

**RULE 9 SUBMISSION TO  
THE COMMITTEE OF MINISTERS  
COUNCIL OF EUROPE**

CASE OF AL NASHIRI V. ROMANIA  
(APPLICATION NO. 33234/12)

JULY 2021

## Executive Summary and Recommendations

This submission is part of a series of Rule 9 communications concerning a group of extraordinary rendition and torture cases – *Al Nashiri v Romania* (Appl. No. 33234/12), *Al Nashiri v Poland* (Appl. No. 28761/11), *Abu Zubaydah v Poland* (Appl. No. 7511/13), and *Abu Zubaydah v Lithuania* (Appl. No. 46454/11)<sup>1</sup> – in which the European Court of Human Rights (“the Court” or “ECtHR”) found the respondent states to be in violation of the European Convention on Human Rights (“the Convention”). The Court concluded that Romania, Poland and Lithuania violated the Convention by participating in the CIA’s extraordinary rendition programme under which Mr. Abd al Rahim al Nashiri and Mr. Husayn Abu Zubaydah were unlawfully detained, tortured and abused. Now detained at Guantanamo Bay since 2006, both men are subject to an on-going “flagrant denial of justice” and/or the risk of a death sentence.

As the twenty-year anniversary of the attacks of September 11 approaches, these cases stand amongst the very few judgments to shed light on the gross human rights violations perpetrated in the name of the so-called “War on Terror”. In the context of the pervasive lack of accountability that has characterized the response to this “war”, these judgments have been the rare exception. Yet the Court’s and Committee of Ministers’ credibility is increasingly threatened by the failure to ensure that these judgments are not meaningfully implemented. Most notably, years after the ECtHR ordered Romania, Poland, and Lithuania to undertake prompt, effective and transparent domestic investigations, there has been no meaningful progress in any of these cases. In Romania, the investigation in the *Al Nashiri* case has already been closed, whereas in Poland the investigation has been partially closed on account that the alleged facts did not happen or do not constitute a crime. In Lithuania there are no indications whatsoever of any meaningful steps to undertake an effective investigation. There has been no meaningful effort to confront the truth, publicly recognize responsibility and ensure non-repetition. In effect, all three countries have dismissed the majority of the ECtHR’s findings and challenged the binding nature of its judgments.

Compliance with these judgments is a critical aspect of meaningful accountability for European complicity in the CIA’s secret detention and torture program. The Committee must escalate its supervision of these cases and call upon all organs of the Council of Europe to ensure that they receive the attention they deserve. As highlighted in the 2020 report of the PACE Rapporteur on Implementation of Judgments, “[t]hese cases reveal a worrying timid reaction of the Committee of Ministers towards the situation where a transfer of detainees may amount to a risk of imposition of the death penalty or to the flagrant denial of justice”.<sup>2</sup> The Committee of Ministers is urged to shift to a more robust approach, reflecting the significance of these cases and non-implementation to date.

With respect to this group of cases, the Open Society Justice Initiative (“OSJI”) makes the following recommendations to the Committee of Ministers (“the Committee”, “CM”):

<sup>1</sup> *El Masri v Former Yugoslav Republic of Macedonia*, Application no. 39630/09, as also a part of this group of cases but was prematurely closed by the Committee of Ministers on 5 December 2019, see: Resolution CM/ResDH(2019)369 Execution of the judgment of the European Court of Human Rights *El-Masri against North Macedonia*, <https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22001-199619%22%5D%7D>.

<sup>2</sup> PACE, 2020, “The implementation of judgments of the European Court of Human Rights Report”, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Constantinos Efstathiou, Doc. 15123, <https://www.ecoi.net/en/file/local/2033883/document.pdf>, para. 25.

1. Monitor these cases more frequently and schedule them for oral debate, beginning with the next CM/DH meeting in September 2021;
2. **Issue an interim resolution** deploring the failure to execute the Court’s judgments and calling upon Romania, Poland, and Lithuania to promptly pursue the following common measures:
  - a. **Undertake effective and transparent domestic investigations.** Where criminal investigations have already been closed, authorities should undertake specific measures to reopen them with the aim of conducting a prompt, thorough and effective inquiry into their government’s role in the CIA’s extraordinary rendition and secret detention program, consistent with the ECtHR’s findings that such conduct indeed occurred. The terms of reference of the investigations should be disclosed to Mr. Al Nashiri’s and Mr. Abu Zubaydah’s counsels and the public, and the materials from these investigations should be declassified to the fullest extent possible and, where possible, made public, particularly transcripts of witness testimonies, responses to data/documents requests, and any procedural decisions made by the Prosecutor.
  - b. **Seek reliable, specific, and binding diplomatic assurances from the U.S. authorities** that Mr. Nashiri and Mr. Abu Zubaydah will not be subjected to the death penalty and/or a flagrant denial of justice. With a new U.S. administration in place, Romanian, Polish, and Lithuanian authorities at the highest level should redouble their efforts to seek such assurances. All communications to and from the U.S. government in relation to these assurances should also be disclosed to Mr. Al Nashiri’s and Mr. Abu Zubaydah’s counsels, so that they can monitor the government’s compliance with the Court’s judgment.
  - c. **Issue an official acknowledgement** that Romania, Poland, and Lithuania hosted a secret CIA prison on their territories **and public apologies** to Mr. Al Nashiri and Mr. Abu Zubaydah for the abuse they endured.
3. Insist that Poland (and Lithuania) facilitate the prompt payment of **just satisfaction** due to Mr. Abu Zubaydah’s designated beneficiary.
4. Insist that Romania **removes the statute of limitations for the crime of torture “in all instances”** i.e. to include liability for acts of torture whenever they occurred, including retrospectively.
5. **Encourage all relevant organs of the Council of Europe to continue to press for execution of these cases**, including the offices of the Commissioner for Human Rights, the Parliamentary Assembly, the PACE Rapporteur for Execution of Judgments, and the Secretary General. In particular, **request the Secretary General to diplomatically engage with the new U.S. administration** in order to obtain assurances that neither Mr. Al Nashiri and Mr. Abu Zubaydah would be at risk of the death penalty and/or a flagrant denial of justice.

This submission explains how the Romanian authorities have failed to conduct an effective investigation, failed to seek and obtain diplomatic assurances, failed to provide details of measures taken to acknowledge Romania’s role in and responsibility for the human rights violations that occurred in this case, and failed to remove the statute of limitations for the crime of torture in accordance with international legal standards. Indeed, more than three years after the Court’s judgment, the Romanian authorities have yet to make any meaningful progress in implementing the judgment. Accordingly, this

submission also urges the CM to recommend that **Romania update its 2019 Action Plan**<sup>3</sup> and urges the CM to exercise escalating supervisory measures until such time that full implementation of the ECtHR judgment is achieved.

### Mr. Al Nashiri's Current Situation

In the 2018 *Al Nashiri v. Romania* judgment, the Court held that, beyond any reasonable doubt, Romania had violated Articles 2, 3, 5, 6, 8, and 13 of the Convention and Article 1 of Protocol No. 6 by participating in the extraordinary rendition and secret detention of Mr. Abd Rahim Al Nashiri in a secret CIA prison on Romanian soil, and by failing to conduct a prompt, thorough, and effective investigation into serious violations of human rights.<sup>4</sup> The Open Society Justice Initiative served as co-counsel on behalf of Mr. Al Nashiri in proceedings before the ECtHR.<sup>5</sup>

In its December 2020 decision, the CM highlighted that “the violations of the Convention found by the Court have not been remedied as he remains at risk of a flagrant denial of justice in the proceedings before a United States military commission and at risk of the death penalty”.<sup>6</sup> Alarming, the situation to date remains unchanged. Specifically, Mr. Al Nashiri remains imprisoned at the Internment Facility in the U.S. Guantánamo Bay Naval Base in Cuba, far away from his family, suffering severe post-traumatic stress disorder caused by his torture and abuse. Nineteen years since his capture by U.S. forces in 2002, it is still unclear when a trial will be held in his case. Despite hundreds of filings, motions, hearings and orders during this excessively long pre-trial litigation phase, no trial date has been set.

Mr. Al Nashiri also remains at risk of a flagrant denial of justice. As stressed in the Court’s judgment, the rules governing proceedings before the military commission adjudicating Mr. Al Nashiri’s case “permit the introduction of coerced statements under certain circumstances”, thus exposing Mr. Al Nashiri to a risk of flagrant denial of justice.<sup>7</sup> Indeed, according to a new ruling from the Military Commission issued on 18 May 2021, statements made under torture will be allowed to be used pre-trial.<sup>8</sup>

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<sup>3</sup> See Annex III, para. 3.1.i.

<sup>4</sup> *Al Nashiri v. Romania*, (App. no. 33234/12), ECtHR, 31 May 2018.

<sup>5</sup> Through litigation, research, advocacy, and technical assistance, the Open Society Justice Initiative strives to secure legal remedies for human rights abuses and promote effective enforcement of the rule of law.

<sup>6</sup> Committee of Ministers Decision in *Al Nashiri v Romania*, CM/Del/Dec(2020)1390/H46-17, 3 December 2020, [https://hudoc.exec.coe.int/eng#f%22EXECIdentifier%22:f%22CM/Del/Dec\(2020\)1390/H46-17E%22](https://hudoc.exec.coe.int/eng#f%22EXECIdentifier%22:f%22CM/Del/Dec(2020)1390/H46-17E%22)], para. 3.

<sup>7</sup> *Al Nashiri v Romania*, para. 74.

<sup>8</sup> *USA v Al Nashiri*, AE 353AA, Ruling: Defense Motion to Strike AE 353V for Inclusion of Statements and Derivative Evidence Obtained by Torture or Cruel, Inhuman, or Degrading Treatment 18 May 2021, p. 6, para. h.

## Failure to Implement the Court’s Judgment

### 1. Individual Measures

#### a. Investigation, Truth and Accountability

As communicated in OSJI’s submission to the Committee of Ministers in May 2021,<sup>9</sup> Romanian authorities ignored the ECtHR’s 2018 judgment and its factual findings, including that a “Detention Site Black” existed on Romanian territory<sup>10</sup> and that Romanian state officials assisted the CIA in its “high value detainees” programme.<sup>11</sup> In March 2021, Romanian authorities dismissed the domestic investigation into Mr. Al Nashiri’s rendition, secret detention and ill-treatment in Romania, claiming that the alleged facts did not take place.<sup>12</sup>

As explained in OSJI’s previous Rule 9 submission,<sup>13</sup> Romania’s domestic investigation, rather than being “prompt”, “effective” and “thorough” as required by the ECtHR, has been inadequate, marked by excessive delays and a number of notable procedural shortcomings: failure to interview key witnesses,<sup>14</sup> failure to request relevant data,<sup>15</sup> and inconsistent application of the standard of proof.<sup>16</sup> These defects render the investigation well below the standards of the Convention. As stressed by the Court in its 2018 judgment, “the obligation of a Contracting State to conduct an effective investigation under Article 3, as under Article 2, of the Convention persists as long as such an investigation remains feasible but has not been carried out or has not met the Convention standards .... An ongoing failure to provide the requisite investigation will be regarded as a continuing violation of that provision”.<sup>17</sup>

Furthermore, in the ordinance to dismiss the investigation, the Prosecutor stated that even if a suspect had been identified, the crimes of torture and deprivation of liberty could not be charged because the

<sup>9</sup> 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)566E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)566E%22%5D%7D).

<sup>10</sup> Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p. 78; Later the decision was upheld through Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 23/II/2/2021, 10 May 2021.

<sup>11</sup> Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p.82.

<sup>12</sup> Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p. 78; Later the decision was upheld through Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 23/II/2/2021, 10 May 2021.

<sup>13</sup> 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)566E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)566E%22%5D%7D).

<sup>14</sup> For a detailed explanation see OSJI’s last Rule 9 submission: 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)566E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)566E%22%5D%7D).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Al Nashiri v Romania, para. 740.

statute of limitations for such crimes had expired.<sup>18</sup> As underlined in OSJI’s appeal to the Prosecutor’s decision (later rejected) and in the last submission to the CM,<sup>19</sup> Romania cannot avail itself of the statute of limitations where its own delay and failure to conduct a prompt and effective investigation was the cause of the limitation period expiring. In any event, as explained in OSJI’s May 2021 Rule 9 communication, the prohibition of torture is a *jus cogens* norm for which statutory limitations do not apply.<sup>20</sup>

As to the Romanian government’s obligation to inform the public about Mr. Al Nashiri’s case, the ECtHR’s judgment made it abundantly clear that, “[t]he Romanian public has a legitimate interest in being informed of the criminal proceedings and their results”,<sup>21</sup> and that it “falls to the national authorities to ensure that, without compromising national security, a sufficient degree of public scrutiny is maintained in respect to the investigation”.<sup>22</sup> Similarly, the CM’s last decision noted that, “to avoid similar abuses and grave human rights violations in the future, it is imperative that Romania demonstrates the highest determination and commitment to prevent impunity by making real and sustained efforts to establish the truth about what happened and how”.<sup>23</sup>

Since the 2018 judgment, however, no efforts have been undertaken to inform the Romanian public about the progress of the investigation. Instead, through a delayed, superficial, and ultimately ineffective “investigation”, Romanian authorities continue to refuse to acknowledge the unlawful detention and torture of Mr. Al Nashiri and the state’s complicity in the CIA’s secret rendition programme.

#### b. Assurances from the United States

Regarding Mr. Al Nashiri’s flagrant denial of justice and the risk of the death penalty, Romania has still not obtained binding assurances from U.S. authorities that he will not be subjected to the death penalty and other violations of fair trial procedures. In its December 2020 decision the CM urged the Romanian authorities to, “[actively] continue their diplomatic efforts including at a higher level, and pursue all possible means to seek to remove the risks incurred by the applicant, to fulfil their obligation under Article 46 of the Convention”.<sup>24</sup> The Committee also encouraged them to “consider other avenues which would enable them to seek removing these risks, such as intervening as *amicus curiae* in any relevant proceedings pending in the United States”.<sup>25</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD\(2021\)566E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD(2021)566E%22%7D%7D).

<sup>20</sup> Ibid, pp. 5-6.

<sup>21</sup> Al Nashiri v Romania, para. 655.

<sup>22</sup> Ibid.

<sup>23</sup> Committee of Ministers Decision in Al Nashiri v Romania, CM/Del/Dec(2020)1390/H46-17, 3 December 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1390/H46-17E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1390/H46-17E%22%7D%7D), para. 14.

<sup>24</sup> Ibid, para. 5.

<sup>25</sup> Ibid, para. 6.

In this regard, the Romanian government's attempts to seek diplomatic assurances from U.S. authorities have been, if viewed generously, *pro forma*. In its last communication to the CM, Romania does not explain how it plans to further seek and obtain assurances that Mr. Al Nashiri will not be subjected to the death penalty or how he will be assured a fair trial.<sup>26</sup> The last updates Romania communicated to the CM regarding its obligation to obtain diplomatic assurance were in November 2020, when it reported that the issue of diplomatic assurances “has been discussed during recent bilateral consultations between the Romanian MFA and the U.S. Department of State” and that “[t]he US side indicated that they would forward the request to their relevant authorities”.<sup>27</sup> The Committee should inquire whether Romania has undertaken any follow up efforts since then.

Romanian authorities must undertake genuine efforts to seek diplomatic assurances from the U.S. This could include intervening as *amicus curiae* in any relevant proceedings and jointly pursuing assurances with the Polish government, as previously suggested by the CM. Romanian authorities could also make written submissions against the death penalty to the U.S. Secretary of Defense (copied to the applicant's military defence counsel) and endeavor to take all possible steps to establish contact with the applicant in Guantánamo Bay, including by sending delegates to meet him and monitor his treatment in custody.<sup>28</sup>

At a minimum, as long as the risk of the death penalty and the denial of due process persists, the CM should keep both of Mr. Al Nashiri's cases – against Romania and against Poland – under enhanced supervision.

### c. Acknowledgement and Apology

The Committee of Ministers has repeatedly called on Romanian authorities to “provide details, in an appropriate form, about the measures taken or envisaged to acknowledge Romania's role in and responsibility for the human rights violations that occurred in this case”.<sup>29</sup> This has yet to happen and Romania's last communication to the CM does not explain how and when it will issue a public acknowledgement of its role in the rendition program and the treatment of Mr. Al Nashiri. The Foreign Minister's intervention affirming the importance of respecting human rights at the launch of the Declaration against Arbitrary Detention in State-to-State Relations organized by Canada on 15 February 2021, which was highlighted in Romania's last submission to the CM,<sup>30</sup> is welcome but, at best, rhetorical, as it fails to acknowledge in any way Romania's role in and responsibility in its hosting of a

<sup>26</sup> 1406e réunion (juin 2021) (DH) - Règle 8.2a Communication des autorités sur les mesures individuelles et générales (07/04/2021) relative à l'affaire Al Nashiri c. Roumanie (requête n° 33234/12), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a20d2d](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a20d2d).

<sup>27</sup> 1390th meeting (1-3 December 2020) (DH) - Rule 8.2a - Communication from the authorities on the individual measures (25/11/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12), [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)1102E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)1102E).

<sup>28</sup> Al Nashiri v Romania, para. 734.

<sup>29</sup> See, for example, Committee of Ministers, Decision CM/Del/Dec(2020)1369/H46-22, 5 March 2020, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016809cc8c4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809cc8c4), para. 15; and Committee of Ministers, Decision CM/Del/Dec(2020)1390/H46-17, [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1390/H46-17E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1390/H46-17E), para. 15.

secret CIA prison over 2003-2005 and for the human rights violations that occurred in Mr. Al Nashiri's case.

The violations that Mr Al Nashiri has been subjected to and continues to be subjected to, as a result of Romanian authorities' actions and inactions - as recognized by the ECtHR in the 2018 judgment -, as well as the ongoing denial of justice demand an official apology. International human rights law recognizes a State's obligation to issue a public apology to victims of human rights violations, as a form of reparation<sup>31</sup> or effective remedy<sup>32</sup> for the harm suffered, in addition to acknowledgement of the facts and acceptance of responsibility. Whilst apologies cannot undo the pain and violations suffered by the victim and his family, the State's acknowledgement of responsibility can be a meaningful way of recognizing the dignity of victims, acknowledging the truth of what happened, and committing to measures of non-repetition.<sup>33</sup> It is worth highlighting that in a similar CIA secret rendition case before the ECtHR (*El Masri v FYRM*),<sup>34</sup> the Committee of Ministers had previously asked for such a measure<sup>35</sup> and State authorities complied with this demand.<sup>36</sup>

## 2. General Measures

### a. Removal of the Statute of Limitations for Torture

The Committee of Ministers previously decided that, in order to implement the *Al Nashiri* judgment, Romania has to remove the statute of limitations for the crime of torture "in all instances".<sup>37</sup>

On 3 June 2021, the Chamber of Deputies (the decisional chamber in the Parliament) adopted legislative proposal Plx 153/2021, which amends the Criminal Code and removes the statute of limitations for the crime of torture.<sup>38</sup> The bill was promulgated by the President of Romania on 1 July 2021.<sup>39</sup>

Whilst the removal of the statute of limitations for torture in the Criminal Code is a welcome

<sup>31</sup> UNHCHR, 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, General Assembly Resolution 60/147 of 16 December 2005, <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> para. 22(e).

<sup>32</sup> UN Human Rights Committee, *Rosalind Williams Lecraft v. Spain*, CCPR/C/96/D/1493/2006 (2009), <https://digitallibrary.un.org/record/662897?ln=en>, para. 9.

<sup>33</sup> See: ICT J, 2016, "What Makes a Public Apology Meaningful?", <https://www.ictj.org/news/ict-j-report-explores-apologies-past-abuses>.

<sup>34</sup> *El Masri v Former Yugoslav Republic of Macedonia*, Application no. 39630/09.

<sup>35</sup> Committee of Ministers, 1302 meeting (DH) - H46-29 *El-Masri v. "the former Yugoslav Republic of Macedonia"* (Application No. 39630/09), CM/Del/Dec(2017)1302/H46-29, [https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2017\)1302/H46-29E%22%7D%7D](https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2017)1302/H46-29E%22%7D%7D), para. 3.

<sup>36</sup> 1318th meeting (June 2018) (DH) - Action plan (11/04/2018) - Communication from "the former Yugoslav Republic of Macedonia" concerning the case of *EL-MASRI v. "the former Yugoslav Republic of Macedonia"* (Application No. 39630/09), [https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%7B%22DH-DD\(2018\)384E%22%7D%7D](https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%7B%22DH-DD(2018)384E%22%7D%7D), pp. 3-4.

<sup>37</sup> Committee of Ministers Decision in *Al Nashiri v Romania*, CM/Del/Dec(2020)1390/H46-17, 3 December 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1390/H46-17E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1390/H46-17E%22%7D%7D), para. 13.

<sup>38</sup> PL-x nr. 153/2021, Proiect de Lege pentru modificarea și completarea Legii nr.286/2009 privind Codul penal, [http://www.cdep.ro/pls/proiecte/upl\\_pck2015.proiect?cam=2&idp=19257](http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19257).

<sup>39</sup> Decret nr. 785/2021; Legea nr. 186/2021.



development that goes some way towards implementation, the amendment regarding the prescription period for torture is inconsistent with international law because it only applies prospectively, i.e., from the time Plx 153/2021 became law, rather than at the time when the crime of torture occurred. In its May 2021 communication to the CM, OSJI expressed its concern about the proposed law's incompatibility with international law regarding the prohibition and prosecution of torture, including its status as a *jus cogens* norm (see pp. 5-6 from previous Rule 9 submission).<sup>40</sup> A memorandum explaining these concerns – and how the Parliament must ensure that the proposed legislation complies with international law – was also sent by OSJI to Romania's Committee of Legal Affairs, Discipline and Immunities in the Chamber of Deputies in the Parliament on 7 May 2021.

The amendment to the Criminal Code therefore does not satisfy the general measures required by the judgment, insofar as a statute of limitations would still apply for the torture inflicted on Mr. Al Nashiri and is not consistent with international human rights law.

## Conclusion

Romania's ongoing failure to conduct an effective investigation, to obtain reliable assurances from the U.S. that Mr. Al Nashiri will not be subjected to the risk of death penalty and a flagrant denial of justice, to acknowledge and apologize for its hosting of a CIA secret prison and its role in Mr. Al Nashiri's torture, as well as to make torture an imprescriptible crime in a manner consistent with international human right law requires not only the Committee's ongoing enhanced supervision of this case, but renewed and escalating pressure to push for the implementation of the ECtHR's judgment.

The Committee of Ministers should orally debate the extraordinary rendition and torture cases against Romania, Poland and Lithuania at its upcoming meeting in September 2021, issue an interim resolution covering all four cases, and request the Secretary General to diplomatically engage with the new U.S. administration, at the highest level, in order to ensure that the right to fair trial and the right to life are respected in Mr. Al Nashiri's and Mr. Abu Zubaydah's judicial proceedings.

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<sup>40</sup> 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD\(2021\)566E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD(2021)566E%22%7D%7D), pp. 5-6.