Numéro de dossier

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

al Nashiri v. Poland

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme, ainsi que des articles 45 et 47 du règlement de la Court

under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of the Court

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I. THE PARTIES

The Applicant

1. Surname: al Nashiri
2. First Names: Abd al Rahim Husseyn Muhammad
3. Nationality: Saudi Arabia
4. Date and Place of Birth: 5 January 1965, Mecca, Saudi Arabia
5. Address: The applicant is currently detained in U.S. custody in Camp 7, Guantánamo Bay, Cuba.
6. Representatives:

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The High Contracting Party

7. The People's Republic of Poland.

II. SUMMARY

8. This case challenges Poland's active complicity in the torture and "rendition" of Abd al Rahim Husseyn Muhammad al Nashiri on Polish soil. In 2002 and 2003, Poland hosted a secret Central Intelligence Agency (CIA) prison at a Polish military intelligence base in Stare Kiejkuty, where Mr. al Nashiri was detained incommunicado for six months and brutally tortured. Here, U.S. interrogators subjected Mr. al Nashiri to mock executions with a power drill as he stood

[1] Mr. al Nashiri's representatives gratefully acknowledge the assistance of Justice Initiative legal fellow Cole Taylor and the Yale Law School Lowenstein Clinic in preparing this application.

naked and hooded; racked a semi-automatic handgun close to his head as he sat shackled before them; held him in "stress positions," including by lifting him off the floor by his arms while they were bound behind his back causing their near dislocation from his shoulders; and threatened to bring in his mother and sexually abuse her in front of him.

9. The Polish government provided extraordinary levels of security cover for CIA rendition operations on Polish territory and actively assisted the United States government in secretly transporting Mr. al Nashiri in and out of the country. On or about 5 December 2002, Poland enabled a secret flight bearing Mr. al Nashiri to land at Szymany airport, Poland. On or about 6 June 2003, Poland assisted the United States in secretly flying Mr. al Nashiri out of Poland, despite the grave risk of his being subjected to further torture, incommunicado detention, a flagrantly unfair trial, and the death penalty in U.S. custody. There is no evidence of any attempt by the Polish government to seek diplomatic assurances from the United States to avert the risk of such consequences. A 2007 Council of Europe Report confirms that Poland was "knowingly complicit" in the CIA's secret detention programme and that senior Polish officials "knew about and authorised Poland's role" in CIA rendition operations on Polish territory.

10. After Poland assisted the CIA in transporting Mr. al Nashiri from Poland, the CIA subjected him to further incommunicado detention at a number of secret locations outside Poland. It was not until September 2006 that the United States government first acknowledged that the CIA had secretly detained Mr. al Nashiri overseas, and that he had since been transferred to U.S. custody in Guantánamo Bay.

11. Mr. al Nashiri remains imprisoned in Guantánamo Bay to date. From the time that he was captured by the CIA in 2002 until the time of this filing, he has never appeared in open court. Moreover, his U.S. lawyers have been unable to relay his communications in public because, under current U.S. government classification guidelines, everything he says is presumed to be classified at the highest i.e., "Top Secret" level, and no procedure has been available for declassifying such communications.

12. A heavily redacted transcript of a 2007 closed proceeding held in Guantánamo Bay reveals that Mr. al Nashiri said: "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." Mr. al Nashiri's own descriptions of the torture methods applied on him by the U.S. government are blacked out in the transcript. He does, however, state: "Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body."

13. On 20 April 2011, United States military commissions prosecutors brought charges against Mr. al Nashiri relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. The prosecutors also stated their intent to seek the death penalty in his case. On 27 April 2011, Bruce MacDonald, the Convening Authority for U.S. military commissions, indicated that he would consider written submissions against the death penalty until 30 June 2011, following

which he will make a decision on whether to approve capital charges and refer them for trial to a military commission.

14. Mr. al Nashiri will face trial by military commission despite his civilian status and the previous indictment of his alleged co-conspirators in U.S. federal court. These military commissions lack independence, impartiality and fair trial guarantees, and apply discriminatorily only to non-U.S. citizens. Indeed, the cumulative deficiencies in these commissions would flagrantly deny Mr. al Nashiri's right to a fair trial.

15. Poland violated Article 3 and Article 8 of the European Convention by enabling Mr. al Nashiri's torture, ill-treatment and incommunicado detention on Polish territory. It also violated Article 5 by permitting his incommunicado detention there.

16. The Polish government further violated Mr. al Nashiri's rights under Article 2, Article 3 and Protocol No. 6 to the Convention by assisting in his transfer from Poland despite a real risk that he would be subjected to the death penalty; under Article 3 by assisting in his transfer despite the real risk of further ill-treatment in U.S. custody; under Article 5 by assisting in his transfer despite a real risk of further incommunicado detention; and under Article 6 by assisting in his transfer from Poland despite the risk of his being subjected to a flagrantly unfair trial.

17. Although Mr. al Nashiri has sought legal redress in Poland, the Polish government has never acknowledged its role in his rendition, and no-one has ever been held accountable for the violation of his rights under the Convention. A criminal investigation into the secret CIA prison commenced almost five years after his transfer from Poland. That investigation has now been pending for more than three years and has been utterly lacking in transparency. Indeed, the Polish prosecutor has made no public disclosures on its precise scope, progress or when it is likely to conclude. By failing to conduct a prompt and effective investigation into the violation of Mr. al Nashiri's rights, Poland violated articles 2, 3, 5, and 8, as well as his right to an effective remedy under Article 13. Finally, the Polish government's failure to acknowledge, effectively investigate, and disclose details of Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition violates his and the public's right to truth under Articles 2, 3,5,10 and 13.

18. Mr. al Nashiri asks this Court to find that Poland has violated his rights under the European Convention and that he is entitled to just satisfaction and an effective investigation into his case.

19. Finally, the U.S. government's 20 April 2011 announcement has placed Mr. al Nashiri at imminent risk of being subjected to a flagrantly unfair trial by military commission and the death penalty. The announcement has also exposed him to anguish associated with the prospect of being put to death, an anguish that is compounded by the prospect of a flagrantly unfair trial by military commission, and likely to continue for many years until his case is resolved. Mr. al Nashiri therefore asks this Court to direct the Polish government to use all available means at its disposal to ensure that the United States does not subject him to the death penalty. These means include but are not limited to: (i) making

written submissions before 30 June 2011 to Bruce MacDonald, the Convening Authority for Military Commissions, to ensure that he does not approve the death penalty for Mr. al Nashiri's case; (ii) obtaining diplomatic assurances from the United States Government that it will not subject Mr. al Nashiri to the death penalty; (iii) taking all possible steps to establish contact with Mr. al Nashiri in Guantánamo Bay, including by sending delegates to meet with him to monitor his treatment and ensure that the status quo is preserved in his case; and (iv) retaining and bearing the costs of lawyers authorised and admitted to practice in relevant jurisdictions in order to take all necessary action to protect Mr. al Nashiri's rights while in U.S. custody including in military, criminal or other proceedings involving his case.

20. Mr. al Nashiri also requests that this Court ask the Secretary General of the Council of Europe to request that the United States not subject Mr. al Nashiri to the death penalty.

III. STATEMENT OF FACTS

21. Mr. al Nashiri is a 46-year old Saudi national who is a victim of a joint U.S.-Polish rendition operation. From about 5 December 2002 to about 6 June 2003, the Polish government enabled his incommunicado detention and torture at a secret CIA prison on Polish territory. On or about 6 June 2003, the Polish government assisted the CIA with his transfer from Poland despite the real risk that he would be subjected to further ill-treatment, incommunicado detention, a flagrantly unfair trial, and the death penalty in U.S. custody.

22. Mr. al Nashiri is currently imprisoned in United States custody in Guantánamo Bay, Cuba.

23. The details of his treatment in the context of the post-11 September 2001 rendition programme are as described below.

Post-11 September 2001 Rendition Programme

24. After 11 September 2001, the U.S. government began operating a "rendition" programme under the auspices of which the CIA, in cooperation with the governments of other countries, secretly detained, interrogated and abused suspected terrorists in detention facilities outside the United States.[2]

25. On 17 September 2001, President Bush signed a classified Presidential Finding granting the CIA authority to detain terrorist suspects and to set up secret

[2] The origins of the post-11 September 2001 rendition programme can be traced to the CIA rendition program set up in 1995. In its pre-11 September 2001 form, the programme aimed at capturing suspected terrorists with the purpose of delivering them to the custody of countries in which they were already subject to legal proceedings. After the terrorist attacks of 11 September 2001, the U.S. rendition program changed to allow the CIA to detain and interrogate terrorism suspects overseas. See Exhibit 1: Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations," Serial No. 110-28, 17 April 2007, p. 12. Available at: http://foreignaffairs.house.gov/110/34712.pdf.

detention facilities outside the United States where it could subject "high-value detainees" to "enhanced interrogation techniques."[3]

26. President Bush publically acknowledged the rendition programme on 6 September 2006,[4] when he announced that the CIA had detained and interrogated Mr. al Nashiri among other individuals in secret locations outside the United States before transferring them to Guantánamo Bay.[5]

27. Official U.S. government documents describe the rendition process for "high value detainees" (HVDs).[6] During rendition, the United States flew HVDs to a secret overseas detention facility known as a "black site"; while in flight, the detainee was "shackled and deprived of sight and sound through the use of blindfolds, ear muffs and hoods."[7] Once suspects arrived at the black site, U.S. black site officials strip-searched them, photographed them, and performed medical exams. The prisoners were then subjected to detention conditions that included "white noise/loud sounds . . . and constant light during portions of the interrogation process"[8] and interrogations aimed at "creat[ing] a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner." [9]

28. According to official U.S government documents, during interrogation at black sites, the prisoners were subjected to "conditioning techniques,"— including nudity, dietary manipulation, and prolonged sleep deprivation via vertical shackling to walls (with or without the use of a diaper for bowel movements)— designed to "reduce . . . [them] to a baseline dependent state." [10] The prisoners

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[3] Exhibit 2: Human Rights Council, United Nations General Assembly, 13th Session, Agenda Item 3, "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" A/HRC/13/42, at para 102-104, 19 February 2010 (U.N. Joint Experts' Report). Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf; see also Exhibit 3: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Council of Europe, Doc. 11302 rev, 11 June 2007, para. 58 (2007 Council of Europe Report). Available at: http:assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

[4] 2007 Council of Europe Report, Summary, para. 3.

[5] President George W. Bush, "Transcript of President Bush's Remarks, "Speech from the East Room of the White House," 6 September 2006. Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html ("a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence Agency. . . .This group includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole."). The U.S. government subsequently claimed that Mr. Al Nashiri was the USS Cole bombing suspect.

[6] Exhibit 4: Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's Combined Use of Interrogation Techniques," 30 December 2004 (CIA Rendition Background Paper). Available at: http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf.

[7] *Ibid.* at 2.

[8] *Ibid.* at 4.

[9] *Ibid.* at 1.

[10] *Ibid.* at 4-5.

were also subjected to "corrective techniques" designed to correct behavior or startle detainees, which included slapping suspects across the face and abdomen, holding a suspect's face in an intimidating manner, and the use of "attention grasps," in which interviewers physically restrained suspects in an attempt to demand their attention.[11] In addition, prisoners held at black sites were subjected to "coercive techniques" in order to "persuade a resistant HVD to participate with CIA interrogators."[12] These techniques included shoving prisoners against a wall ("walling") twenty to thirty times, dousing them with water, placing them in stress positions, and holding them in "cramped confinement" in a large box for eight to as much as 18 hours a day, or in a small box for two hours. Interrogators were expressly permitted to use multiple interrogation techniques during a single interrogation session, and techniques such as walling could be used several times without interruption.[13]

Mr. al Nashiri's Rendition to Polish Black Site

29. Mr. al Nashiri's "rendition" began at the end of October 2002, when he was captured in Dubai, in the United Arab Emirates.[14]

30. By November 2002, Mr. al Nashiri was secretly transferred to the custody of the CIA.[15]

31. U.S. agents took him to a secret CIA prison in Afghanistan known as the "Salt Pit."[16] In Afghanistan, interrogators subjected him to "prolonged stress standing positions," during which his wrists were "shackled to a bar or hook in the ceiling above the head" for "at least two days."[17] After a brief stay at the "Salt Pit," U.S. agents took him to yet another secret CIA prison in Bangkok, Thailand, where he remained until 4 December 2002.[18]

32. According to official U.S. government documents, the CIA subjected Mr. al Nashiri to "enhanced interrogation" methods from November 2002 until 4 December, 2002.[19] The documents further state that the CIA subjected Mr. al Nashiri in two separate interrogation sessions to the "enhanced interrogation technique" known as "waterboarding," [20] which involves "binding the detainee

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[11] *Ibid.* at 5.
[12] *Ibid.* at 7.
[13] *Ibid.* at 7-8.
[14] See Exhibit 5: Combatant Status Review Tribunal Hearing, ISN 10015, U.S. Naval Base Guantánamo Bay, Cuba, 14 March 2007, latest version declassified on 12 June 2009 (al Nashiri CSRT Transcript), at 7. Available at: http://www.aclu.org/files/pdfs/safefree/csrt_alnashiri.pdf; see also Exhibit 6: ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, (ICRC Report) at 5-6. Available at: www.nybooks.com/icrc-report.pdf.
[15] See Exhibit 7: CIA Inspector General, Special Review, Counterterrorism Detention and Interrogation Activities (September 2001—October 2003), 7 May 2004, (CIA OIG report), para 7, ("By November 2002, the Agency had . . . another high value detainee, Abd Al-Rahim al Nashiri, in custody . . . ."). Available at: http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf.
[16] Exhibit 8: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'," *CBS News*, 21 September 2010 (Goldman & Scislowska report). Available at: http://www.cbsnews.com/stories/2010/09/21/world/main6887750.shtml.
[17] Exhibit 6: ICRC Report, at 11.
[18] Exhibit 8: Goldman & Scislowska report.
[19] Exhibit 7: CIA OIG Report, at paras 35-36.
[20] Exhibit 7: CIA OIG Report, at para 36; Exhibit 8: Goldman & Scislowska report.

to a bench with his feet elevated above his head," "immobilizing his head" and "plac[ing] a cloth over his mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation."[21]

33. Official U.S. government documents record Mr. al Nashiri as saying "[f]rom the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way."[22] He adds, "they used to drown me in water. So I used to say yes, yes." [23]

34. Multiple public sources confirm that Mr. al Nashiri was "rendered" to Poland on or about 5 December 2002. According to a United Nations Report, on 4 December 2002, the CIA transported Mr. al Nashiri on a chartered flight with tail number N63MU from Bangkok to a secret CIA detention site in Poland. [24] The flight flew from Bangkok via Dubai and landed in Szymany, Poland on 5 December 2002. [25] The flight was disguised under multiple layers of secrecy that characterized flights the CIA chartered to transport rendition victims. [26]

35. The same report cites two United States sources as confirming that Mr. al Nashiri's transfer on 5 December 2002 to Poland is documented in paragraphs 76 and 224 of the CIA's Office of Inspector General report, which was released in 2009 by the United States government in partially redacted form, i.e., with certain portions of text deleted.[27]

36. Official documents disclosed by the Polish Border Guard to the Helsinki Foundation for Human Rights confirm that Polish officials cleared flight N63MU for arrival at Szymany airport on 5 December 2002.[28]

37. A 2007 Council of Europe report also identifies N63MU as a "rendition plane" that arrived in Szymany from Dubai at 14h56 on 5 December 2002.[29] Using raw aeronautical "data strings," the report notes that rendition flights were "deliberately disguised so that their actual movements would not be tracked or recorded . . . by the supranational air safety agency Eurocontrol. The system of cover-up entailed several different steps involving both American and Polish collaborators."[30] The report notes that the aviation services provider customarily used by the CIA, Jeppesen International Trip Planning, filed multiple "dummy" flight plans that often featured an airport of departure and/or destination that the aircraft never intended to visit. [31]

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[21] Exhibit 7: CIA OIG Report, at para 35.
[22] Exhibit 5: al Nashiri CSRT Transcript, at 16.
[23] *Ibid.* at 20.
[24] Exhibit 2: U.N. Joint Experts' Report, at para 116.
[25] *Ibid*.; Exhibit 8: Goldman & Scislowska report.
[26] Exhibit 2: U.N. Joint Experts' Report, at para 116.
[27] *Ibid*.
[28] Exhibit 9: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010. Available at: http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf
[29] Exhibit 3: 2007 Council of Europe Report, at paras 181-182.
[30] *Ibid*. at para 183.
[31] *Ibid.* at para 185.

38. Although the fact that Poland had hosted a CIA black site was first made public by Human Rights Watch on 6 November 2005[32] and then by a 2006 Council of Europe Report, [33] the 2007 Council of Europe report provides further details relating to Poland's role in the rendition programme, and confirms that there was a CIA "black site" at the Stare Kiejkuty intelligence training base in Poland.[34] It includes information from civil aviation records revealing how CIA-operated planes used for detainee transfers landed at Szymany airport, near the town of Szczytno, in Warmia-Mazuria province in north-eastern Poland.[35]

39. The 2007 Council of Europe report states that:

> "[e]ach of these landings was preceded, usually less than 12 hours in advance, by a telephone call to Szymany Airport from the Warsaw HQ of the Border Guards (Straz Graniczna), or a military intelligence official, informing the Director [of Szymany Airport] Mr Jerzy Kos of an arriving 'American aircraft.' The airport manager, who assumed the flights were coming from the United States, was instructed to adhere to "strict protocols" to prepare for the flights, including: clearing the runways of all other aircraft and vehicles; and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees. The perimeter and grounds of the airport were secured by military officers and Border Guards."[36]

40. Polish military intelligence officials and Polish documentation confirmed that high value detainees entered Poland "on the runway of Szczytno-Szymany [airport]."[37] Passengers from flights were transferred in vans that promptly departed Szymany airport for the Stare Kiejkuty intelligence training base where the high-value detainees were held.[38]

41. The 2007 Council of Europe report also explains how the rendition flights to Poland were disguised by using fake flight plans, with the Polish Air Navigation Services Agency (PANSA) playing a "crucial role in this systematic cover-up."[39] It adds:

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[32] Exhibit 10: Human Rights Watch, "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," 6 November 2005. Available at: http://www.hrw.org/en/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe; see also Exhibit 3: 2007 Council of Europe Report at para 7 (noting that Human Rights Watch and ABC news reported in early November 2005 that Poland had hosted secret CIA prisons).
[33] Exhibit 11: Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States," Doc. 10957, 12 June 2006 at paras 64-67. Available at: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc15 July.pdf (2006 Council of Europe Report). The 2006 Council of Europe report confirmed that a CIA "black site" had existed in Poland, and that CIA-linked "rendition planes" landed at the Polish airport of Szymany, which served as a "detainee drop-off point" and was close to a Polish intelligence services facility known as the "Stare Kiejkuty base."
[34] Exhibit 3: 2007 Council of Europe Report, Summary p 1, paras 197-200.
[35] *Ibid.* at paras 180-197.
[36] *Ibid.* at para 197.
[37] *Ibid.* at para 197.
[38] *Ibid.* at para 197.
[39] *Ibid.* at paras 180-197.

> "PANSA's Air Traffic Control in Warsaw navigated all of these flights through Polish airspace, exercising control over the aircraft through each of its flight phases right up to the last phase, when control was handed over to the authority supervising the airfield at Szymany, immediately before the aircraft's landing. PANSA navigated the aircraft in the majority of these cases without a legitimate and complete flight plan having been filed for the route flown. Moreover, in certain instances, PANSA took on the responsibility of filing the onward flight plan for the next leg of the circuit after Szymany. It is also noteworthy that Jeppesen appears to have followed PANSA's contributions to these operations very closely, acting upon responses from the flight management system to PANSA's communication within minutes of their being received. Furthermore, both Jeppesen and PANSA have coordinated their actions with the in-flight communications from the aircraft's Pilot-in-Command." [40]

42. The 2007 report states that Poland was "knowingly complicit in the CIA's secret detention programme."[41] It adds that "the key arrangements for CIA clandestine operations in Europe were secured on a bilateral level." [42] The report states:

> "[t]he CIA brokered 'operating agreements with the Government . . . of Poland to hold its High-Value Detainees (HVDs) in secret detention facilities on their respective territories. Poland . . . agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference." [43]

43. The 2007 report adds:

> "When we sought confirmation from one of our sources in the CIA that these were bilateral (rather than unilateral) arrangements, and that every programme was carried out with the express authorisation of the relevant partner state, we received this emphatic response: '*One of the great enduring legacies of the Cold War, which has carried into these alliances, is that NATO countries don't run unilateral operations in other NATO countries. It's a tradition that is almost sacrosanct. We [the CIA] just don't go trampling on other people's turf, especially not in Europe*.'"[44]

44. According to the 2007 report, the following individuals "knew about and authorized Poland's role in the CIA's operation of secret detention facilities for High Value Detainees on Polish territory, from 2002 to 2005" and could be held accountable: the President of the Republic of Poland, Aleksander Kwasniewski; the Chief of the National Security Bureau, Marek Siwiec; the Minister of National Defence, Jerzy Szmajdzinski; and the head of Military Intelligence, Marek Dukaczewski.[45]

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[40] *Ibid.* at paras 186-188.
[41] *Ibid.* at para. 165.
[42] *Ibid.* at para 112.
[43] *Ibid.* at para 117.
[44] *Ibid.* at para 165 (emphasis in original).
[45] *Ibid.* at para 174.

45. The report further notes:

> "There was complete consensus on the part of our key senior sources that President Kwasniewski was the foremost national authority on the [high-value detainee] programme. One military intelligence source told us: 'Listen, Poland agreed from the top down… From the President – yes… to provide the CIA all it needed.'[46]

46. The CIA's "chosen partner intelligence agency" in Poland was the Military Information Services (Wojskowe Sluzby Informacyjne, or WSI), which, according to the 2007 Council of Europe Report, is "an agency quite accustomed to covert action that challenges the boundaries of legality and morality."[47] According to the report, the WSI's role in the rendition programme comprised two levels of cooperation:

> "On the first level, military intelligence officers provided extraordinary levels of physical security by setting up temporary or permanent military-style 'buffer-zones' around the CIA's detainee transfer and interrogation services. This approach was deployed most notably to protect the CIA's movements to and from, as well as its activities within, the military training base at Stare Keijkuty. Classified documents, the existence of which was made known to team [preparing the report] describe how WSI agents performed these security roles under the guise of a Polish Army Unit (Jednostka Wojskowa) denoted by the code JW-2669, which was the formal occupant of the Stare Kiejkuty facility. . . . On the second level, the WSI's assistance depended to a large extent on its covert penetration of other state and parastatal institutions through its collaboration with undercover 'functionaries' in their ranks. [Senator Marty's sources] indicated [to his team] that WSI collaborators were present within institutions including: the Polish Air Navigation Services Agency (Polska Agencia Zeglugi Powietrzne), where they assisted in disguising the existence and exact movements of incoming CIA flights; the Polish Border Guard (Straz Graniczna), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (Glowny Urzad Celny), where they resolved irregularities in the non-payment of fees related to CIA operations. . . . When asked to give an example of a WSI collaborator who occupied an important position in the operation of the CIA's covert programme, several Polish sources named Mr. Jerzy Kos," who was Director of Szymany Airport throughout 2003 and 2004."[48]

47. A 14 February 2007 European Parliament resolution, based on the report of rapporteur Giovanni Claudio Fava of the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention

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[46] *Ibid.* at para 176.
[47] *Ibid.* at para 169.
[48] *Ibid.* at para 170-172.

of prisoners, [49] confirms many of the findings of the 2007 Council of Europe report. The resolution, in relevant part, states:

> "Notes the 11 stopovers made by CIA-operated aircraft at Polish airports and expresses serious concern about the purpose of those flights which came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees; deplores the stopovers in Poland of aircraft that have been shown to have been used by the CIA, on other occasions, for the extraordinary rendition of Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Khaled El-Masri and Binyam Mohammed and for the expulsion of Ahmed Agiza and Mohammed El Zar; . . .
>
> Takes note of the declarations made by Szymany airport employees, and notably by its former manager, according to which:
>
> – in 2002, two Gulfstream jets, and in 2003, four Gulfstream jets with civilian registration numbers were parked at the edge of the airport and did not enter customs clearance;
>
> – orders were given directly by the regional border guards about the arrivals of the aircraft referred to, emphasising that the airport authorities should not approach the aircraft and that military staff and services alone were to handle those aircraft and to complete the technical arrangements only after the landing;
>
> – according to a former senior official of the airport, no Polish civilian or military staff were permitted to approach the aircraft;
>
> – excessive landing fees were paid in cash - usually between EUR 2 000 and EUR 4 000;
>
> – one or two vehicles waited for the arrival of the aircraft;
>
> – the vehicles had military registration numbers starting with "H", which are associated with the intelligence training base in nearby Stare Kiejkuty;
>
> – in one case, a medical emergency vehicle belonging to either the police academy or the military base was involved;
>
> – one airport staff member reported following the vehicles on one occasion and seeing them heading towards the intelligence training centre at Stare Kiejkuty."[50]

48. The European Parliament resolution also "[n]otes with concern that the official reply of 10 March 2006 from Under-Secretary of State Witold Waszykowski to the Secretary-General of the Council of Europe, Terry Davis, indicates the

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[49] European Parliament, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners," Rapporteur Giovanni Fava, A6-0020/2007, 30 January 2007 (Fava Report); Available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

[50] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at paras 171, 176. Available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0032&language=EN.

existence of secret cooperation agreements, initialled by the two countries' secret services themselves, which exclude the activities of foreign secret services from the jurisdiction of Polish judicial bodies." [51]

Detention, Torture and Abuse on Polish Territory

49. Mr. al Nashiri was subjected to torture and inhuman and degrading treatment while he was held incommunicado in a secret prison on Polish territory.

Enhanced Interrogation Techniques

50. Official U.S. government documents state that "[t]he interrogation team continued [enhanced interrogation techniques] on al Nashiri for two weeks in December 2002."[52] The documents include a list of 10 "enhanced interrogation techniques" that the CIA used on its prisoners.[53] These include: attention grasp (grabbing the detainee with both hands and yanking him towards the interrogator); walling (pulling the detainee forward and then pushing him into a flexible false wall); facial hold (holding the detainee's head immobile by placing an open palm on either side of the detainee's face); facial or insult slap (slapping the detainee's face); cramped confinement (imprisoning the detainee in a small dark box); insects (placing a harmless insect in the small dark box with the detainee); wall standing (making the detainee stand 4 to 5 feet from a wall with his arms stretched out in front of him and his fingers resting on the wall to support all of his body weight); stress positions (including having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle); sleep deprivation (not exceeding 11 days at a time); and waterboarding.[54]

51. According to the International Committee for the Red Cross (ICRC), who interviewed Mr. al Nashiri and 13 other high-value detainees in September 2006, after they were transferred to Guantánamo Bay:

> "[t]he fourteen [men] . . . described being subjected, in particular during the early stages of their detention, lasting from some days up to several months, to a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information. This regime began soon after arrest, and included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements."[55]

52. According to the ICRC,

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[51] *Ibid*. at para 181.
[52] Exhibit 7: CIA OIG Report, at para 91.
[53] *Ibid.* at p 15.
[54] Exhibit 7: CIA OIG Report, at 35.
[55] Exhibit 6: ICRC Report, at 4.

> "throughout the period during which they were held in the CIA detention programme—the detainees were kept in continuous solitary confinement and incommunicado detention. They had no knowledge of where they were being held, no contact with persons other than their interrogators or guards. . . . None of the fourteen had any contact with their families, either in written form or through family visits or telephone calls. They were therefore unable to inform their families of their fate. As such, the fourteen had become missing persons. In any context, such a situation, given its prolonged duration is clearly a cause of extreme distress for both the detainees and families concerned and itself constitutes a form of ill-treatment. . . . In addition, the detainees were denied access to an independent third party."[56]

53. The ICRC further notes that the fourteen men were subjected to various forms of ill-treatment during their detention in secret locations, including suffocation by water poured over a cloth placed over the nose and mouth; prolonged stress positions such as standing naked with arms held extended and chained above the head; beatings by use of a collar; beating and kicking; confinement in a box; prolonged nudity; sleep deprivation; exposure to cold temperature; prolonged shackling; threats of ill-treatment; forced shaving; and deprivation/restricted provision of solid food from 3 days to 1 month.[57]

54. Based on its interviews with Mr. al Nashiri and thirteen other "high-value detainees," the ICRC observed:

> "Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in different countries. . . . The transfer procedure was fairly standardized in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. . . . 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. . . . 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 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/or 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. . . .[T]hese transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to

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[56] *Ibid.* at 7-8.
[57] *Ibid.* at 8-9.

stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned."[58]

Mock executions

55. Official U.S. government documents also show that Mr. al Nashiri was subjected to mock executions with a hand gun and a power drill during the time he was held in Poland. The documents state:

> "Sometime between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information. After discussing this plan . . . the debriefer entered the cell where al Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. . . . [T]he debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch al Nashiri with the power drill."[59]

Threats of injury to/sexual abuse of family members

56. According to the same documents, "[d]uring another incident . . . the same Headquarters debriefer, according to [another individual also present at the time], threatened Al-Nashiri by saying that if he did not talk, they "could get [his] mother in here," and they could "bring [his] family in here."[60] The report states that " [t]he [redacted] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [redacted] intelligence officer based on his Arabic dialect, and that Al-Nashiri was in [redacted] custody because it was widely believed in Middle East circles that [redacted] interrogation technique involves sexually abusing female relatives in front of the detainee. "[61]

57. According to the report of the ICRC, Mr. al Nashiri told them that he was threatened with sodomy and the arrest and rape of his family in his third place of CIA detention.[62] Mr. al Nashiri's third place of detention in CIA custody was Poland—as set forth above in paragraphs 31 and 34, the CIA detained him in Afghanistan and Thailand before detaining him in Poland. [63]

Stress positions

58. Official U.S. government documents note that the CIA's Office of Inspector General "received reports that interrogation team members employed potentially

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[58] *Ibid.* at 6-7.
[59] Exhibit 7: CIA OIG Report, at para 92; see also Exhibit 8: Goldman & Scislowska report ("According to the former intelligence officials and an internal CIA special review of the program, an agency officer named Albert revved a bitless power drill near the head of a naked and hooded al Nashiri while he was held in the Polish prison. The CIA officer also took an unloaded semiautomatic handgun to the cell where al Nashiri was shackled and racked the weapon's ammunition chamber once or twice next to his head, the review reported.")
[60] Exhibit 7: CIA OIG Report, at para 94.
[61] *Ibid.* at para 94.
[62] Exhibit 6: ICRC Report, at p. 17.
[63] Exhibit 8: Goldman & Scislowska report.

injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed al Nashiri backward while he was in this stress position. On another occasion, [redacted] said he had to intercede after [redacted] expressed concern that al Nashiri's arms might be dislocated from his shoulders. [Redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Mr. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt."[64]

59. According to the ICRC, Mr. al Nashiri said that in his third place of CIA detention he was held naked and subjected to prolonged stress standing positions, during which his wrists were shackled to a bar or hook in the ceiling above the head for periods ranging from two to three days continuously, and for up to two or three months intermittently. [65] Mr. al Nashiri's third place of CIA detention was Poland.[66]

Pain Induced Through Stiff Brush and Shackles

60. According to the documents, an interrogator reported that he witnessed the "use of a stiff brush that was intended to induce pain on al Nashiri and standing on al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [redacted] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. "[67]

Mr. al Nashiri's Rendition from Poland

61. On or about 6 June 2003, Polish authorities assisted the CIA in secretly transferring Mr. al Nashiri from Poland to Rabat, Morocco.[68] There is no evidence of any attempt by the Polish government to seek diplomatic assurances from the United States to avert the risk of his being subjected to further torture, incommunicado detention, a flagrantly unfair trial, or the death penalty in U.S. custody.

62. Official documents released by the Polish Border Guard to the Helsinki Foundation for Human Rights confirm that flight N379P was cleared for departure from Szymany airport on 6 June 2003.[69]

63. The 2007 Council of Europe report identifies flight N379P as a "rendition plane" that flew from Kabul and landed in Szymany airport the previous day, i.e., on 5 June 2003.[70] According to the report, a typical N379P flight circuit involving a landing at Szymany "demonstrated a calculated cover-up of the aircraft's movements" and entailed the following sequence:

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[64] Exhibit 7: CIA OIG Report, at para 97.
[65] Exhibit 6: ICRC Report, at 11.
[66] Exhibit 8: Goldman & Scislowska report.
[67] Exhibit 7: CIA OIG Report, at para 98.
[68] Exhibit 8: Goldman & Scislowska report.
[69] Exhibit 9: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010. Available at: http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf
[70] Exhibit 3: 2007 Council of Europe Report, at paras 181-182.

"Jeppesen files flight plans for every element of the circuit up to and including N379P's return to Europe from Kabul; typically Jeppesen flight plan(s) from Kabul onwards reflect fictitious routes, featuring false airports of destination and departure that are registered in the Eurocontrol flight management system;

N379P's Pilot-in-Command then flies from Kabul into Polish airspace, at which point the Polish authorities (PANSA) take over to navigate the aircraft to a landing at Szymany Airport without a corresponding flight plan, but in conjunction with Polish military authorities in Warsaw and on the ground;

PANSA also handles onward flight planning for N379P's departure from Szymany, either by navigating the aircraft to a stopover in Warsaw or by filing a flight plan for its next international destination, such as Prague or Larnaca;

Jeppesen resumes its planning role once N379P has left Szymany, filing flight plans for the remaining elements of the circuit, starting from either Warsaw or the first international airport after Szymany, continuing until the aircraft's return to its base in the United States."[71]

64. The 2007 report further notes that each of these N379P flights was operated under a "special status" or STS designation which exempted the aircraft from adhering to the normal rules of air traffic flow management such as being required to wait at airports for approved departure slots. It notes that "[s]ince such exemptions are only granted when 'specifically authorized by the relevant national authority, they provide further evidence of Polish complicity in the operations."[72] Thus, "the clearest proof of Poland's knowledge and authorization of such landings is demonstrated by the following two-line messages, contained in several data-strings for flights of N379P in 2003:

"STS/ATFM EXEMPT APPROVED

POLAND LANDING APPROVED" [73]

65. Flight data procured by the Council of Europe for its report and subsequently analysed by the Center for Human Rights and Global Justice (CHRGJ) confirms that N379P's movements over 3-7 June 2003 "conform[s] to the most typical attributes of a CIA rendition circuit."[74] The data shows that a Gulfstream V aircraft, registered with the U.S. Federal Aviation Administration as N379P, embarked from Dulles Airport, Washington D.C. on Tuesday June 3, at 23 h33m GMT and undertook a four-day flight circuit, during which it landed in and departed from six different foreign countries including Germany,

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[71] *Ibid.* at para 189.
[72] *Ibid.* at para 190.
[73] *Ibid.* at para 190.
[74] Exhibit 13: Center for Human Rights and Global Justice, Data String Analysis Submitted As Evidence of Polish Involvement in U.S. Extraordinary Rendition and Secret Detention Program, (CHRGJ Report) at p. 4. Available at: http://www.chrgj.org/projects/docs/polishprosecutor.pdf

Uzbekistan, Afghanistan, Poland, Morocco and Portugal. The aircraft returned from Portugal back to Dulles Airport on 7 June 2003. [75]

66. Jeppesen (the aviation services provider customarily used by the CIA) filed a total of eight messages via the Aeronautical Fixed Telecommunication Network (AFTN) relating to N379P's movements over June 3-7, including seven separate flight plans and one cancellation; the aircraft travelled the entire circuit under various forms of exemption and special status, which indicate that the flights were planned and executed with the full collaboration of the United States government and the "host" states through which the aircraft travelled, including Poland. In departing from and landing in the United States, N379P's flight plans were filed with the annotation "Department of State Support"; for all other component routes of this circuit, N379P's flight plans were designated "STS/ATFM EXEMPT APPROVED" or "STS/STATE," exemptions which are only granted when specifically authorised by the national authority whose territory is being used, thereby indicating collaborative planning on the part of that state. [76]

67. The CHRGJ flight data analysis confirms that "the Polish Government granted licenses and overflight permissions to facilitate these CIA rendition flights,"[77] and "PANSA officials . . . collaborated with Jeppesen (and, by extension, with Jeppesen's client, the CIA) by accepting the task of navigating this disguised flight [N379P] into Szymany without adhering to international flight planning regulations." [78] CHRGJ's analysis further "reveal[s] that Polish officials knowingly issued a permit for Warsaw, despite the fact that they knew that the aircraft was actually going to land in Szymany."[79]

68. After his transfer out of Poland, Mr. al Nashiri was detained in Rabat until 22 September 2003, when he was flown to U.S. custody in Guantánamo Bay in Cuba. [80]

69. On 27 March, 2004, the CIA flew Mr. al Nashiri from Guantánamo back to Rabat. [81]

70. He was subsequently moved to another CIA prison in Bucharest, Romania where he remained until he was transferred to Guantánamo Bay in September 2006.[82]

71. The CIA held Mr. al Nashiri in incommunicado detention for almost four years from the date of his capture. It was not until 6 September 2006 that President Bush acknowledged that the CIA had detained and interrogated Mr. al Nashiri in

[75] *Ibid.* at 4.
[76] *Ibid.* at 4-5.
[77] *Ibid.* at 2.
[78] *Ibid.* at 5.
[79] *Ibid.* at 6.
[80] Exhibit 8: Goldman & Scislowska report.
[81] *Ibid.*
[82] *Ibid.*

secret prisons overseas as part of that programme.[83] In the same speech, President Bush stated that the CIA had transferred 14 detainees in its custody to the United States Naval Base at Guantánamo Bay.[84]

72. Mr. al Nashiri remains imprisoned in U.S. custody at Guantánamo Bay to date.

Poland's Knowledge of Rendition in June 2003

73. By the time of Mr. al Nashiri's transfer from Poland on or about 6 June 2003, Poland knew and should have known of the secret overseas detention and transfer of CIA prisoners and the torture and abuse associated with the CIA rendition programme. It also knew and should have known that prisoners transferred from Poland faced a real risk of being subjected to further abuse, incommunicado detention, flagrantly unfair legal proceedings at Guantánamo Bay, and the death penalty in U.S. custody. As noted above, Polish authorities at the highest levels authorized the operation and cover-up of the rendition programme on Polish territory, and enabled the CIA to land flights carrying prisoners at Szymany airport, transport the prisoners to the secret detention site at the Stare Kiejkuty military intelligence base, and then, after a period of incommunicado detention in Poland, fly them out of Szymany airport to further secret detention overseas.

74. Moreover, as set forth below, by June 2003, news of the rendition programme had been widely reported in newspapers in Europe, including Poland, and in the United States; United Nations bodies to which Poland was party had expressed grave concerns about the U.S. rendition programme; well-known human rights organizations had publicly documented and called attention to the human rights violations associated with the rendition programme; and cases in courts in Bosnia and Herzegovina, Germany, and the United Kingdom challenging the system of "extraordinary rendition" had received significant publicity. In addition, Poland knew and should have known of applicable U.S. laws providing for flagrantly unfair military trials for terrorism suspects as well as for the imposition of the death penalty. Such laws, and their deficiencies, had been publicised widely in news reports, human rights organisations, and United Nations bodies. Finally, the Government of Poland is presumed to have had at its disposal through its diplomatic missions information about the CIA's extraordinary rendition programme and about U.S. government's treatment of terrorism suspects.

Newspaper Reports

75. By June 2003, the Polish press had widely reported on the ill-treatment of prisoners held in U.S. custody in Guantánamo Bay, the prisoners' lack of access to legal representation or to formal legal processes, and the brutal interrogation techniques employed by the CIA on suspected al-Qaeda operatives. These included: (i) "Kept in Cages" (discussing Amnesty International report that 20 Guantánamo prisoners were given intoxicants, handcuffed, shaved and hooded,

[83] President George W. Bush, "Transcript of President Bush's Remarks, "Speech from the East Room of the White House," 6 September 2006. Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.
[84] *Ibid.*

and reporting that then -U.S. Defense Secretary Donald Rumsfeld said that Guantánamo detainees would not be treated as prisoners of war, because they were illegal fighters who do not have rights)[85]; (ii) "Prisoners and POWs" (reporting that the United States government refused to allow Human Rights Watch to visit the detention centre in Guantánamo Bay, and that the detainees did not have lawyers or access to legal representation).[86]; (iii) "George Bush Wants to Circumvent the Geneva Convention" (reporting that U.S. detainees were kept outdoors in cages 2.5 x 2.5 m, chained, with no access to bathroom facilities, on bare mattresses instead of beds, and noting that the U.S. may have been using interrogation techniques prohibited by international law).[87]

76. Polish newspapers also frequently reprinted news from the international media reporting on human rights abuses by the U.S. government in carrying out counter-terrorism operations overseas, and on reports by international human rights organizations such as Human Rights Watch and Amnesty International. Such articles included (i) "Not only during the war" (referring to a Human Rights Watch report documenting human rights abuses in the Bush administration's counter-terrorism operations: "According to HRW, Washington pretends not to see human rights violations during the war on terror and ignores the internal [human rights] situation of its strategic partners, including Saudi Arabia and Pakistan, among others.");[88] (ii) "From Mohammed to bin Laden" (reporting on the interrogation of Khalid Sheikh Mohammed by Pakistani and U.S. personnel and quoted a Pakistani political scientist stating that he "would not be surprised if torture were used.");[89] (iii) "Black holes" (noting that "AI especially criticizes the US practice of detaining hundreds of Afghans suspected of al-Qaeda membership at its base in Guantánamo. According to the report, they remain in a 'legal black hole,' held without charge, without access to lawyers, and without the status of prisoner.")[90]

77. Also prior to 6 June 2003, newspapers and media published outside of the United States and with large global readerships had reported extensively on the rendition to torture of particular suspects in third countries, including reports that named Mr. al Nashiri shortly after he was captured. Many articles described the locations overseas in which terrorism suspects were being detained

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[85] Exhibit 14: "Trzymani w klatkach." *Rzeczpospolita*, 12 January 2002. Available at: http://new-arch.rp.pl/artykul/368733.html.
[86] Exhibit 15: "Więźniowie czy jeńcy." *Rzeczpospolita*, 25 January 2002. Available at: http://new-arch.rp.pl/artykul/370390.html.
[87] Exhibit 16: "George Bush chce obejść konwencje genewską." *Rzeczpospolita*, 9 February 2002. Available at http://new-arch.rp.pl/artykul/372570.html. See also Exhibit 17: "Oskarżyć albo zwolnić (War on Terrorism: Or Release the Accused)." *Rzeczpospolita*, 6 September 2002. Available at http://new-arch.rp.pl/artykul/400507.html; Exhibit 18: "Gorzka cena skuteczności (Bitter price performance)." *Rzeczpospolita*, 11 September 2002. Available at http://new-arch.rp.pl/artykul/401150.html.
[88] Exhibit 19: "Nie tylko, podczas wojny." *Rzeczpospolita*, 15 January 2003. Available at: http://new-arch.rp.pl/artykul/418030.html.
[89] Exhibit 20: "Od Mohammeda do bin Ladena." *Rzeczpospolita*, 4 March 2003. Available at: http://new-arch.rp.pl/artykul/424741.html.
[90] Exhibit 21: Jakub Kowalski**,** "Czarne dziury." *Rzeczpospolita*, 29 May 2003. Available at: http://new-arch.rp.pl/artykul/436868.html.

incommunicado and tortured. These articles included: (i) "US Sends Suspects to Face Torture" (reporting that "the US has been secretly sending prisoners suspected of al-Qaida connections to countries where torture during interrogation is legal. … Prisoners moved to such countries as Egypt and Jordan can be subjected to torture and threats to their families to extract information sought by the US in the wake of the September 11 attacks . . . .[N]ormal extradition procedures have been bypassed in the transportation of dozens of prisoners suspected of terrorist connections. . . . [S]uspects have been taken to countries where the CIA has close ties with the local intelligence services and where torture is permitted.");[91] (ii) "Al Qaeda operative talking" (reporting that "Al Qaeda operative Abd Al-Rahim al Nashiri, captured last month, is talking . . . . few details were revealed about al Nashiri's capture or where he is being held . . . .he was captured 'in the region for which he was responsible' but would not elaborate.");[92] (iii) "Militant Planned Attacks in the Gulf," (reporting that UAE authorities had arrested Mr. al Nashiri in October 2002 and handed him over to the United States and described him as "one of the top al-Qaeda suspects sought by the United States." The article further reported that the United States announced in November 2002 "that it was interrogating Abd al-Rahim al Nashiri after his detention in an undisclosed foreign state.");[93] (iv) "CIA accused of torture at Bagram base; Some captives handed to brutal foreign agencies" (reporting that the CIA was using "'stress and duress' techniques on al-Qaida suspects held at secret overseas detention centres, as well as contracting out their interrogation to foreign intelligence agencies known to routinely use torture);[94] (v) "Ends, Means and Barbarity" (reporting that "American intelligence agents have been torturing terrorist suspects, or engaging in practices pretty close to torture. They have also been handing over suspects to countries, such as Egypt, whose intelligence agencies have a reputation for brutality.")[95]

78. Widely-read U.S. newspapers available on the Internet reported in 2002 and 2003 on the rendition of terrorism suspects to third countries without any legal process, and the application of "stress and duress" interrogating tactics, such as hooding, sleep deprivation, and stress positions, that were employed by the United States in secret overseas detention facilities in the wake of September 11, 2001. Articles also recounted official descriptions of the rendition of many captives to third countries without the benefit of any legal process. These include: (i) "U.S. Behind Secret Transfer of Terror Suspects" ("Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt

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[91] Duncan Campbell, *The Guardian*, 12 March 2002. Available at: http://www.guardian.co.uk/world/2002/mar/12/september11.usa.
[92] CNN, 23 November 2002. Available at: http://archives.cnn.com/2002/US/11/22/alqaeda.capture/.
[93] *BBC* News, 23 December 2002. Available at: http://news.bbc.co.uk/2/hi/middle_east/2602627.stm.
[94] Suzanne Goldenberg, *The Guardian*, 27 December 2002. Available at: http://www.guardian.co.uk/world/2002/dec/27/usa.afghanistan.
[95] "Ends, means and barbarity," *The Economist*, 11 January 2003. Available at: http://www.economist.com/node/1522792.

and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said. 'After September 11, these sorts of movements have been occurring all the time,' a U.S. diplomat said. 'It allows us to get information from terrorists in a way we can't do on U.S. soil.'");[96] (ii) "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities" (quoting a U.S. official on the interrogation of terrorism suspects: "'[I]f you don't violate someone's human rights some of the time, you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists . . . . Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.");[97] (iii)"Questioning Terror Suspects in a Dark and Surreal World" (noting that "interrogations of important Al-Qaeda operatives like Mr. [Faruq] Mohammed occur at isolated locations outside the jurisdiction of American law. Some places have been kept secret, but American officials acknowledged that the C.I.A. has interrogation centers at the United States air base at Bagram in Afghanistan and at a base on Diego Garcia in the Indian Ocean . . . . Intelligence officials also acknowledged that some suspects had been turned over to security services in countries known to employ torture.");[98] (iv) "Army Probing Deaths of 2 Afghan Prisoners" (noting that "the inquiries by the Army's Criminal Investigation Command are proceeding as human rights groups and the International Committee of the Red Cross voice concerns about treatment of prisoners at Bagram. Some U.S. officials familiar with the Bagram detention operation have said that uncooperative prisoners are made to stand for long periods of time, are often hooded, and are deprived of sleep with the use of flashing lights or loud noises."[99]

79. U.S. newspapers and media also reported on the rendition of specific individuals including Mr. al Nashiri, as well as on their transfer to third countries where they would be held incommunicado or tortured. These include (i) "Qaeda Suspect Was Taking Flight Training Last Month" (reporting that Mr. al Nashiri had been arrested the prior month by the United Arab Emirates as a suspected Al Qaeda terrorist and handed over to the CIA, and "flown to a special C.I.A. interrogation site that the agency had set up in Jordan to keep Qaeda operatives for questioning in a jurisdiction removed from the United States.");[100] (ii) "A

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[96] Rajiv Chandrasekaran and Peter Finn, *The Washington Post*, 11 March 2002. Available at: http://www.infowars.com/saved%20pages/Police_state/torture_wapost.htm.
[97] Dana Priest and Barton Gellman, *The Washington Post*, 26 December 2002. Available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.
[98] See Don van Natta, Jr., *The New York Times*, 9 March 2003. Available at: http://www.nytimes.com/2003/03/09/international/09DETA.html?pagewanted=all.
[99] Mark Kaufman, *The Washington Post*, 5 March 2003. Available at: http://www.washingtonpost.com/ac2/wp-dyn/A42373-2003Mar4.
[100] Patrick Tyler, N.Y. Times, 23 December 2002. Available at: http://www.nytimes.com/2002/12/23/world/threats-responses-terror-trail-qaeda-suspect-was-taking-flight-training-last.html?scp=20&sq=&st=nyt. Later investigations such as the Simpson report and the

CIA-Backed Team Used Brutal Means to Crack Terror Cell" (reporting that the Albanian secret police cooperated with CIA agents to capture five suspected militants living in Albania, who were interrogated by the United States and then handed over to Egypt, where they were held incommunicado for periods ranging from two to fifteen months, and reportedly tortured before appearing in court.);[101] (iii) "U.S. Behind Secret Transfer of Terror Suspects," (reporting that Indonesian intelligence apprehended Iqbal Madni at the behest of the U.S., and "two days later – without a court hearing or a lawyer – he was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt.").[102]

U.N. Sources

80. In addition to newspaper articles, by June 2003 multiple U.N. sources had reported on or expressed concern about U.S. ill-treatment of detainees overseas.

81. *U.N. Human Rights Commission*. In February 2003, the U.N. Human Rights Commission received and published on its website reports from non-governmental organizations (NGOs) concerning ill-treatment of U.S. detainees. The International Rehabilitation Council for Torture submitted a statement in which it expressed its concern over reported U.S. use of "stress and duress" methods of interrogation, among them sleep deprivation and hooding, as well as contraventions of *refoulement* provisions in Article 3 of the Convention against Torture. The report criticized the failure of governments to speak out clearly to condemn torture and emphasized the importance of redress for victims.[103] Poland was represented at the Human Rights Commission by a delegation of sixteen representatives.[104]

82. On 23 April 2003, the Human Rights Commission passed Resolution 2003/32, which stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture."[105]

Goldman articles revealed that Mr. al Nashiri was never in Jordan but confirmed that he was in CIA custody.

[101] Andrew Higgins, *The Wall Street Journal*, 20 November 2001.Available at: http://online.wsj.com/article/SB1006205820963585440.htm; see also Egyptian Organization for Human Rights Annual Report, "The Human Rights Situation in Egypt: Violation of Human Rights 2000-2001," 2002. Available at: http://www.eohr.org/annual/2000/p2.htm.

[102] Rajiv Chandrasekaran and Peter Finn, *The Washington Post*, 11 March 2002. Available at: http://www.infowars.com/saved%20pages/Police_state/torture_wapost.htm .

[103] UN Commission on Human Rights, "Civil and Political Rights, Including the Questions of Torture and Detention: Written Statement Submitted by the International Rehabilitation Council for Torture Victims," 59th Session, 28 February 2003, E/CN.4/2003/NGO/51. Available at: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.NGO.51.En?Opendocument.

[104] Commission on Human Rights, "Report on the 59th Session," (17 March-24 April 2003), UN Doc E/CN.4/2003/135, pg. 472. Available at: http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/6395D27097AF5ED0C1256E1600569325/$File/G0316227.pdf?OpenElement.

[105] UN Commission on Human Rights, "Commission on Human Rights Resolution 2003/32: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," E/CN.4/RES/2003/32, 23 April 2003, para. 14. Available at: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-32.doc.

83. In 2002 and 2003, the U.N. Working Group on Arbitrary Detention received many communications alleging the arbitrary character of detention measures used by the U.S. Government as part of its investigations into the terrorist acts of 11 September 2001.[106] It concluded that so long as a competent tribunal in the United States had not issued a ruling on the contested issue of whether the detainees at Guantánamo were entitled to prisoner-of-war status and protection under the Geneva Conventions, the detainees were entitled to the protection of their rights to humane treatment, to a fair trial, and to a determination of the lawfulness of their detention. The report noted that the Inter-American Commission on Human Rights had requested that the United States take urgent measures to have the legal status of detainees at Guantánamo Bay determined by a competent tribunal.[107]

84. *U.N. Special Rapporteurs.* The U.N. Special Rapporteur on Torture issued a report in July 2002, pursuant to the General Assembly's resolution 56/143 of 19 December 2001. In his report, the Rapporteur warned that "[States must] ensure that persons they intend to extradite under terrorist or other charges . . . will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment."[108]

85. On 16 November 2001, the U.N. Special Rapporteur on the Independence of the Judiciary made a public statement outlining his concerns about the legal developments in the United States during the "war on terror," focusing on the establishment of military tribunals, the absence of the guarantee of the right to legal representation and advice while detained, the establishment of an executive review process to replace the right to appeal conviction and sentence to a higher tribunal, and the exclusion of the jurisdiction of any other courts or tribunals.[109] The Rapporteur stated that "[t]he very fact that such powers are available to the executive strikes at the core of the principles of the rule of law, equality before the law and the principles of a fair trial."[110]

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[106] See, e.g., *Benchellali et al. v United States of America*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 33, para. 13 & (2003); *Ayub Ali Khan and Azmath Jaweed v United States of America*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 20, para. 15-18 (2002).

[107] UN Commission on Human Rights, Report of Working Group on Arbitrary Detention, "Civil and Political Rights, Including the Question of Torture and Detention," 59th Session, 16 December 2002, E/CN.4/2003/8, para. 61-64. Available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/c58095e9f8267e6cc1256cc60034de72/$FILE/G0216028.pdf.

[108] General Assembly, "Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment," 57th Session, 2 July 2002, A/47/173, para. 35. Available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2107741d197b2865c1256c390032be06/$FILE/N0247560.pdf.

[109] See UN Wire, "UN Expert on independence of judiciary concerned by military order signed by US president," 16 November 2001. Available at: http://www.un.org/apps/news/story.asp?NewsID=2173&Cr=terror&Cr1=law.

[110] See UN Wire, "UN Expert on independence of judiciary concerned by military order signed by US president," 16 November 2001. Available at: http://www.un.org/apps/news/story.asp?NewsID=2173&Cr=terror&Cr1=law.

86. *Office of the High Commissioner for Human Rights.* The High Commissioner for Human Rights made a statement on 16 January 2002 concerning the detention of Taliban and Al-Qaeda Prisoners at the U.S. Base in Guantánamo Bay. She said:

> "All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees . . . must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention."[111]

Human Rights Organizations

87. During the time Mr. al Nashiri was detained in Poland and at the time of his transfer, many organizations issued human rights reports on the U.S. rendition programme, the circumstances of detention, and torture and ill-treatment in CIA facilities around the world and in Guantánamo.

88. *International Committee of the Red Cross.* The International Committee of the Red Cross (ICRC) began publicly to express its concerns about the legal system the United States was using for detainees during 2003.[112] In relation to Guantánamo, the ICRC president asked the U.S. authorities "to institute due legal process and to make significant changes for the more than 600 internees held there."[113]

89. *Amnesty International.* In its 2003 Annual Report for the United States, Amnesty International provided information on events in 2002, including transfers of detainees to Guantánamo in the wake of September 11, abductions, conditions of transfer, conditions in detention, and lack of charges or access to lawyers or courts.[114] It also reported on detainees being held by the United States in undisclosed locations: "An unknown number of detainees originally in U.S. custody were allegedly transferred to third countries, a situation which

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[111] United Nations High Commissioner for Human Rights, "Statement on detention of Taliban and Al Qaida prisoners at US base in Guantánamo Bay, Cuba," 16 January 2002. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument.

[112] International Committee of the Red Cross, "ICRC President meets with US officials in Washington DC,' News release 03/36, 28 May 2003. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5mybcu?opendocument.

[113] International Committee of the Red Cross, "ICRC President meets with US officials in Washington DC,' News release 03/36, 28 May 2003. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5mybcu?opendocument.

[114] Amnesty International, "2003 Annual Report for the United States of America." (May 2003). Available at: http://www.amnestyusa.org/annualreport.php?id=8926040453C27E8A80256D240037944A&c=USA.

raised concern that the suspects might face torture during interrogation."[115] Amnesty International reported:

> "On 11 August, Riduan Isamuddin aka Hambali, [a man with] suspected links to *al-Qa'ida*, was arrested in the city of Ayutthaya in Thailand. According to media reports, he is being held in U.S. custody at an undisclosed location for interrogation . . . . Amnesty International is concerned that the detention of suspects in undisclosed locations without access to legal representation or to family members and the "rendering" of suspects between countries without any formal human rights protections is in violation of the right to a fair trial, places them at risk of ill-treatment and undermines the rule of law."[116]

90. *Human Rights Watch.* In a 26 December 2002 report entitled "United States: Reports of Torture of Al-Qaeda Suspects," Human Rights Watch noted:

> "[T]housands of persons have been arrested and detained with U.S. assistance in countries known for the brutal treatment of prisoners. The Convention against Torture, which the United States has ratified, specifically prohibits torture and mistreatment, as well as sending detainees to countries where such practices are likely to occur. That would include, according to the U.S. State Department's own annual human rights report, Uzbekistan, Pakistan, Jordan, and Morocco, where detainees have reportedly been sent."[117]

91. Another Human Rights Watch report from August 2002 stated that, since 11 September 2001, there had been an "erosion of basic rights against abusive governmental power" guaranteed under both U.S. and international human rights law. The report noted that most of the detainees of "special interest" to the September 11th investigations had been non-citizens, typically Muslim men. These men were subjected to arbitrary detention and legal proceedings that violated due process and the presumption of innocence, and they were secretly incarcerated in deplorable conditions of confinement and physical abuse.[118]

92. *International Helsinki Federation of Human Rights*. An April 2003 report of the International Helsinki Federation of Human Rights detailed incommunicado and prolonged overseas detention of terrorism suspects by the United States.[119]

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[115] *Ibid.*
[116] *Ibid.*
[117] Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects," 26 December 2002. Available at: http://www.hrw.org/en/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects?print.
[118] Human Rights Watch, "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Vol. 14, No. 4 (G) – August 2002, p. 3. Available at: http://www.hrw.org/legacy/reports/2002/us911/USA0802.pdf (see, in particular, summary recommendations on page 3).
[119] International Helsinki Federation for Human Rights, "Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11," pgs. 91-100, April 2003. Available at: http://www.cestim.it/argomenti/09razzismo/europa/2003Apr18en_report_anti-terrorism_pdf%5B1%5D.pdf

European Legal Cases

93. In 2002 and 2003, a number of cases involving terrorism suspects transferred to Guantánamo or to the United States in the context of the "war on terror" were decided by European courts that put Poland on notice about the ill-treatment of rendition victims by the time of Mr. al Nashiri's transfer from Poland.

94. *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*. In 2002, the U.K. Court of Appeal described Feroz Ali Abbasi's detention in Guantánamo Bay as "legally objectionable" and commented that "Mr. Abbasi is at present arbitrarily detained in a legal black hole." The court noted with respect to the status of Guantánamo detainees, that "[t]here have been widespread expressions of concern, both within and outside the United States, in respect of the stand taken by the United States government" (referring to the policy of denying Geneva Convention protections to Guantánamo detainees).[120] The case was widely reported in European and international media.[121]

95. In *Boudellaa et al. v. Bosnia and Herzegovina*. In 2002, the Human Rights Chamber for Bosnia and Herzegovina (BiH) held that BiH violated Protocol No. 6 to the Convention by transferring suspected terrorists to U.S. custody while "fail[ing] to take all necessary steps to ensure that the applicants will not be subject to the death penalty."[122]

Publicly Available Information on Military Commission Trials and the Death Penalty

96. At the time of Mr. al Nashiri's transfer from Poland in June 2003, publicly available U.S. laws—President Bush's Military Order of 13 November 2001, entitled "Detention, Treatment, and Trial for Certain Non-Citizens in the War Against Terrorism"[123] and the U.S. Defence Department's March 2002 Military Commission Order No. 1[124]—indicated that terrorist suspects captured by the United States would be subjected to a flagrantly unfair trial by military commission in Guantánamo Bay and the death penalty.

97. President Bush's administration took the position that Guantánamo detainees had no rights to the protections afforded to prisoners of war under the Geneva Conventions. At a press conference on 11 January 2002, Secretary of Defense

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[120] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, 6 November 2002. at para. 10 & 18.

[121] See, e.g., "UK Taleban suspect loses appeal", *BBC News* (6 November 2002), Available at: http://news.bbc.co.uk/2/hi/uk_news/2409071.stm. See also "Appeal court blow for British Taliban suspect", *The Guardian* (6 November 2002). Available at: http://www.guardian.co.uk/world/2002/nov/06/september11.uk.

[122] *Boudellaa et al. v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgement of 11 October 2002 at para 300.

[123] Exhibit 22: Military Order of 13 November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Section 4, U.S. Federal Register of 16 November 2001, Vol. 66 No. 222. Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html.

[124] Exhibit 23: US Department of Defense, Military Commission Order No. 1, 21 March 2002 (MCO No. 1). Available at: http://www.defense.gov/news/Mar2002/d20020321ord.pdf.

Rumsfeld stated, they are "unlawful combatants . . . [and] technically, unlawful combatants do not have any rights under the Geneva Convention."[125]

98. The deficiencies inherent in the military commission proceedings applicable to Mr. al Nashiri were well known at the time of his transfer from Poland. Indeed, in a May 2003 Report, the Council of Europe's Parliamentary Assembly publicly denounced the military commissions for detainees at Guantánamo Bay, stating:

> "The Assembly expresses its disapproval that those held in detention may be subject to trial by a Military Commission, receiving a different standard of justice than United States nationals, amounting to *a serious violation of the right to receive a fair trial* and to an act of discrimination contrary to the International Covenant on Civil and Political Rights."[126]

99. The May 2003 report also indicated that "[a]lthough Military Commission Order No 1 takes account of certain criticisms made after publication of the Presidential Order, it is clear that certain fundamental rights might not in future be respected if prisoners were tried by these military commissions."[127] The same report concluded that the Guantánamo bay military commissions' "non-separation of powers" violated the right to an independent and impartial trial.[128]

100. In June 2003, The Parliamentary Assembly adopted Resolution 1340, which affirmed its view that the military commissions were deficient in many minimum fair trial protections.[129]

101. In October 2002, the Human Rights Chamber for Bosnia and Herzegovina found that "the US President's Military Order and the Military Commission Order No. 1 establish tribunals whose independence from the executive power is subject to deep-cutting limitations. The rights to trial within a reasonable time, to a public hearing, to equality of arms between prosecution and defence and to counsel of the accused's choosing are all severely curtailed. Moreover, [individuals subject to the military commissions] are discriminatorily deprived of the guarantees enshrined in the Bill of Rights of the US constitution."[130]

102. On 27 November 2001, Human Rights Watch criticized President Bush's November 13th Military Order on the grounds that "any foreign national designated by the President as a suspected terrorist or as aiding terrorists could potentially be detained, tried, convicted and even executed without a public trial,

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[125] Chronology: The New Rules of War. Available at: http://www.pbs.org/wgbh/pages/frontline/torture/paper/cron.html.

[126] Exhibit 24: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay", Council of Europe, Doc. 9817, 26 May 2003, at para. 8 (emphasis added). Available at: http://assembly.coe.int/Documents/WorkingDocs/doc03/edoc9817.htm

[127] *Ibid.*

[128] *Ibid.*

[129] *Ibid.*

[130] *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 & CH/02/8691, 11 October 2002, at para 299.

without adequate access to counsel, without the presumption of innocence or even proof of guilt beyond reasonable doubt, and without the right to appeal."[131]

103. In a public statement dated 22 March 2002, Amnesty International criticised the military commissions on the grounds that they lacked independence from the executive branch, discriminated against non-U.S. citizens, allowed the admission of tortured and hearsay evidence, forced defendants to accept US military lawyers as counsel against their wishes, failed to guarantee that civilian defence counsel would be able to see all the evidence against their clients, permitted the use of secret evidence and anonymous witnesses, and failed to guarantee that all relevant documents would be translated for the accused.[132]

104. Amnesty International also stated that the presumption of innocence had been undermined by public comments made by the very officials that controlled the commissions. President Bush had repeatedly labelled the detainees as "killers" and "terrorists," and Defense Secretary Donald Rumsfeld had referred to Guantánamo detainees as "among the most dangerous, best-trained, vicious killers on the face of the earth," and as "hard-core, well-trained terrorists." [133]

105. Moreover, Amnesty International noted that Pentagon officials had stated that detainees could remain in detention indefinitely even if acquitted by military commissions. [134]

106. Numerous press reports put Poland on notice of the flagrantly unfair nature of the military commission proceedings applicable to Mr. al Nashiri. On 8 December 2001, the New York Times reported that the United Nations human rights commissioner, Mary Robinson, criticized the Bush administration plan to set up military commissions, saying they skirt democratic guarantees of the basic right to a fair trial. She said that the 11 September 2001 terrorist attacks were crimes against humanity meriting special measures but said that the plan for secret trials was so overly broad and vaguely worded that it threatened fundamental rights.[135]

107. Also on 8 December 2001, the New York Times reported that over 300 law professors openly opposed the military commissions as violating U.S. and international law, including binding treaties. The lawyers publicly stated that the military commissions are "legally deficient, unnecessary and unwise."[136]

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[131] Fact Sheet: Past U.S. Criticism of Military Tribunals, 27 November 2001. Available at: http://www.hrw.org/en/news/2001/11/28/fact-sheet-past-us-criticism-military-tribunals.
[132] *Military commissions: Second-class justice*, Amnesty International, 22 March 2003, AI Index AMR 51/049/2002 - News Service Nr. 53, USA - . Available at: http://www.amnesty.org/en/library/asset/AMR51/049/2002/en/1fa9f425-f7f6-11dd-8935-051395860c48/amr510492002en.pdf.
[133] *Ibid.*
[134] *Ibid.*
[135] United Nations: Rights Official Criticizes U.S. Tribunal Plan, New York Times, 8 December 2001. Available at: http://www.nytimes.com/2001/12/08/world/world-briefing-united-nations-rights-official-criticizes-us-tribunal-plan.html?src=pm
[136] In Letter, 300 Law Professors Oppose Tribunals Plan, New York Times, 8 December 2001. Available at: http://www.nytimes.com/2001/12/08/us/nation-challenged-military-tribunals-letter-300-law-professors-oppose-tribunals.html?src=pm

108. News reports from November 2001 reported that Spanish officials would refuse to extradite persons suspected of complicity in the September 11 attacks to the United States unless they received assurances that such persons would be tried in civilian courts, as opposed to military commissions.[137]

109. A newspaper article dated 4 June 2003 reported that the military commissions for detainees at Guantánamo Bay violate international law by not comporting with the Geneva Conventions. The article cited reports from the BBC, as well as U.S. and Australian newspapers, and stated that: "[i]n violation of international law, the estimated 680 prisoners have been held without charges and without legal representation since they began arriving at the US military camp 18 months ago." Numerous other violations of international law were cited therein.[138]

110. In addition, President Bush's November 2001 order and the Department of Defense March 2002 order provided for the death penalty.[139] The President's Military Order at provides that "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."[140] The Order further states that "Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper."[141]

111. Moreover, it is commonly known that the death penalty is imposed in the United States, and that publicly available U.S. criminal law provisions governing terrorism-related offenses provide for the death penalty.[142]

112. Finally, as a member of the Council of Europe, Poland was well aware of the risk of transferring terrorist suspects to the death penalty as well as guidelines guarding against such risks. Indeed, in July 2002, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism which directed that "[t]he extradition of a person to a country where

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[137] Bush's New Rules to Fight Terror Transform the Legal Landscape, New York Times, November 25, 2001, p. A1, col. 1. Available at: http://www.nytimes.com/2001/11/25/us/nation-challenged-law-bush-s-new-rules-fight-terror-transform-legal-landscape.html

[138] Kate Randall, US prepares for military tribunals at Guantánamo Bay, 4 June 2003. Available at: http://www.wsws.org/articles/2003/jun2003/trib-j04.shtml.

[139] Exhibit 22: Military Order of 13 November 2001, Section 4

[140] *Ibid*., Section 4(a). The US President's Military Order also provides that "it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the *laws of war* and other applicable law by military tribunals," *ibid*., at Section 1(e) (emphasis added); the laws of war in turn provide that "[t]he death penalty may be imposed for grave breaches of the law [of war.]" *United States Dep't of Army Field-Manual 27-10: The Law of Land,* Chapter 8, Section II, para 508. Available at http://www.usmc.mil/news/publications/Documents/FM%2027-10%20W%20CH%201.pdf.

[141] Exhibit 22: Military Order of 13 November 2001, at Section 6(G). US Department of Defense, Military Commission Order No. 1, 21 March 2002. Available at: http://www.defense.gov/news/Mar2002/d20020321ord.pdf.

[142] See, e.g., 18 U.S.C. §§2332 a, b.

he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out." [143]

Diplomatic Missions of Poland

113. The Government of Poland is presumed to have had at its disposal through its diplomatic missions information about the CIA's extraordinary rendition programme and about the U.S. government's treatment of terrorism suspects.

114. There is a presumption in international law that diplomatic missions abroad report to their capitals on events in the country of their posting. In the *Yerodia* case, the International Court of Justice (ICJ) reasoned that a Minister of Foreign Affairs acts on behalf of the State in matters of foreign relations, in part, because communication between embassies and consulates and their governments is presumed.[144]

115. In addition, the Vienna Convention on Consular Relations provides that consular officers have a duty, in considering the extradition and deportation of individuals, to report to their respective governments on conditions in receiving States and to protect the interests of their nationals. For instance, the Convention provides that consular functions shall include "ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested."[145]

116. Well before June 2003, it was common knowledge that the United States was running a secret rendition programme and operating extralegal "black sites" in third countries where detainees were being subjected to torture or inhuman or degrading treatment. It was also common knowledge that U.S. law provided for prolonged detention without trial of terrorism suspects, for trial by military tribunal of terrorism suspects, and for the imposition of the death penalty for categories of detainees, including "high value detainees" such as Mr. al Nashiri.[146]

117. Polish diplomatic missions to the United States and elsewhere are presumed to have informed themselves about and to have reported back to their governments on these developments. Poland's representatives at the United Nations would have been fully aware of the numerous reports criticizing rendition as a violation of human rights standards.

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[143] Exhibit 25: Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, Section XIII, at para 2. Available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=991179.
[144] *Democratic Republic of the Congo v Belgium* [The Yerodia Case], ICJ, Gen. List No. 121, 14 February 2002, at para. 53.
[145] See: Vienna Convention on Consular Relations, 24 April 1963, Article 5, paras. (a) & (c)
[146] *See* paras. 63-70, above.

Detention at Guantánamo Bay

118. Since September 2006, Mr. al Nashiri has been imprisoned in Guantánamo Bay in a single-cell facility known as "Camp 7," where he remains to date.[147]

119. Publicly available U.S. government procedures indicate that "blackened goggles and ear muffs" are placed on Guantánamo prisoners for transports outside of their respective camps.[148] As set out in paragraph 55 above, Mr. al Nashiri was hooded when he was subjected to mock executions with a power drill in Poland.[149] Moreover, official U.S. government documents acknowledge that high-value detainees like Mr. al Nashiri were "shackled and deprived of sight and sound through the use of blindfolds, ear muffs and hoods" on rendition flights, and upon landing at a "black site," subjected to a slew of abusive interrogation methods. [150] The ICRC has documented the psychological damage associated with placing earmuffs and goggles on Mr. al Nashiri and 13 other high-value prisoners during rendition.[151]

120. Mr. al Nashiri has refused to be transported wearing earmuffs and goggles to see his attorneys at Guantánamo.[152] Expert medical testimony concludes that "[u]nder the circumstances and in the context of Mr. al Nashiri's experiences of torture, it is extremely probable that sensory deprivation in the form of blindfolding and ear covers (even for short periods of time) serve as a reminder of previous torture experiences, cause Mr. al Nashiri to re-experience his painful experiences and cause him profound psychological distress . . . or even dissociation . . . and even physical distress. It would be natural under such circumstances for Mr. al Nashiri to avoid any situation where hooding is required (i.e. during transport) in attempt to avoid the physical and psychological pain associated with the hooding."[153] Expert psychological testimony similarly states that "[i]n Mr. al Nashiri's case, it is extremely likely that the continued use of 'hooding' would serve as a particularly powerful reminder of his past abusive experiences (often termed 'retraumatization'), and he may go to extreme efforts to avoid this emotionally painful reminder (e.g., refusing visits or recreation time if he is forced to undergo hooding during transport to and from activities). Indeed, the pairing [of] these 'hooding' episodes with other traumatic experiences (e.g., being threatened with an electric drill, or lifted by the arms in a manner causing dislocation of the

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[147]Review of Department Compliance With President's Executive Order On Detainee Conditions of Confinement at 12. Available at: http://www.defense.gov/pubs/pdfs/review_of_department_compliance_with_presidents_executive_order_on_detainee_conditions_of_confinementa.pdf.
[148]*Ibid.* at 47.
[149] Exhibit 7: CIA OIG report, at para 92.
[150] Exhibit 4: CIA Rendition Background Paper, at 2-7.
[151] Exhibit 6: ICRC Report, at 6-7.
[152] Exhibit 26: Joint Task Force-GTMO response to the United States House Armed Services Committee.
[153] Exhibit 27: Declaration of Sondra S. Crosby, MD, *In the Matter of Abd Al-Rahim Hussain Mohammed Al Nashiri,* 26 September 2009.

shoulders—an extremely painful condition) is likely to heighten the already adverse effects of sensory deprivation itself. . . ."[154]

121. To avoid such "retraumatization," Mr. al Nashiri's U.S. counsel requested that they visit with him in his camp instead of him being brought with earmuffs and goggles outside the camp to visit with them, but the U.S. government denied this request on 7 January 2009.[155]

122. Pursuant to United States government classification guidelines, everything that Mr. al Nashiri says is presumed to be classified at the highest, i.e., "Top Secret" level. Accordingly, Mr. al Nashiri's U.S. counsel can only relay his communications to persons with the requisite security clearance, a determined "need to know" by the United States government, and in a special top secret facility. No procedure has been available for declassifying Mr. al Nashiri's communications. Thus, his U.S. lawyers have been unable to relay his communications in public, and nothing in this pleading is based on information provided by Mr. al Nashiri to his counsel. Nor is anything in this pleading obtained from any classified source.

123. Mr. al Nashiri is not allowed any family visits. The only way he can communicate with his family is through letters delivered by the ICRC.

U.S. Proceedings at Guantánamo Bay

124. From the time that he was captured by the CIA in 2002 until the time of this filing, Mr. al Nashiri has never appeared in open court.

125. On 14 March 2007, after almost five years of being held in U.S. custody, Mr. al Nashiri was subjected at Guantánamo Bay to a "Combatant Status Review Tribunal" hearing, which purported to review all the information related to a detainee to determine whether he met the criteria to be designated as an "enemy combatant."[156] The hearing was closed to the public. Mr. al Nashiri was not afforded legal counsel at this hearing. A "personal representative" was appointed for him, but this person did not act as counsel and Mr. al Nashiri's statements to this representative were not privileged. He did not have access to any classified evidence that was introduced against him. Nor did he have the right to confront any of the statements of his accusers that were introduced at this hearing.

126. According to a partially redacted transcript of that hearing, Mr. al Nashiri states that he "was tortured into confession and once he made a confession his captors

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[154] Exhibit 28: Declaration of Barry Rosenfeld, Phd, *In the Matter of Abd Al-Rahim Hussain Mohammed Al Nashiri*, 9 September 2009.
[155] Exhibit 29: Defense Motion, *United States v. Al Nashiri*, 9 January 2009, at 3. Available at: http://www.defense.gov/news/Jan2009/MotiontoDiscontinue(RedactedSecretandU-FOUO)Redacted.pdf.
[156] Guantánamo Detainee Processes, Updated October 2, 2007, Available at: http://www.defense.gov/news/Sep2005/d20050908process.pdf. The term "enemy combatant" was defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This included any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. *Ibid*.

were happy and they stopped torturing him. [He also states] that he made up stories during the torture in order to get it to stop." [157] Mr. al Nashiri further states that "[f]rom the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." [158] The President of the tribunal asks Mr. al Nashiri to "describe the methods that were used." [159] Mr. al Nashiri's response to this question is largely redacted from the transcript of the hearing. The unredacted portion however states that "before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body." [160] He later states "they used to drown me in water. So I used to say yes, yes." [161] Further details relating to Mr. al Nashiri's own description of his treatment are redacted from the transcript.

127. On 30 June 2008, the U.S. government brought charges against Mr. al Nashiri for trial before a military commission, including those relating to the bombing of the USS Cole on 12 October 2000.[162] On 19 December 2008, the Convening Authority authorized the government to seek the death penalty at his Military Commissions. [163]

128. Immediately after the referral of charges, the defence filed a motion with the military commission contesting the government's method of transporting Mr. al Nashiri to legal proceedings in Guantánamo Bay on the grounds that it was harmful to his health and violated his right to free and unhindered access to his counsel. See paragraphs118 to 121 above. Citing expert medical testimony, the motion argued that "sensory deprivation of Mr. al Nashiri will likely cause profound psychological symptoms, and most significantly, could serve as a continuation of torture."[164]

129. Shortly after this motion was filed, Mr. al Nashiri's arraignment—which signifies the start of his trial before a military commission—was set for 9 February 2009.

130. On 22 January 2009, President Obama issued an Executive Order[165] requiring that all commission proceedings be halted pending the Administration's review of all detentions at Guantánamo Bay. In response to this order, the government requested a 120 day postponement for the 9 February 2009 arraignment.

131. On 25 January, 2009, the military judge assigned to Mr. al Nashiri's military commission denied the government's request for postponement of the trial.

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[157] Exhibit 5: al Nashiri CSRT Transcropt at 20.
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] Charge Sheet (Sworn Charges), 20 June 2008. Available at: http://www.defense.gov/news/nashirichargesheet.pdf.
[163] Charge Sheet (Referred charges), Available at: http://www.defense.gov/news/alNashiriReferredChargeSheet.pdf.
[164] Exhibit 29: Defense Motion, *United States v. Al Nashiri*, 9 January 2009, at 3.
[165] Executive Order, Review and Disposition of Individuals Detained At The Guantánamo Bay Naval Base And Closure of Detention Facilities, 22 January 2009. Available at: http://www.whitehouse.gov/the_press_office/ClosureOfGuantánamoDetentionFacilities/.

Moreover, the military judge ordered that a hearing on the defence motion regarding Mr. al Nashiri's transportation be held immediately after the arraignment. In response to this order, the defence filed a notice that it intended to introduce evidence of how Mr. al Nashiri was treated while in CIA custody. Hours after this notice was filed, on 5 February 2009, the U.S. government officially withdrew charges from the military commission, thus removing Mr. al Nashiri's case from the military judge's jurisdiction.

132. Military commission rules applicable to Mr. al Nashiri have changed since the time he was transferred from Poland and are now governed by the Military Commission Act of 2009, which was enacted on 28 October 2009.[166] However, they still provide for the death penalty[167] and retain many of the deficiencies associated with the previous military commission rules. The current military commissions lack independence from the executive as well as impartiality because the United States Secretary of Defense or his designee, as the convening authority for a given commission,[168] approves charges for trial by military commission[169] and selects the commission members who are required to be members of the armed forces on or recalled to active duty, [170] and as such are subordinate to the Secretary of Defense. Additionally, military commissions still apply only to non-U.S. citizens.[171]

133. In addition, the current military commission rules place no limits on the length of time within which a suspect must be charged or tried—indeed, they expressly exempt military commissions from speedy trial requirements.[172] Furthermore, the current military commission rules allow for the accused to be denied access to classified information or evidence[173] and, unlike U.S. federal court procedures which bar the admission of hearsay, the expressly permit hearsay evidence and do not bar convictions based mainly on such evidence.[174] Mr. al Nashiri's consequent inability to confront witnesses against him is of particular concern in light of the widespread torture and abuse of U.S. terrorism suspects, whose statements could be introduced as hearsay against him. Unlike U.S. federal court procedures which bar the admission of evidence derived from coerced statements, the current military commission rules admit evidence derived from coerced statements if that evidence would have been otherwise obtained and the use of such evidence would be consistent with the interests of justice.[175] Moreover, the military commissions will still be held in the remote location of Guantánamo Bay, thereby significantly hindering public access to

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[166] Military Commissions Act of 2009. Available at: http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf.
[167] Military Commissions Act of 2009, 10 U.S.C. § 948t (2009).
[168] Military Commissions Act of 2009, 10 U.S.C. § 948h (2009).
[169] Military Commission Rule 601, Manual for Military Commissions. Available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.
[170] *Ibid* at § 948i (a), (b)
[171] *Ibid* at § 948c
[172] *Ibid* at § 948b(d)(A).
[173] *Ibid* at § 949p-4(b)(1)
[174] *Ibid* at § 949a(b)(3)(D)
[175] Military Commissions Act of 2009, 10 U.S.C. § 948r (2009); see also Military Commission Rule 305(a)(5)(B).

Mr. al Nashiri's proceedings. Finally, there is considerable uncertainty associated with the current military commission rules, which were enacted as recently as October 2009,[176] and have been applied thus far in only three cases, none of which involved the death penalty.[177]

134. On 20 April 2011, United States military commission prosecutors brought capital charges against Mr. al Nashiri relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. [178] Mr. al Nashiri was designated for trial by military commission despite the fact that the United States government had previously indicted two of his alleged co-conspirators in the USS Cole bombing—Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso—in U.S. federal court.[179] The indictment, filed on 15 May 2003 while Mr. al Nashiri was secretly held in CIA custody in Poland, identified him as an unindicted co-conspirator in the USS Cole bombing.[180]

135. The military commission prosecutors announced that the capital charges against Mr. al Nashiri would be forwarded for independent review to Bruce MacDonald, the "Convening Authority" [181] for the military commissions, who will decide whether to reject the charges or to refer some, all or none of them for trial before military commission."[182]

136. On 27 April 2011, Mr. MacDonald informed U.S. military defense counsel for Mr. al Nashiri that Mr. MacDonald would accept written submissions against the death penalty until 30 June 2011, thereby implying that he would shortly thereafter make a decision on whether capital charges should be referred to a specified military commission for trial.[183]

137. On 2 October 2008, counsel for Mr. al Nashiri had filed a petition for writ of *habeas corpus* on Mr. al Nashiri's behalf in a federal district court of the District

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[176] See Military Commissions Act of 2009. Available at http://www.defense.gov/news/commissionsacts.html.
[177] The three individuals tried thus far under the Military Commissions Act of 2009 are Ibrahim al Qosi, Omar Khadr, and Noor Muhammad. See http://www.defense.gov/news/commissions.html.
[178] Exhibit 30: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at: http://www.defense.gov/releases/release.aspx?releaseid=14424.
[179] See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole, Washington, D.C., May 15, 2003. Available at: http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.
[180] See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, at 6. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf.
[181] The "Convening Authority" is a United States official designated by the United States Secretary of Defense for convening military commissions. See Military Commissions Act of 2009, 10 U.S.C. § 948 h(2009).
[182] Exhibit 30: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011.
[183] Exhibit 31: Memorandum from Bruce MacDonald, Convening Authority for Military Commissions for LCDR Stephen Reyes, OMC-D, 27 April 2011 at 2.

of Columbia. That petition is still pending to date with no decision from the court.

Polish Proceedings

138. In 2005, Poland conducted a brief, two-month parliamentary inquiry into allegations that a secret CIA detention site existed in the country. The inquiry was conducted behind closed doors, and none of its findings have been made public. The only public statement the Polish government made was at a press conference announcing that the inquiry had not turned up anything "untoward."[184] According to the 2006 Council of Europe report, "this exercise was insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations."[185]

139. Similarly, in a 14 February 2007 resolution based on the findings of the Fava report, the European Parliament chastised Polish authorities for their lack of cooperation with the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, and their failure to conduct an effective investigation. The resolution stated, in relevant part, that the European Parliament:

> "Deplores the glaring lack of cooperation by the Polish Government with the Temporary Committee, in particular when receiving the Temporary Committee delegation at an inappropriate level; deeply regrets that all those representatives of the Polish Government and Parliament who were invited to do so, declined to meet the Temporary Committee;
>
> Believes that this attitude reflects an overall rejection on the part of the Polish Government of the Temporary Committee and its objective to examine allegations and establish facts;
>
> Regrets that no special inquiry committee has been established and that the Polish Parliament has conducted no independent investigation;
>
> Recalls that on 21 December 2005, the Special Services Committee held a private meeting with the Minister Coordinator of Special Services and the heads of both intelligence services; emphasises that the meeting was conducted speedily and in secret, in the absence of any hearing or testimony and subject to no scrutiny; stresses that such an investigation cannot be defined as independent and regrets that the committee released no documentation, save for a single final statement in this regard; . . .
>
> Encourages the Polish Parliament to establish a proper inquiry committee, independent of the government and capable of carrying out serious and thorough investigations;
>
> Regrets that Polish human rights NGOs and investigative journalists have faced a lack of cooperation from the government and refusals to divulge information;

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[184] 2006 Marty Report, at para. 252.
[185] 2006 Marty Report, at para. 252.

Takes note of the statements made by the highest representatives of the Polish authorities that no secret detention centres were based in Poland."[186]

140. On 11 March 2008, the district Prosecutor's Office in Warsaw commenced a criminal investigation into secret CIA prisons in Poland. Polish authorities have not disclosed the terms of reference or the precise scope of the investigation. On 9 April 2009, in response to a request for information by the Helsinki Foundation for Human Rights, the head of the Bureau of Organized Crime in the National Prosecutor's Office stated that "in reference to the resolution of the European Parliament regarding the investigation into the alleged use of European countries by Central Intelligence Agency of the United States to transport and illegally detent prisoners, the 5th Department Of Appellate Prosecutor Office for Organized Crime and Corruption in Warsaw is conducting the investigating AP V DS. 37/09 regarding the abuse of power by state officials, namely the offence under article 231 § 1 of the Criminal Code."[187] The letter added that "the presentation of prosecutor's intentions, due to the fact that the wide range of procedural activities are classified, is not possible." [188] Subsequently, in responding to a questionnaire issued in the context of a United Nations Joint Experts report on secret detention, the Polish authorities stated that the investigation was on the subject of "the alleged existence of secret CIA detention facilities in Poland as well as the illegal transport and detention of persons suspected of terrorism." [189]

141. Although the investigation has been pending since 2008, no meaningful information on its terms of reference, precise scope or progress has been publicly disclosed. Nor have Polish prosecutors provided any information on when the investigation is likely to conclude.

142. A United Nations report dated 18 February 2010 recorded its "concern . . . about the lack of transparency into the investigation," observing that "[a]fter 18 months, still nothing is known about the exact scope of the investigation."[190]

143. On 21 September 2010, Polish lawyers for Mr. al Nashiri filed an application with Polish prosecutors in Warsaw requesting an investigation into his detention and treatment in Poland.[191] The application included numerous evidentiary applications, requesting that the prosecutors interview Mr. al Nashiri and a number of other witnesses, admit documents, and petition appropriate entities to disclose the identities and locations of individuals relevant to the investigation. Polish lawyers for Mr. al Nashiri also requested that they be informed about all

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[186] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at para 167-170 and 178-180.
[187] Exhibit 32: Letter from Krzysztof Parchimowicz to Helsinki Foundation for Human Rights, 9 April 2009. Available at http://www.hfhrpol.waw.pl/cia/file/odp_prokuratura_krajowa_9_04_09.pdf.
[188] *Ibid.*
[189] Text of Polish government response to UN Joint experts' questionnaire. See Exhibit 2: U.N. Joint Experts' Report, at para 118.
[190] See Exhibit 2: U.N. Joint Experts' Report, at para 118.
[191] See Exhibit 33: Procedural Letter concerning representation in proceedings, notice regarding suspicion of perpetration of criminal offences and motion regarding accession to further proceedings as a victim, 21 September 2010.

actions undertaken as part of the investigation and be admitted to take part in them.

144. As reported on 22 September 2010, Jerzy Mierzewski, Prosecutor of the Office of the Appellate Prosecutor in Warsaw, Fifth Department of Organized Crime and Corruption, indicated that investigation of Mr. al Nashiri's detention and treatment would be wrapped into the overarching investigation pending since 11 March 2008, and would not require opening a separate investigation.[192]

145. In October 2010, Mr. Mierzewski granted victim status to Mr. al Nashiri, thereby recognizing that his claims against the Polish government may have merit. [193]

146. In concluding observations on Poland dated 27 October 2010, the U.N. Human Rights Committee stated the following:

> "The Committee is concerned that a secret detention centre reportedly existed at Stare Kiejkuty, a military base located near Szymany airport, and that renditions of suspects allegedly took place to and from that airport between 2003 and 2005. It notes with concern that the investigation conducted by the Fifth Department for Organized Crime and Corruption of the Appellate Prosecution Authority in Warsaw is not yet concluded (arts. 2,7, 9). The State party should initiate a prompt, thorough, independent and effective inquiry, with full investigative powers to require the attendance of persons and the production of documents, to investigate allegations of the involvement of Polish officials in renditions and secret detentions, and to hold those found guilty accountable, including through the criminal justice system. It should make the findings of the investigation public."[194]

147. On 25 February 2011, Polish lawyers acting on Mr. al Nashiri's behalf filed a complaint before the District Court in Warsaw stating that the pending criminal investigation into secret detention sites in Poland has been unduly lengthy.[195] Mr. Jerzy Mierzewski redirected the complaint to the Appellate Court in Białystok, 2nd Criminal Division.

148. In a decision dated 20 April 2011, the Appellate Court in Białystok, 2nd Criminal Division, dismissed the complaint, holding that the pending criminal investigation was not excessive in duration.[196] That holding is final and cannot be appealed.

149. To date, the Appellate Prosecutor has not ruled on any of the evidentiary applications contained in Mr. al Nashiri's 21 September 2010 application. Nor

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[192] *Ibid*.
[193] See Exhibit 34: Adam Goldman and Vanessa Gera, Associated Press, "Terror suspect gets victim status in Polish probe," 27 October 2010. Available at: http://www.abc6.com/Global/story.asp?S=13393911.
[194] Exhibit 35: Concluding observations of the Human Rights Committee, Poland, U.N. Doc. CCPR/C/POL/CO/6 (2010), 27 October 2010, at para 15. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs100.htm.
[195] Exhibit 36: Complaint on the issue of the party's right to have the case recognized without undue delay in course of the preliminary criminal proceedings, filed on 25 February 2011.
[196] Exhibit 37: Decision of the Appellate Court in Bialystok, 20 April 2011.

has the Prosecutor provided any indication of when the criminal investigation into CIA black sites in Poland—pending since 11 March 2008—is likely to conclude.

IV. ALLEGED VIOLATIONS OF THE CONVENTION

150. Poland is responsible for violating Mr. al Nashiri's rights under Articles 2, 3,5,6,8 and 13 and Protocol No. 6 to the Convention, as well as for violating his and the public's right to truth. These violations arise from:

- *A. Treatment in Poland.* Poland violated Articles 3, 5 and 8 of the European Convention in enabling Mr. al Nashiri's torture, ill-treatment and incommunicado detention on Polish territory.
- *B. Transfer from Poland*. Poland violated Mr. al Nashiri's rights under Articles 2 and 3 and Protocol No. 6 to the Convention by assisting in his transfer from Poland despite a real risk of his being subjected to the death penalty; under Article 3 by assisting in his transfer despite the real risk of further ill-treatment in U.S. custody; under Article 5 by assisting in his transfer despite the real risk of further incommunicado detention; and under Article 6 by assisting in his transfer from Poland despite the risk of his being subjected to flagrantly unfair trial
- *C. Failure to conduct an effective investigation*. Poland violated Articles 2, 3, 5, and 8, as well as Mr. al Nashiri's right to an effective remedy under Article 13 by failing to conduct an effective investigation into the violation of his rights.
- *D. Failure to disclose the truth.* Poland violated Mr. al Nashiri's and the public's right to truth under Articles 2, 3,5,10 and 13 by failing to acknowledge, investigate, and disclose details of Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition.

STATE RESPONSIBILITY UNDER THE CONVENTION

151. Poland is responsible under Article 1 for Mr. al Nashiri's secret detention and torture on Polish territory because it knowingly, intentionally and actively collaborated with the CIA's rendition programme, thereby enabling the CIA to subject him to such treatment in Poland. It is also responsible under Article 1 for exposing Mr. al Nashiri to a real risk of further incommunicado detention, ill-treatment, a flagrantly unfair trial and the death penalty in U.S. custody, which were not merely the "proximate repercussions" but the direct and foreseeable results of Poland's assistance to the CIA in transporting Mr. al Nashiri out of Poland.

152. Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention." This Court has found that "[t]he undertakings given by a Contracting State under Article 1 of the Convention include, in additional to the duty to refrain from interfering with the enjoyment of the rights and freedoms

guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory."[197] "In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals may engage the State's responsibility under the Convention." [198] Thus, the Court has held that a Contracting State has positive obligations under the Convention with respect to individuals deprived of their rights by non-state actors within its territory even in circumstances where the State does not have effective control over that territory.[199] Furthermore, "[a] State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[200]

153. As noted in the 2007 Council of Europe Report, Poland was "knowingly complicit in the CIA's secret detention programme [201] and senior Polish officials— President of the Republic of Poland, Aleksander Kwasniewski; the Chief of the National Security Bureau, Marek Siwiec; the Minister of National Defence, Jerzy Szmajdzinski; and the head of Military Intelligence, Marek Dukaczewski—"knew about and authorized Poland's role" in the CIA's rendition operations on Polish territory.[202]

154. As set forth in paragraphs34-48 above, The Polish government actively collaborated with CIA rendition operations by:

    a) entering into an "operating agreement" with the CIA to hold high value detainees in secret detention facility on Polish territory203; and signing "secret cooperation agreements initialled by the two countries' secret services, which exclude the activities of foreign secret services from the jurisdiction of Polish judicial bodies."[204]

    b) arranging for the Military Information Services (Wojskowe Sluzby Informacyjne), acting under the guise of the Polish Army Unit designated as the formal occupant of the Stare Kiejkuty facility, to provide "extraordinary levels of physical security by setting up temporary or permanent military-style 'buffer-zones' around the CIA's detainee transfer and interrogation services;[205]

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[197] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para. 313.
[198] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para. 318 (citing *Cyprus v. Turkey*, ECtHR [GC], Judgment of 10 May 2001 at para 81).
[199] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para 2, 331, 339 (holding that even in the absence of effective control over Transdniestra, a region of Moldova which proclaimed its independence but was not recognised by the international community, Moldova had a positive obligation under Article 1 to take measures within its power to re-establish its control over Transdniestrian territory and to ensure that the applicants' rights were respected in that territory).
[200] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para. 317.
[201] Exhibit 3: 2007 Council of Europe Report, at para 15.
[202] *Ibid*. at para 174.
[203] *Ibid*. at para 117.
[204] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at para 181
[205] Exhibit 3: 2007 Council of Europe Report, at para 170.

c) providing Military Information Services (Wojskowe Sluzby Informacyjne) collaborators in other agencies including in the Polish Air Navigation Services Agency (Polska Agencia Zeglugi Powietrzne), where they assisted in disguising the existence and exact movements of incoming CIA flights, the Polish Border Guard (Straz Graniczna), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed, and the national Customs Office (Glowny Urzad Celny), where they resolved irregularities in the non-payment of fees related to CIA operations;[206]

d) granting CIA rendition planes licences and overflight permissions as well as special exemptions from adhering to the normal rules of air traffic flow management;[207]

e) actively assisted in landing and departure of rendition flights, including flights N63MU and N379P, which transported Mr. al Nashiri in and out of Poland respectively;[208]

f) assisting in the cover-up of rendition flights, including flights N63MU and N379P, which transported Mr. al Nashiri in and out of Poland respectively;[209] and

g) clearing the runway and secured the perimeter and grounds of the airport with Polish military officers and border guards so that prisoners could be secretly transported into vans bound from Szymany airport to the Stare Kiejkuty facility.[210]

A. TREATMENT IN POLAND

155. Poland knew and should have known about the CIA's rendition programme, the "black site" in Poland, and the torture and inhuman and degrading treatment to which the CIA subjected "high value detainees" as part of this programme. Yet, Poland knowingly and intentionally enabled the CIA to detain Mr. al Nashiri at the Stare Kiejkuty facility for 6 months, thereby allowing the CIA to subject him on Polish territory to: (1) treatment that amounted to torture in violation of Article 3 of the Convention; (2) detention without any legal basis in violation of Article 5; and (3) arbitrary detention, abuse, and deprivation of any access to or contact with his family, in violation of Article 8.

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[206] *Ibid*. at para 171.
[207] *Ibid*. at paras 180-196; Exhibit 13: CHRGJ report, at 2-6.
[208] Exhibit 3: 2007 Council of Europe Report, at para 197; Exhibit 13: CHRGJ report, at 2-6; Exhibit 9: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010. Available at: http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf
[209] Exhibit 3: 2007 Council of Europe report, at paras 180-190; Exhibit 13: CHRGJ report, at 2-6; Exhibit 2: U.N. Joint Experts' Report, at para 116.
[210] Exhibit 3: 2007 Council of Europe Report, at para 197.

1. Torture and Ill-Treatment: Article 3

156. The treatment of Mr. al Nashiri at the Stare Kiejkuty facility in Poland amounted to treatment in violation of Article 3, rising to the level of torture. While detained at the secret detention facility he was subjected to a wide range of abusive interrogation methods including hooding, prolonged stress positions, mock executions using a handgun and a power drill, shackling, and threats of sexual violence to his family. These techniques were specifically designed to elicit information by inflicting psychological and physical suffering on Mr. al Nashiri.

Relevant Legal Standards

157. The Court defines torture as the "deliberate inhuman treatment causing very serious and cruel suffering."[211] By deliberate, the Court has clarified that it means suffering which is intentionally inflicted for a purpose, such as obtaining evidence, punishment or intimidation.[212] In considering whether treatment meets the degree of "severity" that constitutes torture the Court will "consider all the circumstances of the case, including the duration of the treatment, its physical or mental effects and, in some cases the sex, age and state of health of the victim."[213] Inhuman treatment must "cause either actual bodily harm or intense physical or mental suffering."[214] Degrading treatment occurs where the ill-treatment is "such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them"[215] or it "humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance."[216] Such treatment often has an intention to humiliate or debase.[217]

158. The Court has found that states' obligations under Article 3 include a positive obligation to protect detainees within their jurisdiction from ill-treatment. In *A. v the United Kingdom*, the Court found that taken together, Article 1 and Article 3 "[require] 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 treatment administered by private individuals."[218]

159. Thus, the Court has also held that failure to protect detainees from ill-treatment by third parties – including other prisoners – constitutes a violation of Article 3.[219] Further, the Court has found violations of Article 3 in situations where the State knew that an individual was at risk of being targeted by non-state actors and did not take specific measures to protect him.[220]

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[211] *Ireland v. the United Kingdom*, ECtHR, Judgment of 18 January 1978, para. 167.
[212] *Ilhan v. Turkey*, ECtHR, Judgment of 27 June 2000, para. 85.
[213] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para. 100
[214] *Kudla v. Poland*, ECtHR, Judgment of 26 October 2000, at para. 92.
[215] *Ibid*.
[216] *Pretty v. the United Kingdom*, ECtHR, Judgment of 29 July 2002, at para. 52.
[217] *Kudla v Poland*, ECtHR, Judgment of 26 October 2000, at para. 91.
[218] *A v. the United Kingdom*, ECtHR, Judgment of 23 September 1998.
[219] *Pantea v. Romania*, ECtHR, Judgment of 3 June 2003, at paras 189-192.
[220] *Kaya v. Turkey*, ECtHR, 28 March 2000, at paras 115 & 116.

160. The Article 3 prohibition of torture and inhuman and degrading treatment is absolute. "The requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals . . . It should also be borne in mind that the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct and – where detainees are concerned – the nature of the alleged offence."[221]

161. The Court has found that a combination of different forms of ill-treatment over a period of time can amount to torture. In *Selmouni v. France*, the abuse included periodic beatings and assault, together with threats of sexual assault or demands to perform non-consensual sexual acts, being urinated on and threatened with a blowlamp and a syringe endured over a number of days of questioning, which the Court found rose to the level of torture.[222] In the case of *Aydin v. Turkey*, the Court found treatment to qualify as torture where the applicant was detained over a period of three days during which she was deliberately disoriented by being kept blindfolded, beaten, subjected to humiliation such as public nudity, and pummelled with high pressure water while being spun around in a tire.[223]

162. The Court has found some of the specific techniques used against Mr. al Nashiri to violate Article 3. Two of the five techniques condemned by the Court in *Ireland v the United Kingdom* in 1979 – hooding and wall-standing – were employed against Mr. al Nashiri in 2003, techniques which the Court considered caused "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."[224] The Court has also condemned solitary confinement, because "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or for any other reason."[225] Indeed, prolonged solitary confinement has been found to amount to torture.[226]

163. *Reverse burden.* Where an individual suffers harm while in the custody of the State, the burden shifts to the government to provide a satisfactory and plausible explanation supported by evidence. In *Selmouni v France*, for example, the Court held that "[w]here an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."[227] In such cases, the Court has established that it is the responsibility of the government to

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[221] *Dikme v. Turkey*, ECtHR, Judgment of 11 July 2000, at para. 90.
[222] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at paras 102-104.
[223] *Aydin v. Turkey*, ECtHR, Judgment of 25 September 1997, at para. 84.
[224] *Ireland v the United Kingdom*, ECtHR, Judgment of 18 January 1978, at paras 96, 167-168.
[225] *Ilascu et al v. Moldova and Russia*, ECtHR, Judgment of 8 July 2004, at para. 432.
[226] *Ibid.* at para. 440.
[227] *Selmouni v. France*, ECtHR (GC), Judgment of 28 July 1999, at para. 87; see also *Aksoy v. Turkey*, Judgment of 26 November 1996, at para 61.

produce evidence that challenges the victim's account of events, particularly if medical reports or certificates support that account.[228]

164. Allegations made under Article 3 of the Convention require the Court to conduct a particularly thorough scrutiny on the basis of all the material submitted. In assessing evidence, the standard of proof may be met through the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[229] Where the government fails to provide evidence in support of their explanation of events the Court may rely on such inferences. For example, in *Tas v Turkey*, the Court drew "very strong inferences from the lack of any documentary evidence relating to where Muhsin Tas was detained and from the inability of the government to provide a satisfactory and plausible explanation as to what happened to him."[230]

165. Such cases are not limited to instances where the individual is in the custody of the State, and the Court will draw inferences where the State fails to produce evidence when it is in a unique position to do so: "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, such as in cases where persons are under their control in custody, strong presumptions of fact will arise in respect if injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[231]

Torture in Poland Violated Article 3

166. As noted in paragraphs 49 to 60 above, while in Poland, Mr. al Nashiri was deliberately subjected for a prolonged period of time to a wide range of abusive interrogation methods known as "enhanced interrogation techniques." These methods were often used in combination, and included mock executions, forced nudity, hooding, handcuffing, shackling, stress positions that could have caused arm dislocation, threats of sodomy, threats of injury (including of a sexual nature) to his mother and family, and pain induced through the use of a stiff brush on his body as well as by standing on his shackles. Official U.S. documents confirm that an interrogator "used an unloaded semi-automatic handgun to frighten al Nashiri into disclosing information."[232] The interrogator "entered the cell where al Nashiri sat shackled and racked the handgun once or twice close to al Nashiri's head."[233] The interrogator also "revved" a power drill next to Mr. al Nashiri's ears "while he stood hooded and naked."[234]

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[228] *Ribitsch v. Austria*, ECtHR, Judgment of 4 December 1995, paras 31, 34.
[229] *Desde v. Turkey*, ECtHR, Judgment of 1 February 2011, at para 90; see also *Labita v. Italy*, ECtHR, Judgment of 6 April 2000, at para. 121.
[230] *Tas v Turkey*, ECtHR, Judgment of 14 November 2000, at para. 66; see also *Desde v. Turkey, ECtHR*, Judgment of 1 February 2011, at para. 91.
[231] *Khadzhialiyev and others v Russia*, ECtHR, Judgment of 6 November 2008, at para. 79, 83, 86, 89, 91-93; see also *Takhayeva and Others v. Russia*, ECtHR, Judgment of 18 September 2008, at para. 68, 77, 80.
[232] Exhibit 7: CIA OIG Report, at para 92.
[233] *Ibid*.
[234] *Ibid*.

167. These techniques were specifically designed to elicit information by inflicting psychological and physical suffering on Mr. al Nashiri. Indeed, official U.S. government documents state that the "goal of interrogation [was] to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner," and outline in detail interrogation procedures used "to persuade High-Value Detainees (HVD) to provide threat information and terrorist intelligence in a timely manner."[235] As such, the interrogation methods applied on Mr. al Nashiri to in Poland constituted torture, i.e., "deliberate inhuman treatment causing very serious and cruel suffering."[236]

168. These methods had devastating and lasting effects on Mr. al Nashiri. At his combatant status review tribunal hearing in 2007, Mr. al Nashiri stated that "[f]rom the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." He states that "before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body."[237]

169. The interrogation methods applied on Mr. al Nashiri in Poland violated Article 3, rising to the level of torture. In addition, Mr. al Nashiri's six-month long solitary confinement and incommunicado detention in Poland also amounted to treatment in violation of Article 3. By failing to take measures to protect Mr. al Nashiri from such treatment while he was on Polish territory, Poland violated Mr. al Nashiri's rights under Article 3 of the Convention.

170. Mr. al Nashiri has produced cogent evidence demonstrating that Poland violated his rights under Article 3. In the absence of a satisfactory response from Polish authorities on this matter, this Court is entitled to make further presumptions in his favour.

2. Prolonged Incommunicado Detention: Article 5

171. Poland violated Mr. al Nashiri's rights under Article 5 by allowing him to be held in incommunicado, unacknowledged and secret detention in Poland for a period of approximately six months—from about 5 December 2002 until about 6 June 2003--without ever being brought before a judge or involved in any other judicial proceedings.

Relevant Legal Standards

172. This Court has found the right to liberty and security under Article 5 to be of "primary importance in a democratic society" within the meaning of the Convention. [238] Detention must be lawful, and "[w]here lawfulness of detention is at issue, including the question whether 'a procedure prescribed by law' has

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[235] *Ibid.* at pg 3.
[236] *Ireland v. the United Kingdom*, ECtHR, Judgment of 18 January 1978, at para. 167.
[237] Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10015 at 20. *Available at:* http://www.aclu.org/pdfs/safefree/csrt_alnashiri.pdf
[238] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at para 143.

been followed, the Convention refers essentially to national law."[239] Detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities; where the domestic authorities have neglected to attempt to apply the relevant legislation correctly; or where judicial authorities have authorized detention for a prolonged period of time without giving any grounds for doing so in their decisions. [240] Article 5 creates a positive obligation on the State to prevent any unlawful deprivation of liberty by non-state agents. The state is also "obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent deprivation of liberty of which the authorities have or ought to have knowledge."[241]

173. The Court has found that informal captures and abductions violate the Convention. In *Isakandarov v. Russia*, this Court found that the applicant's abduction and detention for two days by state agents in Russia preceding his transfer to Tajikistan violated Article 5(1) as it was not pursuant to a lawful process.[242] The Court observed that:

> "[I]t is deeply regrettable that such opaque methods were employed by State agents as these practices could not only unsettle legal certainty and instil a feeling of personal insecurity in individuals, but could also generally risk undermining respect for and confidence in the domestic authorities.
>
> The Court further emphasises that the applicant's detention was not based on a decision issued pursuant to national laws. In its view, it is inconceivable that in a State subject to the rule of law a person may be deprived of his liberty in the absence of any legitimate authorization for it. . . . The applicant's deprivation of liberty . . . was in pursuance of an unlawful removal designed to circumvent the Russian Prosecutor General's Office's dismissal of the extradition request, and not to 'detention' necessary in the ordinary course of 'action . . . taken with a view to deportation or extradition'.[243]"

174. Similarly, in *Bozano v France*, after the Courts had refused to order extradition to Italy, the executive issued a deportation order, and the applicant was driven by police across France to the Swiss border where he was arrested by Swiss police. The domestic courts subsequently found the deportation order was invalid. In finding a violation, this Court concluded that the deprivation of liberty "was neither 'lawful', within the meaning of Article 5(1)(f), nor compatible with the 'right to security of person.' Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent" the domestic judicial decisions.[244]

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[239] *Ibid.* at para 144.
[240] *Ibid*. at para 146.
[241] *Storck v. Germany*, ECtHR, Judgment of 16 June 2005, at para. 102.
[242] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at paras 148-152.
[243] *Ibid*. at paras 148-150.
[244] *Bozano v France*, ECtHR, Judgment of 18 December 1986, at para. 60.

175. *No exception in terrorism cases.* The Court has held the threat of terrorism does not mean that the "authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence.[245] In *Aksoy v. Turkey*, fourteen days of incommunicado detention was found to violate Article 5, as "insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him." [246]

176. *Unacknowledged detention grave violation of Article 5.* Significantly, in *Iskandarov*, where the applicant was temporarily disappeared by Russian agents, the Court found the State's failure to acknowledge or log an applicant's detention in any arrest or detention records to constitute "a complete negation of the guarantees of liberty and security of person contained in Article 5 of the Convention and a most grave violation of that Article."[247] Indeed, this Court has repeatedly held that a person's unacknowledged detention and/or disappearance is "a most grave violation" of Article 5.[248] It is also "a complete negation" of the additional Convention safeguards for the preservation of the right to life and freedom from torture of detained persons, which the procedural guarantees of Article 5 are meant to serve (among other goals).[249] A forced disappearance conflicts with some of the most basic rule of law protections against abuse of state power.[250] The initial failure to record the fact and details of detention (date, time and location), and the ongoing failure to account for the detainee's further whereabouts constitute "a most serious failing" since they facilitate the official cover-up of future violations.[251]

Prolonged Incommunicado Detention in Poland Violated Article 5

177. Poland violated Mr. al Nashiri's rights under Article 5 by enabling his unacknowledged detention in Poland for six months. In violation of Article 5(1), Mr. al Nashiri's detention in Poland was not carried out "in accordance with a procedure prescribed by law"; in violation of Article 5(2), he was not properly informed of the reasons for the deprivation of his liberty or of the charges against him; in violation of Article 5(3), he was not brought before a judge or

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[245] *Dikme v Turkey*, ECtHR, Judgment of 11 July 2000, at para 60-67 (holding that detention of sixteen days during which applicant was deprived of all contact with the outside world and had no access to a judge or other judicial officer violated Article 5).
[246] See *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para. 83.
[247] *Iskandarov v. Russia*, ECtHR, Judgement of 23 September 2010, at para 150.
[248] *Kurt v Turkey*, ECtHR, Judgment of 25 May 1998, at para. 124. See on disappearances generally: *Cakici v. Turkey*, ECtHR, Judgment of 8 July 1999, at para. 104; *Cicek v. Turkey*, ECtHR, Judgment of 27 February 2001, at para. 164; *Imakayeva v. Russia*, ECtHR, Judgment of 9 November 2006, at para. 171; and *Luluyev and Others v. Russia*, ECtHR, Judgment of 9 November 2006, at para. 122 (finding a "a very grave violation of Article 5")
[249] *Luluyev and Others v. Russia*, ECtHR, Judgment of 9 November 2006, at paras 123-124.
[250] *Ibid.* at para. 122.
[251] *Kurt v. Turkey*, ECtHR, Judgment of 25 May 1998, at para 125.

other judicial officer of any country or sent to trial; in violation of Article 5(4), he was denied any possibility of challenging the lawfulness of his detention; and in violation of Article 5(5), Mr. al Nashiri was never compensated for his detention.

3. Ill-treatment and Incommunicado Detention: Article 8

178. Poland violated Mr. al Nashiri's rights under Article 8 by enabling the CIA to ill-treat and detain him incommunicado in Poland without any access to his family.

Relevant Legal Standards

179. The essential object of Article 8 is to prevent arbitrary action by governments.[252] Article 8 protects the physical and psychological integrity of the individual.[253] This includes the protection of dignity and personal autonomy.[254] Article 8 also includes "the right to establish and develop relationships with other human beings."[255] The Court has noted that the concept of "private life is a broad term not susceptible to exhaustive definition . . . . Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. . . . The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."[256]

180. Article 8 also protects the right to family life. An essential ingredient of family life is the right to live together so that family relationships may develop normally[257] and so that members of a family may enjoy each other's company.[258]

181. "Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves."[259] The Court has found a violation of Article 8 in instances where a State fails to adequately prosecute and punish infringements of a person's physical integrity.[260] The Court has held that, under Article 8 that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law

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[252] *Kroon and Others v Netherlands*, ECtHR, Judgment of 27 October 1994, at para. 31.
[253] *Pretty v United Kingdom*, ECtHR, Judgment of 29 July 2002, at para 61.
[254] *Ibid.* at paras. 61 and 65.
[255] *Niemietz v. Germany*, ECtHR, Judgment of 16 December 1992, at para. 29.
[256] *Bensaid v. United Kingdom*, ECtHR, Judgment of 6 February 2001, para. 47.
[257] *Marckx v Belgium*, ECtHR, Judgment of 13 June 1979, at para. 31.
[258] *Olsson v. Sweden*, ECtHR, Judgment of 24 March 1988, at para. 59.
[259] *M.C. v. Bulgaria*, ECtHR, Judgment of 4 December 2004, para. 150.
[260] See X *and Y v. the Netherlands*, ECtHR, Judgment of 26 March 1985 (finding that the State failed to provide "practical and effective protection" against the crime of rape where a handicapped minor could not bring a complaint herself, and was not allowed to have her guardian do so on her behalf); see also *M.C. v. Bulgaria*, ECtHR, Judgment of 4 December 2003.

provisions."[261] Children and other vulnerable individuals, in particular, are entitled to effective protection.[262]

Ill-treatment and Incommunicado Detention in Poland Violated Article 8

182. Poland violated Mr. al Nashiri's Article 8 right to private and family life by enabling his abuse and incommunicado detention on Polish territory.

183. As set forth in paragraphs 49 to 60 above, Mr. al Nashiri was held in incommunicado detention and subjected to a range of abusive interrogation methods including forced nudity, mock executions, hooding, handcuffing, shackling, stress positions, threats of injury (including of a sexual nature) to his mother and family, pain induced through the use of a stiff brush on his body as well as by standing on his shackles.

184. Such physical mistreatment interfered with Mr. al Nashiri's physical and moral integrity and resulted in a severe deterioration of his physical well-being and mental health, in violation of his Article 8 rights.

185. Indeed, as set forth in official U.S. government documents, the entire purpose of the rendition programme to which Mr. al Nashiri was subjected, was to disorient him and interfere with his psychological and physical integrity in order to extract information from him. [263] The memorandum states that 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."[264] This is fundamentally at odds with the right to respect of private life protected by Article 8 of the Convention.

186. Mr. al Nashiri's secret, unacknowledged detention in Poland interfered with his right to family life under Article 8. As noted above, according to the ICRC, who interviewed Mr. al Nashiri and thirteen other "high-value detainees," "throughout the period during which they were held in the CIA detention programme—the detainees were kept in continuous solitary confinement and incommunicado detention."[265]

B. TRANSFER FROM POLAND

187. In knowingly and intentionally enabling Mr. al Nashiri's transfer from Poland despite substantial grounds for believing that there was a real risk that he would be subjected to the death penalty, Poland (1) violated his rights under both Articles 2 and 3 of the Convention as well as Protocol 6 to the Convention, (2) violated his rights under Article 3 by allowing him to be transferred from Poland despite the real risk of further ill-treatment, (3) violated his rights under Article 5 by allowing him to be transferred despite a real risk of further incommunicado

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[261] *M.C. v. Bulgaria,* ECtHR, Judgment of 4 December 2003, at para. 150; See also *X and Y v. the Netherlands,* ECtHR, Judgment of 26 March 1985.
[262] *X and Y v. the Netherlands*, ECtHR, Judgment of 26 March 1985, at paras 23-24 and 27.
[263] Exhibit 4: CIA Rendition Background Paper.
[264] *Ibid.* at pg 3.
[265] Exhibit 6: ICRC Report, at 7-8.

detention, and (4) violated his rights under Article 6 by allowing him to be transferred to a jurisdiction where he would be subjected to a flagrantly unfair trial.

1. Transfer to the Death Penalty: Article 2, Article 3, Protocol No. 6

188. Poland violated Mr. al Nashiri's rights under Article 2 and Protocol 6 to the European Convention, as well as Article 3, by permitting his transfer from Poland despite substantial grounds for believing that there was a real risk that he would be subjected to the death penalty, and that this would follow an unfair trial. The death penalty has no place in a democratic society. The Council of Europe's "principled opposition to the death penalty in any circumstances" is reiterated in a resolution adopted by its Parliamentary Assembly on 14 April 2011. This resolution "urge[d] the United States of America . . . as [an] observer state . . . to join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty."[266] The resolution further stated that the Parliamentary Assembly "regrets that the arbitrary and discriminatory application of the death penalty in the United States and the public scandals surrounding the different methods of execution in use (lethal injection, electric chair, firing squad) have stained the reputation of this country, which its friends expect to be a beacon for human rights." [267]

Relevant Legal Standards

189. Article 2 protects the right to life. Article 3 prohibits torture or inhuman or degrading punishment, which includes the threat of the death penalty. Article 1 of Protocol No. 6 to the Convention abolishes the death penalty in all peacetime situations. Poland ratified Protocol No. 6 on 30 October 2000. The Protocol entered into force on 1 November 2000. Poland signed Protocol No. 13 to the Convention on 3 May 2002 but has not yet ratified it.

190. As this Court recognized in *Al Saadoon and Mufdhi v. United Kingdom*, there has "been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the Member States of the Council of Europe."[268] The Court found that "consistent State practice in observing the moratorium on capital punishment," together with the fact that "[a]ll but two of the member States have now signed Protocol No. 13[269] and all but three of the States which have signed have ratified it," to be "strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances."[270] Accordingly, the Court concluded that "Article 2 of the Convention . . . prohibit[s] the extradition or deportation of an individual to another State where

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[266] *Ibid.*
[267] *Ibid*.
[268] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR. Judgment of 2 March 2010, at para 116.
[269] Protocol 13 to the European Convention, which has been ratified by forty-two member states of the Council of Europe, abolishes the death penalty in all circumstances, including in times of war or national emergency. Every member state of the Council of Europe, with the exception of Russia, has ratified Protocol No. 6 to the European Convention.
[270] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 120.

substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."[271] Significantly, in July 2002, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism which directed that "[t]he extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out." [272]

191. This judgment that the death penalty is prohibited in all circumstances evolved from the previous position of the Court in *Őcalan v Turkey*, in which the Grand Chamber held that the imposition of the death penalty following an unfair trial would amount to an "arbitrary deprivation of life" in violation of Article 2[273] and would also violate Article 3 by subjecting the person "wrongfully to the fear that he will be executed",[274] and "a significant degree of anguish" which "cannot be dissociated from the unfairness of the proceedings underlying the sentence." [275] More recently, in *Al-Saadoon*, the Court found an Article 3 violation arising out of "psychological suffering" associated with the applicants' fear of being executed after being transferred by the United Kingdom to Iraqi authorities.[276]

192. There is a further violation of Article 3 where an individual is subjected to the "death row phenomenon" by waiting for many years under sentence of death while the legal process continues, which the Court considered would "expose him to a real risk of treatment going beyond the threshold set by Article 3."[277] The Court found that because Article 3 covers not just violations that had already taken place but also the "foreseeable consequences in the requesting country," the imposition of the death penalty need not be certain or even probable.[278]

193. *Diplomatic Assurances.* There is a duty upon a sending state to obtain diplomatic assurances that the death penalty will not be used, and if a mistake is made, to seek to ensure that the death penalty is not imposed. In *Soering*, the Court found that the existence of a real risk of a death sentence creates an obligation on the sending State to seek adequate assurances from the receiving State that the death penalty will not be imposed "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to" the death penalty.[279] Adequate assurances are

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[271] *Ibid*. at para 123.
[272] Exhibit 25: Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, Section XIII, at para 2.
[273] *Őcalan v Turkey*, ECtHR (GC), Judgment of 12 May 2005, at paras. 166-169.
[274] *Ibid.* at para 169.
[275] *Ibid.* at para 169.
[276] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para. 135.
[277] *Soering v. the United Kingdom*, ECtHR, Judgment of 7 July 1989, at paras. 88-91
[278] *Ibid.* at para. 90.
[279] *Ibid.* at paras. 93-99.

required even in situations involving threats to national security,[280] because "the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[281] General assurances of protection are not sufficient.[282] This creates a continuing obligation, even after the applicant has been transferred, to take "all possible steps to obtain an assurance" that he will not be subjected to the death penalty.[283]

194. The affirmative obligation to prevent the post-transfer imposition of the death penalty was confirmed in a case closely analogous to the one presently before this Court. In *Boudellaa et al. v Bosnia and Herzegovina,* the Human Rights Chamber for Bosnia and Herzegovina (BiH) found that BiH had violated applicants' rights under Article 1 of Protocol 6 to the Convention by transferring them to U.S. custody thereby placing them at risk of the death penalty and trial by military commission at Guantánamo Bay under the same rules applicable to Mr. al Nashiri at the time of his transfer from Poland. The court observed that:

> "US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave risk to an obligation on the respondent Parties to seek assurances from the United States, prior to the hand-over of the applicants, that the death penalty would not be imposed upon the applicants." [284]

195. The Chamber observed that "in accordance with Article 1 of Protocol No 6 to the Convention, the imposition of the death penalty is prohibited and the death penalty is abolished" which "for purposes of international co-operation in criminal matters" means that "the extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted." [285] It held that in failing to "take all necessary steps to ensure that the applicants would not be subject to the death penalty," upon their transfer to U.S. custody, the respondent states violated Article 1 of Protocol no. 6 to the Convention. [286] The Chamber ordered Bosnia and Herzegovina to "take all possible steps to prevent the death penalty from being pronounced against and executed on the

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[280] *Chahal v. United Kingdom*, ECtHR, Judgment of 15 November 1996, at para. 105.
[281] *Ibid.* at para. 79.
[282] *Ibid.* at paras. 97 & 105-107; *Saadi v Italy,* ECtHr, Judgment of 28 February 2008, at paras. 128, 142 & 148-149.
[283] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at 170-171.
[284] *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 & CH/02/8691, 11 October 2002, at para 300.
[285] *Ibid.* at para 273.
[286] *Ibid*. at para 300.

applicants," including through procuring post-transfer diplomatic assurances from the United States.[287]

Transfer to Real Risk of the Death Penalty Violated Articles 2 and 3 and Protocol No. 6

196. As set out in paragraphs 96 to 117 above, at the time of this transfer, it was a matter of public record that detainees held in US custody as suspects in the "war on terror" were likely to be subjected to the death penalty, as well as an unfair trial by military commission, (see section B(4) below). In November 2001, the U.S. President issued a Military Order that provided that "[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." [288] Military Commission Order No. 1 similarly provided that "[u]pon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence *may include death*, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper."[289] Both these orders were published and publically available.

197. Long before Mr. al Nashiri's transfer from Poland on or about 6 June 2003, non-governmental organizations had also put Poland on notice of the real risk of transfer to an unfair trial followed by the death penalty. On 17 January 2002, Amnesty International reported that six Algerian men were at risk of imminent transfer from Bosnia-Herzegovina to US custody to stand trial in connection with their alleged participation in "international terrorism."[290] Amnesty International observed that the men could be transferred without sufficient guarantees of their rights, and subjected to the risk that they would be sentenced to death: "These men should only be transferred to US custody following proper extradition proceedings before a court of law and after the Federation authorities have obtained firm guarantees that they will not be tried before the special military commissions *or face the death penalty.*"[291] Amnesty reported on 18 January 2002 that the six men were illegally handed over to American officials, and that they were to be imminently transported to US territory.[292]

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[287] *Ibid*. at para 330.
[288] See Exhibit 22: Military Order of 13 November 2001,The US President's Military Order also provides that "it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the *laws of war* and other applicable law by military tribunals," *ibid*., at Section 1(e) (emphasis added), and the laws of war in turn provide that "[t]he death penalty may be imposed for grave breaches of the law [of war.]" *United States Dep't of Army Field-Manual 27-10: The Law of Land*, Chapter 8, Section II, at para 508. Available at http://www.usmc.mil/news/publications/Documents/FM%2027-10%20W%20CH%201.pdf.
[289] Exhibit 23: MCO No. 1, at Section 6(G) (emphasis added).
[290] Amnesty International, Press Release, "Bosnia-Herzegovina: Transfer of six Algerians to US custody puts them at risk" (17 January 2002), AI Index EUR 63/001/2002 - News Service Nr. 10.
[291] *Ibid*. (emphasis added).
[292] *Ibid*.

198. Court decisions also put Poland on notice of the risk of transfer to an unfair trial and the death penalty. In *Boudellaa et al. v. Bosnia and Herzegovina*, the Human Rights Chamber for Bosnia and Herzegovina (BiH) held that BiH violated Protocol No. 6 to the Convention by transferring suspected terrorists to U.S. custody while "fail[ing] to take all necessary steps to ensure that the applicants will not be subject to the death penalty."[293]

199. Poland violated Mr. al Nashiri's rights under Articles 2 and 3 as well as under Protocol 6 to the Convention by enabling his transfer from Poland despite substantial grounds for believing that he would face a real risk of being subjected to the death penalty in U.S. custody. By permitting his transfer to the death penalty in the face of the additional risk of an unfair trial, Poland further violated his rights under Article 3.

200. Mr. al Nashiri remains at a real risk of being subjected to the death penalty under military commission rules currently applicable to his case.[294] On 20 April 2011, United States military commission prosecutors brought capital charges against Mr. al Nashiri relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. [295] The prosecutors announced that the charges would be forwarded for independent review to Bruce MacDonald, the "Convening Authority" [296] for the military commissions, who will decide whether to reject the charges or to refer some, all or none of them for trial before military commission."[297]

201. Poland therefore has a duty to use all available means—including diplomatic representations to the United States—at its disposal so as to ensure that Mr. al Nashiri is not subjected to the death penalty.[298]

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[293] *Boudellaa et al. v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgement of 11 October 2002 at para 300.
[294] See Military Commissions Act of 2009, 10 U.S.C. § 948t (2009).
[295] U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at: http://www.defense.gov/releases/release.aspx?releaseid=14424
[296] The "Convening Authority" is a United States official designated by the United States Secretary of Defense for convening military commissions. See Military Commissions Act of 2009, 10 U.S.C. § 948 h(2009).
[297] U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at: http://www.defense.gov/releases/release.aspx?releaseid=14424
[298] See *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 171 (ordering the United Kingdom to take all possible steps to obtain post-transfer assurances from the Iraqi government that it would not impose the death penalty on individuals transferred from British custody); see also *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para. 330-331 (holding that Bosnia and Herzegovina was under a continuing obligation to "take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants" after their transfer to U.S. custody and to retain and bear the costs of lawyers admitted to practice in the relevant jurisdictions to protect the applicants' rights while in US custody).

2. Transfer to ill-treatment in U.S. Detention: Article 3

202. Poland also violated Article 3 by assisting with Mr. al Nashiri's transfer from Poland in circumstances where there were substantial grounds to believe that the conditions of his detention would violate Article 3. The inhuman treatment of detainees in U.S. custody in Guantánamo Bay and elsewhere overseas was known to Poland at the time of transfer, and has been recognized by this Court. Indeed, in *Al Moayad*, this Court stated that it was "gravely concerned by the worrying reports that have been received about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism," especially with respect to "prisoners detained by the US authorities outside the national territory, notably in Guantánamo Bay (Cuba), Bagram (Afghanistan) and some other third countries."[299]

Relevant Legal Standards

203. A decision by a Contracting State to transfer an individual outside its territory may engage the responsibility of that State under Article 3 of the Convention "where substantial grounds have been shown for believing that the person concerned . . . faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment" after transfer. [300] The establishment of such responsibility requires an assessment of the conditions in the requesting country against the standards of Article 3.[301]

204. In considering "whether there existed a real risk of ill-treatment in case of extradition... and whether this risk was assessed prior to taking the decision on extradition, with reference to the facts which were known or ought to have been known at the time of the extradition,"[302] the Court has found an Article 3 violation where information had been available about the risk of ill-treatment but the extraditing state failed to seek adequate assurances or to request medical reports or visits by independent observers prior to extradition.[303]

Transfer from Poland Despite Real Risk of Further Ill-Treatment Violated Article 3

205. Poland knew and should have known that there were substantial grounds for believing that following his transfer from Poland, Mr. al Nashiri faced a real risk of further ill-treatment—including solitary confinement and incommunicado detention—in U.S. custody.

206. As set out in paragraphs 73 to 117 above, the torture, inhuman and degrading treatment and incommunicado detention associated with the CIA's extraordinary rendition programme were well known as of the time of his transfer in June 2003.

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[299] *Al-Moayad v. Germany*, ECtHR, Decision of 20 February 2007, at para 66 (Admissibility).
[300] *Soering v the United Kingdom*, ECtHR, Judgment of 7 July 1989, at para. 91.
[301] *Saadi v Italy*, ECtHR (GC), Judgment of 28 February 2008, at para. 125 (deportation). *Cruz Varas and Others v Sweden*, ECtHR, Judgment of 20 March 1991, at para. 70 (expulsion).
[302] *Garabayev v Russia*, ECtHR, Judgment of 7 June 2007 (GC), at para. 77.
[303] *Ibid.* at para. 79.

207. Significantly, after being subjected to solitary confinement and incommunicado detention on Polish territory for six months, Mr. al Nashiri was held incommunicado in other secret overseas locations for more than three years until about September 2006, at which point he was transferred to Guantánamo Bay.[304]

208. By permitting Mr. al Nashiri's transfer from Poland despite substantial grounds for believing that he faced a real risk of torture and inhuman or degrading treatment, Poland violated his rights under Article 3.

3. Transfer to Prolonged Incommunicado Detention: Article 5

209. In enabling Mr. al Nashiri's transfer from Poland despite substantial grounds for believing that he faced a real risk of being subjected to further incommunicado detention, the Polish government also violated Article 5. [305]

Relevant Legal Standards

210. In *Z and T. v. United Kingdom*, the Court accepted that a valid claim under Article 5 might be made against a government that expels an individual to a country where "the prospect of arbitrary detention was sufficiently flagrant."[306] Similarly, in *M.A.R. v United Kingdom*, where the applicant alleged that his deportation to Iran would violate Article 5 because it presented "a real risk of being detained in a system which does not 'even contemplate' the legal safeguards of Article 5 "[307] the European Commission on Human Rights held that this claim was not manifestly ill-founded. [308] The UN Human Rights Committee has similarly admitted claims relating to the alleged violation of Covenant rights due to extradition to a country that allows for prolonged preventative detention.[309]

211. As noted above, this Court has found the right to liberty and security under Article 5 to be of "primary importance in a democratic society" within the meaning of the Convention. [310] Moreover, it has held that unacknowledged detention amounts to "a complete negation of the guarantees of liberty and security of person contained in Article 5 of the Convention and a most grave violation of that Article." [311] Article 5 protections are critical for the "prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention." [312]

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[304] Exhibit 8: Goldman & Scislowska report.
[305] See *M.A.R. v United Kingdom*, Decision of the European Commission on Human Rights, 16 January 1997 (Admissibility).
[306] *Z and T v. The United Kingdom*, ECtHR, Decision of 28 February 2006 (Admissibility).
[307] *M.A.R. v United Kingdom*, Decision of the European Commission on Human Rights (Admissibility), 16 January 1997.
[308] *M.A.R. v United Kingdom*, Decision of the European Commission on Human Rights (Admissibility), 16 January 1997.
[309] *G.T. v. Australia*, CCPR, Views of 4 December 1997, para. 5.12.
[310] *Iskandarov v. Russia*, ECtHR, Judgement of 23 September 2010, at para 143.
[311] *Ibid.* at para 150.
[312] *Kurt v Turkey*, ECtHR, Judgment of 25 May 1998, at paras 123-124.

212. Accordingly, transfer to a country "where substantial grounds have been shown for believing that the person concerned . . . faces a real risk"[313] of being subjected to unacknowledged detention violates Article 5.

Transfer to Prolonged Incommunicado Detention Violated Article 5

213. As set out in paragraphs 73 to 117 above, by June 2003, it was widely known that the U.S. rendition programme involved secret detention in overseas locations. Accordingly, Poland knew and should have known that there were substantial grounds for believing that Mr. al Nashiri faced a real risk of being subjected to further incommunicado detention after being transferred from Poland. Indeed, the U.S. government did not publically acknowledge it was holding Mr. al Nashiri until at least September 2006. By knowingly and intentionally enabling Mr. al Nashiri's transfer despite this risk, Poland violated his rights under Article 5.

4. Transfer to Flagrantly Unfair Trial: Article 6

214. Poland violated Mr. al Nashiri's rights under Article 6 by permitting his transfer from Polish soil despite the risk that he would be subjected to a flagrant denial of the right to a fair trial. Military commissions applicable to Mr. al Nashiri in June 2003 were neither independent nor impartial; they were not established by law; and they violated a range of fair trial guarantees.

Relevant Legal Standards

215. This Court has repeatedly affirmed that "the right to a fair trial in criminal proceedings as embodied in Article 6 holds a prominent place in a democratic society."[314] Indeed, it has noted that "[e]ven the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the very essence of a fair trial as guaranteed by Article 6."[315] Accordingly, the Court has reiterated that "an issue might exceptionally arise under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."[316] The risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the person concerned.[317]

Transfer Despite Risk of Flagrant Denial of Fair Trial Violated Article 6

216. Poland violated Article 6 by allowing Mr. al Nashiri's transfer from Poland despite the risk that he would be subjected to a flagrantly unfair trial in U.S. custody. By June 2003, Poland knew and should have known of this risk. As set

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[313] *Soering v the United Kingdom*, ECtHR, Judgment of 7 July 1989, at para. 91.
[314] *Al Moayad v. Germany*, ECtHR, Judgment of 20 February 2007, at para 100; *Soering v. The United Kingdom*, ECtHR, Judgment of 7 July 1989, at para 113.
[315] *Al Moayad v. Germany*, ECtHR Judgment of 20 February 2007, at para 100.
[316] *Ibid.* at para 100.
[317] *Ibid.*; *Mamatkulov and Askarov v Turkey*, ECtHR (GC) Judgment of 4 February 2005, at para. 90.

out in paragraphs 96 to 117 above, by the time of Mr. al Nashiri's transfer from Poland, the deficiencies of the military commission procedures applicable to terrorist suspects in U.S. custody at that time had been publicly criticised in the May 2003 Report of the Parliamentary Assembly of the Council of Europe; by the same Parliamentary Assembly's Resolution 1340; by the Human Rights Chamber for Bosnia and Herzegovina; by non-governmental organizations including Human Rights Watch and Amnesty International; as well as in news reports.

217. Moreover, by the time of Mr. al Nashiri's transfer from Poland, orders governing the military commission procedures to which he would likely be subjected—set forth in President Bush's Military Order of November 13, 2001, entitled "Detention, Treatment, and Trial for Certain Non-Citizens in the War Against Terrorism"[318] (November 13 Order) and the U.S. Defense Department's Military Commission Order No. 1 (MCO No. 1)[319] – had been published, and were publicly available and widely debated in international media. As set forth below, the text of these orders demonstrated that the military commissions were deficient in many respects, and taken together, these deficiencies would have amounted to a flagrant denial of Mr. al Nashiri's right to a fair trial.

a) Right to an independent and impartial tribunal

218. The U.S. military commissions established by the time of Mr. al Nashiri's transfer from Poland were neither independent nor objectively impartial, in appearance or reality.

219. In determining whether a body can be considered to be sufficiently "independent" to satisfy Article 6, this Court "has regard to the manner of appointment of its members and the duration of their term in office, the existence of guarantees against outside pressures, and the question of whether the body presents an appearance of independence."[320] The manner and circumstances in which a judge can be removed are also considered a key indicator of independence.[321] A judge who gives the appearance of being "subordinate to his superiors and loyal to his colleagues," in the executive branch has been held to "undermine the confidence which must be inspired by the courts in a democratic society" and violate Article 6(1)'s requirement of independence and impartiality.[322] Article 6(1) requires adjudicative bodies to be "objectively" impartial, which entails the absence of "ascertainable facts which may raise doubts as to . . . impartiality"—"in this respect, even appearances may be of some importance."[323] It also requires adjudicative bodies to be "subjectively" impartial, which entails the absence of bias arising from the

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[318] Exhibit 22: Military Order of 13 November 2001,at Section 4, U.S. Federal Register of 16 November 2001, Vol. 66 No. 222.
[319] Exhibit 23: MCO No. 1.
[320] *Campbell and Fell v. the United Kingdom*, ECtHR Judgment of 28 June 1984, at para. 78.
[321] *Ibid.* at para 80.
[322] See *Belilos v. Switzerland*, ECtHR Judgment of 29 April 1988, at para. 66-67 (holding, in challenge to conduct of police force, that review by local Police Board, which consisted of a lawyer from police headquarters violated article 6(1)).
[323] *Kyprianou v. Cyprus*, ECtHR Judgment of 15 December 2005, at para. 118.

personal conviction or interest of a given judge in a particular case. [324] The Court has "consistently held that certain aspects of the status of military judges sitting as members of national security courts made their independence from the executive questionable."[325] In cases in which military judges have tried civilians, the Court has consistently found violations of Article 6(1), indicating that the civilian defendants' legitimate fears that the military court in which they were tried lacked independence and impartiality were objectively justified.[326]

220. Especially in light of his civilian status, the transfer of Mr. al Nashiri to the risk of trial by U.S. military commission violated the independence and impartiality requirements of Article 6(1). Military commission members were appointed by the United States Secretary of Defense (the "Appointing Authority") or his designee and could be removed by the same authority for good cause.[327] Those members were further subordinate to the Secretary of Defense or his designee because they all were required to be commissioned officers of the United States armed forces.[328] Moreover, post-trial review was conducted by a review panel consisting of three military officers also designated by the Secretary of Defense.[329] A Military Commission finding as to a charge and sentence became final when the President, or if designated by the President, the Secretary of Defense made a final decision thereon.[330] For all of these reasons, the military commissions at that time were neither independent nor objectively impartial and violated Article 6(1).

221. Nor were the military commissions subjectively impartial. Indeed, as set forth above, President Bush and Defense Secretary Rumsfeld repeatedly referred to individuals detained at Guantánamo Bay as guilty parties, despite the fact that Mr. Rumsfeld had the authority to appoint and remove military commission members[331] and both the President and Mr. Rumsfeld had the authority to confirm the commission's decisions. [332]

b) Tribunal established by law

222. Tribunals are not "established by law" if they violate domestic legal provisions relating to the establishment and competence of judicial organs or those relating

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[324] *Ibid*.
[325] *Incal v. Turkey*, ECtHR, Judgment of 9 June 1998; *Ocalan v. Turkey*, ECtHR, Judgment of 12 May 2005, at para. 112. See also *Findlay v. UK*, ECtHR, Judgment of 27 February 1997 (finding a lack of impartiality in a court-martial due to the senior command of the convening officer); *Morris v. UK*, ECtHR, Judgment of 26 February 2002 (finding the reformed system still violated Article 6, due to the lack of independence of ordinary members of the tribunal); *Grieves v. UK*, ECtHR (GC), Judgment of 16 December 2003 (finding that the Royal Navy court martial system was not impartial as the judge advocates were not civilians); and *Cooper v. UK*, ECtHR (GC), Judgment of 16 December 2003 (finally finding that reforms to the Army courts-martial system did guarantee independence).
[326] *Incal v. Turkey*, ECtHR Judgment of 9 June 1998, at para. 71; *Ergin v. Turkey*, ECtHR Judgment of 4 May 2006, at para. 44; *Ocalan v. Turkey*, ECtHR Judgment of 12 May 2005, at para. 118.
[327] MCO No. 1, § 2, § 4A (1), (2) & (3).
[328] MCO No. 1 § 4A (3).
[329] MCO No. 1 § 6(H)(4).
[330] MCO No. 1, § 6H(2)-(5)-(6).
[331] MCO No. 1, § 2, § 4A (1), (2) & (3).
[332] MCO No. 1, § 6H(2)-(5)-(6).

to the particular rules governing tribunals.[333] Military commissions established under MCO No.1 violated the laws of the United States—including the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions—which were publically available as of the time of Mr. al Nashiri's transfer from Poland. Moreover, the Bush administration took the position that the Geneva Conventions did not apply to prisoners held at Guantánamo, and the illegality of the military commission procedures under U.S. law had been widely recognised by the time of Mr. al Nashiri's transfer from Poland. See paragraphs 96-117. Indeed, the United States Supreme Court subsequently confirmed that military commissions established by MCO No. 1 "lacked power to proceed" because their structure and procedures violated both the UCMJ and the Geneva Conventions."[334] Accordingly, military commissions applicable to Mr. al Nashiri at the time of his transfer were not "tribunals established by law" and therefore violated Article 6(1).

c) Fair trial guarantees

223. The military commission procedures violated Mr. al Nashiri's fair trial rights under Article 6(1) and Article 6(3) because MCO No. 1 violated a number of fair trial guarantees including the bar on discrimination in the administration of justice, the right to a trial within a reasonable time, the bar on admission of evidence obtained by torture or inhuman or degrading treatment, the right of the accused to be present at his proceedings, the right to equality of arms, the right to a public trial, and the right not to be convicted on hearsay evidence alone (Article 6(3)(d)). Taken together, these deficiencies were a flagrant denial of the right to a fair trial.

224. *Discrimination in the administration of justice.* The military commission procedures applicable to Mr. al Nashiri at the time of transfer violated Article 6 taken in conjunction with Article 14 because they applied only to non-U.S. citizens suspected of being al Qaeda members or being involved in various ways with perpetrating international terrorism.[335] This difference of treatment between U.S. citizens and non-U.S. terrorist suspects was discriminatory because it had "no objective and reasonable justification." [336]

225. *Right to trial within a reasonable time*. The excessive delays and indefinite detention that characterize military commissions violate the Article 6(1) right to a "fair and public hearing within a reasonable time." The aim of this provision "is to protect […] against excessive procedural delays" and "in criminal matters, especially, […] to avoid that a person charged should remain too long in a state of uncertainty about his fate" [337] as well as to ensure justice is rendered "without delays which might jeopardise its effectiveness and credibility."[338] Less leeway

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[333] *DMD Group v. Slovakia*, ECtHR, Judgment of 5 Oct. 2010, at para 59-61.
[334] *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 623-35 (2006).
[335] President's Military Order of November 13, 2000, Section 2 (a).
[336] *Gaygusuz v. Austria*, ECtHR Judgment of 16 September 1996, at para. 42-52 (holding that the Austrian government breached Article 14 by discriminating between Austrians and non-Austrians with regard to their entitlement to emergency assistance)
[337] *Stögmüller v. Austria*, ECtHR judgment of 10 November 1969, at para 5 (as to the law section).
[338] *H. v. France*, ECtHR Judgment of 24 October 1989, at para. 58.

is afforded States with regard to the length of proceedings in criminal cases than might be allowed in civil actions.[339] The Court takes particular note of what is at stake for the applicant, including the possibility of life-time imprisonment or a serious criminal conviction.[340] Furthermore, the Court has held that "persons held in detention pending trial are entitled to 'special diligence' on the part of the competent authorities," and that ongoing detention is "a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met."[341]

226. The delays permitted by the military commissions were known at the time of the transfer. Neither the President's Military Order of 2001 nor MCO No. 1 attempt to limit the length of time within which a suspect had to be charged or tried, thereby violating Article 6(1). As set forth above, there had been extensive criticism of these orders in light of the fact that they would allow for prolonged indefinite detention without charge or trial. Indeed, the May 2003 report of the Parliamentary Assembly of the Council of Europe indicated that the arbitrary detention without trial within a reasonable time at the Guantánamo Bay detention facility constituted a violation of the right to fair trial.[342] Significantly, since he was transferred from Poland, Mr. al Nashiri was detained for almost eight years without being charged, let alone tried. [343]

227. *Admission of evidence obtained through torture or inhuman or degrading treatment.* At the time of transfer, it was known that the military commissions allowed the use of evidence obtained by torture. This Court has held that "the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings."[344] The use of "incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or . . . torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe" or to "afford brutality the cloak of law."[345]

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[339] *Baggetta v. Italy*, ECtHR judgment of 25 June 1987, at para. 24.
[340] *Henworth v. United Kingdom*, ECtHR, Judgment of 2 November 2004, at para. 25
[341] *Abdoella v. the Netherlands*, ECtHR, Judgment of 25 November 1992, at para. 24-25 (finding a violation of Article 6 because of a period of apparent inactivity of 21 months within 52 months of proceedings was "well beyond what can still be considered 'reasonable' for the purposes of Article 6(1)" where the applicant remained in detention); see also *Kalashnikov v. Russia*, ECtHR, Judgment of 15 July 2002, para. 132, (finding a violation of Article 6 with regard to proceedings that lasted 5 years and 1 month) ; *Kudla v. Poland*, 26 October 2000, ECtHR, Judgment of 26 October 2000, at paras 114, 130-31 (observing pre-trial detention of applicant for three years and four months with negative psychological impact required "particular diligence" on the part of the Government, and that delay of year and eight months between the quashing of his initial conviction and beginning of his retrial violated Article 6).
[342] Exhibit 24: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay", Council of Europe, Doc. 9817, 26 May 2003, at Section II (d).
[343] Although Mr. Al Nashiri was initially charged in 2008, those charges were subsequently withdrawn in 2009.
[344] *Jalloh v. Germany*, ECtHR Judgment of 11 July 2005, at para. 105.
[345] *Ibid.* at para. 105.

Thus, the Court has held that the use of evidence obtained as a result of inhuman or degrading treatment rendered proceedings "unfair" in violation of Article 6.[346]

228. Poland was on notice at the time of Mr. al Nashiri's transfer of the widespread torture and abuse of terrorist suspects held in U.S. custody overseas (see paragraphs 73 to 117 above), as well as of MCO No. 1, which deemed evidence admissible merely if the Presiding Officer or a majority of the Commission was of the opinion that the evidence "would have probative value to a reasonable person."[347] By potentially allowing the admission of evidence obtained through torture or inhuman or degrading treatment, MCO No. 1 would have violated Mr. al Nashiri's right to a fair trial.

229. *Equality of arms and right to an adversarial trial*. The military commissions at the time of transfer violated fair trial rights as they allowed for unreasonable limits on the ability of the accused and his counsel to participate in the proceedings. The principles of equality of arms and the closely related right to an adversarial trial are fundamental to Article 6(1). Equality of arms requires that ". . . each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent."[348] In determining whether there is equality of arms, the Court will consider the appearance of equality, as well as the seriousness of what is at stake for the applicant.[349] The Court has held that it is not necessary for an applicant to show that they suffered actual prejudice resulting from a procedural inequality in order to find a violation of Article 6.[350]

230. The adversarial proceedings requirement is satisfied when both the prosecution and defence are given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[351] "Thus, the 'fairness' principle requires that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument."[352] The prosecution must disclose to the defence all material evidence in their possession for or against the accused.[353] The defence must also be given

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[346] *Ibid.* at para. 105, 108 (finding that use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair); *Ozen v. Turkey*, ECtHR Judgment of 12 April 2007, at para 104 (finding that applicant's confession while being subjected to inhuman treatment in absence of his counsel "rendered his trial as a whole unfair" in violation of Article 6).

[347] Exhibit 23: MCO No.1, at Section 6(D)(1).

[348] *Foucher v. France*, ECtHR Judgment of 18 March 1997, at para. 34.

[349] *A.B. v. Slovakia*, ECtHR, Judgment of 4 March 2003, at para. 55.

[350] *Ibid.* at paras 56, 61, 61, (finding a violation of Article 6 where the regional court failed to take a formal decision on the applicant's request for the appointment of a lawyer and by proceeding with the case in the applicant's absence, but not determining whether the applicant suffered actual prejudice); See also *Bulut v. Austria*, ECtHR, Judgment of 23 January 1996, para. 49, 50 (finding a violation of Article 6 and the principle of equality of arms but not requiring a showing of "quantifiable unfairness flowing from a procedural inequality").

[351] *Rowe and Davis v. the United Kingdom*, ECtHR Judgment of 16 February 2000, at para. 60; see also *Edwards and Lewis v. United Kingdom*, ECtHR Judgment of 27 October 2004, at para. 46, p. 17.

[352] *Mirilashvili v. Russia*, ECtHR, Judgment of 11 December 2008, at para. 162.

[353] *Rowe and Davis v. the United Kingdom*, ECtHR Judgment of 16 February 2000, at para. 60; see also: *Ruiz-Mateos v. Spain*, ECtHR Judgment of 23 June 1992, at para. 63.

"adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings."[354]

231. In addition, the Court has held that "omissions and lack of clarity" in procedural rules violates article 6 by generating uncertainty and rendering the defence vulnerable to the "abuse of authority."[355] With regard to criminal cases, the European Court has held that Article 6 entitles individuals accused of criminal activity to be present at the trial hearing.[356]

232. MCO No. 1 cumulatively violated the principle of equality of arms and the right to an adversarial trial because the procedural rules were newly created and untested, and as such were uncertain to the detriment of the defence; the accused and civilian defence counsel could be excluded from key parts of the proceedings;[357] and the defence could be denied access to evidence in possession of the prosecution.[358]

233. *Right to a public trial*. At the time of transfer it was known that any trial would be held on the US military based at Guantanamo Bay, with no effective public access for observers. Article 6(1)'s requirement of a public hearing is met "only if the public is able to obtain information about the date and place. . . [of a trial] and if this place is easily accessible to the public."[359] Even if the public is not formally excluded, "hindrance in fact" can contravene the Convention just like a legal impediment. [360] The Inter-American Court of Human Rights has held that even where military tribunals on military bases are in theory open to the public, they violate the right to a public trial where, in effect, the location and procedures exclude the public.[361] The military commissions applicable to Mr. al Nashiri after transfer from Poland almost certainly violated the right to a "public hearing" under Article 6(1) because they would have been held in the remote location of a United States naval base in Guantánamo Bay, which is extremely difficult if not impossible for the public to access.

234. *Hearsay evidence.* Article 6(3)(d) guarantees a person charged with a criminal offence the right "to examination of witnesses on his behalf under the same

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[354] *Mirilashvili v. Russia*, ECtHR, Judgment of 11 December 2008, paras 163, 223, 226-229 (finding a violation of Article 6 where the defence was placed at a disadvantage because they were not allowed to question witnesses or to submit written statements by witnesses retracting statements they claimed ot have made under pressure).

[355] *Coeme v. Belgium*, ECtHR, Judgment of 22 June 2000, paras 101-103.

[356] *Ekbatani v. Sweden*, 26 May 1988, at paras 25,32,33, (finding a violation of Article 6 where the Court of Appeals was considering the case as to the facts and the law and "had to make a full assessment of the question of the applicant's guilt or innocence," noting that "there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person.")

[357] Exhibit 23: MCO No. 1, at Section 6(B)(3)

[358] Exhibit 23: MCO No. 1, at Section 6(B)(5)(b)

[359] *Riepan v. Austria*, ECtHR Judgment of 14 November 2000, at para. 29.

[360] *Ibid.* at para. 28.

[361] *Palamara Iribarne vs. Chile*, IACtHR Judgment of November 22, 2005, at para. 174, Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf; *Castillo Petruzzi et al. v. Peru*, IACtHR Judgment of 30 May 1999, (Ser. C.) No. 52, at para. 172-73. Available at: www.corteidh.or.cr/docs/casos/articulos/seriec_173_ing.doc.

conditions as witnesses against him." In *Unterpretinger v. Austria*, this Court held that a conviction based mainly on a witness statement read to the judge, where the witness did not testify in person and the applicant had no opportunity to question the witness at any prior stage of the proceedings, violated Article 6(3)(d).[362] MCO No. 1 placed no bar on the admission of hearsay evidence, thereby potentially allowing conviction mainly on the basis of such evidence in violation of Article 6(3)(d).[363]

Conclusion

235. In light of the widespread public criticism of the military commission procedures applicable to Mr. al Nashiri at the time of his transfer from Poland as well as the numerous deficiencies apparent from the text of the military orders governing his proceedings, Poland knew and should have known that Mr. al Nashiri would be subjected to a flagrant denial of his right to a fair trial after transfer from Poland. By permitting his transfer despite this risk, Poland violated his rights under Article 6.

236. Although the military commission rules applicable to Mr. al Nashiri have changed since the time he was transferred from Poland, they still provide for the death penalty.[364] On 20 April 2011, the U.S. government announced that it would seek the death penalty in Mr. al Nashiri's case. Moreover, the current rules retain a number of deficiencies described below which, especially when considered in the context of a death penalty case, cumulatively amount to a flagrant denial of justice under Article 6:

    (i) The current military commissions lack independence from the executive as well as impartiality because the United States Secretary of Defense or his designee, as the convening authority for a given commission[365] approves charges for trial by military commission,[366] and selects the commission members, who are required to be members of the armed forces on or those recalled to active duty, [367] and as such are subordinate to the Secretary of Defense. Mr. Al Nashiri's status as a civilian further underscores the unfairness of subjecting him to trial by military commission in a death penalty case, instead of in U.S. federal court. Significantly, two of his alleged co-conspirators in the USS Cole bombing were indicted in U.S. federal court on May 15, 2003.[368] The indictment identified him as a co-conspirator in the USS Cole bombing.[369]

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[362] See *Unterpertinger v. Austria*, ECtHR, Judgment of 24 November 1986, at para. 33; *see also Barbera, Messegue and Jabardo v. Spain*, ECtHR, Judgment of 6 December 1988, at paras 86 & 89.
[363] Exhibit 23: MCO No. 1, at Section 6(D)(1).
[364] Military Commissions Act of 2009, 10 U.S.C. § 948t (2009). Available at: http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf.
[365] Military Commissions Act of 2009, 10 U.S.C. § 948h (2009).
[366] Military Commission Rule 601, Manual for Military Commissions. Available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.
[367] *Ibid* at § 948i (a), (b)
[368] See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole,

(ii) They discriminatorily apply only to non-U.S. citizens[370];

(iii) There are no limits on the length of time within which a suspect has to be charged or tried, and the applicable rules expressly exempt military commissions from speedy trial requirements[371];

(iv) They allow for the accused to be denied access to classified information or evidence[372];

(v) Unlike U.S. federal court procedures which bar the admission of hearsay, the military commission rules expressly permit hearsay evidence, and do not bar convictions based mainly on such evidence[373]. Mr. Al Nashiri's consequent inability to confront witnesses against him is of particular concern in light of the widespread torture and abuse of U.S. terrorism suspects, whose statements could be introduced as hearsay against him, see paragraphs 49-54 and 73-92 above;

(vi) Unlike U.S. federal court procedures which bar the admission of evidence derived from coerced statements, the current military commission rules admit evidence derived from coerced statements if that evidence would have been otherwise obtained and the use of such evidence would be consistent with the interests of justice[374];

(vii) The military commissions will still be held in the remote location of Guantánamo Bay, thereby significantly hindering public access to Mr. Al Nashiri's proceedings.

(viii) The principle of equality of arms is significantly undermined by the considerable uncertainty associated with the current military commission rules, which were enacted as recently as October 2009,[375] and have been applied thus far in only three cases, none of which involved the death penalty.

237. The cumulative effect of the aforementioned deficiencies in the military commissions would flagrantly deny Mr. al Nashiri his right to a fair trial. Accordingly, Poland is now under a duty to use all available means at its disposal—including diplomatic representations to the United States—so as to

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Washington, D.C., May 15, 2003. Available at: http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.

[369] See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, at 6. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole, Washington, D.C., May 15, 2003. Available at: http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.

[370] *Ibid* at § 948c

[371] *Ibid* at § 948b(d)(A).

[372] *Ibid* at § 949p-4(b)(1)

[373] *Ibid* at § 949a(b)(3)(D)

[374] Military Commissions Act of 2009, 10 U.S.C. § 948r (2009); see also Military Commission Rule 305(a)(5)(B).

[375] See Military Commissions Act of 2009.

ensure that Mr. al Nashiri is not subjected to the currently applicable military commission proceedings.[376]

C. FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION

238. Poland has violated and continues to violate Mr. al Nashiri's rights under articles 2, 3, 5, 8 and 13 by failing to conduct an effective investigation into his ill-treatment.

Relevant Legal Standards

239. The procedural limb of Article 2 creates an affirmative obligation on the part of states to conduct an effective official investigation into violations of the right to life.[377] The investigation must be capable of leading to the identification and punishment of those responsible.[378] The Court has further held that investigations that do not lead to a decision to prosecute, provide no reasons for the lack of prosecution and make "no information […] available either to the applicant or the public which might have provided reassurance that the rule of law had been respected," do not conform to the obligations of the Convention.[379] The Court has found lack of "transparency" and "public scrutiny" to be a significant factor contributing to the ineffectiveness of an investigation,[380] finding that "there must be a sufficient element of public scrutiny of [an] investigation or its results to secure accountability in practice as well as in theory."[381]

240. Similarly, the Court has held that Article 3 requires an "effective official investigation" where there is an arguable claim of serious ill-treatment." [382] States are obliged to investigate all Article 3 violations once they know, or should know, that an arguable claim of a violation exists, and this obligation applies even in situations where an applicant did not explicitly communicate his or her mistreatment to the State.[383] These investigations must be expeditious,[384]

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[376] *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para. 330-31 (ordering Bosnia and Herzegovina "to use diplomatic channels in order to protect the basic rights of the applicants" after being transferred to U.S. custody, as well as to "retain lawyers authorised and admitted to practice in relevant jurisdictions"--including military proceedings--to protect "applicants' rights while in US custody" and bear the costs of attorneys fees and expenses of such lawyers).

[377] *See Edwards v. The United Kingdom*, ECtHR, Judgment of 14 March 2002, para. 69; *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 191.

[378] *McCann and Others v. the United Kingdom*, ECtHR, Judgment of 27 September 1995, at para. 161; *Kaya v. Turkey*, ECtHR, Judgment of March 2000, at para. 86; *Yaşa v Turkey*, ECtHR, Judgment of 2 September 1998, at para. 98

[379] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, para. 83.

[380] *McKerr v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, paras 157- 160.

[381] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, para. 71, 84; *see also Kelly and Others v United Kingdom*, ECtHR, Judgment of 4 May 2001, at para. 98.

[382] *Assenov and Others v Bulgaria*, ECtHR, Judgment of 28 October 1998, at para. 102.

[383] *See Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para. 56 (holding that Turkey violated the applicant's Article 3 right since there were visually perceptible injuries on the applicant's person that he did not have when he entered prison); *Osman v the United Kingdom*, ECtHR, Judgment of 28 October 1998.

as well as "thorough."[385] "[I]nertia displayed by the authorities in response to… allegations [of ill-treatment is] inconsistent with the procedural obligation which devolves upon them under Article 3 of the Convention."[386] The failure to conduct an effective investigation constitutes an ongoing violation of applicant's rights under the Convention.[387]

241. This Court has also found that Article 5 requires the authorities to conduct a prompt and effective investigation into arguable claims that the article has been violated.[388]

242. Furthermore, the Court has recognized that "the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation."[389] In *M.C. v. Bulgaria*, the Court established that "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice *through effective investigation and prosecution*."[390]

243. Article 13 applies whenever an arguable claim of a Convention violation exists.[391] It protects the right to a domestic remedy that ensures either the prevention of the alleged violation, or the provision of adequate redress, including compensation, for a victim of a violation.[392] The remedy required by Article 13 must be "effective" in practice as well as in law, meaning the ability of an individual to exercise her right to a remedy must not unjustifiably be hindered by the acts or omissions of the authorities of the respondent State.[393]

244. In considering the adequacy of the investigatory component of a remedy, the Court considers the speed of the investigatory procedure as one measure of effectiveness. The Court has stated that investigations must be expeditious,[394] as well as "thorough"[395] and "effective."[396] The Court has also found that "[t]here

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[384] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008, at para. 48; see also *Labita v Italy*, ECtHR, Judgment of 6 April 2000 (noting that the slow pace of the investigation was a factor in rendering it ineffective in violation of Article 3).
[385] *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, at para. 55.
[386] *Sevtap Veznedaroglu v Turkey*, ECtHR, Judgment of 11 April 2000, at para. 35.
[387] See e.g., *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para. 194.
[388] *Cakici v. Turkey*, ECtHR, Judgment of 8 July 1999, at para. 104.
[389] *M.C. v. Bulgaria*, ECtHR, Judgment of 4 December 2004, at para. 152.
[390] *Ibid.* at para. 153. (Emphasis added).
[391] *Silver v United Kingdom*, ECtHR, Judgment of 25 March 1983, at para.113.
[392] *Kudla v Poland*, ECtHR, Judgment of 26 October 2000, at para. 152.
[393] *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para. 95.
[394] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008, at para. 48; *See also Labita v Italy*, ECtHR, Judgment of 6 April 2000, at para 133 (noting that the slow pace of the investigation was a factor in rendering it ineffective in violation of Article 3).
[395] *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, at para. 55.
[396] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008, at para. 47.

must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[397]

245. The Court has stated that Article 35 "has a close affinity" with Article 13 in that both assume there to be "an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights."[398] In *Bryn v. Denmark*, the Commission found that domestic compensation proceedings that were ongoing for more than two years "cannot, due to their excessive length, be considered to be an effective or adequate remedy within the meaning of Article 26 [Now Article 35] of the Convention." [399]

246. Finally, a state's failure to conduct an effective investigation constitutes an ongoing violation of applicant's rights under the Convention.[400]

Poland's Failure to Conduct an Effective Investigation Is a Continuing Violation of Articles 2, 3, 5, 8 and 13.

247. Notwithstanding the fact that grave human rights violations such as torture and incommunicado detention are at issue, the Polish investigation into CIA black sites in Poland has been unduly delayed. Indeed, it has been pending for well over three years—since 11 March 2008—and the Prosecutor has not publicly disclosed any information relating to its progress or when it is likely to conclude. Moreover, the Polish Prosecutor has not ruled on any of Mr. al Nashiri's motions for evidence, which have been pending for well over seven months now. The undue delay associated with this investigation as well as the Prosecutor's failure to rule on Mr. al Nashiri's motions for evidence or publically disclose information relating to its progress renders the investigation ineffective.

248. By failing to conduct an expeditious and effective investigation into CIA black sites in Poland and the associated violation of Mr. al Nashiri's rights, the Polish government has violated and continues to violate articles 2, 3, 5, 8 and 13.

D. RIGHT TO TRUTH

249. The Polish government's refusal to acknowledge, effectively investigate, and disclose details of Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition violates his and the public's right to truth under Articles 2, 3,5,10 and 13.

Relevant Legal Standards

250. Although this Court has not yet explicitly recognized the right to truth, it has upheld key aspects of this right in the context of addressing Convention violations. In addition, the wealth of international legal authority supports the Court's express recognition of the right to truth in this case.

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[397] *Kelly and Others v United Kingdom*, ECtHR, Judgment of 4 May 2001, at para. 98
[398] *Kudla v. Poland*, 26 October 2000, ECtHR, Judgment of 26 October 2000, at para. 152.
[399] *Bryn v. Denmark*, ECtHR Judgment of 1 July 1992, at para. 3 (Admissibility).
[400] See e.g., *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para. 194.

251. *Right to Truth Closely Intertwined with Obligations to Investigate Convention Violations.* This Court has found the state's withholding of information relevant to Convention violations to be incompatible with its obligation to investigate Convention violations. Thus, in *Kelly and Others v the United Kingdom*, a case brought by the next of kin of nine men who had been shot dead by soldiers in Northern Ireland, the Court addressed the government's failure to disclose its reasons for deciding not to prosecute any of the soldiers. The Court found that this situation "crie[d] out for explanation. The applicants . . . were not informed of why the shootings were regarded as not disclosing a criminal offence or as not meriting a prosecution of the soldiers concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case."[401] Similarly, in *Ramsahai v Netherlands,* in examining the effectiveness of an investigation into an Article 2 violation, the Grand Chamber of the Court underscored the importance of "public confidence in the state's monopoly on the use of force."[402]

252. Moreover, this Court has recognized that the obligation to investigate Convention violations is directed at disclosing the truth. Thus, in *Skenzic and Krznaric v. Croatia*, the Court observed that delays and other shortcomings in the investigation of an enforced disappearance "compromised the effectiveness of the investigation and could not but have had a negative impact on the prospects of establishing the truth." [403] The Court noted this as a factor in holding that there had been a violation of Article 2.[404] Similarly, in *Jularic v. Croatia*, the Court noted that an ineffective investigation would hamper the ability to establish the truth behind the killing of the applicant's husband, in violation of Article 2.[405]

253. *Right to Truth Supported by Article 10 Case law.* This Court has consistently recognized "that the public has a right to receive information of general interest" [406] and has "recently advanced towards a broader interpretation of the notion of 'freedom to receive information and thereby towards the recognition of a right of access to information." [407] In this context, the Court has upheld the right under Article 10 of civil society organisations and other entities—that function, like the press, as social "watchdogs"—to receive and impart information held by the state, particularly where such information is in the exclusive possession of the government.[408] There can be little dispute that a full and truthful accounting regarding gross violations of core Convention rights constitutes "information of

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[401] *Kelly and Others v the United Kingdom,* ECtHR, Judgment of 4 May 2001, at para. 118.
[402] *Ramsahai v Netherlands*, ECtHR (GC), Judgment of 15 May 2007, at para. 325.
[403] *Skenzic and Krznaric v. Croatia*, ECtHR, Judgment of 20 January 2011, at para.85.
[404] *Ibid*. at para. 85.
[405] *Jularic v. Croatia*, ECtHR, Judgment of 20 January 2011, at para. 49
[406] *Társaság v. Hungary*, ECtHR, Judgment of 14 April 2009, at para 26.
[407] *Ibid.* at para 56.
[408] *Ibid.* at para 28, 36; *see also Kenedi v. Hungary*, ECtHR, Judgement of 26 May 2009 at para 43 (holding that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right under Article 10 to freedom of expression).

general interest" to which the public is entitled under this Court's Article 10 jurisprudence.

Right to Truth Under International Law

254. The right to truth under international law has been discussed most extensively in relation to missing persons and forced disappearances. The origins of this right have been traced to Additional Protocol I to the Geneva Conventions, which recognizes the right of families to know the fate of their relatives and requires states parties to an armed conflict to search for persons reported missing.[409] The International Committee of the Red Cross considers these state obligations to be norms of customary international law.[410] In a recent resolution, the U.N. Human Rights Council recognized "the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and respect human rights."[411] Perhaps the most explicit recognition of the right to truth for victims of disappearance appears in the recent *International Convention for the Protection of All Persons from Enforced Disappearances*, which entered into force on 23 December 2010 and provides that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[412]

255. In the last several decades, the Inter-American Commission on Human Rights[413] and the Inter-American Court of Human Rights,[414] the U.N. Human Rights Committee,[415] the U.N. Working Group on Enforced or Involuntary Disappearances,[416] the Parliamentary Assembly of the Council of Europe,[417] and

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[409] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 32-33. Poland has not yet signed this Convention. However, this Court has not traditionally drawn hard distinctions between sources of law according to whether the respondent State has signed or ratified the relevant instruments to the extent that common ground among member states manifests around the norms at issue. See *Demir and Baykara v. Turkey*, ECtHR (GC), Judgment of 12 November 2008, at paras. 69, 74-7; see also, *Muller et al v. Switzerland*, ECtHR, Judgment of 24 May 1988, at para. 27.

[410] ICRC, *Customary International Humanitatian Law*, Volume I, Rules (Cambridge University Press, 2005), Rule 117, pg. 421.

[411] Human Rights Council, "Resolution 9/11. Right to Truth," 18 September 2008, p. 3, at para. 1. Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf ("Human Rights Council Resolution 9/11").

[412] As of January 2011, 87 countries have signed and 21 countries have ratified the Convention. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.

[413] See, e.g., Annual Reports 1985-86, p. 205; *Manuel Bolanos v Ecuador*, IACommHR, Report of 12 September 1995; and *Bamaca Velasquez v Guatemala*, IACommHR, Report of 7 March 1996.

[414] See, e.g., *Velasquez Rodriguez v Honduras*, IACtHR, Judgment of 29 July 1988, at para.181 ("the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims"); *Castillo Paez v Peru*, IACtHR, Judgment of 24 January 1998; and *Bamaca Velasquez v Guatemala*, IACtHR, Judgment of November 25, 2000, at paras. 74-76 (stating that the right to truth is recognized in international human rights law and by this court).

[415] *Almeida de Quinteros v Uruguay*, UNHRC, Comm. 107/1981, views of 21 July 1983.

[416] First Report of the U.N. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1435, at para. 187.

[417] Resolutions 1056(1987); 1414(2004), para. 3; and 1463(2005), para. 10(2).

the Human Rights Chamber for Bosnia and Herzegovina[418] (relying on the European Convention), among others, have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons.

256. In the *Almeida de Quinteros* case, the Human Rights Committee addressed the plight of the mother of a victim of enforced disappearance, noting that "[it] understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has *the right to know* what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter.[419] Furthermore, the Committee has declared that the right to the truth is essential to ending or preventing the mental suffering of the relatives of victims of enforced disappearances and secret executions.[420]

257. In *Gomes Lund and Others v. Brazil*, the Inter-American Court of Human Rights recently recognized a legally enforceable right to the truth for victims and society as a whole under the right to information enshrined in Article 13 of the American Convention in addition to Articles 8 and 25 of that Convention.[421] That case affirmed the Inter-American Court's earlier recognition in *Barrios Altos v. Peru* and *Almonacid-Arellano v. Chile* of a right to the truth about gross human rights violations under Articles 8 (duty to investigate grave violations) and 25 (judicial protection of rights) of the American Convention.[422] In addition, in *Moiwana Community v Suriname*, the Inter-American Court had previously held that "all persons, including the family members of victims of serious human rights violations, have the right to truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations."[423]

258. The Inter-American Commission has gone even further by emphasizing the particular importance of state compliance with the right to the truth in those cases in which legal or historical developments, such as extensive amnesties, have made difficult or impossible the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses.[424]

259. Human rights bodies and authorities including the U.N. Human Rights Committee,[425] the Inter-American Court,[426] the U.N. Human Rights Council,[427]

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[418] *Palic v Republika Srpska*, Judgment of 11 January 2001; and the *Srebrenica Cases*, Judgment of 7 March 2003, at para. 220(4).
[419] *Almeida de Quinteros v Uruguay*, Comm. 107/1981, Views of 21 July 1983, at para. 14 (emphasis added).
[420] *Sarma v Sri Lanka*, UNHRC, 16 July 2003, at para. 9.5; *Lyashkevich v Belarus*, UNHRC, 3 April 2003, at para. 9.2.
[421] *Gomes Lund and Others v. Brazil*, IACtHR, Judgment of 24 November 2010.
[422] *Barrios Altos v. Peru*,IACtHR, Judgment of 14 March 2001. *Almonacid-Arellano v. Chile*, IACtHR, Judgment of 26 September 2006.
[423] *Moiwana Community v Suriname*, IACtHR, Judgment of 15 June 2005, para. 204 (emphasis added).
[424] See, among others, *Parada Cea and Others v El Salvador*, IACommHR, Report of 27 January 1999; *Ignacio Ellacuria v El Salvador*, IACommHR, Report of 22 December 1999.
[425] *Concluding Observations on Guatemala*, 3 April 1996, CCPR/C/79/add.63, at para. 25.
[426] See *Moiwana Community v Suriname*, IACtHR, Judgment of 15 June 2005.

and the Office of the U.N. High Commissioner for Human Rights (OHCHR)[428] have defined the scope of the right to truth to include a state obligation to shed light on all serious or gross human rights violations, such as torture or extrajudicial executions. The OHCHR's 2006 study of the right to truth concluded that "[t]he right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels."[429] The increasingly universal recognition of the right to truth solidifies its importance in international law.

260. *Public Component of the Right to Truth.* Many authorities have construed the right to truth to include a public component, above and beyond right to know of victims and their families. The 2005 Updated Principles on Impunity adopted by the U.N. Commission on Human Rights declare that "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances that led, through massive or systematic violations, to the perpetration of those crimes."[430]

261. Similarly, the United Nations' 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth."[431] The Inter-American Court has held that "society as a whole must be informed of everything that has happened in connection" with severe violations, such as extrajudicial executions.[432] The Bosnian Human Rights Chamber in the Srebrenica cases, as well as the highest courts of Argentina, Colombia and Peru, have reached similar conclusions in respect of the public's right to the truth.[433]

262. Although the elements of the right to the truth are in a process of evolution and may vary across jurisdictions, the OHCHR has concluded that this right has crystallized to include at its core "knowing the full and complete truth about events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place,

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[427] Human Rights Council, "Resolution 9/11. Right to Truth," Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf .
[428] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006.
[429] *Ibid.* at para. 55.
[430] Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Commission Resolution 2005/81, principle 2.
[431] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by U.N. General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b). Available at: http://www2.ohchr.org/english/law/remedy.htm.
[432] *Mack Chang v Guatemala*, IACtHR, Judgment of 25 November 2003, at para. 274.
[433] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, at para. 36. Available at: http://www.unhcr.org/refworld/docid/46822b6c2.html.

as well as the reasons for them."[434] In cases of enforced disappearances and related abuses, the right to the truth also has the specific component of a right to know the fate and whereabouts of the direct victim.[435]

Poland Violated the Right to Truth

263. The Polish government's failure to acknowledge, effectively investigate, and disclose details of Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition violates his and the public's right to truth under Articles 2, 3,5,10 and 13.

264. Mr. al Nashiri was secretly detained, interrogated, and tortured by CIA officials who worked with the knowledge and cooperation of Polish government personnel on Polish military premises. While being detained without charge, he was denied his right to legal counsel and access to a court and prevented from challenging the Polish state's violation of his rights and from gaining factual knowledge as to the reasons for his detention. Subsequent to his transfer, Poland has refused to acknowledge or clarify the circumstances of Mr. al Nashiri's detention and has failed to conduct a meaningful or effective investigation into his ill-treatment in Poland. To this day, no one has been identified as a perpetrator of or prosecuted for the violations of Mr. al Nashiri's rights.

265. As a direct victim of enforced disappearance, Mr. al Nashiri and his family have a right under the Convention and other international human rights law to the full truth about the circumstances of his abduction and extraordinary rendition. Moreover the public – in Poland and in Europe as a whole – is entitled to know the full truth about the Polish government's role in his ordeal.

266. In fulfilment of these rights, the Polish government should provide, through appropriate and credible means, a full account of the facts of Mr. al Nashiri's enforced disappearance and rendition to Poland; the reasons and processes that led to these actions, including Poland's role in the United States-led "war on terror;" the reasons for the failures of any mechanisms that should have been in place to prevent such abuse; the responsibilities of officials and agencies at all levels of the Polish government; and, where appropriate, the identification of those responsible for the multiple Convention violations.

V. STATEMENT RELATIVE TO ARTICLE 35 OF THE CONVENTION

267. Mr. al Nashiri has exhausted all available and effective domestic remedies in Poland. His application to intervene in pending criminal investigation into CIA black sites in Poland has been fruitless, as that investigation is unduly delayed and ineffective. His judicial complaint on the subject of the undue delay of the pending investigation was dismissed by the Appellate Court in Białystok, 2nd Criminal Division, on 20 April 2011. That decision is final and cannot be appealed. Accordingly, this case is ripe for consideration by this Court.

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[434] *Ibid.* at para. 59.
[435] *Ibid.*

268. This application is being submitted in compliance with the 6-month rule (Article 35.1). It has been submitted within 6 months of 20 April 2011, the date of the final judicial decision in this case, in which the Appellate Court in Białystok, 2nd Criminal Division dismissed Mr al Nashiri's complaint on the subject of the undue delay in the pending criminal investigation. The subject matter of this application has not been submitted to any other international procedure (Article 35.2(b)).

Victim Status

269. Mr. al Nashiri is the direct victim of multiple violations of his rights under Convention, as submitted in this application.

Exhaustion of Available Remedies

270. Despite the difficult circumstances under which he is currently detained, the applicant has made every effort to engage the authorities in order to ensure an effective investigation of his case in Poland. On 21 September 2010, he filed an application with the Polish prosecutor to intervene in the pending criminal investigation on CIA black sites in Poland. However, it is apparent now that the investigation is ineffective—it has been pending for more than three years with no public disclosures as to its precise scope, progress or when it is likely to conclude. In addition, the prosecutor has not ruled on any of the evidentiary motions filed along with Mr. al Nashiri's application. On 25 February 2011, Mr. al Nashiri filed a complaint before the Warsaw district court on the subject of the undue delay of the pending criminal investigation. That complaint was dismissed on 20 April 2011 in a decision that was final and cannot be appealed. Accordingly, Mr. al Nashiri has exhausted all available and effective domestic remedies.

Relevant Legal Principles

271. The Court has repeatedly emphasised that the requirement that a complaint exhaust all domestic remedies "must be applied with some degree of flexibility and without excessive formalism," giving "due allowance that it is being applied in the context of machinery for the protection of human rights."[436] There is no obligation to have recourse to remedies which are "inadequate or ineffective," or where there are "special circumstances" that absolve the applicant from pursuing such remedies.[437] Moreover, "the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant."[438] The Court has

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[436] *Akdivar v. Turkey*, ECtHR, Judgment of 16 September 1996, at para. 69; see also *Aksoy v. Turkey*, ECtHR, Judgment of 26 November 1996, at para. 53; *Ringeisen v. Austria*, ECtHR, Judgment of 16 July 1971, at para. 89.

[437] See *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para. 51-52 (holding that prosecutor's failure to take action despite being aware of applicant's injuries exempted applicant from exhausting domestic remedies); *Ahmet Ozcan v. Turkey*, ECtHR, Judgment of 6 April 2004, at para. 359 (noting that applicant was exempted from exhaustion domestic remedies where authorities failed to investigate despite official documentation of ill-treatment).

[438] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para 77.

held that "the issue is . . . not so much whether there was an inquiry . . . as whether it was conducted diligently, whether the authorities were determined to identify and prosecute those responsible, and accordingly, whether the inquiry [is] 'effective.'"[439]

272. *Remedies ineffective due to undue delay.* An applicant may be absolved of the obligation to exhaust local remedies where delays in the procedure or examination of complaints make a remedy inadequate or ineffective. Thus, in *Bryn v. Denmark*, the European Commission held that where domestic compensation proceedings had been pending for more than two years and the government had "not provided information which could lead the Commission to conclude" that those proceedings would "be coming to an end soon," the proceedings "due to their excessive length, [could not] be considered to be an effective or adequate remedy."[440] Therefore, the applicant's complaint was admissible even though compensation proceedings might have subsequently been decided.[441] Similarly, in *Halimi-Nedzibi v. Austria*, the United Nations Committee against Torture held that an investigation that had been pending without results for 26 months and had been launched 15 months after the applicant registered his complaint of torture and mistreatment had been "unjustifiedly delayed."[442] The Committee found that the "lack of a decision" in the pending investigation "ma[de] it absolutely pointless to apply for any domestic remedy."[443]

273. *Special Circumstances.* The Court has also held that the lack of an appropriate response from the authorities where they are on notice of potential Convention violations may constitute "special circumstances" that alleviate the applicant's duty to exhaust domestic remedies.[444] Where authorities remain "passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance," the burden will fall on the respondent government to show that they have adequately responded to the applicant's complaints.[445]

Mr. al Nashiri has fulfilled all of his exhaustion requirements.

274. Despite Mr. al Nashiri's best efforts to intervene in the pending criminal investigation on CIA black sites in Poland, it is apparent that this investigation is unduly delayed and ineffective. Indeed, the investigation began on 11 March 2008—almost five years after Mr. al Nashiri was transferred from Poland, and almost two and a half years after credible reports of a CIA prison in Poland were first published.[446] Moreover, it has been pending now for more than three years

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[439] *Ibid.* at para 79.
[440] *Bryn v. Denmark*, ECtHR Judgment of 1 July 1992, para. 3 (Admissibility).
[441] *Ibid.*
[442] UNCAT, Communication No. 8/1991, *Halimi-Nedzibi v Austria*, at para 6.4.
[443] *Ibid*. at para 6.5.
[444] *Aksoy v. Turkey*, ECtHR, Judgment of 26 November 1996, para. 56-57.
[445] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para. 76.
[446] See Exhibit 10: "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," 6 November 2005; see also 2006 Council of Europe Report at para 7 (noting that Human Rights Watch and ABC news reported in early November 2005 that Poland had hosted secret CIA prisons).

with no public disclosures as to its precise scope, progress, or when it is likely to conclude.

275. The non-transparency and significant delay associated with the current investigation, when viewed in the context of Poland's past reluctance to seriously investigate the existence of a CIA prison in Poland, confirm that this case is ripe for consideration by this Court at the current time. While Poland did conduct a brief, two-month parliamentary inquiry in 2005 into allegations of a secret CIA prison, that investigation was not a criminal investigation, and therefore did not meet Poland's obligations under the Convention.[447] Moreover, the inquiry was conducted behind closed doors, and none of its findings were made public. The only public statement the Polish government ever made was at a press conference announcing that the inquiry had not turned up anything "untoward."[448] According to a 2006 Council of Europe report, "this exercise was insufficient in terms of the obligation to conduct a credible investigation of credible allegations of serious human rights violations."[449]

276. In 2006 and 2007, the Council of Europe released reports confirming that that a secret CIA prison did indeed exist in Poland.[450] This was further supported by the Legal Affairs and Human Rights Committee of the Council of Europe, which stated in 2007 that it "considered it factually established that secret detention centres operated by the CIA have existed for some years in Poland."[451] The Council called on Poland to conduct an investigation and disclose information on such sites.

277. Similarly, in a 14 February 2007 resolution, the European Parliament chastised Polish authorities for their failure to conduct an effective investigation, their lack of transparency, and their obstructionist tactics with the investigation conducted by the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.[452] The resolution also "[r]egret[ed] that Polish human rights NGOs and investigative journalists have faced a lack of cooperation from the government and refusals to divulge information," and took "note of the statements made by the highest representatives of the Polish authorities that no secret detention centres were based in Poland. [453]

278. Yet, despite mounting evidence of CIA black sites in Poland and calls for further investigation, the Polish government did not commence a criminal

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[447] *Assenov and Others v Bulgaria*, ECtHR, Judgment of 28 October 1998, at para. 102 (holding that contracting state is required to conduct an "effective official investigation . . . capable of leading to the identification and punishment of those responsible.")
[448] Exhibit 11: 2006 Council of Europe Report, p. 51, at para. 252.
[449] *Ibid.*
[450] *Ibid.* at p. 20; Exhibit 3: 2007 Council of Europe Report at p.7.
[451] Exhibit 3: 2007 Council of Europe Report, at para. 15.
[452] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at para 167-170 and 178-180
[453] *Ibid.*

investigation into the matter until March of 2008. [454] Although the investigation has been pending since 2008, no meaningful information on its progress has publically been disclosed. Thus, the investigation lacks "a sufficient element of public scrutiny. . . to secure accountability in practice as well as in theory."[455] Nor have Polish prosecutors provided any information on when the investigation is likely to conclude. Such "inertia displayed by the authorities in response to… allegations [of ill-treatment is] inconsistent with procedural obligation[s]" under the Convention.[456]

279. Significantly, in concluding observations on Poland dated 27 October 2010, the Human Rights Committee "note[d] with concern that the investigation . . . is not yet concluded," and urged Poland to "initiate a prompt, thorough, independent and effective inquiry, with full investigative powers to require the attendance of persons and the production of documents, to investigate allegations of the involvement of Polish officials in renditions and secret detentions, . . . to hold those found guilty accountable, including through the criminal justice system, . . .[and to] make the findings of the investigation public."[457]

280. While Poland has possessed sufficient information to initiate a criminal investigation for many years, Mr. al Nashiri was unable to pursue legal remedies in Poland on account of being held in incommunicado detention until September 2006 and not having sufficient access to relevant facts. Notwithstanding these hurdles, Mr. al Nashiri has attempted to pursue domestic remedies in Poland, but to no avail. On 21 September 2010, i.e., more than seven months ago, his Polish lawyer filed an application with the Appellate Prosecutor to intervene in the pending criminal investigation. Yet, the Appellate Prosecutor's office has not yet ruled on numerous requests for evidence filed in that application. After waiting more than five months for the Prosecutor to rule on his requests for evidence, on 25 February 2011, Mr. al Nashiri filed a complaint with the District Court in Warsaw on the undue delay in the proceedings. The Appellate Court in Białystok, 2nd Criminal Division, dismissed that complaint on 20 April 2011. That decision is final and cannot be appealed.

281. Consequently, this Court's intervention is necessary, especially in light of the gravity of the Convention violations Mr. al Nashiri has endured, the anguish he is currently exposed to as a result of the U.S. government's announcement that it intends to seek the death penalty in his case, and the imminent risk of his being subjected to a flagrantly unfair trial followed by the death penalty.

282. In addition, as set forth above, the "general legal and political context" in Poland has been marked by a reluctance seriously to investigate wrongdoing associated with the CIA black site in Poland. Indeed, the 14 February 2007 European Parliament resolution took "note of the statements made by the highest representatives of the Polish authorities that no secret detention centres were

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[454] Text of Polish government response to UN Joint experts' questionnaire in Exhibit 2: U.N. Joint Experts' Report, at para 118.
[455] *Kelly and Others v United Kingdom*, ECtHR, Judgment of 4 May 2001, at para. 98
[456] *Sevtap Veznedaroglu v Turkey*, ECtHR, Judgment of 11 April 2000, at para 35.
[457] Exhibit 35: Concluding observations of the Human Rights Committee, Poland, U.N. Doc. CCPR/C/POL/CO/6 (2010), October 27, 2010, at para 15.

based in Poland and criticised the authorities for their lack of transparency and obstructionist tactics. [458]

283. Finally, the Polish government's passivity in the face of mounting evidence of a CIA prison in Poland constitutes "special circumstances" that further warrant this Court's intervention in this case. [459] The 14 February 2007 European Parliament resolution further confirms that the Polish authorities had no intention of conducting an investigation into the CIA black sites in Poland or allowing anyone else to uncover the truth of the matter. [460] Moreover, as noted above, the criminal investigation into the CIA prison began as late as 2008, almost five years following Mr. al Nashiri's transfer from Poland. That investigation remains pending to date with no sign of conclusion despite mounting evidence that Mr. al Nashiri was tortured there. In addition, the prosecutor has failed to rule on Mr. al Nashiri's motions for evidence or provide his counsel with access to the classified investigative files.

284. Mr. al Nashiri has exhausted all available and effective domestic remedies in Poland.

Six-Month Rule

285. This application has been filed within six months of 20 April 2011, the date of the final judicial decision in this case.

286. Article 35 (1) requires that applicants submit their complaint within six months of the final decision that represents the exhaustion of domestic remedies. Where an applicant attempts to use a remedy and only subsequently becomes aware of its inefficacy, the six-month period will begin from the date when the applicant first became aware or ought to have become aware of those circumstances. [461]

287. This application has been filed within six months of 20 April 2011, the date of the final judicial decision in this case, in which the Appellate Court in Białystok, 2nd Criminal Division, dismissed Mr al Nashiri's complaint on the subject of the undue delay in the pending criminal investigation. That dismissal cannot be appealed. Mr. al Nashiri has therefore exhausted all available and effective domestic remedies.

288. In any event, the six month time limitation is not applicable with respect to the violation of Mr. al Nashiri's right to truth or his right to an effective investigation under Articles 2,3,5,6, 8 and 13, because these are ongoing violations of the Convention.

289. The six-month rule is not applicable where there is an ongoing situation caused or continued by the State that violates the Convention. [462] "[T]he six month time-

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[458] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at para. 179-180.
[459] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para. 76.
[460] Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007, at paras 167-170 and 178-180.
[461] *Varnava and Others v. Turkey*, ECtHR (GC), Judgement of 18 September 2009, at para. 151.
[462] *Iordache v. Romania*, ECtHR, Judgment of 14 October 2008, at para. 49.

limit does not apply as such to continuing situations . . . this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end."[463]

VI. STATEMENT OF THE OBJECT OF THE APPLICATION

290. Mr. al Nashiri seeks a declaration from the Court that his rights have been violated under Article 2, Article 3, Article 5, Article 6, Article 8, and Article 13 of the Convention, a declaration that his right to truth has been violated, and a finding that there must be a full investigation into his rendition to Poland, his detention and torture in Poland, and his subsequent transfer from Poland. Mr. al Nashiri will also seek just satisfaction under Article 50 (pecuniary and non-pecuniary damages together with legal costs and expenses) as well as general measures to ensure that Poland will not commit or cover up such violations in the future. Mr. al Nashiri will submit detailed information in connection with the claim for just compensation at a later date.

Post-Transfer Obligation to Intervene

291. Mr. al Nashiri also seeks measures relating to the imminent risk of his being subjected to a flagrantly unfair trial and the death penalty.[464]

292. This Court has recognised the post-transfer obligations of states to ensure that applicants transferred from their territory in violation of the Convention are not subjected to the death penalty or a flagrantly unfair trial. Thus, in *Al Saadoon and Mufdhi v. United Kingdom*, this Court found that the United Kingdom "failed to take proper account of [its] obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13" by transferring two Iraqi applicants from British custody in Iraq to stand trial before the Iraqi High Tribunal on charges carrying the death penalty without obtaining "binding assurances" from the Iraqi authorities that the applicants would not be subjected to the death penalty.[465] The Court observed that the post-transfer outcome of the applicants case was uncertain, i.e., that while they remained at real risk of execution since their case had been remitted for reinvestigation, it could not be predicted whether or not they would be retried on charges carrying the death penalty, convicted, sentenced to death and executed.[466] That uncertainty did not change the duty to obtain such assurances, as in such circumstances, the Court did "not consider that the risk of applicants' being executed ha[d] been entirely dispelled."[467] "Whatever the eventual result, however," the Court found that "through the actions and inactions of the United Kingdom authorities the

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[463] *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 159; see also *Agrotexim Hellas S.A and Others v. Greece*, European Commission decision of 12 February 1992, DR 71, at para. 148; and *Cone .v Romania,* ECtHR, Judgment of 24 June 2008, at para 22.
[464] This argument has been included in a separate application under Rule 39 filed on the same day as the main application.
[465] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para. 143.
[466] *Ibid.* at para. 144.
[467] *Ibid.* at para. 135.

applicants ha[d] been subjected . . . to the fear of execution by the Iraqi authorities," that "causing the applicants psychological suffering of this nature and degree constituted inhuman treatment," and that there had been a violation of Article 3 of the Convention.

293. With regard to the appropriate remedies, the Court further observed that "[w]hile the outcome of the proceedings before the [Iraqi High Tribunal] remain[ed] uncertain," the "mental suffering caused by the fear of execution" continued.[468] The Court therefore held that "compliance with . . . Article 3 of the Convention require[d] the Government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that [the applicants] will not be subjected to the death penalty."[469]

294. The remedy which the applicant seeks is similar to that previously granted pursuant to the Convention in a case involving transfer to Guantánamo Bay and the risk of execution and an unfair trial by military commission. In *Boudellaa et al. v Bosnia and Herzegovina*, the Human Rights Chamber for Bosnia and Herzegovina found that Bosnia and Herzegovina had violated applicants' rights under Protocol 6 by transferring them to United States custody and exposing them to the risk of the death penalty following trial by military commissions at Guantánamo Bay. The Chamber found that "considerable uncertainty exist[ed] as to whether the applicants" would be charged with a criminal offense, what charges would be brought against them, which law will be deemed applicable, and what sentence would be sought, but that "this uncertainty [did] not exclude the imposition of the death penalty against the applicants."[470] The Court observed:

> "On the contrary, the US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave risk to an obligation on the respondent Parties to seek assurances from the United States, prior to the hand-over of the applicants, that the death penalty would not be imposed upon the applicants."[471]

295. Since Bosnia and Herzegovina had already transferred the applicants over to the United States by the time of the Chamber's decision, the Chamber ordered

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[468] *Ibid*. at para 171.
[469] *Ibid*. at para 171.
[470] See *Boudellaa et al. v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para. 300.
[471] *Ibid*.

Bosnia and Herzegovina to "use diplomatic channels in order to protect the basic rights of the applicants."[472]

296. In particular, the Chamber ordered Bosnia and Herzegovina to "take all possible steps to establish contacts with the applicants and to provide them with consular support,"; "to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the United States via diplomatic contacts that the applicants will not be subjected to the death penalty"; and to retain and bear the costs of lawyers authorised and admitted to practice in the relevant jurisdictions "in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible, military, criminal or other proceedings involving the applicants."[473]

297. As noted in paragraphs 132-136 above, Mr. al Nashiri is now at imminent risk of being subjected to a flagrantly unfair trial by military commission followed by the death penalty. The U.S. government's 20 April 2011 announcement that it intends to seek the death penalty has also exposed him to anguish associated with the prospect of being put to death, an anguish that is compounded by the prospect of a flagrantly unfair trial by military commission, and likely to continue for many years until his case is resolved. He therefore asks this Court to direct the Polish government to use all available means at its disposal to ensure that the United States does not subject him to the death penalty. These measures include but are not limited to an indication to the Polish government that it immediately should:

    a) make written submissions before 30 June 2011 to Bruce MacDonald, the Convening Authority for Military Commissions, to ensure that he does not approve the death penalty for Mr. al Nashiri's case;

    b) obtain diplomatic assurances from the United States Government that it will not subject Mr. al Nashiri to the death penalty;

    c) take all possible steps to establish contact with Mr. al Nashiri in Guantánamo Bay, including by sending delegates to meet with him to monitor his treatment and ensure that the status quo is preserved in his case; and

    d) retain and bear the costs of lawyers authorised and admitted to practice in relevant jurisdictions in order to take all necessary action to protect Mr. al Nashiri's rights while in US custody including in military, criminal or other proceedings involving his case.

298. Mr. al Nashiri also requests that this Court ask the Secretary General of the Council of Europe to request that the United States does not subject Mr. al Nashiri to the death penalty.

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[472] *Ibid.* at para. 330.
[473] *Ibid*. at para. 330-331.

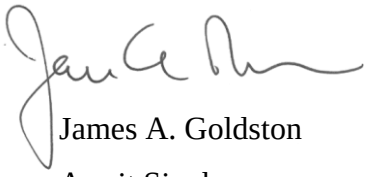
VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

299. At the present time, there are no other international proceedings relating to Mr. al Nashiri's treatment in and transfer from Poland.

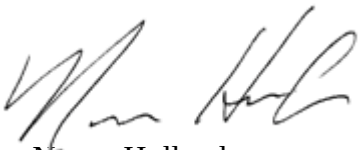
VIII. DECLARATION AND SIGNATURE

300. I hereby declare that to the best of my knowledge and belief, the information I have given in the present application is correct.

New York
6 May 2011



James A. Goldston
Amrit Singh
Rupert Skilbeck
Open Society Justice Initiative



Nancy Hollander
Freedman Boyd Hollander Goldberg Ives and Duncan P.A.

IX. LIST OF EXHIBITS

Exhibit 1: Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations," Serial No. 110-28, 17 April 2007.

Exhibit 2: Human Rights Council, United Nations General Assembly, 13th Session, Agenda Item 3, "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" A/HRC/13/42, 19 February 2010 (U.N. Joint Experts' Report)

Exhibit 3: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report," Council of Europe, Doc. 11302 rev, 11 June 2007 (2007 Council of Europe Report)

Exhibit 4: Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's Combined Use of Interrogation Techniques," 30 December 2004 (CIA Rendition Background Paper).

Exhibit 5: Combatant Status Review Tribunal Hearing, ISN 10015, U.S. Naval Base Guantánamo Bay, Cuba, 14 March 2007, latest version declassified on 12 June 2009 (al Nashiri CSRT Transcript)

Exhibit 6: ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, (ICRC Report)

Exhibit 7: CIA Inspector General, Special Review, Counterterrorism Detention and Interrogation Activities (September 2001—October 2003), 7 May 2004, (CIA OIG report)

Exhibit 8: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'," *CBS News*, 21 September 2010 (Goldman & Scislowska report)

Exhibit 9: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010 (English and Polish)

Exhibit 10: Human Rights Watch, "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," 6 November 2005.

Exhibit 11: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States," Doc. 10957, 12 June 2006 (2006 Council of Europe Report)

Exhibit 12: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), 14 February 2007

Exhibit 13: Center for Human Rights and Global Justice, Data String Analysis Submitted As Evidence of Polish Involvement in U.S. Extraordinary Rendition and Secret Detention Program (CHRGJ Report)

Exhibit 14: Trzymani w klatkach, Rzeczpospolita, 12 January 2002

Exhibit 15: Więźniowie czy jeńcy, Rzeczpospolita, 25 January 2002

Exhibit 16: George Bush chce obejść konwencje genewską, Rzeczpospolita, 9 February 2002

Exhibit 17: Oskarżyć albo zwolnić, Rzeczpospolita, 6 September 2002

Exhibit 18: Gorzka cena skuteczności, Rzeczpospolita, 11 September 2002

Exhibit 19: Nie tylko, podczas wojny, Rzeczpospolita, 15 January 2003

Exhibit 20: Od Mohammeda do bin Ladena, Rzeczpospolita, 4 March 2003

Exhibit 21: Jakub Kowalski, "Czarne dziury." Rzeczpospolita, 29 May 2003

Exhibit 22: Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Military Order of 13 November 2001)

Exhibit 23: US Department of Defense, Military Commission Order No. 1, 21 March 2002 (MCO No. 1)

Exhibit 24: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay," Council of Europe, Doc. 9817, 26 May 2003

Exhibit 25: Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002

Exhibit 26: Joint Task Force-GTMO response to the United States House Armed Services Committee

Exhibit 27: Declaration of Sondra S. Crosby, MD, In the Matter of Abd Al-Rahim Hussain Mohammed Al Nashiri, 26 September 2009.

Exhibit 28: Declaration of Barry Rosenfeld, Phd, In the Matter of Abd Al-Rahim Hussain Mohammed Al Nashiri, 9 September 2009.

Exhibit 29: Defense Motion, United States v. Al Nashiri, 9 January 2009

Exhibit 30: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011

Exhibit 31: Memorandum from Bruce MacDonald, Convening Authority for Military Commissions for LCDR Stephen Reyes, OMC-D, 27 April 2011

Exhibit 32: Letter from Krzysztof Parchimowicz to Helsinki Foundation for Human Rights, 9 April 2009 (English and Polish)

Exhibit 33: Procedural Letter concerning representation in proceedings, notice regarding suspicion of perpetration of criminal offences and motion

regarding accession to further proceedings as a victim, 21 September 2010 (English and Polish)

Exhibit 34: Adam Goldman and Vanessa Gera, Associated Press, "Terror suspect gets victim status in Polish probe," 27 October 2010

Exhibit 35: Concluding observations of the Human Rights Committee, Poland, U.N. Doc. CCPR/C/POL/CO/6 (2010), 27 October 2010.

Exhibit 36: Complaint on the issue of the party's right to have the case recognized without undue delay in course of the preliminary criminal proceedings, filed on 25 February 2011 (English and Polish)

Exhibit 37: Decision of the Appellate Court in Bialystok, 20 April 2011 (English and Polish)