

JANKOWSKI & CO.

Al. Jana Pawla II 34 lok. 3
00-141 Warszawa
t/f: +48 22 624 72 81
e: bartlomiej@jankowski.org.pl
w: www.jankowski.org.pl

Warsaw, 16th December 2010

**APPEAL PROSECUTION OFFICE IN WARSAW
V'TH DEPARTMENT
FOR COMBATING ORGANIZED CRIME AND CORRUPTION
ul. Ostroroga 24e
01-163 Warsaw**

Applicant: advocate Bartlomiej Jankowski

correspondence address:
in heading

acting on behalf of :

Zayn al-Abidin Muhammad Husayn'a

also known as:

Abu Zubaydah

detained at:

Prison of

United States Naval Base

Guantanamo Bay

Cuba

Case reference number: Ap V Ds. 37/09

**ATTORNEY IN FACT APPLICATION WITH THE MOTION TO ENCLOSE
VICTIM STATUS IN PROCEEDING AND NOTIFICATION ON SUSPICION OF
CRIMINAL OFFENCES**

I. Notification on suspicion of criminal offences

Acting on behalf of Zayn al-Abidin Muhammad Husayn (also known as Abu Zubaydah, hereinafter „**Abu Zubaydah**” or “**Constituent**”), on the ground of the power of attorney document signed by Joseph Margulies, I hereby submit my power of attorney to act as his representative in the investigation being conducted by the Appellate Prosecutor’s Office in Warsaw, Department V for Combating Organized Crime and Corruption concerning the offence of article 231 §1 of the Polish Criminal Code (hereinafter “**CC**”) and others regarding the suspicion of existence in Poland of at least one secret outpost (hereinafter “**the Site**”) to which unspecified persons – including my Constituent - were brought illegally, detained illegally,

tortured and abused, and subsequently illegally removed from Polish territory, with the participation of the United States Central Intelligence Agency (hereinafter “CIA”) in the situation in which Polish public officers were aware of such activity and at the least did not raise any objections thereto.

I hereby state that the power of attorney document, attached to this notification has been signed by Joseph Margulies – *attorney-at-law*- legal consul of Abu Zubaydah in proceeding conducted in United States of America, on the ground of the art. 83 § 1 CPC in relation to the art. 88 § 1 CPC. Moreover - according to the possessed information – I state that my Constituent is imprisoned at U.S. Naval Base – Guantanamo Bay (Cuba) so the authorization to act on behalf (of Abu Zubaydah) in criminal proceeding could be done by other persons.

Moreover, in relation to attorney in fact application on behalf of Abu Zubaydah, I do state as follows:

1. On the ground of the art. 117 § 1 CPC in relation to the art. 116 CPC , I demand to be informed and allowed to any action undertaken in pending proceeding, in particular:
 - a. on the ground of the art. 315 § 2 CPC, I demand to be informed of dates and places of any action undertaken in pending proceeding, so I (or another attorney at law representing my Constituent if the activities take place abroad) may take part therein;
 - b. on the ground of the art. 156 § 5 CPC, I demand to get the access to files of pending proceeding including authorization to make photographs and copies.

II. Notice Regarding Suspicion of Perpetration of Criminal Offences

There is a high probability of commitment of other offences to the detriment of my Constituent and others in relation to the operation of the Site on the territory of the Republic of Poland, apart from the described above offence of article 231 §1 of the CC. In particular:

1. offence of the art. 231 § 1 of the CC on harm of Abu Zubaydah, other persons and public order, by persons holding public officers offices and participating in the Site operation, by persons providing supplies and means to the Site and giving consent to the Site’s operation in relation to the art. 2 CC by persons supervising the abovementioned and in connection with article 18 §1 of the CC by people commanding them, including persons acting as central authorities of the state, in the form of consent for the operation of a site on the territory of the Republic of Poland, where people were detained without legal basis or judicial control of an independent tribunal, were subjects to torture and inhuman and degrading treatment and subsequently deported to a jurisdiction where they are at risk of torture, inhuman treatment or punishment and where capital punishment may be proclaimed and executed

2. offence of the art. 240 § 1 of the CC directly by all the persons who were aware of the existence and operation of the Site, in the form of refraining from informing the law enforcement authorities about the commitment of offences penalized by the article 189 § 1, 2 or 3 CC in effect of torturing and inhuman treatment of mentioned above persons;
3. offence of the art.246 of the CC on harm of my Constituent directly by persons conducting interrogations, in relation to the art. 18 § 1 of the CC by their supervisors or persons who have ordered them, in relation to the art. 2 of the CC by persons at whose disposal my Constituent remained during the detention in the Site and in connection with the art. 18 § 3 of the CC by persons who provided the infrastructure and means for the Site and who gave consent for the operation and organization of the Site, in the form of use of physical violence in the form of hitting with fists, kicking, walling and illegal threats of imprisonment and torture in order to force him to give testimony incriminating himself and other people, if the perpetrator is found to be a public officer in the meaning of article 115 § 13 of the CC;
4. offence of the art. 247 § 3 of the CC directly by persons at whose disposal my Constituent remained during the time of detention in the Site and by the persons who provided the infrastructure and means for the Site and who gave consent for the organisation and operation of the Site, as one of its functions was to use physical and psychological violence against persons imprisoned therein, if it is found that the abovementioned people were public officers;

It should be mentioned that the qualification of offences made above – in relation to the illegal operation of the Site on territory of the Republic of Poland harmful for my Client - has been done on the ground of substantial law binding in the moment of filing this notification. After establishing precise time and place of the alleged offences on the basis of presented evidence, it would be possible to exercise proper temporal laws, and in effect adopt the proper legal qualification, for illegal actions described in the statement of facts.

It is justified and necessary to conduct the proceedings in order to explain the circumstances of all offences described above and to hold the perpetrators accountable. In view of the circumstances of the above-mentioned offences, it is necessary to extend the scope of the proceedings conducted under file number Ap V Ds. 37/09.

III. Motion Regarding Accession to Further Proceedings as a Victim

A considerable amount of publicly available information indicates that, on a basis still unknown, there existed a detention site on the territory of the Republic of Poland, in which my Constituent was illegally detained and was subject to torture and degrading and inhuman treatment. In connection with the site's operation there is a high probability of commitment of the offences described in point 1 of this notification. My Constituent was detained without legal basis or judicial control of an independent authority, was subject to torture and inhuman and degrading treatment and subsequently deported to a jurisdiction where he was at risk of torture, inhuman treatment or punishment and where capital punishment may be proclaimed and executed.

Bearing in mind statements mentioned above it is justified to enclose my Constituent into criminal proceedings as a victim (injured person) as seen by article 49 §1 of the CPC, with all the rights connected to this status, as my Constituent is one of the people who suffered as a result of the existence of the Site.

I also declare that my Constituent wishes to act in the character of an auxiliary prosecutor in the potential judicial proceedings.

IV. Motions of evidence

In order to help establish and clarify precisely all circumstances of the case, having in mind the aims of criminal proceedings and the need to determine the material truth, I request the following evidence to be admitted. Apart of the motions of evidence mentioned below I do fully support all motions of evidence contained in the pleading of 21st September 2010 filed by advocate Mikołaj Pietrzak representing another injured person in the pending proceeding.

Moreover, I request that the following evidence be taken:

1. oral evidence of Abu **Zubaydah** (currently detained in the prison at the Guantanamo Bay United States Naval Base in Cuba) as the injured party, concerning his illegal detention, subjection to torture, inhuman and degrading treatment, as well as his transportation between various locations and concerning the identification of the location where he was detained within the territory of the Republic of Poland; this evidence may, if necessary, be taken via legal assistance procedures in accordance with the provisions of the Treaty on Mutual Legal Assistance in Criminal Matters between the Republic of Poland and the United States of America, drawn up on 10th July 1996 and in accordance with article 3 paragraph 2 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America, signed in Washington on 25th June 2003 (hereinafter "**Mutual Legal Assistance Agreement**");
2. oral evidence of **George W. Bush**, the former President of the United States in the period from 20th January 2001 to 21st January 2009, concerning the implementation of the CIA program in Europe, and in particular the existence of secret prisons within the territory of Poland, the detention and interrogation therein of detainees using so-called Enhanced Interrogation Techniques, (hereinafter "**Enhanced Interrogation Techniques**"), particularly with respect to the interrogation procedures used in relation to the injured party, Abu Zubaydah, about which this witness writes in his book entitled *Decision Points* – published on 9th November 2010, by the publisher, Random House Large Print Publishing; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
3. oral evidence of **George Tenet**, Director of Central Intelligence of the CIA in the period from 11th July 1997 to 11th July 2004, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had

access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who had gained reliable knowledge of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

4. oral evidence of **Tyler Drumheller**, chief of the European Division of the CIA's Directorate of Operations in the period from 2001 to 2004, concerning the capture of Abu Zubaydah, the existence of secret CIA prisons in Europe, the conditions that prevailed there, the interrogation methods used in relation to him by CIA officers and other persons who had access to him during his stay within the territory of the Republic of Poland; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
5. oral evidence of **John McLaughlin**, Director of Central Intelligence of CIA in the period from 11th July 2004 to 24th September 2004, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
6. oral evidence of **Porter Goss**, Director of Central Intelligence of the CIA in the period from 24th 2004 to 30th May 2006, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
7. oral evidence of **Michael Hayden**, Director of Central Intelligence of the CIA in the period from 30 May 2006 to 12 February 2009, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
8. oral evidence of **Leon Panetta**, Director of Central Intelligence of the CIA in the period from 13th February 2009 to date, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of

the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

9. oral evidence of **A.B. "Buzzy" Krongard**, Executive Director of the CIA in the period from 16th March 2001 to October 2004, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
10. oral evidence of **Kyle Dustin "Dusty" Foggo**, head of the Frankfurt Regional Support Terminal (the CIA's main supply base in Europe) in the period from 2003 to October 2004 and Executive Director of the CIA in the period from October 2004 to 2006, concerning his role in creating CIA black sites in Europe, their description and location, as well as concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
11. oral evidence of **Stephen R. Kappes** concerning the location or locations where Abu Zubaydah was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
12. oral evidence of **James L. Pavitt**, Deputy Director for Operations of the CIA in the period from August 1999 to 4th June 2004, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
13. oral evidence of **Jose Rodriguez**, director of the CIA Counterterrorist Center in the period from May 2002 to November 2004 and Deputy Director for Operations of the CIA in the period from 16th November 2004 to 30th September 2007, concerning the conditions, in which the destruction of the video recordings of the interrogations of Abu Zubaydah and other detainees occurred, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him; this evidence may be

taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

14. oral evidence of **John Helgerson**, Inspector General of the CIA, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
15. oral evidence of **Jay Bybee**, the author of the memorandum of 1st August 2002 concerning the interrogation of Abu Zubaydah, concerning his capture, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
16. oral evidence of **John Yoo**, the author of the memorandum of 1st August 2002 concerning the interrogation of Abu Zubaydah, concerning his capture, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
17. oral evidence of **Daniel Levin**, Acting Assistant Attorney General for the Office of Legal Counsel ("OLC") of the Department of Justice in the period from July 2004 to February 2005, concerning his sending of a letter to the CIA on 6th August 2004, indicating to the CIA that the use of waterboarding as an interrogation technique was unlawful, the preparation by him of opinions concerning the thirteen Enhanced Interrogation Techniques, particularly waterboarding, which stated that these techniques were illegal by virtue of the Federal Torture Statute, as well as concerning his signature of an opinion of 30th December 2004 updating the OLC interpretation relating to the Federal Torture Statute and superseding the opinion of Assistant Attorney General Jay Bybee, which had been in the public domain since August 2002; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
18. oral evidence of **John Rizzo**, formerly acting CIA General Counsel, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him

by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

19. oral evidence of **Steven Bradbury**, formerly acting CIA General Counsel, concerning the capture of Abu Zubaydah, the location or locations where he was detained, the conditions, in which he was detained, the interrogation methods used in relation to him by CIA officers and other persons who had access to him, as well as persons co-operating with CIA officers within the territory of the Republic of Poland and persons who became aware of their activities; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
20. oral evidence of the **pilot and commander** (identity unknown) of the N63MU plane, in the period from 2nd December 2002 to 6th December 2002, i.e. at the time when Abu Zubaydah was probably being illegally transferred onboard this plane between various Sites where he was held, concerning the carrying out of transfers of Abu Zubaydah, their frequency, routes and the conditions, in which they occurred, as well as the existence and content of the operational procedures adopted in these circumstances and concerning Abu Zubaydah remaining within the territory of the Republic of Poland in connection with the actions of third parties as described, including Polish public officers; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
21. oral evidence of **all the persons acting as pilots on board** the N63MU plane, and also as **members of the service personnel** of this plane, in the period from 2nd December 2002 to 6th December 2002, i.e. at the time when Abu Zubaydah was probably being illegally transferred onboard this plane between various Sites where he was held, concerning the carrying out of transfers of Abu Zubaydah, their frequency, routes and the conditions, in which they were carried out, as well as the existence and content of the operational procedures adopted in these circumstances and concerning Abu Zubaydah remaining within the territory of the Republic of Poland in connection with the actions of third parties as described, including Polish public officers; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
22. oral evidence of **Michael Keith Winograd**, who, according to publicly available information, headed the operations of the CIA facility in Thailand, concerning the operation of sites run by the CIA, in which detainees were illegally held outside US territory and were subjected to torture and degrading and inhuman treatment, the timing and conditions of Abu Zubaydah's detention at sites of this type and the location of the facility, to which he was transferred after leaving the site in Thailand; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

23. oral evidence of [REDACTED], head of the CIA facility in Thailand in 2002, concerning the operation of sites run by the CIA, in which detainees were illegally held outside US territory and were subjected to torture and degrading and inhuman treatment, the timing and conditions of Abu Zubaydah's detention at sites of this type and the location of the facility, to which he was transferred after leaving the site in Thailand; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
24. oral evidence of **Geoff Loane and other** authors of the International Committee of the Red Cross report of 14th February 2007 concerning the treatment of the fourteen "high value detainees" remaining at the disposal of the CIA, particularly those that had direct access to Abu Zubaydah, concerning the imprisonment of Abu Zubaydah without legal basis, the conditions, in which he was detained, his transportation by air between various detention sites within the territory of various countries and the use of torture and inhuman, degrading treatment in relation to him; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
25. oral evidence of [REDACTED], concerning the operation of sites run by the CIA, in which detainees were illegally held outside US territory and were subjected to torture and degrading and inhuman treatment, the timing and conditions of Abu Zubaydah's detention at sites of this type, particularly within the territory of the Republic of Poland, Abu Zubaydah's arrival and departure from the territory of the Republic of Poland, the treatment of Abu Zubaydah at the time when the deponent was responsible for him, and also concerning the knowledge of Polish public officers and other persons about the operation of the Site in the Republic of Poland and the circumstances associated with this practice; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
26. oral evidence of the persons forming part of the medical personnel monitoring the health status of persons held at the Site (identity unknown), concerning the timing and conditions of Abu Zubaydah's detention at the site, Abu Zubaydah's arrival and departure from the territory of the Republic of Poland, the treatment of Abu Zubaydah at the time when the deponents were responsible for him and his health status and the level of pain which was inflicted on him, and also concerning the knowledge of Polish public officers and other persons about the operation of the site and the circumstances relating to this practice; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
27. oral evidence of the person only known as "**Albert**" in press materials, probably residing in the United States of America, currently at a CIA facility in the Republic of Poland, who conducted the interrogation of detainees, probably including Abu Zubaydah, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken

via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

28. oral evidence of the person only known as "**Mike**" in press materials, probably residing in the United States of America, a higher ranking officer who was present at the CIA facility in the Republic of Poland and took part in the interrogation of detainees, probably including Abu Zubaydah, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
29. oral evidence of "**Deuce**" **Martinez**, who, according to publicly available information, was present at the CIA facility in the Republic of Poland and took part in the interrogations of Abu Zubaydah and other detainees, in relation to which Enhanced Interrogation Techniques were used, such as sleep deprivation, low temperatures, fear, pain and waterboarding, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
30. oral evidence of **Ali Soufan**, who, according to publicly available information, carried out the initial interrogation of Abu Zubaydah, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
31. oral evidence of **Stephen Gaudin**, who, according to publicly available information, was present at Abu Zubaydah's initial interrogation, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
32. oral evidence of **John Kiriakou**, who, according to publicly available information, was present at the capture, initial detention and interrogation of Abu Zubaydah, concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
33. oral evidence of Dr. **R. Scott Shumate**, Chief Operational Psychologist for the CIA Counterterrorist Center, who was present at Abu Zubaydah's initial interrogation,

concerning the timing and location of Abu Zubaydah's detention, the conditions, in which he was detained, the interrogation methods used in relation to him and other circumstances associated with this practice, about which he could be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

34. oral evidence of **John L. McPherson**, lawyer of the CIA Office of General Counsel, who was present at the CIA facility in Thailand, and who viewed all 92 videotapes and other materials arising i.a. during the interrogation of Abu Zubaydah, concerning the content of the recordings and the messages transmitted by the CIA facility in Thailand to the main CIA head quarters, the treatment of Abu Zubaydah during interrogations, as well as concerning the time and place, in which this practice occurred and how it related to the overall plan of torturing and terrorising Abu Zubaydah, and also other circumstances associated therewith, about which the deponent may be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
35. oral evidence of **Khalid Sheik Mohammed, Ramzi bin al-Shibh, Abd al-Rahim al-Nashiri** (currently probably detained at the prison at the Guantanamo Bay United States Naval Base in Cuba) and **Abu Yasir Al Jaza'iri** (last known to be in custody of the United States of America), who, according to publicly available information, were held at the CIA site in the Republic of Poland at the same time as Abu Zubaydah, concerning their illegal detention, subjection to torture, inhuman and degrading treatment, as well as their transfer between various locations and concerning the identification of the location where he was held within the territory of the Republic of Poland and other circumstances associated with this practice, about which they may be aware; this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
36. oral evidence of **Christopher R. Hill**, ambassador of the United States of America in the Republic of Poland in the period from 2000 to 2004, who until recently acted as the ambassador of the USA in Iraq, concerning the existence of a CIA Black Site within the territory of the Republic of Poland in the indicated period, the detention therein of detainees suspected of terrorism, including Abu Zubaydah, the use of torture and inhuman and degrading treatment in relation to them and the knowledge of and also the potential consent of Polish public officers for the existence of this site and for the practice which took place therein, this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;
37. oral evidence of **Victor H. Ashe**, ambassador of the United States of America in the Republic of Poland in the period from 2004 to 2009, USA citizen, concerning the existence of a CIA Black Site within the territory of the Republic of Poland, the detention therein of detainees suspected of terrorism, including Abu Zubaydah, the use of torture and inhuman and degrading treatment in relation to them and the knowledge of and also the potential consent of Polish public officers for the existence of this site and for the

practice which took place therein, this evidence may be taken via legal assistance procedures in accordance with the provisions of the Mutual Legal Assistance Agreement;

38. oral evidence of **Jerzy Buzek**, Prime Minister of the Republic of Poland in the period until 19th October 2001, concerning the conclusion of agreements between the Republic of Poland and the United States of America and between the Polish intelligence services and the CIA after the terrorist attacks on the World Trade Center on 11th September 2001, prepared in the period when he held the office of Prime Minister of the Republic of Poland, concerning mutual support with respect to counter terrorism, as well as concerning who could have had this knowledge at that time and if disclosure to the relevant authorities was refrained from;
39. evidence from the hearing of **General Marek Dukaczewski**, head of Military Intelligence Services from October 2001 to November 2004, related to the circumstances surrounding his involvement with authentication and support for the CIA operations in the Republic of Poland, and to whether he had any knowledge of a CIA facility operating on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
40. evidence from a hearing of **Andrzej Barcikowski**, head of Internal Security Agency from June 2002 to November 2005, related to whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
41. evidence from a hearing of **Marek Siwiec**, head of the National Security Bureau from February 1997 through June 2004, related to the circumstances surrounding his involvement in authenticating and providing support to CIA operations in Poland as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
42. evidence from the hearing of **Zbigniew Nowek**, head of Intelligence Agency from November 2005 to March 2008, related to content of the information revealed through an investigation carried out by the Parliamentary Commission for Special Services in December of 2006 and during a 2006 meeting at the office of the Prime Minister of the Republic of Poland - Kazimierz Marcinkiewicz, attended by members of the Intelligence Agency, devoted to CIA operations at the Stare Kiejkuty Military Base as well as support CIA was to provide to about twenty Polish intelligence officers, and whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;

43. evidence from a hearing of **Roman Giertych**, former head of the Parliamentary Committee for Security Services, related to content of the information revealed through an investigation carried out by the Parliamentary Commission for Special Services in December of 2006 and during a 2006 meeting at the office of Prime Minister of the Republic of Poland - Kazimierz Marcinkiewicz attended by members of the Intelligence Agency devoted to CIA operations at the Stare Kiejkuty Military Base as well as support CIA was to provide to about twenty Polish intelligence officers, and whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
44. evidence from a hearing of **Janusz Kaczmarek**, Minister of Internal Affairs and Administration from February 2007 through August 2007, related to the content of a 2006 meeting at the office of Prime Minister of the Republic of Poland - Kazimierz Marcinkiewicz, attended by members of the Intelligence Agency devoted to CIA operations at the Kiejkuty Military Base as well as support CIA was to provide to about twenty Polish intelligence officers, and whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
45. evidence from a hearing of **Witold Marczuk**, head of Internal Security Agency from November 2005 to December 2006, related to a 2006 meeting at the office of Prime Minister of the Republic of Poland - Kazimierz Marcinkiewicz, attended by members of the Intelligence Agency devoted to CIA operations at the Stare Kiejkuty Military Base as well as support CIA was to provide to about twenty Polish intelligence officers, and whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
46. evidence from a hearing of **Zbigniew Sosnowski** related to the content of a 2006 meeting at the office of Prime Minister of the Republic of Poland - Kazimierz Marcinkiewicz, attended by members of the Intelligence Agency devoted to CIA operations at the Stare Kiejkuty Military Base as well as support CIA was to provide to about twenty Polish intelligence officers, and whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
47. evidence from a hearing of **Marek Biernacki**, former chairman of the Parliamentary Committee for Special Services, former Minister of Internal Affairs and Administration, related to the circumstances under which he obtained knowledge of a facility being operated by CIA on territory of the Republic of Poland where prisoners were illegally detained, subjected to torture, degrading and inhuman treatment, and the circumstances surrounding this malpractice;

48. evidence from a hearing of **Janusz Zemke**, Vice Minister of Defense from October 2001 to October 2005, related to entering into an agreement for support for CIA operations on the territory of the Republic of Poland and its content, organizing of a team of civil and military intelligence officers, most likely reporting to Janusz Zemke, and the tasks of this team in relation to CIA operations on the territory of the Republic of Poland, the circumstances of his involvement in facilitation CIA flights over the territory of the Republic of Poland, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
49. evidence from a hearing of Major **Mariusz Haraf**, former commander of the Border Patrol, responsible for oversight of traffic at Szymany International Airport, related to circumstances surrounding CIA planes' landings at the airport, presence in Poland of any individuals connected with the flights organized by CIA, content of the documents created by Polish Border Patrol related to CIA flights and names of any individuals involved in this malpractice, as well as the circumstances under which he obtained knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
50. evidence from the hearing of **Jerzy Kos**, former CEO of "Mazury-Szczytno" Airport and a Managing Director for Szymany International Airport, related to the circumstances surrounding his communications with Military Information Services or CIA regarding arrivals and departures of CIA planes from Szymany International Airport, servicing of CIA flights and the names of all personnel who had any involvement with these flights, as well as the circumstances under which he obtained knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice;
51. evidence from a hearing of **Jaroslaw Jurczenko**, former Managing Director for Szymany International Airport, related to the circumstances under which CIA flights landed and departed from Szymany International Airport, transporting of CIA prisoners, and to other individuals involved with the CIA flights which landed at Szymany International Airport, servicing of CIA flights, the names of all personnel who had any involvement with these flights, as well as the circumstances under which he obtained knowledge of a facility being operated by CIA on the territory of the Republic of Poland where prisoners were illegally detained, subjected to torture and degrading and inhuman treatment, and the circumstances surrounding this malpractice
52. evidence from the hearing of **Mariola Przewlocka**, Szymany International Airport Managing Director between 2003 and 2006, related to the operations undertaken at Szymany International Airport, CIA planes' landings and takeoffs from Szymany

International Airport, transporting of detainees and other individuals involved with these CIA flights, vehicles that serviced CIA flights, the profits obtained from CIA operations, determination of what individuals received that compensation and who paid it, and the content of instructions given to Szymany International Airport personnel in connection with the CIA operations;

53. evidence from a hearing of **Barbara Piwnik**, Minister of Justice from October 2001 to May 2002, related to the circumstances surrounding her knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and operations involved in the investigation of the circumstances indicated above;
54. evidence from the hearing of **Grzegorz Kurczuk**, Minister of Justice during the period from July 2002 to May 2004, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;
55. evidence from a hearing of **Marek Sadowski**, Minister of Justice during the period from May 2004 through June 2004, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;
56. evidence from a hearing of **Andrzej Kalwas**, Minister of Justice from June 2004 through October 2005, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to

torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;

57. evidence from the hearing of **Zbigniew Ziobro**, Minister of Justice from October 2005 through November 2007, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;
58. evidence from the hearing of **Zbigniew Cwiakalski**, Minister of Justice from November 2007 to January 2009, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;
59. evidence from the hearing of **Andrzej Czuma**, Minister of Justice from January 2009 to November 2009, related to the circumstances surrounding his knowledge of any agreements concluded between the Republic of Poland and the United States of America, and between Polish Intelligence Services and CIA related to detention of individuals in the CIA's custody and their transportation through the territory of Republic of Poland, and the operations involved in the investigation of the circumstances indicated above, as well as whether he had any knowledge of a facility being operated by CIA on the territory of the Republic of Poland, where prisoners were illegally detained and subjected to torture, as well as degrading and inhuman treatment and circumstances surrounding this malpractice;
60. evidence from evidence provided by medical experts, including psychiatrists, and psychologists related to physical and mental health condition of Abu Zubaydah and the relationship between this condition and the fact he was tortured and subjected to inhuman, degrading treatment, as well as long-term detention in conditions incongruous with the minimum standards per human rights;
61. evidence from the text from the ruling of the Tribunal on the status of a participant in hostilities of March 27, 2007 which is attached to this protocol , and the statements Abu Zubaydah has made, regarding torture, inhuman and degrading treatment he experienced

during the detention from individuals acting under the command of the United States government which corroborate the necessity of conducting his hearing before Polish authorities in the course of the pending proceeding;

62. evidence from photocopies of pages from George W. Bush's book called *Decision Points* - published on November 09, 2010 by the publisher: Random House Large Print Publishing related to the fact the so-called enhanced interrogation techniques (Enhanced Interrogation Techniques), a part of the CIA program known as Enhanced Interrogation Program and the CIA program called Terrorist Surveillance Program were used with Abu Zubaydah, existence of secret prisons in Europe where prisoners were detained and interrogated with the use of the interrogation techniques indicated above;
63. evidence from content of the documents attached to this motion: letter from the Border Patrol Commanding Center Managing Director dated July 23, 2010, "Summary of landings and take offs of Boeing I Gulfstream planes at and from Szymany Airport between the years 2002 and 2005, and the table CIA Planes Arrivals to and Departures from the Territory of Poland" prepared by the Helsinki Foundation for Human Rights, related to the circumstances surrounding arrivals and departures of planes considered under CIA orders to and from Poland and the numbers of passengers on each of them;
64. evidence from hearings of flight controllers and support staff at the Szymany Airport between the years 2002 and 2005, and customs and border patrol officers who were responsible for the oversight of landings and takeoffs of aircrafts from the above mentioned airport, related to the circumstances surrounding landings and takeoffs of Boeing I Gulfstream aircraft at this airport and the circumstances surrounding those events, as well as takeoffs and landings of other civilian and military planes, whose circumstances of presence exhibited characteristics similar to those disclosed in the course of the hearing;
65. evidence from the hearing of the author of a document, attached hereto, entitled "Summary of Landings and Takeoffs of Boeing I Gulfstream Type Aircrafts at the Szymany Airport between the years 2002 and 2005", the circumstances verifying the document's authenticity and its official nature and the purpose for which it was prepared, as well as a list of individuals who were or could have been familiar with it;
66. evidence from the content of a document dated of May 07, 2004 entitled *Special Review of [censored] Counterterrorism Interrogation and Detention Operations (September 2001 - October 2003)*, (hereinafter „CIA OIG Special Review”), available at: http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf, related to the fact that torture, inhuman and degrading treatment, including behavior which put prisoners in immediate danger of losing their lives were used against prisoners detained at CIA facilities (including Abu Zubaydah), as well as objectives of secret CIA prisons program and the terms on which they operated;

67. evidence from the content of a document entitled *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, published by Office of Professional Responsibility, U.S. Department of Justice on July 29, 2009 (hereinafter: "**OPR Report**") which is an attachment to this letter, the circumstances surrounding creation and implementation of the CIA hearings program, as well as the fact that Abu Zubaydah was illegally detained, subjected to torture, as well as inhuman and degrading treatment;
68. evidence from the content of a document published by the Office of the Inspector General, U.S. Department of Justice, entitled *A Review of the FBI's Involvement in and Observations of detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* (hereinafter "**DoJ OIG FBI & Detainee Interrogations**"), available from the Internet at: <http://www.justice.gov/oig/special/s0910.pdf>, which is attached to this letter related to the fact Abu Zubaydah was illegally detained, subjected to torture, as well as inhuman and degrading treatment;
69. evidence from the content of a document entitled *Inquiry into the Treatment of Detainees in U.S. Custody*, published by Committee on Armed Services, United States Senate on November 20, 2008 (hereinafter: "**SASC Detainee Report**"), available from the Internet at http://armed-services.senate.gov/Publications/Detainee_Report_Final_April_22_2009.pdf, which is attached to this letter and reveals the objections of the CIA hearings program and the fact Abu Zubaydah was illegally detained, subjected to torture, as well as inhuman and degrading treatment;
70. evidence from the content of a document entitled *ICRC Report on Treatment of Fourteen "High Value Detainees" in CIA Custody*, published by Red Cross International Committee in February of 2007, (hereinafter: "**ICRC Report on CIA Detainees**"), available at: <http://www.nybooks.com/icrc-report.pdf>, related to the fact that torture, inhuman and degrading treatment, including behavior which put prisoners in immediate danger of losing their lives were used against prisoners detained at CIA facilities (including Abu Zubaydah), as well as objectives of the secret CIA prisons program and the terms on which [these prisons] operated;
71. evidence from the content of a document entitled *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, published by European Parliament Assembly., Committee on Legal Affairs and Human Rights on June 12, 2006 [hereinafter: "**CoE Rendition Report (June 12, 2006)**"], available at: <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>, which is an attachment to this publication, related to the fact that secret CIA facilities did exist on the territory of the Republic of Poland, and that torture, inhuman and degrading treatment, illegal transporting to and from the territory of the Republic of Poland were used against prisoners detained at CIA facilities (including against Abu Zubaydah);
72. evidence from the content of a document entitled *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, published by European Parliament*

Assembly, Committee on Legal Affairs and Human Rights on July 7, 2007; [hereinafter: "**CoE Rendition Report (June 7, 2007)**"), available at:

http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf,

which is attached to this writ, related to the fact the secret CIA facilities existed on the territory of the Republic of Poland, and that torture, inhuman and degrading treatment, illegal transporting to and from the territory of the Republic of Poland were used against prisoners detained at CIA facilities (including against Abu Zubaydah);

73. evidence from the content of a document entitled *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, published by European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners on January 30, 2007 (hereinafter: "**Fava Report**"), available from the Internet at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=->

[//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN](http://EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN), which is an attachment to this writ, related to the fact the secret CIA facilities existed on the territory of the Republic of Poland, and that torture, inhuman and degrading treatment, illegal transporting to and from the territory of the Republic of Poland were used against prisoners detained at CIA facilities (including against Abu Zubaydah);

74. evidence from the document entitled *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, symbol A/HRC/13/42, published on February 19, 2010 (hereinafter: "**UN Joint Experts Report on Secret Detention**"), available from the Internet at:

<http://www2.ohchr.org/english/bodies/hrcouncil/13session/reports.htm>; in relation to the circumstances discussed further in this writ;

75. evidence from the content of a document – memorandum Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Acting General Counsel of the Central Intelligence Agency of August 1, 2002, entitled *Re: Interrogation of al Qaeda Operative* (hereinafter: "**OLC Abu Zubaydah Memo**"), available from the Internet at:

http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf,

Related to the fact Abu Zubaydah was illegally detained, subjected to tortures, inhuman and degrading treatment;

76. evidence from the content of a document – memorandum U.S. Department of Justice, Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President of August 1, 2002, entitled *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (hereinafter: "**OLC Standards for Interrogation Memo**"), available from the Internet at: <http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf>, related to the circumstances discussed further in this writ;

77. evidence from the content of a document authored by George J. Tenet, Director of Central Intelligence, entitled *Guidelines on Confinement Conditions for CIA Detainees*, Attachment "D" to CIA OIG Special Review, published on January 28, 2003 (hereinafter: "**DCI Confinement Guidelines**"), which is attached to this writ in relation to circumstances related further in this writ;
78. evidence from the content of a document of Office of Medical Services (OMS), Central Intelligence Agency of September 4, 2003, entitled *Draft OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention*, Attachment „F” to CIA OIG Special Review (hereinafter: "**OMS Guidelines**"), which is attached to this writ, related to the fact that torture, inhuman and degrading treatment, including behaviors placing prisoners in immediate danger of losing their lives, were used against prisoners detained at CIA prisons (including Abu Zubaydah), and that there were individuals obligated to comply with medical ethics requirements who participated in these ill conceived practices, and objectives for the CIA’s secret prisons program, as well as the terms upon which these prisons operated;
79. evidence from the content of a document – letter of Scott W. Muller, General Counsel, Central Intelligence Agency to Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel of March 2, 2004 (hereinafter: "**CIA Additional Techniques Letter**"), available from the Internet at:
<http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc22.pdf>,
relation to the circumstances indicated further in this writ;
80. evidence from the content of a document – correspondence between Central Intelligence Agency and Dan Levin, Office of Legal Counsel, Department of Justice of December 30, 2004, entitled *Background Paper on CIA’s Combined Use of Interrogation Techniques* (hereinafter: "**CIA Background Paper on Combined Techniques**"), available from the Internet at:
<http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf>, in
relation to the circumstances indicated further in this writ;
81. evidence from the content of a document issued by Office of Medical Services (OMS), Central Intelligence Agency on May 17, 2004, entitled *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention*, [hereinafter: "**OMS Guidelines (17 May 2004)**"], available from the Internet at:
<http://www.aclu.org/torturefoia/released/103009/cia-olc/2.pdf>, attached to this writ,
related to the fact that torture, inhuman and degrading treatment, including behaviors placing prisoners in immediate danger of losing their lives were used against prisoners detained at CIA prisons (including Abu Zubaydah), and there were individuals obligated to comply with medical ethics requirements who participated in these ill conceived practices, and objectives for the CIA’s secret prisons program, as well as the terms upon which these prisons operated;
82. evidence from the content of a document issued by Office of Medical Services (OMS), Central Intelligence Agency in December 2004, entitled *OMS Guidelines on Medical and*

Psychological Support to Detainee Rendition, Interrogation, and Detention, [hereinafter: “**OMS Guidelines (December 2004)**”], which is attached to this writ, related to the fact that torture, inhuman and degrading treatment, including behaviors placing prisoners in immediate danger of losing their lives were used against prisoners detained at CIA prisons (including Abu Zubaydah), and that there were individuals obligated to comply with medical ethics requirements who participated in these ill conceived practices, and objectives for the CIA’s secret prisons, as well as the terms upon which these prisons operated;

83. evidence from the content of a document – memorandum authored by James B. Comey, Deputy Attorney General, Department of Justice addressed to Daniel Levin, Acting Assistant, Attorney General, Office of Legal Counsel, Department of Justice of December 30, 2004, entitled *Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A* (hereinafter: “**OLC Standards for Interrogation Memo**”), available from the Internet at: <http://www.usdoj.gov/olc/18usc23402340a2.htm>, in relation to the circumstances referred to further in this writ;
84. evidence from the content of a document – correspondence between Office of General Counsel, Central Intelligence Agency and Steve Bradbury, Acting Assistant, Attorney General, Office of Legal Counsel, Department of Justice of April 22, 2005 entitled *Horizontal Sleep Deprivation* (hereinafter: “**CIA Horizontal Sleep Deprivation**”), available from the Internet at:
<http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc107.pdf>, in relation to the circumstances referred to further in this writ;
85. evidence from the content of a document – memorandum of Scott W. Muller, General Counsel, Central Intelligence Agency addressed to John Bellinger, Senior Associate Counsel to the President and Legal Adviser to the National Security Council of July 2, 2004 (hereinafter: “**CIA Memorandum for John Bellinger**”), available from the Internet at:
<http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc43.pdf>, in relation to the circumstances referred to further in this writ;
86. evidence from the content of a document – memorandum Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency May 30, 2005, entitled *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (hereinafter: “**OLC CIDT Memo**”), available from the Internet at:
http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf, in relation to the circumstances referred to further in this writ;
87. evidence from the content of a document – memorandum Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel to John A. Rizzo, Senior

Deputy General Counsel, Central Intelligence Agency of May 10, 2005, entitled *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (hereinafter: “**OLC Combined Techniques Memo**”), available from the Internet at: http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury_20pg.pdf, in relation to the circumstances referred to further in this writ;

88. evidence from the content of a document – memorandum Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency of August 31, 2006 (hereinafter: “**OLC Conditions of Confinement Letter**”), available from the Internet at: http://www.aclu.org/human-rights_national-security/documents-delivered-responsive-torture-foia, related to the circumstances referred to further in this writ;
89. evidence from the content of a document from the period preceding December 19, 2005, entitled *Standard Conditions of CIA Detention*, disclosed in the letter of John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency to Steve Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice of December 19, 2005, (hereinafter: “**Standard Conditions of CIA Detention**”), available from the Internet at: [http://ccrjustice.org/files/August 24, 2009 CIA Doc Release, Docs 21 - 274.pdf](http://ccrjustice.org/files/August%2024,%202009%20CIA%20Doc%20Release,%20Docs%2021%20-%20274.pdf), related to the circumstances referred to further in this writ;
90. evidence from the content of a document titled *CIA Organization Chart* (hereinafter: “**CIA Organization Chart**”), available from the Internet at: <https://www.cia.gov/about-cia/leadership/70040-BLU-Jan-09-OPA.pdf.pdf>, in relation to the circumstances referred to further in this writ;
91. evidence from the content of a complaint filed by Texas Association of Psychologists on June 16, 2010 related to the fact that there was a substantiated suspicion that specific individuals, namely James Mitchell and Bruce Jessen, used torture and inhuman, degrading treatment, also on the territory of the Republic of Poland;
92. evidence from the content of a report of Lithuanian National Security and Lithuanian Parliament Defense Committee, related to alleged transportation and detention of CIA prisoners on the territory of the Republic of Lithuania, available from the Internet at: www.cosac.eu/fr/meetings/Brussels2010/ordinary.pdf/lt.pdf/, related to identification of some of the aircrafts which also landed on the territory of Poland as the ones which transported CIA’s prisoners;
93. evidence from the content of a report published by Amnesty International on April 5, 2006 related to secret flights completed on the US Government orders, available from the Internet at: <http://www.amnesty.org/en/library/asset/AMR51/051/2006/en/b543c574-fa09-11dd-b1b0-c961f7df9c35/amr510512006en.pdf>, related to the fact a secret CIA facility existed

on the territory of the Republic of Poland and the conditions in which citizens of third countries were detained, including Abu Zubaydah, as well as procedures and circumstances associated with transportation of these individuals between detention centers located on territories of different countries;

94. evidence from a section of special United Nations correspondents' reports related to use of torture and human rights in the context of war on terrorism: by Professor Manfred Nowak and Martin Scheinin, as well as from the full text contained in the indicated report, available on the Internet at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc>, which is attached to this writ, related to the fact that Abu Zubaydah was detained at a secret CIA facility on the territory of Poland, air transportation of Abu Zubaydah between different CIA facilities located in different countries which necessitated his illegal transportation over the border of the Republic of Poland, participation of an aircraft with the N63MU marking in this malpractice and use of practices intended to conceal actual flight routes and designations, including falsification of air traffic documentation, used by CIA and its subordinates;
95. evidence from the content of press articles, attached to this writ, related to the fact that information that secret CIA facilities existed outside of the United States' territories, including on the territory of the Republic of Poland, was a common knowledge and that torture, inhuman and degrading treatment with participation of specific individuals were used against detainees remaining in these facilities, including Abu Zubaydah, and that there were secret military and civilian flights between these facilities, including Szymany Airport.

At the same time I would like to point out that due to the large volume of new evidence contained in the documents indicated, the majority of which are tens-or hundreds-pages long reports of international organizations or government agencies of different countries, they are recorded and attached to this writ in the format of computer files on a CD.

VI. Formal Motions

Moreover, I submit a motion to:

- a) determine the current addresses of polish citizen mentioned above in order to summon them to be examined as witnesses;
- b) determine the current addresses of persons mentioned above on the ground of the art. 12 of the Mutual Legal Assistance Agreement to the appropriate authority of the USA or by other means, of the current addresses and if necessary the identity in order to summon them to be examined as witnesses.

SUBSTANTIATION

Substantiation of this pleading has been divided for two major parts. First of them includes the statement of facts, which was limited to the description of the circumstances relevant to provide proper qualification of criminal offences and further evidence proceeding. To preserve the clearance of inference, documental evidence has been mentioned in footnotes. Second part of the substantiation includes legal approaches in relation to the alleged crimes, mentioned at the enacting clause in particular of the offence of the art. 231 § 2 CC.

1. STATEMENT OF THE FACTS

1.1. Summary

Abu Zubaydah is a stateless Palestinian born in Saudi Arabia. He was held in secret detention by the CIA of the United States of America from the time of his capture in March 2002 until approximately 6 September 2006, when it was announced that he was transferred to the custody of the U.S. Department of Defence (“DOD”) at Guantanamo Bay.

US government documents demonstrate that Abu Zubaydah was transferred to the Central Intelligence Agency (“CIA”) ‘black site’ in the territory of the Republic of Poland on 4 December 2002.¹

Throughout the period of Abu Zubaydah’s secret detention, interrogation and torture by the CIA he was falsely alleged to be a member of Al-Qaeda and a close associate and senior lieutenant of Osama bin Laden. He was also falsely alleged to have had a role in various al Qaeda terrorist acts – including the attacks on 11 September 2001. After more than six years of incommunicado detention, Zubaydah obtained access to U.S. lawyers, who challenged his detention in U.S. courts and forced the U.S. Department of Justice to withdraw all such allegations. The United States no longer alleges Abu Zubaydah was ever a member of al Qaeda or that he supported al Qaeda's radical ideology. The United States no longer alleges that Abu Zubaydah was an associate of Osama bin Laden or that he was his senior lieutenant. The United States no longer alleges that Zubaydah had any role in any terrorist attack planned or perpetrated by al Qaeda, including the attacks of 11 September 2001. He remains in indefinite detention in DOD custody at Guantanamo Bay, however he has never been charged of any crime, either in a military commission or a civilian court.

Abu Zubaydah was the first so-called “high value detainee” (“HVD”) to be captured, detained and interrogated by the CIA.² For the purpose of his interrogation, the CIA devised a set of “enhanced interrogation techniques” intended to create a state of learned helplessness through the application of severe physical and psychological stress.

The Office of Legal Counsel of the U.S. Department of Justice provided approval for ten techniques specifically for use on Abu Zubaydah. These included techniques they called

¹ OPR Report (July 29, 2009), p. 85; CIA OIG Special Review (May 7, 2004), para. 76.

² CIA OIG Special Review (May 7, 2004), para. 4; ICRC Report on CIA Detainees, page 9.

³ OLC Abu Zubaydah Memo (August 1, 2002), p. 2.

⁴ OLC Combined Techniques Memo (May 10, 2005), p. 2.

⁵ ICRC Report on CIA Detainees, page 9.

⁶ OLC Standards for Interrogation Memo (August 1, 2002), p. 3.

⁷ Physicians for Human Rights, Experiments in Torture-Evidence of Human Subject Research and Experimentation in the

“attention grasp,” “walling,” “facial hold,” “facial slap (insult slap),” “cramped confinement,” “wall standing,” “stress positions,” “sleep deprivation,” “insects placed in a confinement box,” and the “waterboard.”³ The CIA subsequently utilized additional enhanced interrogation techniques, including prolonged nudity, dietary manipulation, abdominal slap, water dousing, and water flicking.⁴ According to publicly available reports, Abu Zubaydah is the only detainee who was subjected to all of the permitted interrogation techniques.⁵

Throughout his secret detention, the OLC advised that the applicable law against torture, cruel and degrading treatment only prohibited pain and duress that rose to “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions” and only when “the [government official] specifically intended to cause severe physical or mental pain or suffering.”⁶

Prior to Abu Zubaydah’s detention, the CIA had not used the “enhanced” interrogation program, and it therefore carried out the interrogation techniques on him in a manner designed to test and determine medical limitations on their use. It is alleged that this constitutes a form of human medical experimentation.⁷

The CIA also designed further aspects of its interrogation program to create a state of learned helplessness and fear. According to CIA documents, the program was divided into three phases, described as “Initial Conditions,” “Transition to Interrogation” and “Interrogation.”⁸ Initial Conditions included the treatment of detainees upon their capture in a manner intended to induce “capture shock,” and an elaborate program of extraordinary rendition of detainees from one location to another in manner intended to disorient and create “significant apprehension” and “dread.”⁹ The “Transition to Interrogation” and “Interrogation” phases took place in the secret prisons and included use of the enhanced interrogation techniques.¹⁰ In the case of Abu Zubaydah, the cycle between extraordinary rendition and interrogation at secret CIA sites was repeated an unknown number of times.

In one of the cycles, Abu Zubaydah was transferred by extraordinary rendition from Thailand into Poland and detained and interrogated at a secret prison in the territory of the Republic of Poland.

The CIA’s treatment of Abu Zubaydah prior to his presence in the territory of the Republic of Poland is relevant to the investigation into crimes committed against him in Poland for the following reasons:

First, according to publicly available U.S. government documents, the same psychologists/interrogators who interrogated Abu Zubaydah in Thailand also staffed the CIA

³ OLC Abu Zubaydah Memo (August 1, 2002), p. 2.

⁴ OLC Combined Techniques Memo (May 10, 2005), p. 2.

⁵ ICRC Report on CIA Detainees, page 9.

⁶ OLC Standards for Interrogation Memo (August 1, 2002), p. 3.

⁷ Physicians for Human Rights, Experiments in Torture-Evidence of Human Subject Research and Experimentation in the ‘Enhanced’ Interrogation Program, 6 June 2010, available at http://phrtorturepapers.org/?dl_id=9, accessed on 11 November 2010.

⁸ CIA Background Paper on Combined Techniques (2004), p. 1.

⁹ CIA Background Paper on Combined Techniques (2004), pp. 2-4

¹⁰ CIA Background Paper on Combined Techniques (2004), p. 1.

site in Poland.¹¹ Those persons, some of whom are identified in this motion, and additional personnel who participated in Abu Zubaydah's interrogation in Thailand are therefore relevant to the investigation because, among other things, they have knowledge of the conditions of detention and interrogation employed in each of the CIA detention sites including in Poland, and they have knowledge of Abu Zubaydah's movements, when and where he was held in Poland, and his physical and mental condition.

Second, while at the site in Thailand, the CIA first developed and implemented a new interrogation program on Abu Zubaydah, and the so-called "enhanced interrogation techniques" employed in Thailand were subsequently used in Poland.

Third, the offences committed to the detriment of Abu Zubaydah were a part of a complex plan, which was realized over a long time in more than one country. Therefore, even if attributing specific actions to specific suspects on the territory of the Republic of Poland proves to be impossible, it would be justified to take into account also actions that happened outside the territory of the Republic of Poland. Such actions constitute essential aspects of the above described offences committed in a continuous fashion, and should be prosecuted in Poland.

Fourth, evidence of the treatment of Abu Zubaydah prior to his entry into Poland goes toward establishing Abu Zubaydah's vulnerable and helpless condition while in detention in Poland, which is relevant to the determination that his treatment amounted to torture.

Fifth, if it can be established that Polish officials had knowledge of or were willfully blind to the Abu Zubaydah's treatment prior to his arrival in Poland, these facts would go toward establishing the relevant criminal state of mind for offenses committed against Zubaydah while he was within Poland.

Due to the clandestine nature of the CIA program and the overbroad application of state secrecy by the States involved, much of the circumstances of the CIA's treatment of Abu Zubaydah remain inaccessible to him and unknown to the public. Despite these substantial limitations on his access to justice, it is now possible to establish, as demonstrated in the following paragraphs, that Abu Zubaydah was unlawfully transferred into a CIA secret prison in the territory of the Republic of Poland on 5 December 2002, and that during his detention he was subjected to conditions of detention and interrogation that amount to torture, cruel and inhuman treatment, and additional crimes specified herein.

1.2. Capture and initial interrogation

Abu Zubaydah is a stateless Palestinian born in Saudi Arabia. In March 2002, he was living in Faisalabad, Pakistan. On 28 March 2002, local special services and officers of the Central Intelligence Agency (CIA) of the United States of America raided a house he was in and seized him.¹² In the attack, Abu Zubaydah was shot three times—in the groin, thigh, and stomach—and

¹¹ CIA OIG Special Review (May 7, 2004), paras 74, 91.

¹² SASC Detainee Report (November 20, 2008), p. 14; Tim McGirk, Time Magazine, Anatomy Of A Raid, 15 April 2002, available at <http://www.time.com/time/printout/0,8816,1002208,00.html>

was gravely wounded.¹³ Former CIA agent John Kiriakou, who was a co-leader of the team of US and Pakistani forces that seized Zubaydah, has said that Zubaydah “was almost killed” and that one of the doctors who treated him told Kiriakou that “he had never seen wounds so severe where the patient had lived.”¹⁴

US government documents and several media reports detail the events of Zubaydah’s capture and initial detention.¹⁵

After capture, he was almost immediately handed over to officers of Federal Bureau of Investigations (FBI) and CIA who initially planned a joint effort to interrogate him.¹⁶ Abu Zubaydah became a prisoner in a secret program conducted by the CIA, initiated after 11 September 2001, in which alleged suspects were jailed and systematically tortured at secret prisons outside the USA known as ‘black sites.’¹⁷

1.3. Transfer to a ‘black site’ and initial ‘enhanced’ interrogation

Within three days of his capture, Abu Zubaydah was flown out of Pakistan and rendered to a secret CIA facility in Thailand.¹⁸

Among the first interrogators to arrive at the site in Thailand were two FBI agents, identified by the pseudonyms “Gibson” and “Thomas,” who travelled to the site to interview Zubaydah.¹⁹ Based on publicly available information, FBI agents Ali Soufan and Stephen Gaudin took part in Zubaydah’s initial interrogation.²⁰ Pursuant to instructions from Charles Frahm, Acting Deputy Assistant Director for the section that later became the Counterterrorism Division, the FBI agents were told that the CIA was in charge of Zubaydah’s detention and interrogation and Soufan and Gaudin were to provide assistance.²¹ However, initially Ali Soufan and Stephen

¹³ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. ix; Brian Ross, CIA- Abu Zubaydah: Interview with John Kiriakou: Transcript, ABC News, 10 December 2007, available at

http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf, accessed on 13 November 2010.

¹⁴ Brian Ross, CIA- Abu Zubaydah: Interview with John Kiriakou: Transcript, ABC News, 10 December 2007, available at http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf, accessed on 13 November 2010.

¹⁵ Tim McGirk, Time Magazine, Anatomy Of A Raid, 15 April 2002, available at

<http://www.time.com/time/printout/0,8816,1002208,00.html>; Brian Ross, ABC News, "CIA – Abu Zubaydah", Transcript of Interview with John Kiriakou, 12 October 2007, available at

http://abcnews.go.com/images/blotter/brianross_kiriakou_transcript1_blotter071210.pdf and

http://abcnews.go.com/images/blotter/brianross_kiriakou_transcript2_blotter071210.pdf.

¹⁶ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 67.

¹⁷ Dan Froomkin, Bush’s Exhibit A for Torture, Washington Post, 18 December 2007, available at

<http://www.washingtonpost.com/wp-dyn/content/blog/2007/12/18/BL2007121800862.html>, accessed on 13 November 2010.

¹⁸ Dan Eggen and Walter Pincus, FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods, Washington Post, 18 December 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151_pf.html, last visited 13 November 2010; Tim McGirk, Time Magazine,

Anatomy Of A Raid, 15 April 2002, available at <http://www.time.com/time/printout/0,8816,1002208,00.html>; Katherine Eban. Rorschach and Awe, Vanity Fair Online (July 17, 2007), available at

<http://www.vanityfair.com/politics/features/2007107torture200707>; David Johnston, At a Secret Interrogation, Dispute Flared Over Tactics, New York Times, 10 September 2006, available at

http://www.nytimes.com/2006/09/10/washington/10detain.html?_r=1&pagewanted=all, accessed on 10 November 2010.

¹⁹ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 67, n. 41 (referring to the two FBI agents by the pseudonyms “Gibson” and “Thomas”).

²⁰ Michael Isikoff, Newsweek, ‘We Could Have Done This the Right Way’, 25 April 2009, (describing the role of Ali Soufan and Steve Gaudin in Abu Zubaydah’s initial interrogation), available at <http://www.newsweek.com/2009/04/24/we-could-have-done-this-the-right-way.print.html>, accessed on 9 December 2010.

²¹ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 67.

Gaudin took the lead in interviewing Zubaydah because the CIA interrogators had not yet arrived.²²

At one point in the early weeks of his interrogation, Abu Zubaydah was taken to a hospital for medical treatment because he nearly died from infected wounds.²³ While in the hospital, the FBI continued to interrogate Abu Zubaydah.²⁴ However, U.S. officials felt that Zubaydah was not providing enough information under FBI questioning and permitted the CIA to take over.

To assist in the interrogation of Abu Zubaydah, the CIA hired a group of retired military psychologists led by James Elmer Mitchell and John “Bruce” Jessen to implement a new regime of interrogation techniques.

Mitchell and Jessen had devised a plan in which the stated objective was to “[h]old, manage and exploit detainees to elicit critical information” at an “exploitation facility” established at a secret location that would be off-limits to ICRC and foreign observers, among others.²⁵ The Mitchell and Jessen exploitation plan recommended that the U.S. Joint Personnel Recovery Agency (“JPRA”) deploy a “core captivity/exploitation team” which would “direct the process under the lead of the JPRA Senior SERE Psychologist and receive all additional specified support from a sponsor.”²⁶ Jessen described the means by which JPRA would implement that recommendation, and included requirements for an undisclosed exploitation facility and the means by which detainees would be transported and held there.²⁷

The Mitchell and Jessen plan—the blueprint for the CIA’s interrogation program that was deployed in sites around the world—was first used and tested on Abu Zubaydah. Former CIA Director George Tenet recalled that once Abu Zubaydah was in custody the CIA “got into holding and interrogating high-value detainees in a serious way.”²⁸ President Bush similarly described that the CIA developed an “alternative set” of “tough” interrogation techniques, and put them to use on Abu Zubaydah and other so-called High Value Detainees.²⁹

James Mitchell and other CIA personnel first travelled to the CIA site in early to mid-April 2002. Mitchell immediately assumed control of Abu Zubaydah’s interrogation and within a short time he began to employ so-called “enhanced interrogation techniques” (EITs), which are also precisely described below.³⁰

²² DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 68.

²³ David Johnston, At a Secret Interrogation, Dispute Flared Over Tactics, New York Times, 10 September 2006, available at http://www.nytimes.com/2006/09/10/washington/10detain.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1289668233-FWYxGL7QqPeohhXrZ20QxA, accessed on 13 November 2010.

²⁴ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 68.

²⁵ SASC Detainee Report (November 20, 2008), p. 15.

²⁶ SASC Detainee Report (November 20, 2008), p. 15.

²⁷ SASC Detainee Report (November 20, 2008), p. 15.

²⁸ SASC Detainee Report (November 20, 2008), p. 15.

²⁹ Office of the Press Secretary, The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (September 6, 2006) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (last accessed Dec. 22, 2009) (hereinafter “Bush Statement (Sept. 6, 2006)”).

³⁰ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. ix; see also Jane Mayer, *The Experiment*, The New Yorker (July 11-18, 2005); Jane Mayer, *The Black Sites*, The New Yorker (August 13, 2007) (“According to an eyewitness, one psychologist advising on the treatment of Zubaydah, James Mitchell, argued that he needed to be reduced to a state of ‘learned helplessness.’ (Mitchell disputes this characterization.)”); Katherine Eban, Rorschach and Awe, *Vanity Fair*, 17 July

According to the CIA, an “effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD behavior, to overcome a detainee’s resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.”³¹ To achieve this goal, the CIA employed EITs in an “escalating fashion, culminating with the waterboard though not necessarily ending with this technique.”³²

Mitchell and Jessen took over the interrogation of Abu Zubaydah in May 2002, and for months subjected Zubaydah to a variety of extreme physical and psychological abuses.³³

Under the direction of Mitchell, the CIA chained Abu Zubaydah to a chair for weeks on end; whipped him by the neck into concrete walls; forced him into a small, black box and left him for hours; hanged him naked from the ceiling; and kept him awake for 11 consecutive days, spraying him with cold water if he fell asleep.³⁴ Afterward, Mitchell ordered that Abu Zubaydah be strapped to the waterboard.

When he was finally given access to the ICRC five years later, Zubaydah described the procedure as follows:

I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.

I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilt over me.... I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall

2007, available at <http://www.vanityfair.com/politics/features/2007/07/torture200707?printable=true> (last visited May 31, 2010).

³¹ CIA Background Paper on Combined Techniques (2004), p.

³² OLC Abu Zubaydah Memo (August 1, 2002), p. 2; see also OLC Abu Zubaydah Memo (August 1, 2002), p. 15.

³³ Katherine Eban, Rorschach and Awe, Vanity Fair, 17 July 2007, available at <http://www.vanityfair.com/politics/features/2007/07/torture200707?printable=true> (last visited May 31, 2010).

³⁴ ICRC Report on CIA Detainees, pp. 28-31; CIA OIG Special Review (May 7, 2004), para. 15; Jason Leopold, *Zubaydah's Torture, Detention Subject of Senate Inquiry*, TRUTHOUT.ORG, available at <http://www.truthout.org/zubaydahs-torture-detention-subject-senate-intelligence-inquiry58666>, accessed on 10 November 2010.

with the plywood covering and repeatedly slapped in the face by the same two interrogators as before.

I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold.

This went on for approximately one week. During this time the whole procedure was repeated five times. On each occasion, apart from one, I was suffocated once or twice and was put in the vertical position on the bed in between. On one occasion the suffocation was repeated three times. I vomited each time I was put in the vertical position between the suffocation.

During that week I was not given any solid food. I was only given Ensure to drink. My head and beard were shaved everyday.

I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor.

I was told during this period that I was one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people.³⁵

According to the CIA, Abu Zubaydah was water-boarded 83 times in August 2002 alone.³⁶ Numerous US government documents describe the use of authorized and unauthorized interrogation techniques on detainees including Abu Zubaydah,³⁷ who — according to publicly available reports — is the only detainee who was subjected to all of the authorized enhanced interrogation techniques.³⁸

Apparently the use of EITs was not agreed to by the FBI agents who were present when the CIA used enhanced interrogation techniques on Abu Zubaydah.³⁹ They later reported that the CIA had assured them the interrogation techniques had been approved “at the highest levels”.⁴⁰ In April or May 2002, an FBI agent complained to FBI Counterterrorism Assistant Director Pasquale D'Amuro at FBI Headquarters⁴¹ that the CIA techniques were “borderline torture”.⁴² He was ordered to leave the CIA facility in approximately May 2002 in order not to participate further in the CIA’s interrogation of Abu Zubaydah.⁴³ However, the other FBI agent remained at the facility until June 2002 at the direction of Charles Frahm, then-Acting Deputy Assistant

³⁵ ICRC Report on CIA Detainees, Annex I.

³⁶ CIA OIG Special Review (May 7, 2004), para. 223; Mitchell is reported to have described Zubaydah’s interrogation as “like an experiment, when you apply electric shocks to a caged dog, after a while he’s so diminished, he can’t resist.” Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (Doubleday, 2008).

³⁷ CIA Background Paper on Combined Techniques (2004); CIA OIG Special Review (May 7, 2004); OLC Combined Techniques Memo (May 10, 2005); OMS Guidelines (September 4, 2003).

³⁸ ICRC Report on CIA Detainees, page 9.

³⁹ DoJ OIG FBI & Detainee Interrogations (rev 2009), pp. xxvii-xxviii.

⁴⁰ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 69.

⁴¹ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 69.

⁴² DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 68.

⁴³ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 69.

Director for the section that later became the Counterterrorism Division.⁴⁴ Similarly, Dr. R. Scott Shumate, the chief operational psychologist for the CIA's counterterrorism center, who was present during the initial uses of enhanced interrogation techniques, reportedly objected to their use and left the site.⁴⁵ Based on publicly available reports, Dr. Shumate and FBI agents Ali Soufan and Stephen Gaudin probably have relevant knowledge of the conditions of Abu Zubaydah's detention and interrogation.

Other CIA personnel involved in Abu Zubaydah's initial interrogation have not yet been identified. Abu Zubaydah describes that "many guards were present, plus two interrogators who did the actual beating, still asking questions, while the main interrogator left to return after the beating was over."⁴⁶ Additional participating CIA personnel probably can be identified from those who were trained by the JPRA in "exploitation strategies".⁴⁷ One such training was a two-day training on July 1-2, 2002 for interrogators who probably took part in Abu Zubaydah's interrogation.⁴⁸ Col. Randy Moulton and JPRA personnel Joseph Witsch and Dr. Gary Percival are described in publicly available documents as having attended or having knowledge of this training program.⁴⁹

1.4. Documenting Abu Zubaydah's interrogations

The CIA site in Thailand communicated by cable with CIA headquarters every day during Zubaydah's interrogation and detention. A table of CIA cable traffic shows that 549 cables were sent between the CIA site in Thailand and CIA headquarters. The cable traffic begins on 13 April 2002 and ends on 4 December 2002.⁵⁰

According to publicly available reports, the CIA videotaped Abu Zubaydah "day and night" throughout his interrogation, including during use of the waterboard and while he was sleeping in his cell.⁵¹ The CIA personnel who viewed the videotapes can attest to their content including the conditions of Abu Zubaydah's detention and interrogation—the tapes themselves have been destroyed. The videotaping of interrogations at the Thailand site ended on 4 December 2002.⁵² It is not known whether interrogations taking place in Poland were videotaped. On 3 December 2002, John L. McPherson, an attorney in the CIA Office of General Counsel, who was present at the site,⁵³ "conducted an inventory of all videotapes and other related materials created at" the black site in Thailand during the interrogations of Abu Zubaydah.⁵⁴ The inventory included "92 tapes and three other items (one each: [redacted] officer logbook; portfolio of AZ notes and

⁴⁴ DoJ OIG FBI & Detainee Interrogations (rev 2009), p. 69.

⁴⁵ Katherine Eban, Rorschach and Awe, Vanity Fair, 17 July 2007, available at <http://www.vanityfair.com/politics/features/2007/07/torture200707?printable=true> (last visited May 31, 2010).

⁴⁶ ICRC Report on CIA Detainees, Annex I.

⁴⁷ SASC Detainee Report (November 20, 2008), p. 20.

⁴⁸ SASC Detainee Report (November 20, 2008), p. 21.

⁴⁹ SASC Detainee Report (November 20, 2008), pp. 21-22.

⁵⁰ http://www.aclu.org/torturefoia/legaldocuments/torturefoia_list_20090518.pdf

⁵¹ Dan Eggen and Walter Pincus, Washington Post, FBI, CIA Debate Significance of Terror Suspect, 18 December 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151_pf.html, accessed on 10 November 2010.

⁵² See Central Intelligence Agency, "Inventory of Videotapes" – Redacted Version, undated document ("CIA Inventory of Videotapes"), available at: http://www.aclu.org/files/torturefoia/released/030609/videotape_inventory.pdf. (Released 6 March 2009)

⁵³ CIA OIG Special Review (May 7, 2004), para. 77.

⁵⁴ http://www.aclu.org/files/assets/cia_release20100415_p10-18.pdf, at page 14 of PDF.

drawings; and envelope [redacted] notes).⁵⁵ McPherson viewed all of the videos in play or play/forward mode⁵⁶ and later referred to these materials as “all the interrogation materials”⁵⁷ pertaining to the videotapes of interrogations of Abu Zubaydah.⁵⁸ The videotapes were destroyed on 9 November 2005 at the direction of Jose Rodriguez, who was then Deputy Director of Operations.⁵⁹ Having viewed all or part of the videotapes, McPherson is probably aware of the conditions of Abu Zubaydah’s detention and interrogation.

On 15 November 2002, another so-called High Value Detainee joined Abu Zubaydah in Thailand,⁶⁰ and on 4 December 2002 the facility was closed down.⁶¹

1.5. ‘Extraordinary rendition’ into Polish ‘black site’

On 4 December 2002, Abu Zubaydah was transferred to another CIA ‘black site’,⁶² which we have now learned was located within the territory of the Republic of Poland.

Like the sites elsewhere, the ‘black site’ in Poland formed part of the so-called “HVD” (high value detainee) program publicly referred to by the President of the United States on 6 September 2006.⁶³ However, the site in Poland played a unique role—the prison at Stare Kiejkuty was “the most important one” for the CIA, according to CIA sources including A.B. Krongard, the former Executive Director of the CIA from March 2001 to December 2004.⁶⁴

At the time of preparation of this letter, neither the government of the USA nor the authorities of the Republic of Poland confirm the existence of a secret site within the territory of the

⁵⁵ http://www.aclu.org/files/assets/cia_release20100415_p10-18.pdf, at page 14 of PDF.

⁵⁶ http://www.aclu.org/files/assets/cia_release20100415_p10-18.pdf, at page 14 of PDF.

⁵⁷ See the six-page “Top Secret” memorandum entitled “Review of Interrogation Videotapes”, prepared by an attorney of the CIA OGC, dated January 9, 2003, identified as Document 9, at pages 24 to 28 of the “Part 1” PDF file, *op. cit., supra* note 173; at page 25: “I inventoried all the interrogation materials.”

⁵⁸ http://www.aclu.org/files/assets/cia_release20100415_p01-09.pdf, pages 24-28 of PDF.

⁵⁹ http://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf; Mark Mazzetti, New York Times, C.I.A. Destroyed 2 Tapes Showing Interrogations, 7 December 2007, available at http://www.nytimes.com/2007/12/07/washington/07intel.html?_r=1&pagewanted=print, accessed on 1 November 2010.

⁶⁰ Department of Justice, Office of Professional Responsibility, First Draft, Investigation into the Office of Legal Counsel’s Memoranda on Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, 22 December 2008, p. 58, available at <http://judiciary.house.gov/hearings/pdf/OPRFirstReport081222.pdf>.

⁶¹ Secret two-page cable sent from a senior CTC Director at CIA Headquarters to the Chief of Base at the first site, dated 3 December 2002 stating “SUBJECT: EYES ONLY – [redacted] AND DESTRUCTION OF CLASSIFIED MATERIAL [REDACTED]”, available at http://www.aclu.org/files/assets/cia_release20100415_p01-09.pdf, page 11 of PDF, accessed on 10 November 2010 (secret two-page cable sent from a senior CTC Director at CIA Headquarters to the Chief of Base at the first site, dated 3 December 2002 stating “SUBJECT: EYES ONLY – [redacted] AND DESTRUCTION OF CLASSIFIED MATERIAL [REDACTED]”); Office of the Inspector General, CIA, “OIG Documents” (110 pages) – Vaughn Index of documents relating to the reasons or people behind CIA’s destruction of 92 videotapes, dated November 20, 2009, available at http://www.aclu.org/files/assets/20091120_Govt_Para_4_55_Hardcopy_Vaughn_Index.pdf, at page 15, Document No. 8, dated 3 December 2002, (containing a matching cross-reference to the document secret two-page cable entitled, “Closing of facility and destruction of classified information” and describing the contents as ““Subject: Closing of facility and destruction of classified information; Document Description: This document is a two-page cable from CIA Headquarters to the field discussing the destruction of videotapes and other classified material at a field facility. The document contains information relating to classified intelligence operations and methods.”)

⁶² OPR Report (July 29, 2009), p. 85; CIA OIG Special Review (May 7, 2004), para. 76.

⁶³ Bush Statement (Sept. 6, 2006). Office of the Press Secretary, The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (September 6, 2006) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (last accessed Dec. 22, 2009) (hereinafter “Bush Statement (Sept. 6, 2006)”).

⁶⁴ Scott Shane, Inside the Interrogation of a 9/11 Mastermind, New York Times, 22 June 2008, available at <http://www.nytimes.com/2008/06/22/washington/22ksm.html?pagewanted=all>, accessed on 13 November 2010.

Republic of Poland. Nevertheless, there is a considerable amount of evidence that indicates that the site in fact existed. Some of this evidence is presented below.

In an investigation conducted by the Parliamentary Assembly of the Council of Europe, CIA sources identified Poland as the location of the ‘black site’ where Abu Zubaydah was held.⁶⁵ Similarly, two UN special rapporteurs and two UN working groups jointly reported that Abu Zubaydah was allegedly held at a site in Stare Kiejkuty.⁶⁶

It is now known from publicly available records and independent investigations that Abu Zubaydah was rendered from the CIA site in Thailand on 4 December 2002 to a CIA site in Poland on 5 December 2002, and that the CIA flight landed at Szymany international airport. The CIA extraordinary rendition transferring Abu Zubaydah into the territory of the Republic of Poland took place on a Gulfstream IV aircraft, registered as N63MU with the U.S. Federal Aviation Authority.⁶⁷

Two documents from Polish government sources demonstrate that the plane registered N63MU landed at Szymany international airport on 5 December 2002. First, a Polish document indicates that on 5 December 2002 the plane registered N63MU landed at Szymany international airport. This document, entitled “Summary Landing and Take Off Aircraft Type Boeing and Gulfstream at Szymany international airport in Years 2002-2005” lists nine flights, including the first entry, which states “1. 5 December 2002 Gulfstream sign N63MU arrival at 14.56 departure at 15.43”. Second, a Letter from the Polish Border Guard to the Polish Helsinki Foundation for Human Rights, dated 23 July 2010, shows that the plane registered N63MU arrived at Szymany international airport on December 5, 2002 with 8 passengers and 4 crew, and departed with no passengers and 4 crew.⁶⁸ Polish authorities have failed to disclose flight data to the Helsinki Foundation for Human Rights for the plane registered N63MU,⁶⁹ a violation of Poland’s obligations under Articles 3, 8 and 13 of the European Convention.

At least three corporations were apparently involved in the extraordinary rendition flight. The plane registered N63MU is owned by International Group LLC, which has its principal place of business at 163 Main Street, Penn Yan, NY 14527.⁷⁰ According to company records, International Group is owned by Steve Marchionda.⁷¹ In a 2007 press report, Marchionda

⁶⁵ CoE Rendition Report (June 7, 2007), para. 127.

⁶⁶ UN Joint Experts Report on Secret Detention (2010),

⁶⁷ A/HRC/13/42, Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances, dated 19 February 2010, para. 53 (“UN Joint Experts Report on Secret Detention (2010)”), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.

⁶⁸ Letter from Polish Border Guard to HFHR, 23 July 2010, available at <http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf>

⁶⁹ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>.

⁷⁰ http://www.internationalgroupllc.com/charter_fleet_ourfleet.html

⁷¹ See Tom Hundley, “Remote Polish airstrip holds clues to secret CIA flights”, Chicago Tribune, 6 February 2007, available at http://articles.chicagotribune.com/2007-02-06/news/0702060187_1_cia-flights-poland-and-romania-detention-centers, accessed on 13 November 2010; http://www.internationalgroupllc.com/charter_fleet_ourfleet.html

confirmed that the plane registered N63MU landed at Szymany international airport on 5 December 2002.⁷²

The flight logistics company Universal Weather and Aviation, Inc., apparently filed false flight plans for N63MU and First Flight Management apparently provided approval for the trip plan for N63MU.⁷³

The N63MU airplane probably travelled the following routes:

<u>Location of Take-off</u>	<u>Destination</u>	<u>Date of the flight</u>
Elmira, New York (KELM)	Washington, DC (KIAD)	3 rd Dec 2002
Washington, DC (KIAD)	Anchorage, Alaska (PANC)	3 rd Dec 2002
Anchorage, Alaska (PANC)	Osaka, Japonia (RJBB)	3 rd Dec 2002
Osaka, Japonia (RJBB)	Bangkok, Tajlandia (VTBD)	4 th Dec 2002
Bangkok, Tajlandia (VTBD)	Dubai, UAE (OMDB)	5 th Dec 2002
Dubai, UAE (OMDB)	Szymany, Polska (EPSY)	5 th Dec 2002
Szymany, Polska (EPSY)	London Luton, UK (EGGW)	5 th Dec 2002
London Luton, UK (EGGW)	Dulles, Washington DC (KIAD)	6 th Dec 2002
Washington, DC (KIAD)	Elmira, New York (KELM)	6 th Dec 2002

Bold lettering above indicates the places where the secret sites in which the CIA probably held detainees.

1.6. Description of the rendition process

The rendition process itself amounts to numerous violations of Polish and international law. According to the CIA's "generic description of the process"⁷⁴ a rendition involves:

- a. The HVD is flown to a Black Site [redacted] A medical examination is conducted prior to the flight. During the flight the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. [Redacted]

⁷² See Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights", Chicago Tribune, 6 February 2007, available at http://articles.chicagotribune.com/2007-02-06/news/0702060187_1_cia-flights-poland-and-romania-detention-centers, accessed on 13 November 2010.

⁷³ UN Joint Experts Report on Secret Detention (2010), para. 116.

⁷⁴ CIA Background Paper on Combined Techniques (2004), fax cover letter.

There is no interaction with the HVD during this rendition movement except for periodic, discreet assessments by the on-board medical officer.

b. Upon arrival at the destination airfield, the HVD is moved to the Black Site under the same conditions and using appropriate security procedures.⁷⁵

The ICRC describes, from the perspective of the detainees, the standardised practice of extraordinary rendition as follows:

The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. Abu Zubaydah alleged that during one transfer operation the blindfold was tied very tightly resulting in wounds to his nose and ears. He does not know how long the transfer took but, prior to the transfer, he reported being told by his detaining authorities that he would be going on a journey that would last twenty-four to thirty hours.

The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper.

On some occasions the detainees were transported lying flat on the floor of the plane and/of with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort.

In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment described below.

⁷⁵ CIA Background Paper on Combined Techniques (2004), p. 2.

The ICRC was informed by the US authorities that the practice of transfers was linked specifically to issues that included national security and logistics, as opposed to being an integral part of the program, for example to maintain compliance. However, in practice, these transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned.⁷⁶

This account largely reflects the routine consistently recounted by victims, and recorded by NGOs, government inquiries and other witnesses,⁷⁷ which suggests a *modus operandi* of US extraordinary renditions. Prisoners recount that their kidnappers were dressed in black, with masks, wearing what looked like Timberland boots.⁷⁸ Prisoners are stripped naked,⁷⁹ photos were taken,⁸⁰ fingers were forced into their anus in a “cavity search”. They were then dressed in tracksuits,⁸¹ shackled, with ear-mufflers, blindfolded, and put onto a plane.⁸²

⁷⁶ ICRC Report on CIA Detainees, pp. 6-7.

⁷⁷ See for example the account of Mohamed Bashmillah to his lawyers in “Surviving the Darkness: testimony from the U.S. “Black Sites”, New York University School of Law Centre for Human Rights and Global Justice, 2007 available at <http://www.chrgj.org/projects/docs/survivingthedarkness.pdf>. For the account of Khaled El-Masri, see declaration of Khaled El-Masri in support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, in *El-Masri v. Tenet et al*, Eastern District Court of Virginia in Alexandria, 6 April 2006, at pp 8-9. For the accounts of Bisher Al-Rawi and Jamil El-Banna, see Parliamentary Assembly of the Council of Europe, “Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States”, AS/Jur (2006) 16 Part II, at p39.

⁷⁸ See for example unclassified statement of Bisher Al-Rawi made to his lawyer in Guantánamo Bay describing “big people in balaclavas” referred to in the “witness statement of Clive Stafford Smith” submitted to the UK High Court of Justice in Case No. 2005/10470/05, at p31; unclassified statement of Jamil El-Banna made to his lawyer at Guantánamo Bay describing people “dressed in black like ninjas” referred to in the “witness statement of Clive Stafford Smith” submitted to the UK High Court of Justice in Case No. 2005/10470/05, at p 40; and see Office of the Parliamentary Ombudsman (Sweden), describing people wearing “ordinary clothes, but hooded”: “Interview Conducted with State Official X of the Security Police (Sapo), Case No. 2169-2004, 30 September 2004, at p10; See Center for Human Rights and Global Justice (“CHRGJ”), NYU School of Law Report “Surviving the Darkness: Testimony from the U.S. “Black Sites”. Mohamed Farag Ahmed Bashmilah described people “dressed head to toe in black, with black masks covering their faces” at p14/15.

⁷⁹ See Office of the Parliamentary Ombudsman (Sweden), describing the methodical cutting off of the victim’s clothes, “Interview Conducted with State Official X of the Security Police (Sapo), Case No. 2169-2004, 30 September 2004, at p13. See also Amnesty Report “Human Cargo” in relation to Khaled Al-Maqtari at p42, the CHRGJ report at p14 (see above) and the Human rights Watch Report on Marwan Jabour, all of which describe detainees being stripped naked.

⁸⁰ Binyam Mohamed was photographed again when he was rendered from Morocco to Kabul, and both Khaled El-Masri and Mohamed Al-Zeri were photographed during their renditions. Binyam Mohamed said that that as he was being taken onto a plane in Rabat, “there was a white female with glasses... One of them held my penis and she took digital pictures.” Khaled El-Masri said: “They took off my blindfold... As soon as it was removed, a very bright flashlight went off and I was temporarily blinded. I believed from the sounds that they had taken photographs of me from throughout.” See declaration of Khaled El-Masri in support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, in *El-Masri v. Tenet et al*, Eastern District Court of Virginia in Alexandria, 6 April 2006, at p9; And see Office of the Parliamentary Ombudsman (Sweden), “Interview Conducted with State Official X of the Security Police (Sapo), Case No. 2169-2004, 30 September 2004, comment made at p13: “He wasn’t naked, he had his underpants on; the upper body was undressed and then his picture was taken.”

See also Amnesty Report “Human Cargo” at p42 Al-Maqtari was stripped naked and had photos taken. See also Surviving the Darkness p15 Bashmilah describes being stripped and photographed.

See also the Human Rights Watch Report online report “The Case of Marwan Jabour” who describes being stripped naked and videoed, at <http://www.hrw.org/reports/2007/us0207/2.htm>

⁸¹ “See Surviving the Darkness” report which describes Bashmilah having a finger inserted into his anus at p15.

⁸² See declaration of Khaled El-Masri in support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, in *El-Masri v. Tenet et al*, Eastern District Court of Virginia in Alexandria, 6 April 2006, at p9.

1.7. Conditions at the Polish site

According to a report submitted to the Parliamentary Assembly of the Council of Europe, “sources in the CIA named Poland as the ‘black site’ where Abu Zubaydah was held and questioned using “enhanced interrogation techniques’.”⁸³

That Abu Zubaydah was subjected to the waterboard has been confirmed by the former Director of the CIA, Michael V. Hayden, in testimony before the US Senate Select Committee on Intelligence on 5 February 2008, in which he stated, “Let me make it very clear and to state so officially in front of this committee that waterboarding has been used on only three detainees. It was used on Khalid Sheikh Mohammed, it was used on Abu Zubaydah, and it was used on Nashiri (enclosed as a victim in criminal proceeding conducted by the Appeal Prosecution Office in Warsaw under the ref. number Ap. V Ds 37/09). The CIA claims it has not used waterboarding for almost five years.”⁸⁴ That information was confirmed by George W. Bush in his book *Decision Points*.⁸⁵

According to the description of the highly coordinated extraordinary rendition process in the CIA Background Paper on Combined Techniques (2004), once detainees arrive at a detention “black site,” they are subject to poor detention conditions and a variety of interrogation techniques that are designed to reduce them to a baseline dependant state and to demonstrate that the detainee has no control over his basic human needs.⁸⁶ The CIA practice included exposing detainees to white noise and constant light during detention and forced nudity, sleep deprivation by vertical shackling, dietary manipulation, and interrogation techniques such as slapping and “walling” – slamming the detainee against a flexible wall – water dousing, and cramped confinement.⁸⁷

The Council of Europe’s description provides additional details. Prisoners in the CIA program were taken to their cells by guards who wore black outfits, masks that covered their whole faces, and dark visors over their eyes. Prisoner’s clothes were cut up and torn off; many detainees were then kept naked for several weeks, going through months of solitary confinement and extreme sensory deprivation in cramped cells, shackled and handcuffed at all times. A common feature for many detainees was the four-month isolation regime. During this period of over 120 days, absolutely no human contact was granted with anyone but masked, silent guards.⁸⁸ There was a shackling ring in the wall of the cell, about half a meter up off the floor. Detainee’s hands and feet were clamped in handcuffs and leg irons. Bodies were regularly forced into contorted shapes and chained to this ring for long, painful periods.⁸⁹

⁸³ CoE Rendition Report (June 7, 2007), para. 127.

⁸⁴ Comments of Michael V. Hayden, Hearing on Annual Worldwide Threat Assessment, Senate Select Committee on Intelligence, 5 February 2008, available at www.dni.gov/testimonies/20080205_transcript.pdf, accessed on 13 November 2010.

⁸⁵ Zob: G.W. Bush, *Decision Points*, p. xx

⁸⁶ CIA Background Paper on Combined Techniques (2004), p. 1.

⁸⁷ Central Intelligence Agency, “Memo to DOJ Command Center – Background Paper on CIA’s combined use of Interrogation Techniques,” 30 December 2004, p. 1, available at <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf>.

⁸⁸ CoE Rendition Report (June 7, 2007), paras 245-252.

⁸⁹ CoE Rendition Report (June 7, 2007), paras 245-252.

Food was raw, tasteless and was often tipped out carelessly on a shallow dish so part of it would waste. Apart from a thin, foam mattress to lie on or rest against, many cells had a bare floor and blank walls. Detainees never experienced natural light or natural darkness, although most were blindfolded many times so they could see nothing. Moreover, the air in many cells came from a ventilation hole in the ceiling, which was often controlled to produce extremes of temperature: sometimes so hot one would gasp for breath, sometimes freezing cold.⁹⁰

CIA documents released by the U.S. establish beyond doubt that detainees held by the CIA were subjected to a wide range of sanctioned techniques that included so-called “standard measures (i.e., without physical or substantial psychological pressure)”, including:

- (i) Shaving
- (ii) Stripping
- (iii) Diapering
- (iv) Hooding
- (v) Isolation
- (vi) White noise or loud music
- (vii) Continuous light or darkness
- (viii) Uncomfortably cool environment
- (ix) Restricted diet, including reduced caloric intake
- (x) Shackling in upright, sitting, or horizontal position
- (xi) Water dousing
- (xii) Sleep deprivation (up to 72 hours)⁹¹

CIA agents and people assisting them during interrogations at the CIA site in Poland also used so called “enhanced interrogation techniques”, including:

- (xiii) Attention grasp
- (xiv) Walling
- (xv) Facial hold
- (xvi) Facial slap (insult slap)
- (xvii) Cramped confinement
- (xviii) Wall standing
- (xix) Stress positions
- (xx) Sleep deprivation (up to 11 days)
- (xxi) Insects placed in a confinement box
- (xxii) Prolonged nudity
- (xxiii) Dietary manipulation
- (xxiv) Abdominal slap
- (xxv) Water dousing
- (xxvi) Water flicking
- (xxvii) The waterboard⁹²

⁹⁰ CoE Rendition Report (June 7, 2007), paras 253-257.

⁹¹ CIA OIG Special Review (May 7, 2004), Annex F

⁹² OLC Abu Zubaydah Memo (August 1, 2002), p. 2; OLC Combined Techniques Memo (May 10, 2005), p. 2.

These techniques are described in detail in the ICRC Report on CIA Detainees, the CIA OIG Special Review (May 7, 2004), and the OMS Guidelines (September 4, 2003), among many other documents. The authors of the ICRC Report on CIA Detainees confirm the exercise by the CIA of said techniques in a manner constituting torture and inhuman treatment. Additionally, the above mentioned interrogation methods and their use have been revealed in many press publications, some of which has been attached to this motion.

Zubaydah described to the ICRC the CIA's use of the techniques on him,⁹³ and when asked to provide details of the treatment at a hearing at Guantanamo Bay on 27 March 2007, Abu Zubaydah provided answers that fill over two pages of the transcript.⁹⁴ The description is redacted entirely.

According to publicly available reports, Abu Zubaydah is the only detainee who was subjected to all of the permitted interrogation techniques.⁹⁵

1.8. The role of Polish authorities in facilitating the operation of the CIA 'black site'

It should be obvious that the complex clandestine CIA operation in Poland — involving the landing of numerous aircraft at Szymany international airport; securing the transport of detainees and materials from the airport to a 'black site' at Stare Kiejkuty; and providing support for the establishment and operation of the 'black site' — could not have been achieved without the necessary support of numerous entities within the Government of the Republic of Poland.

The role of senior Polish elected officials and the Polish intelligence services appears to have been particularly important in carrying out the operations and covering them up after the fact. The CoE Rendition Report (June 7, 2007) provides a useful analysis of the role of different entities which should be closely examined.

According to the report, the CIA formed bilateral arrangements for the operation of the HVD program with the Military Information Services (Wojskowe Służby Informacyjne, or WSI), whose officials are part of the Polish Armed Forces and lacked oversight from democratic institutions.⁹⁶ The report continues that the WSI's role comprised two levels of cooperation: *first*, military intelligence officers, sometimes operating under the guise of a Polish Army Unit denoted JW-2669, provided physical security for the site and by creating "buffer zones" around CIA operations; *second*, WSI agents penetrated other state and parastatal institutions including the Polish Air Navigation Services Agency and Polish Border Guard to ensure the normal functions of these institutions would not disrupt CIA activities.⁹⁷

Dick Marty, author of the CoE Rendition Report (June 7, 2007) determined that

“some individual high office-holders knew about and authorised Poland's role in the CIA's operation of secret detention facilities for High-Value Detainees

⁹³ ICRC Report on CIA Detainees, Annex I.

⁹⁴ Transcript of Abu Zubaydah CSRT, 27 March 2007, pp. 25-27, available at http://www.aclu.org/files/pdfs/safefree/csrt_abuzubaydah.pdf (last visited July 21, 2010)

⁹⁵ ICRC Report on CIA Detainees, page 9.

⁹⁶ CoE Rendition Report (June 7, 2007), paras 168-169.

⁹⁷ CoE Rendition Report (June 7, 2007), paras 170-171.

on Polish territory, from 2002 to 2005. The following persons could therefore be held accountable for these activities: the President of the Republic of Poland, Aleksander KWASNIEWSKI, the Chief of the National Security Bureau (also Secretary of National Security Committee), Marek SIWIEC, the Minister of National Defence (Ministerial oversight of Military Intelligence), Jerzy SZMAJDZINSKI, and the Head of Military Intelligence, Marek DUKACZEWSKI.”⁹⁸

Former President Aleksander Kwaisniewski is reputed to have played a substantial role in ensuring the CIA were provided with necessary assistance, and the National Security Bureau (Biuro Bezpieczeństwa Narodowego, or BBN), located in the Chancellery of President Kwasniewski, negotiated the bilateral operational arrangements with the CIA on the part of the President’s office.⁹⁹

1.9. Rendition out of Poland

Abu Zubaydah was transferred from the ‘black site’ in Poland to another CIA ‘black site’ in which he continued to be detained, interrogated and subjected to torture and cruel and inhuman treatment. On information and belief, Zubaydah was transferred from Poland on a Boeing 737 airplane registered as N313P with the U.S. Federal Aviation Authority.

Three documents from Polish government sources demonstrate that the plane registered N313P landed at Szymany international airport on 22 September 2003. First, a Polish document indicates that on 22 September 2003 the plane registered N313P landed at Szymany international airport. This document, entitled “Summary Landing and Take Off Aircraft Type Boeing and Gulfstream at Szymany international airport in Years 2002-2005” lists nine flights, including the eighth entry, which states “8. 22 September 2003 Plane Boeing sign N313P arrival at 21:00 departure at 21.57”. Second, a Letter from the Polish Border Guard to the Polish Helsinki Foundation for Human Rights, dated 23 July 2010, shows that the plane registered N313P arrived at Szymany international airport on 22 September 2002 with 0 passengers and 7 crew, and departed with 5 passengers and 7 crew.¹⁰⁰ Third, a letter from the Polish Air Navigation Service Agency to the Helsinki Foundation for Human Rights, dated 16 September 2009 describes the flight data for the plane registered N313P, including the 22 September 2009 flight.¹⁰¹

Documents disclosed by Polish authorities to the Polish Helsinki Foundation for Human Rights indicate several entities involved in the N313P extraordinary rendition flight.

The plane was leased by Stevens Express Leasing, Inc., identified by the New York Times as a CIA front company.¹⁰² Stevens Express Leasing, Inc. was the registered owner of the plane

⁹⁸ CoE Rendition Report (June 7, 2007), para. 174.

⁹⁹ CoE Rendition Report (June 7, 2007), para. 177.

¹⁰⁰ Letter from Polish Border Guard to HFHR, 23 July 2010, available at <http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf>

¹⁰¹ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>; flight data available at http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip, accessed on 13 November 2010.

¹⁰² Scott Shane, New York Times, C.I.A. Expanding Terror Battle Under Guise of Charter Flights, 31 May 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9407E2DB1F39F932A05756C0A9639C8B63&pagewanted=print>, accessed on 13 November 2010.

registered N313P until late 2001 or early 2002 when it was registered with Premier Executive Transport Services, Inc.¹⁰³ Premier Executive Transport Services is a Delaware registered corporation with its home office listed as Hill & Plakias, P.C., 339 Washington Street, Suite 202, Dedham, Massachusetts, 02026.¹⁰⁴ Premier Executive Transport Services's officers and directors were Philip Quincannon, President and Director, James Kershaw, Secretary/Treasurer and Director, and Colleen A. Bornt, director.¹⁰⁵ According to a report in the New York Times, these identities are probably pseudonyms.

Jeppesen Dataplan, Inc., provided false flight data for the rendition flight. Jeppesen Dataplan has its principle place of business at 121 Albright Way, Los Gatos, California 95030, United States. An agent listed as [REDACTED] in Jeppesen Dataplan's International Trip Planning department provided updated information for the flight.¹⁰⁶

According to the SITA data released to the Helsinki Foundation for Human Rights, the plane was apparently piloted by "Michael Dineen".¹⁰⁷ The same information indicates that LOT Grounds Services was sub-contracted by Jeppesen Dataplan to perform ground-handling services at Szymany¹⁰⁸ World Fuel Service provided fuel at Szymany international airport.¹⁰⁹

The N313P airplane probably travelled the following routes:

<u>Location of Take-off</u>	<u>Destination</u>	<u>Date of the flight</u>
Washington, DC (KIAD)	Prague, Czech Republic (LKPR)	21st Sept 2003
Prague, Czech Republic (LKPR)	Tashkent, Uzbekistan (UTTI)	22nd Sept 2003
Kabul, Afghanistan (OAKB)	Szymany, Poland (EPSY)	23rd Sept 2003
Szymany, Poland (EPSY)	Bucharest, Romania (LRBS)	23rd Sept 2003
Bucharest, Romania (LRBS)	Rabat, Morocco (GMME)	23rd Sept 2003
Rabat, Morocco (GMME)	Guantanamo, Cuba (MUGM)	24th Sept 2004

¹⁰³ <http://www.airliners.net/search/photo.search?regsearch=N313P>

¹⁰⁴ <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=521857292>

¹⁰⁵ <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=521857292>

¹⁰⁶ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>; flight data available at http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip, accessed on 13 November 2010..

¹⁰⁷ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>; flight data available at http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip, accessed on 13 November 2010..

¹⁰⁸ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>; information available at http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip, accessed on 13 November 2010.

¹⁰⁹ See <http://www.hfhrpol.waw.pl/cia/konferencja-prasowa-czy-w-polsce-byly-wiezienia-cia>; information available at http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip, accessed on 13 November 2010.

Based on recent media reports, it is believed that the following detainees were present in the territory of the Republic of Poland as part of the extraordinary rendition flight of N313P: Khalid Sheik Mohammed, Ramzi Binalshibh, Abd Al-Nashiri, Abu Yasir Al Jazairi, Gouled Hassan Dourad, and Mutafa al-Hawasawi, who are witnesses to Abu Zubaydah's rendition from Poland.¹¹⁰

1.10. Abu Zubaydah's medical condition

As a result of the torture and ill-treatment Zubaydah has been subjected to, including in Poland, he suffers from debilitating pain and anguish. After more than four years of secret detention and torture, Abu Zubaydah has paid with his mind. I am unable to provide many of the details of Zubaydah's physical and psychological injuries because a U.S. court will not allow his U.S. counsel to disclose his injuries. Publicly available records describe that Zubaydah suffered a head injury from shrapnel while fighting the communists in Afghanistan. Those injuries were exacerbated by the ill-treatment inflicted by the CIA and by his extended isolation. As a consequence, he suffers blinding headaches and has permanent brain damage. I am told he has an excruciating sensitivity to sounds, hearing what others do not. The slightest noise drives him nearly insane. In the last two years alone, he has experienced about 200 seizures. His physical pain is only exceeded by his awareness that his mind is slipping away. Moreover long lasting torture and detention in inhuman condition left permanent harm on his agility and physical state, however bearing in mind the limitations described above at this stage of proceeding it is impossible to describe his physical state precisely. Besides of that he suffers the personal disorder and partial amnesia.

2. LEGAL SUBSTANTIATION OF THE CRIMINAL OFFENCES SUBJECT TO THE NOTIFICATION

2.1. Offence under article 231 § 1 Criminal Code

In light of the circumstances presented in the statement of facts it is highly probable that an offence under article 231 § 1 CC has been committed to the detriment of Abu Zubaydah and others, as well as to the detriment of the public interest, by persons with the status of public officers participating in the activities of the Site, as well as by persons providing infrastructure and operational resources for the Site and giving consent for its operation, in conjunction with article 2 CC by persons appointed to supervise the activities of the abovementioned persons and in conjunction with article 18 §1 CC by persons senior to these persons or persons giving them binding orders, also including persons forming part of the central state authorities. The offence in question consisted in consenting to the operation of a site within the territory of the Republic of Poland, where imprisoned persons were detained without legal basis or control by an independent tribunal, subjected to torture and inhuman, degrading treatment and subsequently deported to a country where they are at immediate risk of torture and inhuman, degrading treatment or punishment and where the death sentence could be pronounced and carried out on them.

¹¹⁰ Adam Goldman, Associated Press, CIA Flight Carried Secret from Gitmo, 6 August 2010, available at <http://abcnews.go.com/print?id=11339130>, accessed on 13 November 2010; Flash® presentation, available at <http://hosted.ap.org/specials/interactives/wdc/binalshibh/>.

It should be emphasised that the activities of the Site outlined in the statement of facts would not have been possible unless the criminal offences under article 231 § 1 CC, article 231 § 1 in conjunction with article 2 CC and with article 231 § 1 in conjunction with article 18 § 1 CC had been committed. In this state of affairs, including my Constituent, who had been directly harmed as a result of the illegal activities of the Site, in the pending proceedings with case reference number Ap V Ds. 37/09 as an injured party would be fully justified.

Article 231 CC penalises so-called malfeasance in office (official misconduct) defined as *an abuse of power* or *abuse of power by an official*, consisting in a public official misusing their powers or exceeding their duties, to the detriment of the public or private interest. Acting to the detriment in this case means that the perpetrator's conduct puts the interests of the law in the public sphere (the interests of society) or private sphere (the interests of the individual) at risk, with the perpetrator's conduct being able to take the form of action or nonfeasance.

There is no doubt that permitting an illegal detention site to operate within the territory of the Republic of Poland, which detains imprisoned persons without legal basis or control by an independent tribunal, subjecting them to torture, inhuman and degrading treatment and subsequently deporting them to a jurisdiction where they are at immediate risk of torture and inhuman, degrading treatment or punishment and where the death sentence could be pronounced and carried out on them, possesses the defining characteristics of the objective circumstances of an offence as per article 231 § 1 CC.

Within the context of reconstructing the defining characteristics of the objective circumstances of the criminal offence classified in article 231 § 1 CC, it should first of all be noted that the substance of the powers of any public officer may not and does not give rise to the authority to permit an illegal detention site to operate within the territory of the Republic of Poland or the illegal activities conducted therein, specified in detail in the description of the offence in question. Moreover, in no circumstances do the powers of public officers include taking part in the activities of such a site, providing it with infrastructure and operational resources nor giving binding orders associated with the above actions (see article 231 § 1 CC in conjunction with article 18 § 1 CC). The conduct specified above, can, when nonfeasance on the part of the persons appointed to monitor/supervise the activities of the persons directly involved in the Site's operations are added thereto (see article 231 § 1 CC in conjunction with article 2 CC), also constitute breach of duty – in each and every case.

The above comments retain their relevancy not only with reference to the normative powers and duties of public officers, as defined directly in the provisions of the law, but also to any rights and obligations of a non-normative type, the exceeding of which may fulfil the defining characteristics of liability under article 231 CC, including those that derive from the very essence of the exercising and nature of a particular position¹¹¹. In line with the above perspective, in relation to each public officer who has become aware of the Site, it can be stated that they are subject to the

¹¹¹ Cf. Ruling of the Supreme Court of 29th July 2009, I KZP 8/09, publ. Bulletin SN 2010, No. 2, and also – on the basis of article 286 Criminal Code of 1931- verdict of the Supreme Court of 10th October 1946, K 1292/46, publ. OSN(K) 1947, No. 4, item 101.

duty to prevent and not permit its illegal activities, which derives from the very essence of the exercising of public office.

In light of the above, it should be assumed with a high level of probability bordering on certainty that the illegal operation of the Site would have been impossible without associated conduct being carried out by persons with the status of public officers, which breached the duties or powers of these persons and were based on the fact that a site of this type had been "permitted" to operate within the territory of the Republic of Poland.

Moreover, it should be noted that in the circumstances of the present case, the consequences of the probable conduct of public officers under discussion no doubt consisted in actions that were detrimental to the private interest. The offence under discussion should thus be deemed as having been committed to the detriment of my Constituent and other persons, who, together with him, were imprisoned at the Site without legal basis or control by an independent tribunal, subjected to torture and inhuman, degrading treatment and then transported to a country where they are at immediate risk of torture or inhuman, degrading treatment or punishment or where the death sentence could be pronounced and carried out on them.

It is also not possible to overlook the fact that the operation of a site of this type within the territory of the Republic of Poland caused direct and indirect harm to the public interest, particularly to its manifestations, such as public safety, the authority of the public powers that be and citizens' trust in the authorities, and finally the good name of the Republic of Poland and the position of the Polish nation in the context of international relations.

With a view to completing the reconstruction of the defining characteristics of the objective circumstances of the offence as per article 231 § 1 CC, the existence of the undisputed relationship between the conduct of public officers under discussion and the consequences (and features at the same time) of this conduct in the form of actions to the detriment of the private and public interest should also be noted. The consequence of conduct consisting in public officers permitting the Site to operate within the territory of the Republic of Poland was thus the sanctioning and supporting of such a state of affairs, in which detainees, including my Constituent, were subjected i.a. to torture and inhuman, degrading treatment at the Site.

At the same time the above observation is unrelated to the qualification of the prohibited act described in article 231 § 1 CC as a crime giving rise to consequences (according to the view expressed in some case law and doctrine) or as a formal crime (according to the dominant view in case law).

If one favours the second of the above classifications in relation to the assessment of the legal nature of the crime subject to analysis, it should be noted that acting to the detriment of the public or private interest is not a characterisation of the consequences, but rather the conduct of the perpetrator. Thus the very fact that harm has arisen, or even the immediate threat of harm do

not possess the defining characteristics of a crime in this case, which determines the formal (not giving rise to consequences) nature of the crime regulated in article 231 § 1 CC¹¹².

To sum up the line of argument concerning the offence under article 231 § 1 CC, the seriousness of the offences should be emphasised, which have been committed, in all probability, by perpetrators with the status of public officers to the detriment of my Constituent and other persons, as well as to the detriment of the public interest. If the perpetrators who are guilty of the practice described herein are found it will thus be possible to describe the offences, of which they are accused, as being a phenomenon constituting a glaring abnormality with respect to the functioning of state or local government institutions, and therefore falling within the scope of the interests the legislator intended to protect by way of the provision in article 231 CC.

2.2. Offence under article 240 § 1 of the Criminal Code

In accordance with the statement of fact presented above there is a justified suspicion that the crime described in article 189 § 3 CC has been committed by unknown perpetrators to the detriment of my Constituent, for if one were to accept the cited state of facts as being proven, the suspicion of perpetrating the offence under article 240 § 1 CC directly by all the persons who – during the period when such conduct was subject to penalisation – had gained reliable knowledge of the perpetration of a crime under article 189 § 1, 2 or 3 CC within the area of the Site, i.e. an offence consisting in the detention of my Constituent and other persons, together with the torture of these persons and subjecting them to inhuman, degrading treatment should be considered as being justified.

The offence defined in article 240 § 1 CC is perpetrated by a person with reliable knowledge of the criminal preparation for or attempt at or perpetration of a prohibited act defined in article 118, 118a, 120-124, 127, 128, 130, 134, 140, 148, 163, 166, 189, 189a § 1, article 252 or a terrorist crime, who does not immediately notify a law enforcement agency. A person obliged to report the perpetration of one of the crimes indicated in the provision of the law under discussion (a so-called informer) is therefore subject to the duty which should be treated as a obligation to report a specific incident, about which the law enforcement authorities are not yet aware, that is as an order to report the occurrence of the "fact" itself which should "put prosecution in train" and potentially prevent perpetration¹¹³.

In light of the circumstances described in the present substantiation it would seem doubtful that the facts concerning the existence of the Site and its unlawful activities (including those perpetrated therein that have the defining characteristics of crimes under article 189 § 1, 2 or 3 CC), could remain unknown to any Polish public officers or other persons – over the period when the norm subject to analysis (in its current wording) was applicable. Taking into account

¹¹² Cf. *A. Zoll*, Commentary to article 231 CC in: The Criminal Code. Special Section. Volume II. Commentary to article 117-277 KK, Zakamycze, 2006, II edition, and verdicts of the Supreme Court of 12.2002, IV KKN 273/01, publ. Legalis and LEX no. 74484; of 4.12.2004, IV KK 276/07, publ. Legalis; of 8.5.2007, IV KK 93/07, publ. Prokuratura i Prawo - wk. 2007, No. 12, item 8; and SN [Supreme Court] verdict of 5.2.2008, WA 1/08, publ. Prok. i Pr. – wk. 2008, No. 11, item 9.

¹¹³ Supreme Court verdict of 12.10.2006 IV KK 247/06, publ. OSNwSK 2006, No. 1, item 1961.

the above, the suspicion of the perpetration of a crime under article 240 § 1 CC should be deemed as highly probable.

2.3. Offence under article 246 of the Criminal Code

On the basis of the state of facts presented in the present pleading it is highly probable that an offence under article 246 CC has been perpetrated to the detriment of my Constituent directly by the persons conducting his interrogation, in conjunction with article 18 § 1 CC by their supervisors or persons who have given them binding orders, in conjunction with article 2 CC by persons, at whose disposal my Constituent remained during his detention at the Site and in conjunction with article 18 § 3 CC by persons providing the infrastructure and resources for operating the Site and who gave consent for the operation of the Site. The offence would consist in the use of physical violence against Abu Zubaydah in the form of hitting with fists, kicking, walling and illegal threats of imprisonment and torture, as well as other forms of physical or psychological ill treatment of my Constituent, in order to force him to give testimony incriminating himself and other people, if the perpetrator is found to be a public officer within the meaning of article 115 § 13 CC or a person acting under their orders.

In accordance with article 246 CC the crime defined in this provision of the law may be perpetrated by a public officer or someone acting under their orders who uses violence, illegal threats or physically or psychologically mistreats another person in another way, in order to elicit specific testimony, explanations, information or statements. The object of the protection afforded by this provision of the law is therefore the proper functioning of the administration of justice, which in particular ensures the upholding of human rights, and moreover: human freedom, dignity and mental and physical integrity.

The circumstances of using physical and mental torture and unlawful threats against Abu Zubaydah, which have been described in detail in this substantiation fully comply with the defining characteristics of violence and unlawful threat and equally of other forms of physical and psychological ill treatment.

At the same time it should be noted that Abu Zubaydah was subjected to actions consisting in violence, unlawful threats and physical and mental ill treatment, in order to elicit specific testimony, explanations, information or statements, which has further defining characteristics of the objective circumstances of an offence under article 246 CC.

At this juncture it is worth noting that within the context of the crime described in article 246 CC the legislator penalises an offence consisting in coercing the giving of testimony and other information, irrespective of for what purpose this testimony or information is to be used and under what procedures it is obtained (particularly irrespective of whether it is obtained as part of proceedings conducted in accordance with legislation). The above conclusion should be deemed as justified, if only on the basis of comparing the wording of the law under discussion and the content of article 233 CC. For, contrary to the latter, in article 246 CC the formulation: *"to be used as evidence in court proceedings or other proceedings conducted on the basis of legislation"* was not used to characterise the coerced testimony. It should also be noted that the act defined in article 246 CC

constitutes a crime, irrespective of whether the coerced testimony, explanations and information that have been obtained by force are true or false.

According to the definition contained in article 115 § 13 CC, a public officer within the meaning of this law is, i.a. an officer of a body set up to protect public safety or an officer of the Prison Service (article 115 § 13 clause 7 CC), as well as a person on active military service (article 115 § 13 clause 8 CC).

Therefore, in a situation where actions with the defining characteristics of a prohibited act under article 246 CC have been perpetrated by officers appointed to protect public safety (e.g. from the Polish Intelligence Agency or Internal Security Agency), officers of the Prison Service or soldiers on active military service, including in the form of assistance by way of providing infrastructure and resources and giving consent for the operation of the site (article 246 CC in conjunction with article 18 § 3 CC), the qualification of the actions of these officers under article 246 CC should be deemed as being fully justified.

At the same time, in the situation described a convergence of the norms from article 246 CC and article 231 § 1 CC would be possible. For, the act under article 246 CC is, in principle, an act consisting in exceeding powers or breach of duty by a public officer and acting to the detriment of the private and public interest.

Also, the fact cannot be overlooked that the crime of coercing testimony has been classified by the Polish legislator with respect to the fulfilment of convention obligations relating to the illegality of using torture (see *Justification of the draft CC*, page 101), deriving from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Poland (Journal of Laws of 1989 No. 63, item 378) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Journal of Laws of 1995 No. 46, item 238 as amended). The introduction of the provision of law in question was also directly linked to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4.11.1950. (Journal of Laws of 1993 No. 61, item 284 as amended), article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights (Journal of Laws of 1977 No. 38, item 167), as well as the content of article 40 of the Polish Constitution and article 3 CC and article 4 of the Code of Execution of Criminal Sentences (CECS), which provide a statutory framework for humanitarianism.

Article 1, paragraph 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "**UN Convention**") defines the meaning of the term "*torture*". According to the provision of law in question "*torture*" means "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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Article 4 of the UN Convention obliges the State Parties to the UN Convention to ensure that that all acts of torture constitute crimes under their domestic criminal law, with this obligation also applying to attempting to perpetrate torture and complicity or participation in torture. On the other hand, according to article 2 of the Convention each State Party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. Similarly, an order from a superior officer or a public authority may not be invoked as a justification of torture.

In light of the definition of "torture" in the UN Convention, one cannot overlook the fact that the establishment in the pending proceedings that Abu Zubaydah had been subjected to a constant and systematic regime of investigative practices, termed "enhanced interrogation techniques" in a detention centre within the territory of the Republic of Poland would constitute a flagrant case of possessing all the defining characteristics specified in this definition.

With respect to the norms of international law it should moreover be emphasised that the offence classified in article 246 CC may constitute an infringement of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), according to which no-one may be subjected to torture or inhuman or degrading treatment or punishment. For, the scope of the defining characteristics of the objective circumstances of a crime as per article 246 encompasses two of the three forms of treatment which are prohibited by article 3 ECHR; that is torture or inhuman or degrading treatment. In accordance with the established line of case law of the European Court of Human Rights, when interpreting article 3 ECHR the definition of torture cited above is used, as incorporated in article 1 of the UN Convention. On the other hand, in case law inhuman or degrading treatment is considered to be such that reaches a certain threshold of discomfort which may not only be of a physical, but also mental nature.¹¹⁴

The prohibition of ill treatment deriving from article 3 ECHR is absolute. This means that departure therefrom may not be legitimised by any public interest, even that of the highest import: "even in the most difficult of circumstances, as are combating terrorism or [organised] crime, the Convention absolutely prohibits the use of torture or inhuman or degrading treatment or punishment."¹¹⁵

¹¹⁴ See P. Hofmański, *Nowe polskie prawo karne w świetle europejskich standardów w zakresie ochrony praw człowieka*, Warszawa 1997, page 16.

¹¹⁵ Cf. L. Garlicki, commentary to article 3 in: "Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do artykułów 1–18", prof. dr hab. Leszek Garlicki, prof. dr hab. Piotr Hofmański, prof. dr hab. Andrzej Wróbel, Warszawa 2010, C.H. Beck, edition 1, and the verdicts cited therein of the European Court of Human Rights: of 4.7.2006 in the case of *Ramirez Sanchez v. France*, para. 115; of 28.2.2008, in the case of *Saadi v. Italy*, para. 137; of 19.2.2009 and in the case of *A. and Others v. the United Kingdom*, para. 126.

If it is found that the circumstances of the state of facts described in this pleading have taken place, then the prohibition laid down in article 3 ECHR has without doubt been infringed, due to torture and inhuman, degrading treatment being used in relation to Abu Zubaydah.

2.4. Offence under article 247 § 3 of the Criminal Code

In the state of facts described in detail in this substantiation, it is suspected that an offence under article 247 § 3 CC has been perpetrated directly by the persons at whose disposal Abu Zubaydah remained during his stay at the Site and by persons providing the infrastructure and resources for the operation of the Site and giving consent for the Site's operation – consisting in consenting to an offence defined in article 247 § 2 being perpetrated in relation to Abu Zubaydah, consisting in inflicting physical and psychological violence on him whilst he was at the Site, in a situation where it would be deemed that Abu Zubaydah has been lawfully imprisoned and in which the above persons have turned out to be public officers within the meaning of article 115 § 13 CC.

The provision in article 247 § 3 CC classifies the crime of so-called permitting the ill treatment of an imprisoned person. This is committed by a public officer, who in breach of duty, perpetrates the offence defined in article 247 § 1 or 2 CC, and therefore the offence of ill treating an imprisoned person.

With respect to the perpetrated act in the form of "ill treatment" (see article 247 § 1 and 2 CC) one can cite the view of the Supreme Court, according to which "*the statutory term: 'ill treats' signifies action or nonfeasance, consisting in the deliberate inflicting of physical pain or severe mental suffering, which occurs repeatedly or once, however is intense and lasts for an extended period of time*"¹¹⁶. In the same judgement the Supreme Court found that bringing about a consequence by ill treatment, which falls outside the scope of the concept of ill treatment and fully complies with the defining characteristics of another crime, justifies the cumulative legal qualification of such an act.

The offence provided for in article 247 § 3 CC consists in nonfeasance, and therefore the non-undertaking of actions (in breach of duty) aiming at preventing the ill treatment of an imprisoned person or a lack of response to the fact that such a person is being ill treated or the toleration of such a fact. The object of the penalised offence under article 247 § 3 CC may only be a public officer, particularly – but not solely, a person whose duty it is to supervise the performance of the means consisting in imprisonment (e.g. an officer of the Prison Service).

In the circumstances of the present case attention should be paid to the doubts brought about by the issue of Abu Zubaydah, and potentially other persons detained at the Site being deemed as lawfully imprisoned, and therefore persons, to the detriment of which a crime under article 247 CC may be committed (that is deeming the Injured Party to be a so-called *subject of an executive act*). The term "imprisoned person" should be understood as being a person who has been imprisoned on grounds of a court judgement or a legal order issued by another competent state body, but not

¹¹⁶ Thus: the Supreme Court in the previous "*Wytyczne wymiaru sprawiedliwości i praktyki sądowej w zakresie prawnokarnej ochrony rodziny*" [Guidelines for the judiciary and court practice concerning the protection of the family in criminal law] – SN [Supreme Court] ruling of 9.6.1976, VI KZP 13/75, publ. OSNKW 1976, No. 7-8, item 86, and also Supreme Court verdict of 8.2.1982, II KR 5/82, publ. OSNPG 1982, No. 8, item 114.

as a result of a crime under article 189 CC. However, if the findings of the investigation were to lead to the conclusion that Abu Zubaydah did have the status of a person who had been lawfully imprisoned, qualifying the nonfeasance of the persons who allowed his physical and mental ill treatment of a particularly cruel nature (article 247 § 2 CC) as offences under article 247 § 3 CC should be considered appropriate.

For all of the above reasons, I make application as in the motion.

Bartłomiej Jankowski
advocate