1. Summary

In the unanimously decided case of *Al Nashiri v. Poland*, the European Court of Human Rights determined that Poland was in breach of Article 3 of the European Convention on Human Rights,[1] which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[2] About Article 3, the Court noted that it uniquely allows no exceptions or derogation[3] and that it pertains only to ill-treatment that "attain[s] a minimum level of severity"[4] conducted purposively.[5] Applying these standards, the Court concluded that "the treatment to which the applicant was subjected by the CIA . . . amounted to torture within the meaning of Article 3."[6] The first question, then, is the relationship between this treatment by a United States agency and Poland's liability under the Convention.

The basis of Poland's breach in the Court's estimation was its knowledge of and complicity in the CIA treatment of the appellant, which amounted to a failure to "take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private

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[1] Al Nashiri v. Poland, App. No. 28761/11, para. 518 (Eur. Ct. H.R. July 24, 2014), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044 (citations omitted).
[2] Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.
[3] *Al Nashiri*, para. 507.
[4] *Id.* at para. 508. Importantly, there must be a distinction between conduct that constitutes torture and that which constitutes "inhuman or degrading treatment." *Id.*
[5] *Id.*
[6] *Id.* at para. 516.

individuals."[7] Such an omission forms the basis of liability "under Article 1 of the Convention, taken together with Article 3,"[8] according to the Court because Poland knew or ought to have known of a risk of ill-treatment.[9] This included "kn[owing] of the nature and purposes of the CIA's activities on its territory at the material time;"[10] "cooperat[ing] in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory;"[11] being "complicit[] in the HVD Programme;"[12] and that "given the knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, [Poland] ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention."[13] All this amounted to "for all practical purposes, facilitate[ing] the whole process, creat[ing] the conditions for it to happen and ma[king] no attempt to prevent it from occurring."[14]

The second question is what ruling the ECtHR has made with respect to the United States. It appears from the judgment finding Polish liability for complicity with American actions that the Court has found the United States in breach of Article 3 of the Convention. Yet such a conclusion seems in tension with the Vienna Convention on the Law of Treaties rules regarding third states, which indicate that, generally, "[a] treaty does not create either obligations or rights of a third State without its consent."[15] Moreover, one might argue that the United States was a necessary party to the litigation, a doctrine we covered in cases such as the *East Timor* case.[16]

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[7] *Id.* at para. 517 (citation omitted).
[8] *Id.* Article 1 of the Convention states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.
[9] *Al Nashiri*, para. 509.
[10] *Id.* at para. 517.
[11] *Id.*
[12] *Id.*
[13] *Id.* (citation omitted).
[14] *Id.*
[15] Vienna Convention on Law of Treaties, art. 34, 1155 U.N.T.S. 331.

2. Relevant Text from *Al Nashiri v. Poland*

507. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in time of war or other public emergency threatening the life of the nation (see, among many other examples, Soering, cited above, § 88; Selmouni v. France, cited above, § 95; Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV); Ilas□cu and Others cited above, § 424; Shamayev and Others, cited above, § 375 and El-Masri, cited above, § 195; see also Al-Adsani v. the United Kingdom [GC], no. 35763/97, §§ 26-31, ECHR 2001-XI).

Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see Chahal v. the United Kingdom, 15 November 1996, § 79, Reports 1996-V; Labita, cited above, § 119; Öcalan v. Turkey [GC], no. 46221/99, § 179 ECHR 2005-IV and El-Masri, cited above, § 195

508. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see Ireland v. the United Kingdom, cited above, § 162; Kudła v. Poland [GC], no. 30210/96, § 92, ECHR 2000-XI Jalloh v. Germany cited above, § 67). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, inter alia, Aksoy v. Turkey, 18 December 1996, § 64, Reports 1996-VI; Egmez v. Cyprus, no. 30873/96, § 78, ECHR 2000-XII; Krastanov v. Bulgaria, no.50222/99, §53, 30 September 2004; and El-Masri, cited above, § 196).

In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see Aksoy, cited above, § 62). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see I□lhan v. Turkey [GC], no. 22277/93, § 85, ECHR 2000-VII; and El-Masri, cited above, § 197).

509. The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention,

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[16] For an example of this argument, see Martin Scheinin, *The ECtHR Finds the US Guilty of Torture—As an Indispensable Third Party?*, EJIL: TALK! (July 28, 2014), http://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/.

taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see A. v. the United Kingdom, 23 September 1998, § 22, Reports of Judgments and Decisions 1998-VI and Z and Others v. the United Kingdom [GC], no. 29392/95, § 73, ECHR 2001-V). The State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see Mahmut Kaya v. Turkey, no. 22535/93, § 115, ECHR 2000-III and El-Masri, cited above, § 198).

[…]

516. In view of the foregoing, the Court concludes that the treatment to which the applicant was subjected by the CIA during his detention in Poland at the relevant time amounted to torture within the meaning of Article 3 of the Convention (see paragraph 508 above and El-Masri, cited above, § 211).

517. The Court has already found that Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory. It has also found that, given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, it ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention (see paragraph 442 above).

It is true that, in the assessment of the experts – which the Court has accepted – the interrogations and, therefore, the torture inflicted on the applicant at the Stare Kiejkuty black site were the exclusive responsibility of the CIA and that it is unlikely that the Polish officials witnessed or knew exactly what happened inside the facility (see paragraphs 441-442 above).

However, under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals (see paragraphs 443 and 509 above).

Notwithstanding the above Convention obligation, Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring. As the Court has already held above, on the basis of their own knowledge of the CIA activities deriving from Poland's complicity in the HVD Programme and from publicly accessible information on treatment applied in the context of the "war on terror" to terrorist suspects in US custody the authorities – even if they did not witness or participate in the specific acts of ill-treatment and abuse endured by the applicant – must have been aware of the serious risk of treatment contrary to Article 3 occurring on Polish territory.

Accordingly, the Polish State, on account of its "acquiescence and connivance" in the HVD Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory (see paragraph 452 above and El-Masri, cited above, §§ 206 and 211).

518. Furthermore, Poland was aware that the transfer of the applicant to and from its territory was effected by means of "extraordinary rendition", that is, "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see El-Masri, cited above, § 221).

In these circumstances, the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer (see paragraph 454 above). Consequently, by enabling the CIA to transfer the applicant to its other secret detention facilities, the Polish authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraphs 103, 442 and 453-454 above).

519. There has accordingly been a violation of Article 3 of the Convention, in its substantive aspect.

3. Articles 34–38 of the Vienna Convention on the Law of Treaties

SECTION 4. TREATIES AND THIRD STATES

Article 34. GENERAL RULE REGARDING THIRD STATES

A treaty does not create either obligations or rights for a third State without its consent.

Article 35. TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36. TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37. REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38. RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

4. Martin Scheinin, *The ECtHR Finds the US Guilty of Torture—As an Indispensable Third Party?*, EJIL: TALK! (July 28, 2014), http://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/.

The recent rulings by the European Court of Human Rights in two cases concerning secret detention in Poland are remarkable, not the least because their bold approach in respect of human rights violations committed by a third party, in this case the United States of America. Of course, the US is not a party to the European Convention on Human Rights and was not a participant in the proceedings. In both cases Poland was found to have violated a number of ECHR provisions, including articles 3 and 5, by hosting a CIA black site and by otherwise participating in the US programme of secret detention and extraordinary renditions.

In paragraph 516 of *Al Nashiri v. Poland* (Application no. 28761/11, Chamber Judgment of 24 July 2014), the Court concludes:

> In view of the foregoing, the Court concludes that the treatment to which the applicant was subjected by the CIA during his detention in Poland at the relevant time amounted to torture within the meaning of Article 3 of the Convention (...).

The same conclusion appears in paragraph 511 of *Husayn (Abu Zubaydah) v. Poland* (Application no. 7511/13, Chamber Judgment of 24 July 2014). Immediately after the finding on torture by the US, the Court makes its finding in respect of Poland (*Al Nashiri* para. 517).:

> Accordingly, the Polish State, on account of its "acquiescence and connivance" in the HVD Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory ...

One may ask whether the ECtHR through its formulations in paras. 516-517 created a situation where the US was an indispensable third party, to the effect that the finding in respect of the lawfulness of conduct by the US was a prerequisite for a conclusion in relation to Poland, even if the Court obviously did not consider the US participation in the proceedings (or consent to its jurisdiction) to be indispensable.

The ECtHR was more cautious in *El-Masri*

The findings in the new cases were formulated differently from the earlier judgment in *El-Masri v. the former Yugoslav Republic of Macedonia* (Application no. 39630/09, Grand Chamber Judgment of 13 December 2012, para. 211):

> In the Court's view, such treatment amounted to torture in breach of Article 3 of the Convention. The respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring.

The small differences compared to *Al Nashiri* are that in *El-Masri* the ECtHR did not explicitly name the perpetrator of the primary human rights violation in the actual conclusion (but yes in the preceding paragraphs, see para. 206 of *El- Masri*) and that it at least to certain extent explained why the conduct by the European state was in itself in breach of the ECHR ("actively facilitated" & "failed to take any measures"). By and large the comments by André Nollkaemper on *El-Masri* on *EJIL: Talk!* are pertinent also in the new cases which took even further the idea of finding an ECHR party responsible for the very conduct of another state.

The ICJ and the indispensable third party doctrine

The International Court of Justice has long relied on the indispensable third party doctrine, first developed in the Monetary Gold case – see, e.g., Christian Tomuschat, Jurisdiction, in Zimmermann et al., The Statute of the International Court of Justice: A Commentary (OUP 2012, at pp. 648-650). For example, in the *Case Concerning East Timor (Portugal v. Australia)* (I.C.J. Reports 1995, p. 90), the Court declared inadmissible the whole case, as the question of a breach of international law by Australia could not be addressed without assessing the conduct of a third state, Indonesia:

> ... the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation... Indonesia's rights and obligations would thus constitute the very subject matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954, p. 32).

In *Nauru v. Australia*, the ICJ however did not decline jurisdiction, when a finding in respect of Australia might have implications for the legal situation of the UK and New Zealand, "but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia". (*Nauru v. Australia*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 para. 55)

It may be that the state-centred nature of adjudication between sovereign states requires that consent and diplomacy are as important as facts and law. One could assume that in the field of

human rights there is both a moral need and a legal foundation for assessing one state's actions and responsibility irrespective of whether that can only be done by saying something about another state's conduct as well.

UN human rights treaty bodies

The Committee against Torture was surprisingly cautious about third party responsibility in its own rendition case, *Agiza v. Sweden* (Communication No. 233/2003, Decision of 20 May 2005). The case concerned the rendition by the CIA of an Egyptian individual from Sweden to Egypt. Before the CAT, the case was framed as one about non- refoulement (article 3 of the Convention against Torture), and the question of Agiza's treatment by CIA agents on Swedish soil was not addressed. Keeping quiet about the USA and when assessing only the non-refoulement issue, the CAT also steered clear from assessing any action by Egypt, restricting itself only to what was foreseeable for Sweden at the time of removal:

> 9.4 The Committee noted that Egypt has not made the declaration provided for under article 22 recognizing the Committee's competence to consider individual complaints against that State party. The Committee observed, however, that a finding, as requested by the complainant, that torture had in fact occurred following the complainant's removal to Egypt (see paragraph 5.8), would amount to a conclusion that Egypt, a State party to the Convention, had breached its obligations under the Convention without it having had an opportunity to present its position. This separate claim against Egypt was thus inadmissible ratione personae.

The companion case of Alzery v. Sweden was subsequently decided by the Human Rights Committee (Communication No. 1416/2005, Views of 25 October 2006), on the basis of richer factual information and including a separate complaint about ill-treatment on Swedish soil prior to the complainant's removal. The Committee made explicit references to the United States and the CIA in the narrative parts of its Views but not in its conclusion. Sweden was found complicit in such treatment by foreign agents on Swedish soil that triggered a violation of ICCPR article 7 by itself:

> 11.6 On the issue of the treatment by the author at Bromma airport, the Committee must first assess whether the treatment suffered by the author at the hands of foreign agents is properly imputable to the State party under the terms of the Covenant and under applicable rules of State responsibility. The Committee notes that, at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party (see also article 1 of the Convention against Torture). It follows that the acts complained of, which occurred in the course of performance of official functions in the presence of

> the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged...

Contrary to the ECtHR rulings in the new cases against Poland, the HRCttee was here relating to a third state (the USA) that was a party to the ICCPR and subject to monitoring by the same body through the periodic reporting procedure and potentially the mechanism of inter-state complaints.

Three observations

As the ECtHR does not have nor ever will have jurisdiction over the US, even bold statements concerning human rights violations by non-European states will in no way be prejudicial in subsequent cases before it. This is a clear difference as compared to the ICJ or UN human rights treaty bodies and may encourage a bold approach.

One may nevertheless ask what would be lost if the ECtHR were to take care to formulate its findings in relation to a respondent state in a way that would not make it an indispensable prerequisite to first say something conclusive on a human rights violation by a third state. Here, the formulae used by the ECtHR in *El-Masri* or by the HRCttee in *Alzery* may provide some guidance.

Finally, the ECtHR has otherwise made creative use of ECHR article 36 that allows the inviting "any other person concerned" as third-party intervener in a case. Could this provision be extended to non-European states when they are implicated by the facts? Even if they declined the invitation, it would strengthen the legitimacy of the ECtHR if it were to offer an opportunity to appear as third-party intervener.