. concerning human rights protection by the partner intelligence agency[27]), except the procedural one, namely the authorization by the Prime Minister.[28]

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21 Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), CDL-AD(2016)012-e.

22 *Zakharov v. Russia*, GC, 4 December 2015, Application no. 47143/06.

23 *Szabo and Vissy v. Hungary*, 12 January 2016, application no. 37138/14.

24 *Zakharov v. Russia*, para. 236.

25 Act of 24 May 2002 on Internal Security Agency and Intelligence Agency, Official Journal 2002, No. 74, position, 676.

26 „Independent oversight institutions are able to examine intelligence-sharing arrangements and any information sent by intelligence services to foreign entities" - UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *"Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight"*, A/HRC/14/46, Practice 34

27 „Mandate oversight bodies to scrutinise the human rights compliance of security service co-operation with foreign bodies, including co-operation through the exchange of information, joint operations and the provision of equipment and training. External oversight of security service co-operation with foreign bodies should include but not be

The lack of an independent expert oversight body with access to classified information in conjunction with basic challenges of security services oversight (such as plausible denial or third party rule) drastically precludes any effective oversight of international intelligence cooperation. For this reason, an international standard suggested frequently by experts is the requirement that there should be at least one external oversight body that is empowered to scrutinise the policies and practices relating both to the outgoing and incoming sharing of personal data with foreign entities. Moreover, it shall have full access to information held by the intelligence services, including information from or pertaining to international intelligence cooperation, which it considers to be relevant for the fulfilment of its mandate.[29] Consideration should be given to requiring intelligence services to include in their agreements with foreign partners a clause stating that cooperation may be subject to scrutiny by a particular oversight body.

On behalf of the Helsinki Foundation for Human Rights,

Danuta Przywara
President of the Board

The submission was prepared by Barbara Grabowska-Moroz, lawyer of the Helsinki Foundation for Human Rights with the support of prof. Ireneusz C. Kamiński.

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limited to examining: a. ministerial directives and internal regulations relating to international intelligence co-operation; b. **human rights risk assessment and risk-management processes relating to relationships with specifc foreign security services and to specifc instances of operational co-operation**; c. outgoing personal data and any caveats (conditions) attached thereto; d. security service requests made to foreign partners: (i) for information on specifc persons; and (ii) to place specifc persons under surveillance; e. intelligence co-operation agreements; f. joint surveillance operations and programmes undertaken with foreign partners" - *Democratic and effective oversight of national security services*. Issue paper published by the Council of Europe Commissioner for Human Rights (2015), p. 12. Moreover, „at a minimum, States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question. (...) Hence, States that receive information obtained through torture or inhuman and degrading treatment are complicit in the commission of internationally wrongful acts. Such involvement is also irreconcilable with the obligation erga omnes of States to cooperate in the eradication of torture" - *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, 4 February 2009, A/HRC/10/3.

28 UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *"Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight"*, A/HRC/14/46, Practices 31-35.

29 Hans Born, Ian Leigh and Aidan Wills, *Making International Intelligence Cooperation Accountable*, DCAF 2015, p. 138-139