

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

CASE OF AL NASHIRI V. POLAND  
(APPLICATION NO. 28761/11)  
&  
CASE OF ABU ZUBAYDAH V. POLAND  
(APPLICATION NO. 7511/13)

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 Poland* (Appl. No. 28761/11), *Abu Zubaydah v Poland* (Appl. No. 7511/13), *Al Nashiri v Romania* (Appl. No. 33234/12), 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 Poland, Romania, 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 meaningfully implemented. Most notably, years after the ECtHR ordered Poland, Romania, 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 and Human Rights in Practice therefore make the following recommendations to the Committee of Ministers:

1. Monitor these cases more frequently and **schedule them for oral debate, beginning with the next CM/DH meeting in September 2021;**

<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#f%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.

2. **Issue an interim resolution** deploring the failure to execute the Court’s judgments and calling upon Poland, Romania, 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, Polish, Romanian, 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.

### Mr. Al Nashiri’s and Mr. Abu Zubaydah’s Current Situation

In *Al Nashiri v. Poland*, the Court held that Poland violated Articles 2 and 3 (taken together with Article 1 of Protocol No. 6 to the Convention), as well as Articles 5, 6 § 1, 8 and 13 of the European Convention

on Human Rights (“the Convention”) and Article 1 of Protocol No. 6 to the Convention.<sup>3</sup> Similarly, in *Abu Zubaydah v. Poland*, the Court held that Poland violated Articles 3, 5, 6 § 1, 8 and 13 of the Convention.<sup>4</sup> This communication explains how the Polish authorities have failed to conduct an effective investigation, failed to seek diplomatic assurances, and failed to provide details of measures taken to acknowledge Poland’s role in and responsibility for the human rights violations that occurred in these cases.

In its decision of December 2020, the CM highlighted that “the consequences of the violations of the Convention for the applicants have not been remedied, as Mr. Al Nashiri remains at risk of a flagrant denial of justice in the proceedings before the military commission and at risk of the death penalty, and Mr. Abu Zubaydah remains subjected to a flagrant denial of justice notably due to his “indefinite detention” without charge since 2002.<sup>5</sup> This situation remains unchanged.

Nineteen years since his capture by U.S. forces in 2002, Mr. Al Nashiri remains imprisoned at the Internment Facility in the US Guantánamo Bay Naval Base in Cuba, far away from his family, suffering severe post-traumatic stress disorder caused by his torture and abuse, and is at risk of death penalty. It is still unclear when a trial will be held in Mr. al Nashiri’s case. Despite hundreds of filings, motions, hearings and orders during this excessively long pre-trial litigation phase, no trial date has been set. 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>6</sup> Indeed, according to new ruling from the Military Commission issued on 18 May 2021, statements made under torture will be allowed to be used at the pre-trial phase.<sup>7</sup>

Mr. Abu Zubaydah has been held without any review of the lawfulness of his detention by a court or independent legal authority, and without charge or trial, for nineteen years. He falls into the category dubbed “forever prisoners” who the U.S. administration refuses to charge or try but will not release. Despite filing his Petition for a Writ of *Habeas Corpus* in the U.S. District Court for the District of Columbia on 6 August 2008, and multiple unanswered motions since then, he has still had no habeas corpus hearing.<sup>8</sup> His case is a dramatic example of the dysfunctional system of *habeas* review for Guantánamo detainees today. A collective *habeas* claim lodged by “forever” prisoners challenging that dysfunction, and the lawfulness of indefinite detention without charge under the U.S. constitution, has

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<sup>3</sup> The Open Society Justice Initiative (“OSJI”) served as co-counsel on behalf of Mr. Al Nashiri in proceedings before the ECtHR. Through litigation, research, advocacy, and technical assistance, OSJI strives to secure legal remedies for human rights abuses and promote effective enforcement of the rule of law.

<sup>4</sup> Helen Duffy, Human Rights in Practice, was co-counsel in the cases before the Court and is the international legal representative of Abu Zubaydah.

<sup>5</sup> Committee of Ministers Decision in *Al Nashiri v Poland*, CM/Del/Dec(2020)1390/H46-16, 3 December 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1390/H46-16E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1390/H46-16E%22%7D%7D), para. 2.

<sup>6</sup> *Al Nashiri v Poland*, para. 564.

<sup>7</sup> *U.S.A. 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.

<sup>8</sup> *Husayn v. Gates*. 1:08-cv-1360, Doc.1 (D.D.C. 2008).

been rejected.<sup>9</sup> He has still not been charged or tried, despite counsel repeatedly requesting that charges be lodged, and there is no indication of the intention to do so. There are currently no avenues available to him to address the ongoing “flagrant denial of justice” entailed in his arbitrary detention.<sup>10</sup>

## Failure to Implement the Court’s Judgment

### 1. Individual Measures

#### a. Investigation, Truth, and Accountability

Poland’s domestic investigations in these cases, rather than being “prompt”, “effective” and “thorough” as required by the ECtHR,<sup>11</sup> have been inadequate, shrouded in secrecy, and marked by excessive delays. As a result, the investigations in Mr. Al Nashiri’s and Mr. Abu Zubaydah’s cases fall well below the standards of the Convention.

Recent developments in the investigation into both cases conducted by the Prosecutor’s Office in Krakow illustrates how dramatically ineffective these proceedings have been. Since October 2020, there has been no information provided to Mr. Al Nashiri’s counsel on any developments in the case. More worryingly, on 30 November 2020,<sup>12</sup> the prosecutor decided to partially discontinue the criminal investigation, effectively absolving all Polish authorities, officials and officers who were engaged in the operation of the CIA’s secret prison of responsibility, including the one person who has faced charges to date.<sup>13</sup> The prosecutor concluded that the suspect had not committed the alleged offence, as a result of extraordinary circumstances and his lack of knowledge at the relevant time. In contrast to the findings of the ECtHR on the knowledge at the relevant time, the prosecutor also concluded that Polish officials could not have suspected that the Americans would not respect provisions of the international law within the Stare Kiejkuty facility. The prosecutor further concluded that activities taken by other Polish authorities and officers do not constitute an offence under Polish law. This flies in the face of the core of the Convention, and the Court’s judgment, in respect of the obligations to protect human rights, and to investigate and prosecute serious crimes.

In a strong indication of the ongoing secrecy surrounding these investigations, the prosecutor’s decision has not been made public and important parts of the decision remain completely classified. The decision has been challenged. In the challenge brought by Mr. Al Nashiri’s counsel, a Polish court was due to examine the complaint against the partial closure decision on 9 June 2021; however, that court hearing

<sup>9</sup> Tofiq Nasser Awad Al Bihani, Abdu Latif Nasser, Sharqawi Al Hajj, Sanad Al Kazimi, Suhail Sharabi, Said Nashir, Abdul Rabbani, Ahmed Rabbani, Abdul Razak, Abdul Malik, and Abu Zubaydah v. Trump, Case no. 1:09-cv-00745-RCL, Motion for Order Granting Writ of Habeas Corpus (11 January 2018), 30.

<sup>10</sup> For more details of his current arbitrary detention see Application to UN Working Group on Arbitrary Detention at <https://static1.squarespace.com/static/5b82ab175b409b90d4c99071/t/609c1e66dcc584609980b82d/1620844135983/30042021+AZ+v+US+filed+-public.pdf>.

<sup>11</sup> See, for example, Al Nashiri v Poland, para. 499.

<sup>12</sup> Decision of the prosecutor of the Regional Prosecutor’s Office in Krakow (postanowienie prokuratora Prokuratury Regionalnej w Krakowie) of 30 November 2020, case files no. RP II Ds 16.2016.

<sup>13</sup> The prosecutor informed Mr.. Al Nashiri’s counsel that the name of the person who faced charges is classified.

was postponed until 7 September 2021.<sup>14</sup> The prosecutor issued another concerning decision on 26 February 2021,<sup>15</sup> suspending the rest of the investigation while waiting for a response from the U.S. authorities to the prosecutor’s mutual legal assistance request. This decision has also been challenged.

In its last communication to the CM, in July 2021, Poland mentions the prosecutor’s decision on partial discontinuation of the investigation.<sup>16</sup> Even though, it is an important decision, no detailed information was presented to the CM. Essential parts of the decision, including its operative part, remain unclassified, thus there are no obstacles to provide the CM with more details.

In its December 2020 decision, the CM also asked the government about the relationship between its own investigation and that of the ICC.<sup>17</sup> However, the Polish authorities’ submission makes no reference to this and provides no indication of efforts taken by the Polish government to reach out or to cooperate with the ICC prosecutor.

In its judgments, the ECtHR made it clear that, “[s]ecuring proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the Polish State institutions’ adherence to the rule of law and the Polish public has a legitimate interest in being informed of the investigation and its results. It therefore falls to the national authorities to ensure that, without unacceptably compromising national security, a sufficient degree of public scrutiny is maintained in the present case”.<sup>18</sup> Since the Court’s judgments, however, no efforts have been undertaken to inform the Polish public about the progress of the investigations in these two cases. Instead, through delayed, superficial, and ultimately ineffective “investigations”, Polish authorities continue to refuse to even acknowledge the unlawful detention and torture of Mr. Al Nashiri and Mr. Abu Zubaydah and the state’s role in the CIA’s secret rendition program.

#### b. Assurances from the United States

In its 2014 judgment in the *Al Nashiri* case, the ECtHR explicitly ordered the Polish government to remove the risk of death penalty “as soon as possible” by “seeking assurances from the US authorities that he will not be subjected to the death penalty.”<sup>19</sup> Similarly, in its December 2020 joint decision regarding the cases of Mr. Al Nashiri and Mr. Abu Zubaydah, the CM emphasized that “it is crucial that the Polish authorities actively continue their diplomatic efforts and pursue all possible means to seek to

<sup>14</sup> The Court has scheduled a hearing and is going to examine the complaint in the courtroom enabling protection of classified information.

<sup>15</sup> Decision of the prosecutor of the Regional Prosecutor’s Office in Krakow (postanowienie prokuratora Prokuratury Regionalnej w Krakowie) of 26 February 2021, case files no. RP II Ds 16.2016.

<sup>16</sup> 1411th meeting (September 2021) (DH) - Rule 8.2a Communication from the authorities (20/07/2021) concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a34847](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a34847).

<sup>17</sup> Committee of Ministers Decision in *Al Nashiri v Poland*, CM/Del/Dec(2020)1390/H46-16, 3 December 2020, [https://hudoc.exec.coe.int/eng#f1%22EXECIdentifier%22:%22CM/Del/Dec\(2020\)1390/H46-16E%22](https://hudoc.exec.coe.int/eng#f1%22EXECIdentifier%22:%22CM/Del/Dec(2020)1390/H46-16E%22)], para. 9.

<sup>18</sup> *Al Nashiri v Poland*, para. 497; *Abu Zubaydah v Poland*, para. 491.

<sup>19</sup> *Al Nashiri v Poland*, para. 589.



remove the risks incurred by the applicants”.<sup>20</sup> It further “encouraged the Polish authorities while pursuing and intensifying the diplomatic efforts, to consider exploring 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>21</sup>

Poland’s efforts to obtain such assurances from U.S. authorities, however, have been sporadic, minimal, and, ultimately, ineffective. In its July 2021 communication to the CM, Poland vaguely indicates a meeting between the Polish Deputy Ambassador and the Deputy Assistant Secretary of the U.S. Department of State but with no concrete advance on the point of obtaining diplomatic assurances regarding the applicants.<sup>22</sup> Whilst in their submission the CM Polish authorities list a series of documents exchanged with U.S. authorities, aimed at obtaining diplomatic guarantees, no copies have been provided to the CM, the applicants or to the applicants’ counsels. This is particularly problematic given that Mr. Al Nashiri’s counsel initiated administrative proceedings to access the content of those documents.<sup>23</sup>

In the same communication, Poland notes that “further actions will be considered with a view of obtaining diplomatic assurances for both applicants”<sup>24</sup> without explaining what these actions will consist of, how they will be different to what has already been tried, and how they will be more effective. This is of particular concern given the new U.S. administration, which provides a different context and significant potential opportunity for renewed representations and reinvigorated efforts to bring to end the ongoing injustice in these cases.

Renewed, persistent and more creative methods should therefore be undertaken to implement the judgment’s requirement that such assurances be sought. These could include, as previously noted by the CM, jointly pursuing assurances with the Romanian and Lithuanian governments, which could be a more effective diplomatic measure given that these four cases concern the same problems. Polish authorities could also make written submissions against the death penalty to the U.S. Secretary of Defense (copied to military defense counsel) and endeavor to take all possible steps to establish direct contact with the applicants in Guantánamo Bay, including by sending delegates to meet them and monitor their treatment in custody.<sup>25</sup>

The Committee of Ministers also referred explicitly to the possibility of intervening as *amicus curiae* in any relevant proceedings;<sup>26</sup> in this respect it is noted that proceedings are underway before the U.S. Supreme Court concerning Mr. Abu Zubaydah’s efforts to subpoena psychologists regarding his torture in Poland, in which the Polish authorities could intervene as per the CM’s decision, but to our knowledge

<sup>20</sup> 1369 meeting (DH) March 2020 - H46-19 Al Nashiri group v. Poland (Application No. 28761/11), CM/Del/Dec(2020)1369/H46-19, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1369/H46-19E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1369/H46-19E%22%7D%7D), para. 3.

<sup>21</sup> Ibid, para. 4.

<sup>22</sup> 1411th meeting (September 2021) (DH) - Rule 8.2a Communication from the authorities (20/07/2021) concerning the Al Nashiri group of cases v. Poland (Application No. 28761/11), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a34847](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a34847), p. 2.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Al Nashiri v Poland, para. 584.

<sup>26</sup> 1369 meeting (DH) March 2020 - H46-19 Al Nashiri group v. Poland (Application No. 28761/11), CM/Del/Dec(2020)1369/H46-19, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1369/H46-19E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1369/H46-19E%22%7D%7D), para. 4.

have not done so.

Given the lack of progress in seeking diplomatic assurances and the ongoing serious risks that Mr. Al Nashiri and Mr. Abu Zubaydah face, the Committee of Ministers should also consider how other organs of the Council of Europe could likewise protect the rights of Mr. Al Nashiri and Mr. Abu Zubaydah. The CM could request, for instance, the Secretary General—as well as respondent states—to diplomatically engage with the new U.S. administration, at the highest level, in order to obtain binding assurances that Mr. Al Nashiri and Mr. Abu Zubaydah will not be at risk of the death penalty or of a flagrant denial of justice.

### c. Acknowledgement and Apology

The Committee of Ministers has repeatedly called on Polish authorities to “to provide details about the measures taken or envisaged to acknowledge Poland’s role in and responsibility for the human rights violations that occurred in these cases without any further delay”.<sup>27</sup> This has yet to happen. Poland’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 or Mr. Abu Zubaydah. Neither does Poland’s updated Action Plan provide any details on this matter.<sup>28</sup>

The violations that Mr. Al Nashiri and Mr. Abu Zubaydah have been subjected to demand full recognition of responsibility for the wrongs, truth telling, and 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>29</sup> and as a remedy<sup>30</sup> for the harm suffered, in addition to acknowledgement of the facts and acceptance of responsibility. While apologies cannot undo the pain of violations suffered by the victims and their family, formal acknowledgement by the state of its 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>31</sup> Indeed, in another CIA secret rendition case before the ECtHR (*El Masri v FYRM*),<sup>32</sup> the Former Yugoslav Republic of Macedonia issued a formal apology following the Committee of Ministers’ call for such a measure.<sup>33</sup>

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<sup>27</sup> Ibid, para. 12.

<sup>28</sup> Poland’s Action Plan for the implementation on Al Nashiri and Abu Zubaydah judgments, 2020, [https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:\[%22DH-DD\(2020\)100E%22\]](https://hudoc.exec.coe.int/eng#f%22EXEIdentifier%22:[%22DH-DD(2020)100E%22]).

<sup>29</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/remedyandrepairation.aspx> para. 22(e).

<sup>30</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>31</sup> See: ICT J, 2016, “What Makes a Public Apology Meaningful?”, <https://www.ictj.org/news/ictj-report-explores-apologies-past-abuses>.

<sup>32</sup> *El Masri v Former Yugoslav Republic of Macedonia*, Application no. 39630/09.

<sup>33</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#f%22EXEIdentifier%22:\[%22CM/Del/Dec\(2017\)1302/H46-29E%22\]](https://hudoc.exec.coe.int/ENG#f%22EXEIdentifier%22:[%22CM/Del/Dec(2017)1302/H46-29E%22]), para. 3.



#### d. Just Satisfaction

Finally, while the Court indicated payment of just satisfaction of EUR 100,000 to Mr. Abu Zubaydah, this payment has still not been made. The authorities have explained repeatedly that they considered themselves unable to make payment in the immediate aftermath of the judgement, given the applicant's wrongful inclusion UN sanctions list.<sup>34</sup> However, as made clear in previous Rule 9 submissions,<sup>35</sup> once he was successfully removed from both UN and EU sanctions lists, Poland should have made the payment.<sup>36</sup> The government has continued to insist that additional steps must be taken, involving claims being lodged with attendant formalities before Polish courts, which requires the release of documentation from Guantanamo that it has been practically impossible to secure given the extreme regime of secrecy in place. This was understood by the Court which adopted a flexible approach to the normal rules governing powers of attorney for example, whereas the government continues to repeat the same explanation without due accommodation.

Mr. Abu Zubaydah's counsel continues to take all possible steps to secure the release of the power of attorney from Guantanamo and to overcome the hurdles in the way of payment of just satisfaction. However, requiring the victim to engage in further legal proceedings to secure the payment of damages, which the government is obliged to execute without delay, poses an unreasonable burden on the applicant given his circumstances, as has been pointed out in Rule 9 submissions in the past.<sup>37</sup> The CM should insist that the government make the necessary payment of just satisfaction without delay and without imposing further unreasonable burdens on the applicant.

## 2. General Measures

### Supervision of Secret Services

In its decision of December 2020, the Committee called on Polish authorities to clarify how the new order of the Prime Minister establishing a Council of Ministers' Committee for National Security and Defence Affairs will increase democratic oversight over the intelligence services and to clarify whether the previous reflections to remedy certain deficiencies in this oversight remain ongoing.<sup>38</sup> Should the Committee of Ministers consider the strengthening of the supervision of the special services

<sup>34</sup> Communication from the authorities (20/07/2021) concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a34847](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a34847), p. 3

<sup>35</sup> Communication from an NGO (Human Rights in Practice) (06/02/2020) and reply from the authorities (13/02/2020) in the case of HUSAYN (ABU ZUBAYDAH) v. Poland (Al Nashiri group) (Application No. 7511/13), <https://rm.coe.int/native/09000016809c7872>, pp. 5-6.

<sup>36</sup> On 26th December 2017 Abu Zubaydah was removed from the UN Sanctions List by the Security Council, following a report by the UN Ombudsperson finding that he is not a member of al Qaeda and does not currently pose any risk that would justify his inclusion on that list. UN Security Council press release, <https://www.un.org/press/en/2017/sc13144.doc.htm>.

<sup>37</sup> Communication from an NGO (Human Rights in practice) (06/02/2020) and reply from the authorities (13/02/2020) in the case of HUSAYN (ABU ZUBAYDAH) v. Poland (Al Nashiri group) (Application No. 7511/13), <https://rm.coe.int/native/09000016809c7872>, pp. 5-6.

<sup>38</sup> 1390th meeting (1-3 December 2020) (DH) - H46-16 Al Nashiri v. Poland (Application No. 28761/11), [https://hudoc.exec.coe.int/eng#f1%22EXECIdentifier%22:f1%22CM/Del/Dec\(2020\)1390/H46-16E%22](https://hudoc.exec.coe.int/eng#f1%22EXECIdentifier%22:f1%22CM/Del/Dec(2020)1390/H46-16E%22)], para. 11.

as completed, as suggested in Poland's current Action Plan,<sup>39</sup> the Polish government must provide compelling information to the Committee.

In its July 2021 communication to the CM, Poland provides minimal information on the composition and tasks of the Council of Minister's Committee for National Security and Defence Affairs.<sup>40</sup> Those explanations cannot be regarded as satisfactory or convincing. The information provided by Poland does not refer to any specific action that has been taken to implement the ECtHR judgment and the CM's requested measures concerning the democratic oversight of intelligence services.

Also in its decision of December 2020, the Committee noted with concern the persistent lack of a clear message from the authorities at high level to the intelligence and security services as to the absolute unacceptability of and zero tolerance towards arbitrary detention, torture and secret rendition operations.<sup>41</sup> Polish authorities are still to deliver an unequivocal message in this respect and provide details about the measures taken or envisaged to acknowledge Poland's role in and responsibility for the human rights violations that occurred in these cases. The current Action Plan does not provide any such details.

## Conclusion

Poland's ongoing failure to conduct an effective investigation, to obtain reliable assurances from the U.S. that Mr. Al Nashiri and Mr. Abu Zubaydah 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 and Mr. Abu Zubaydah's torture, and to effectively pay the just satisfaction for the damages to Mr. Abu Zubaydah requires not only the Committee's ongoing enhanced supervision of these cases, but renewed and escalating pressure to push for the implementation of the ECtHR's judgments.

The Committee of Ministers should orally debate these cases against Poland, Romania 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>39</sup> Poland's Action Plan for the implementation on Al Nashiri and Abu Zubaydah judgments, 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD\(2020\)100E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD(2020)100E%22%7D%7D), p. 12.

<sup>40</sup> 1411th meeting (September 2021) (DH) - Rule 8.2a Communication from the authorities (20/07/2021) concerning the Al Nashiri group of cases v. Poland (Application No. 28761/11), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a34847](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a34847).

<sup>41</sup> 1390th meeting (1-3 December 2020) (DH) - H46-16 Al Nashiri v. Poland (Application No. 28761/11), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec\(2020\)1390/H46-16E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22CM/Del/Dec(2020)1390/H46-16E%22%7D%7D), para. 13.