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Communication from Poland concerning the cases of AL NASHIRI and HUSAYN (ABU ZUBAYDAH) v. Poland (Applications No. 28761/11, 7511/13)

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Réunion : 1302e réunion (décembre 2017) (DH)

Référence du point : Plan d'action

Communication de la Pologne concernant les affaires AL NASHIRI et HUSAYN (ABU ZUBAYDAH) c. Pologne (requêtes n° 28761/11, 7511/13) ***(anglais uniquement)***

Updated action plan [1]
as to the measures to comply with the judgments
in the cases of *Al Nashiri and Abu Zubaydah v. Poland*

Cases
Al Nashiri, application no. 28761/11, judgment of 24/07/2014, final on 16/02/2015
Abu Zubaydah, application no. 7511/13, judgment of 24/07/2014, final on 16/02/2015

Description of the cases
The cases concern allegations of torture, ill-treatment and secret detention of two men suspected of terrorist acts. The applicants alleged that they were held at a CIA "black site" at the respondent state's territory.

The applicants in the two cases are Abd Al Rahim Hussayn Muhammad Al Nashiri, a Saudi Arabian national of Yemeni descent who was born in 1965; and Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah, a stateless Palestinian, who was born in 1971 in Saudi Arabia. Both men are currently detained in the Internment Facility at the United States (the U.S.) Guantanamo Bay Naval Base in Cuba.

Mr. Al Nashiri has been suspected of the terrorist attack on the U.S. Navy ship USS Cole in the harbour of Aden, Yemen, in October 2000. He has also been suspected of playing a role in the attack on the French oil tanker MV Limburg in the Gulf of Aden in October 2002.

At the time of his capture, Mr. Husayn was considered by the U.S. authorities to be one of the key members of the terrorist network Al' Qaeda, who allegedly played a role in several terrorist operations, including planning the 11 September 2001 attacks. Since his capture in March 2002, he has not been charged with any criminal offence and remains in "indefinite detention" in Guantanamo. The only review of his detention was carried out by a panel of officials of a U.S. military tribunal in March 2007, which found that he was to remain in detention.

Both applicants alleged that they were victims of an "extraordinary rendition" by the U.S. Central Intelligence Agency (CIA), that is, of apprehension and extrajudicial transfer to a secret detention site in Poland with the knowledge of the Polish authorities for the purpose of interrogation, during which they were tortured. Both men stated that in December 2002 they were taken to Poland on board of the same "rendition plane".

Mr. Al Nashiri submitted that, having been captured in Dubai, the United Arab Emirates, in October 2002, and subsequently transferred to secret CIA detention facilities in Afghanistan and Thailand, he was brought to Poland on 5 December 2002. He was placed in a CIA secret detention facility and held there until 6 June 2003, when he was secretly transferred on board the rendition plane – with the assistance of the Polish authorities – to Morocco and, in

[1] Updated information submitted by Polish authorities on 28 September 2017 including new information, obtained after submission of the updated action plan of 23 March 2016 and the Government's communications of 17 May 2017 and 23 August 2017, which are presented in a bold type

September 2003, to the U.S. Naval Base in Guantanamo Bay. He was subsequently transferred to two other sites before eventually being moved back to Guantanamo Bay. According to Mr. Al Nashiri, he was subjected to torture and ill-treatment while being held in unacknowledged detention in Poland. In particular, so-called "enhanced interrogation techniques" (EITs) were used against him. He alleged that he was also subjected to "unauthorized" interrogation methods.

Mr. Al Nashiri maintained that, when he was transferred from Poland, there was no 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, an unfair trial and the death penalty when in U.S. custody. The US Government brought charges against Mr. Al Nashiri in June 2008 for trial before a military commission, but so far he has not been convicted and he remains in detention in Guantanamo Bay. The proceedings against the applicant already stated and all the documents related to the proceedings are available on the Military Commission's website: http://www.mc.mil/CASES/Militarycommissions.aspx

Mr. Husayn submitted that, having been seized in Pakistan in March 2002 and subsequently transferred to a secret CIA detention facility in Thailand, he was brought to Poland on 5 December 2002 where he was held in a secret CIA detention facility until 22 September 2003. He was then taken to Guantanamo Bay and subsequently to several secret detention facilities in a number of countries before being eventually transferred back to Guantanamo Bay.

According to his submission, Mr. Husayn was subjected to various forms of abuse and ill-treatment during his detention in Poland. According to Mr. Husayn's lawyers, communication with him is extremely restricted, making it impossible to pass on information or evidence directly from him to the European Court of Human Rights. The presentation of his case is principally based on publicly available sources.

Both Mr. Al Nashiri and Mr. Husayn noted, in support of their submissions, that the circumstances surrounding their extraordinary rendition have been the subject of various reports and investigations, including reports prepared by the Swiss Senator Dick Marty, in 2006, 2007 and 2011, as rapporteur for the investigation conducted by the Parliamentary Assembly of the Council of Europe into allegations of secret detention facilities being run by the CIA in several Member States (the "Marty Reports"). The Marty Reports detail an intricate network of CIA detention and transfer in certain Council of Europe Member States. Among other things, the reports identify the secret detention center in Poland as being located in the Stare Kiejkuty intelligence training base near the town of Szczytno in Northern Poland.

The submissions by Mr. Al Nashiri and Mr. Husayn were also based on various CIA documents that were disclosed to the public. In particular, the applicants relied on a report prepared by the CIA Inspector General in 2004 – "Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003". The report, previously classified as "top secret", was released by the U.S. authorities in August 2009 with large parts being blackened out. It shows that Mr. Al Nashiri and Mr. Husayn fell into the category of "High-Value Detainees" (HVD) – terrorist suspects likely to be able to provide

information about current terrorist threats against the United States – against whom the "enhanced interrogation techniques" (EITs) were being used.
The applicants' submissions also referred to a 2007 report by the International Committee for the Red Cross on the treatment of "High-Value Detainees" in CIA custody, based on interviews with 14 such detainees, including Mr. Al Nashiri and Mr. Husayn, which described the treatment to which they were subjected in CIA custody.

A criminal investigation in Poland against persons unknown concerning secret CIA prisons on Polish territory was opened in March 2008. It has been extended a number of times and remains pending.

Having regard to the evidence before it, the Court came to the conclusion that the applicants' allegations mentioned above were sufficiently convincing.

The Court found that the respondent state had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and it ought to have known that by enabling the CIA to detain the applicants on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

Therefore the Court held in both cases, that there had been:
- a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention, in both its substantive and procedural aspects;
- a violation of Article 5 (right to liberty and security);
- a violation of Article 8 (right to respect for private and family life);
- a violation of Article 13 (right to an effective remedy); and,
- a violation of Article 6 § 1 (right to a fair trial).

As regards Mr. Al Nashiri, the Court further held that there had been a violation of Article 2 (right to life) and Article 3 of the Convention taken together with Article 1 of Protocol No. 6 (abolition of the death penalty).

The Court also held that the respondent state did not comply with the Court's requests for the submission of evidence and, in consequence, failed to discharge its obligations under Article 38 – to furnish all necessary facilities for the effective conduct of an investigation.

I. Individual measures

1. Urgent individual measures concerning violation of Articles 2 and 3 of the Convention taken together with Article 1 of the Protocol No. 6 to the Convention in the *Al Nashiri* case and violation of Article 6§1 of the Convention in both cases.

A. <u>Talks with U.S. authorities' representatives</u>

The Polish Government undertook rapid individual measures in connection with the Court's judgment in case of *Al Nashiri v. Poland* even before the judgment became final.

Acting pursuant to Article 46 of the Convention and on the basis of paragraph 589 of the Court's judgment in the above case, the issue of providing guarantees by the Government of the U.S. that Mr. Al Nashiri would not be subjected to the death penalty was raised during a meeting between Undersecretary of State at the Ministry of Foreign Affairs of the Republic of Poland (hereinafter MFA), Mr. Artur Nowak-Far and Principal Deputy Legal Adviser of the Office of the Legal Adviser of the U.S. Department of state, Ms. Mary McLeod, which took place on 9 October 2014.

Subsequently, on 6 March 2015, when Polish MFA submitted a diplomatic note to the Embassy of the U.S. in Warsaw, a representative of the U.S. authorities assured Polish authorities that the requests expressed in the note would be taken into consideration.

On 13 May 2015 during a meeting at which a second diplomatic note was submitted by Polish MFA to the U.S. Embassy (please see below), Polish Government Co-Agent, Ms. Aleksandra Mężykowska in talks with Deputy Head of U.S. Mission to Poland, Mr. Douglas Greene, underlined the importance of the execution of the Court's judgments in both cases in particular with regard to urgent individual measures.

Polish MFA make efforts to include the issue of diplomatic guarantees and situation of the applicants into agendas of every relevant meeting with the U.S. counterparts.

B. <u>Diplomatic notes.</u>

Soon after the Court's judgments became final, the Polish Government has immediately undertaken further measures aiming at the execution of the obligations stemming from the Court's judgments.

On 6 March 2015, the Polish MFA, by a diplomatic note submitted to the Embassy of the U.S. in Warsaw, requested the U.S. Department of State to provide guarantees that the death penalty would not be imposed or carried out with respect to the applicant Mr. Al Nashiri who is under the U.S. jurisdiction.

On 2 April 2015, the U.S. Embassy in Warsaw by a diplomatic note sent to the Polish MFA confirmed that Poland's request of 6 March 2015 was transmitted to the relevant U.S. authorities.

On 13 May 2015, the Polish MFA submitted to the U.S. Embassy in Warsaw another diplomatic note. In this note the MFA requested the relevant U.S. authorities to provide guarantees that the death penalty would not be ruled or carried out with respect to applicant - Mr. Al Nashiri who is under the U.S. jurisdiction. The MFA also recalled that the issue of providing guarantees by the U.S. authorities was the subject of its previous diplomatic note (note no. DPOPC 432.390.2013 of 6 March 2015) and was also raised during bilateral consultations.

Moreover the MFA requested the relevant US authorities to provide guarantees that applicants Mr. Al Nashiri and Mr. Abu Zubaydah who find themselves under the jurisdiction

of the U.S., will not be deprived of the right to a fair trial while being exposed to the flagrant denial of justice.

C. A letter to American Ambassador to Warsaw

On 14 October 2015 Undersecretary of State at the Polish MFA, Mr. Artur Nowak-Far sent a letter to the Ambassador of the United States of America in Warsaw, M. Paul W. Jones, concerning the execution of the urgent individual measures stemmed from the above judgments.

In this letter Polish Minister reminded the U.S. Ambassador of the two diplomatic notes which were submitted to the U.S. Embassy in March and May 2015 respectively. He also informed the Ambassador that Committee of Ministers of the Council of Europe had already adopted three decisions on the state of execution of the urgent individual measures in the Al Nashiri group of cases.

In his letter Polish Minister highlighted that in its latest decision the Committee of Ministers had expressed its serious concern about the lack of response to these requests from the American side and had urged the Polish authorities to continue their efforts to obtain the necessary assurances, taking all possible steps in this respect and keeping the Committee informed of all developments. The Committee had also invited the Secretary General of the Council of Europe to transmit its decision to the Permanent Observer of the United States to the Council of Europe.

Moreover the Polish Minister informed the American Ambassador on the date of the next DH meeting to be held in December 2015 and asked him to cause action to ensure American authorities' cooperation with Polish authorities aimed at execution of the above judgments in accordance with the Committee's decisions.

Finally the Polish Minister once again requested the American Ambassador to cause the relevant U.S. authorities' action to provide guarantees that the death penalty would not be ruled or carried out with respect to applicant - Mr. Al Nashiri and that the applicants Mr. Al Nashiri and Mr. Abu Zubaydah who find themselves under the jurisdiction of the U.S., will not be deprived of the right to a fair trial while being exposed to the flagrant denial of justice.

Information obtained by the Government after submission of the updated action plan of 17 November 2015

D. Reply from the U.S. authorities

In response to the above letter the U.S. authorities confirmed that Polish authorities' request for diplomatic assurances related to a judgment of the European Court of Human Rights cannot be supported. According to the U.S. authorities the European Convention on Human Rights and decisions of the European Court of Human Rights do not necessarily reflect the obligations of the United States under international law.

Moreover the U.S. authorities informed that in their view both the military commissions and federal courts are appropriate for addressing the cases of Guantanamo Bay detainees in a manner that comports with all applicable international and domestic law.

Moreover the military commission proceedings at Guantanamo Bay incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3, Article 15 of *the Convention against Torture*, and other applicable law and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions.

Additionally the 2009 Military Commissions Act (MCA) provides for a number of safeguards including the presumption of innocence, the beyond-a-reasonable-doubt burden of proof standard, the right to counsel at government expense, the right to counsel "learned" in death penalty law and practice when the military commission is one empowered to adjudge the death penalty and the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review (USCMCR). A defendant also has a right to appeal a USCMCR decision to the U.S. Court of Appeals for the District of Columbia Circuit and may ultimately seek review from the U.S. Supreme Court. The MCA prohibits the use of statements obtained by either torture or cruel, inhuman or degrading treatment (10 U.S.C. § 948r (a)).

Additionally, international law does not prohibit capital punishment when imposed and carried out in a manner that is consistent with a state's international obligations.

The U.S. authorities informed also that the U.S. has many additional procedural protections for individuals facing capital punishment.

Moreover the U.S. authorities recalled that the US continues to have legal authority under the law of war to detain individuals who are part of or substantially supported Al-Quaeda, the Taliban, or associated forces until the end of hostilities, consistent with U.S. law and applicable international law.

Finally, detainees have the right to challenge the legality of their detention in the U.S. court through a petition for the writ of habeas corpus.

The Polish Government, having regard to the above information transmitted by the U.S. authorities as well as the judgments in the cases of Al Nashiri and Abu Zubaydah v. Poland, declares its readiness to repeat its requests to the Government of the U.S.

E. A Letter to the U.S. Deputy Secretary of State

In accordance with the Committee of Ministers decisions adopted in March and in June 2016 as well as Polish Government's commitment expressed in the action plan of 13 May 2016 Polish authorities renewed their request for diplomatic assurances for the applicants to the American side with engagement of the Chancellery of the President of the Republic of Poland, thus at the highest possible political level.

In his letter of 14 July 2016 the Secretary of State of the Chancellery of the President of the Republic of Poland, Minister Krzysztof Szczerski informed the Deputy Secretary of State of the United States of America, Mr. Antony J. Blinken that the above-mentioned European Court's judgments are binding upon Poland pursuant to Article 46 of the Convention on the Protection of Fundamental Rights and Freedoms.

Moreover the Polish Secretary of State recalled previous efforts of the Polish side such as diplomatic notes and the ministerial letter by which it informed the U.S. Embassy in Warsaw about the content of the Court's judgments as well as on the obligations stemming from them for Polish authorities.

The Secretary of State also reminded the American side on Polish requests to provide guarantees that the death penalty would not be imposed or carried out with respect to Mr. Al Nashiri and that both applicants, Mr. Al Nashiri and Mr. Abu Zubaydah, would not be deprived of the right to a fair trial.

Additionally Polish Secretary of State informed his American counterpart on the Committee of Ministers' decisions adopted on both judgments urging the Polish authorities to undertake concrete and urgent measures aimed at obtaining from the U.S. authorities the relevant diplomatic guarantees and to inform the Committee about any further developments concerning the case.

Polish side also recalled that the Committee called on the Secretary General and representatives of the Member States of the Council of Europe to raise the issue of diplomatic assurances in their contacts with the United States authorities. In its decision of 10 March 2016, the Committee also recalled that the United States has observer status with the Council of Europe and as such shares its ideals and values.

Polish side also stressed that the Committee considered that U.S. observer status encourage co-operation and urged the United States authorities to reconsider their response to the Polish authorities in the context of any future request for assurances.

Finally Polish side requested American support for the Government of Poland in the process of the execution of its international obligations stemming from Article 46 of the Convention with respect to the judgments of the Court by causing that appropriate U.S. authorities provide diplomatic assurances that the death penalty will not be ruled or carried out with respect to the applicant Mr. Al Nashiri. At the same time, it asked to cause that the appropriate U.S. authorities provide assurances to the effect that the applicants Mr. Al Nashiri and Mr. Abu Zubaydah who find themselves under the U.S. jurisdiction, will not be deprived of the right to a fair trial.

Finally Polish Secretary of State once again renewed the requests for diplomatic assurances for both applicants in the above-mentioned extent.

The U.S. Embassy in Warsaw by a diplomatic note of the 1st August 2016 formally confirmed the receipt of the Minister Krzysztof Szczerski's letter and made reference to its previous

diplomatic note of December 2015 containing the reply to the Polish Deputy Minister of Foreign Affairs' letter of October 2015. That note containing the American reply was described in detail at the action plan submitted by Polish authorities on 19 February 2016.

Nevertheless the above information included in the U.S.'s note of 1 August 2016 Polish side has awaited a substantive reply from the addressee of the letter, i.e. U.S. Deputy Secretary of State.

If no such reply will be given by the addressee of the above letter to its author in the near future, Polish side considers to renew its requests for diplomatic assurances for both applicants in the above-mentioned extent.

F. A Letter to the Assistant Secretary at the Bureau of European and Eurasian Affairs of the U.S. Department of State

In accordance with Polish authorities' commitment expressed in their action plan of 20 October 2016 as well as pursuant to par. 2 of the Committee Ministers' decision adopted in September 2016 Polish authorities renewed their request to the American side by a letter of 1 December 2016 of the Undersecretary of State of Polish Ministry of Foreign Affairs, Ms. Renata Szczęch to Ms. Victoria Nuland, Assistant Secretary at the Bureau of European and Eurasian Affairs of the U.S. Department of State.

In the above-mentioned letter Polish Minister renewed Polish authorities' request for diplomatic assurances for both applicants in the extent as it had been already presented in the context of the Minister of the Chancellery of the President of the Republic of Poland, Mr. Krzysztof Szczerski's letter to the U.S. Deputy Secretary of State, Mr. Antony J. Blinken of 14 July 2016. The content of that letter was presented in detail in the action plan of 20 October 2016 (DH-DD(2016)1164).

The U.S. Embassy in Warsaw responded to the above letter of Ms. Renata Szczęch by a diplomatic note of the 12 January 2017. By this note the U.S. Embassy formally confirmed the receipt of the Polish authorities' letter and made reference to its previous diplomatic note of 4 December 2015 which had provided the U.S. Government's position on the issues raised in the Polish Deputy Minister of Foreign Affairs' letter. That note had been described in detail at the action plan submitted by Polish authorities on 19 February 2016 (DH-DD(2016)191).

As it transpires from information presented above the U.S. Government's official position is constant regardless of the level of Polish authorities at which each of the letters were sent. All the responds were sent from the U.S. Embassy and not from the particular addressees of every letter. Therefore any possible future actions should be thoroughly thought but reflection on constructive solutions in such difficult situation needs time in particular in the context of changes in the U.S. administration after 20 January 2017.

With reference to the above Polish Government appreciates the commitment of the Secretary General of the Council of Europe on the matter of diplomatic guarantees for the

applicants and is looking forward to the response to his letter of 4 January 2017 from the U. S. authorities.

G. A meeting between Mr. Piotr Wilczek, Ambassador of the Republic of Poland in the United States of America and Mr. Joshua L. Dorosin Deputy Legal Advisor of the U.S. Department of State

In accordance with Polish authorities' commitment expressed in their latest action plan of 23 March 2017 as well as pursuant to par. 4 of the Committee Ministers' decision adopted in March 2017 Polish Embassy in Washington arranged a meeting on May 15th 2017, of Mr. Piotr Wilczek, Ambassador of the Republic of Poland in the United States of America and Mr. Joshua L. Dorosin Deputy Legal Advisor, who is responsible for this issues. He was accompanied by Mr. Ian McKay (responsible for contact with Periodic Review Board) and Ms. Amanda Wall (human rights expert) from the Office of Legal Advisor as well as Paul S. Veidenheimer and Sarah K. Becker from the European and Eurasian Office. In the Government's opinion the fact that Mr. Joshua L. Dorosin was accompanied by four experts proves that the U.S. authorities seriously treated Polish request for a meeting.

Polish Ambassador informed Mr. Joshua L. Dorosin that the above judgments of the European Court of Human Rights are binding upon Poland pursuant to Article 46 of the Convention on the Protection of Fundamental Rights and Freedoms and that the execution of the above judgments by Polish authorities is under supervision of the Committee of Ministers of the Council of Europe. The Ambassador also reminded that in the process of execution of the above judgments the Ministry of Foreign Affairs of the Republic of Poland in its diplomatic notes of 6 March and 13 May 2015 submitted to the United States of America's Embassy in Warsaw, requested the U.S. authorities to provide guarantees that the death penalty would not be imposed or carried out with respect to the applicant Mr. Al Nashiri who is under the U.S. jurisdiction and that both applicants, Mr. Al Nashiri and Mr. Abu Zubaydah who find themselves under the jurisdiction of the U.S., will not be deprived of the right to a fair trial. Similar requests for diplomatic guarantees for both applicants were also expressed in three letters sent from two Under Secretaries of State at the Polish Ministry of Foreign Affairs (on 14 October 2015 and on 1 December 2016) as well as in one letter sent by the Secretary of State at Chancellery of the President of the Republic of Poland (on 14 July 2016).

Additionally Polish Ambassador highlighted the important role attached to this issue by the Committee of Ministers of the Council of Europe and certain member states of the Council of Europe. He pointed out the possibility of the Polish authorities returning to these issues at the higher political level. Polish Ambassador also requested the U.S. authorities to provide as soon as possible response to presented by him information including information on current situation of the both applicants.

Mr. Joshua L. Dorosin underlined that the Department of State is aware of the Polish obligation to monitor the issue on a regular basis and to raise it in relation with the U.S. authorities. However he pointed out that there is a difference in the scope of international obligations as the U.S. is not a party to the European Convention, and in the United States

there is no ban on death penalty in the military court proceedings. The situation has not changed over the years, but it does not mean that this problem is not important for the US. He informed that the request for diplomatic assurances related to the judgments of the European Court of Human Rights cannot be supported.

In his opinion the applicants are not deprived of the right to a fair trial as military court proceedings are conducted in accordance with the U.S. standards including article 3 of the *Geneva Convention relative to the Treatment of Prisoners of War and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. He also pointed out that although the U.S. is not a party to *The Second Optional Protocol to the International Covenant on Civil and Political Rights* to a certain extent the U.S. standards go beyond the basic standards that apply in this respect. Therefore in the opinion of the Departament of State nothing indicate that the applicants rights are violated.

Mr. Joshua L. Dorosin informed that the American judicial system is aware of the seriousness of the issues pending before the Court in Strasbourg. Because of the Supreme Court's judgements (cases *Boumediene et al vs. Bush, Hamdi vs. Rumsfeld, Rasul vs. Bush, and Hamdan vs. Rumsfeld*), the practice and standards of treatment of Guantánamo detainees have improved as they can now pursue their rights concerning condition of their detention before the federal courts and they use this opportunity. Limiting the number of convicts sent to third countries also confirms that the United States treats military courts proceedings as a special solution.

Finally Mr. Joshua L. Dorosin asked to share with the Department of State information on the steps taken by the Council of Europe in this area.

H. A meeting between of Undersecretary of State of Polish Ministry of Foreign Affairs, Ms. Renata Szczęch and Mr. John A. Heffern Principal Deputy Assistant of the US Secretary of State for European and Eurasian Affairs of the U.S. Department of State.

In accordance with Polish authorities' commitment expressed in their latest communication of 17 May 2017 as well as pursuant to par. 2 of the Committee of Ministers' decision adopted in June 2017 Polish authorities arranged a meeting on June 5th 2017, of Undersecretary of State of Polish Ministry of Foreign Affairs, Ms. Renata Szczęch and Mr. John A. Heffern Principal Deputy Assistant of the US Secretary of State for European and Eurasian Affairs. He was accompanied by Ms. Sarah K. Becker from the European and Eurasian Office. The meeting mainly concerned possibility of obtaining by Poland diplomatic guarantees. Polish Undersecretary of State requested the U.S. authorities to provide guarantees that the death penalty would not be imposed or carried out with respect to the applicant Mr. Al Nashiri who is under the U.S. jurisdiction and that both applicants, Mr. Al Nashiri and Mr. Abu Zubaydah who find themselves under the jurisdiction of the U.S., will not be deprived of the right to a fair trial.

Mr. John A. Heffern underlined that in the opinion of the Law Division within the Department of State, military court proceedings are conducted in accordance with rules and standards of international law. Detainees have a right to start proceedings on a base of

habeas corpus for example: due to potentially inappropriate prison conditions. Moreover Mr. John A. Heffern pointed out that the position of the EU on death penalty is well known to American authorities. Nevertheless according to the U.S. authorities capital punishment is not prohibited in the international law and can be executed under certain conditions. He also informed that a diplomatic note referring to previous meetings with representatives of the Department of State is prepared within the Department of State.

I. Second reply from the U.S. authorities

In response to the Polish Government's position presented by Mr. Piotr Wilczek, Ambassador of the Republic of Poland in the United States of America on May 15th 2017 and by Undersecretary of State of Polish Ministry of Foreign Affairs, Ms. Renata Szczęch on June 5th 2017, the U.S. authorities by a diplomatic note of June 22nd 2017 referred to its diplomatic note of December 4th 2015 and confirmed that the Republic of Poland's request for diplomatic assurances related to the aforementioned judgments cannot be supported. Additionally the U.S. authorities reiterated that the European Convention on Human Rights and the decisions of the European Court of Human Rights do not necessarily reflect the obligations of the United States under international law.

The U.S. authorities informed that in their view both military commissions and federal courts are appropriate for addressing the cases of Guantanamo Bay detainees in a manner that comports with all applicable international and domestic law.

Moreover the military commission proceedings at Guantanamo Bay incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3, Article 15 of the Convention against Torture, and other applicable law and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions.

Additionally the 2009 Military Commissions Act (MCA) provides for a number of safeguards including the presumption of innocence, the beyond-a-reasonable-doubt burden of proof standard, the right to counsel at government expense, the right to counsel "learned" in death penalty law and practice when the military commission is one empowered to adjudge the death penalty and the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review (USCMCR). A defendant also has a right to appeal a USCMCR decision to the U.S. Court of Appeals for the District of Columbia Circuit and may ultimately seek review from the U.S. Supreme Court. The MCA prohibits the use of statements obtained by either torture or cruel, inhuman or degrading treatment.

Additionally, international law does not prohibit capital punishment when imposed and carried out in a manner that is consistent with a state's international obligations.

The U.S. authorities informed also that the U.S. has many additional procedural protections for individuals facing capital punishment.

Moreover the U.S. authorities recalled that the US continues to have legal authority under the law of war to detain individuals who are part of or substantially supported al-Qa'ida, the

Taliban, or associated forces until the end of hostilities, consistent with U.S. law and applicable international law.

Finally, detainees have the right to challenge the legality of their detention in the U.S. court through a petition for the writ of habeas corpus.

Additionally to the above information which was reiteration of the diplomatic note of December 4th 2015 the U.S. authorities provided information on the status of the relevant proceedings.

The U.S. authorities informed that Abd al-Rahim Hussein Muhammed Abdul al-Nashiri has been charged before Military Commission convened in accordance with the MCA. He was charged with perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel.

Moreover the U.S. authorities informed that these charges arose out of the applicant alleged role in an attempted attack on the USS THE SULLIVANS in January 2000, the attack on the USS COLE in October 2000, and the attack on the MV Limburg in October 2002. The case is currently in the pre-trial litigation phase, which has involved extensive briefing on pre-trial motions and the collection of discovery.

The U.S. authorities underlined that although Mr. Nashiri faces capital charges, if convicted, he would have the opportunity to present mitigation evidence at sentencing and the sentence would be within the discretion of the military commission, subject to legal limitations. Once the trail concludes, if convicted, Mr. Al Nashiri would have a right to appeal, first to the United States Court of Military Commission Review (an intermediate appellate court) and then to the Court of Appeals for the D.C. Circuit.

Referring to situation of Mr. Zayn Al-Ibidin Muhammed Husayn the U.S. authorities informed that the applicant is detained lawfully by the United States under the Authorization for the Use of Military Force, as informed by the law of war, in the ongoing conflict with al-Qa'ida, the Taliban, and associated forces.

Moreover under U.S. law, he may challenge the legality of his detention in U.S. court through a petition for the writ of *habeas corpus*. The U.S. authorities emphasized that Mr. Husayn, represented by counsel, has filed such a petition with the U.S. District Court for the District of Columbia, which is currently pending.

Additionally Mr. Husayn is also eligible for review by the Periodic Review Board (PRB), which is discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantanamo Bay remains necessary to protect against a continuing significant threat to the security of the United States.

According to the information provided by the U.S. authorities the PRB held a hearing for Mr. Husayn on August 23, 2016, and determined on September 22, 2016, that continued law of war detention remains necessary. Additionally the PRB conducted a file review of Mr.

Husayn and, on April 28, 2017, determined that no significant question has been raised as to whether his continued detention is warranted.

The PRB conducts full reviews of each eligible detainee every three years and conducts file reviews every six months between full reviews.

The U.S. authorities underlined that the PRB does not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment to support a determination that continued law of war detention is warranted, consistent with U.S. obligations under the Convention Against Torture.

Finally, the U.S. authorities informed that information on the case of Mr. Al Nashiri, including copies of motions and orders, is publicly available at www.mc.mil and information on the PRB, including unclassified summaries of the board's determinations, is publicly available at www.prs.mil.

As it transpires from information presented above the U.S. Government's official position is constant regardless of the way the Polish authorities are trying to contact American authorities. Nevertheless the Polish Government will continue its efforts to find a way of guaranteeing the rights of the applicants.

Finally, the Polish Government believes that constant efforts of various Polish authorities aiming at obtainment of diplomatic assurances from the American side sufficiently prove their determination in the full implementation of those judgments of the European Court of Human Rights which concern very complex and sensible questions.

2. Violation of Article 3 of the Convention in its substantive aspect as well as violations of Articles 5 and 8 of the Convention

A. Current situation of the applicants

1) Information obtained by the Government on 2 April 2015 are the following:

with regard to Mr. Abu Zubaydah

- the Combatant Status Review Tribunal (hereinafter the "CSRT") decided that the applicant fulfilled the criteria for being designated enemy combatant. In this context it should be underlined that this decision is of administrative nature and it is not a court judgment,
- since the applicant's detention no court proceedings have been conducted, no charges against him have been presented, no military legal-aid lawyer has been appointed for him,

with regard to Mr. Al Nashiri

- the applicant was detained in 2002 and transferred to Guantanamo in 2006. He was charged with: treachery and perfidy, wilful homicide of 17 US soldiers, terrorism, conspiracy

for terrorism and homicide, wilful grievous bodily harm, attack on civilians, attack on civilian targets, hijacking of ship or aircraft,
- according to US regulations, civil as well as military legal-aid lawyers were appointed for the applicant and at least one of them is a qualified counsel in cases where the accused face the death penalty,
- the applicant was served an indictment in English and Arabian,
- the proceedings against the applicant are continued and all the documents related to the proceedings are available on the Military Commissions' website: http://www.mc.mil/CASES/Militarycommissions.aspx
- hearings are public and broadcast live for: media and victims and their families in two spots at the US territory.

2) Information obtained by the Government on 30 October 2015 are the following:

In January 2015 American authorities changed the rules governing the recognition of proceedings before the military commissions as classified. According to the new rules information on tortures of the CIA prisoners are no longer classified. According to the Pentagon speaker information on the interrogation techniques of the former CIA prisoners and the conditions of their detention are no longer subject of the military commissions judges' decisions („military commission judges' protective orders").

But not all the prisoners' diaries will be declassified at the same time. The diaries will be declassified only at the prisoners' lawyers' requests. According to the information obtained, in the Guantanamo prisoners' lawyers opinion declassification of their clients' diaries is of a crucial importance for the proper preparation of the proceedings including motions for expert opinions or witnesses.

In April 2015 the judge, col. Vance Spath, conducting Mr. Al Nashiri's case ordered a brain magnetic resonance imaging test to be performed. However he did not indicate the date of the test and the Guantanamo base is not equipped with adequate medical equipment to perform such test. According to information obtained Mr. Al Nashiri's lawyers are of the opinion that as a consequence of several years in CIA prison the applicant has suffered a severe brain injury. Proving that could – according to one of the applicant's lawyers – exclude the possibility of execution of capital punishment in military conditions in case of such sentence will be issued.

On 15 April 2015 American authorities informed military commission on the possibility of quarterly talks of Mr. Al Nashiri with his family by „Direct Interactive Communication Experience" (DICE) system. The applicant availed himself of such opportunity on 18 January 2015 talking with his parents and three other family members for 30 minutes. But he did not take the advantage of the opportunities of subsequent talks which have been offered to him.

With reference to Mr. Abu Zubaydah according to information obtained by Polish authorities, as it was already stated above, since the applicant's detention no court proceedings have been conducted, no charges against him have been presented, no military legal-aid lawyer has been appointed for him.

3) Information obtained by the Government on 9 February 2016 are the following:

with regard to Mr. Abu Zubaydah

- since the applicant's detention no court proceedings have been conducted, no charges against him have been presented, no military legal-aid lawyer has been appointed for him;

with regard to Mr. Al Nashiri

- on 9 April 2015, as it was already presented above, the Military Commission ordered the Convening Authority, i.e. the detention facility authority, to provide Mr. Al Nashiri a magnetic resonance image (hereinafter the MIRI) of his brain for mitigation purposes;
- on 18 September 2015 the applicant's defense counsel requested the Commission to compel the Convening Authority (hereinafter the CA) to administer the previously ordered MIRI of the applicant's brain with the following requirements:
  - the MIRI be conducted in the defense counsel's presence and only after the defense counsel and Dr. Sondra S. Crosby meet with the applicant to prepare him for the MIRI,
  - the CA direct the MIRI technician adhere to specific, defense suggested methods and techniques of MIRI imaging, as listed in a memorandum to the CA,
  - the CA limit distribution of the results of the MIRI to the defense;

- on 2 October 2015 the U.S. Government requested the Commission to deny the defense counsel's motion as unripe, since when making a request for expert witnesses or specific resources, the defense must request the resources from the CA; if the request is denied by the CA, the defense can renew the request before the military judge, if the Commission finds the expert assistance or resources are relevant and necessary, the military judge can order the CA to provide the requested expert or resources; in the instant case the CA has not denied the defense's constructive request for specific resources, thus the issue is not ripe for resolution by the Commission, moreover in the Commission's opinion the defense's request to limit the distribution of the MIRI results to the defense is moot;
- on 20 January 2016 the defense counsel submitted the petitioner-appellant's brief in which it questioned a right to conduct a judicial proceedings against Mr. Al Nashiri before a Military Commission on the basis of *the Military Commissions Act;* the defense argued that the alleged offence took place before 9 September 2001; the above-mentioned document does not refer to the detention of Mr. Al Nashiri at the Guantanamo base, but to the place and authority which is competent to judge in the applicant's case; this request has been advocated by two amicus briefs: 1) from 14 retired generals and admirals of the US Army and 2) from Mr. David Glazier – law professor and commentator of military commissions.

4) Information obtained by the Government after submission of the updated action plan of 19 February 2016

with regard to Mr. Abu Zubaydah

- since the applicant's detention no court proceedings have been conducted, no charges against him have been presented, no military legal-aid lawyer has been appointed for him;

with regard to Mr. Al Nashiri

- since February 2016 there were no changes concerning the applicant's situation in the proceedings before the military commission;
- on 17 February 2016 three D.C. Circuit Court judges considered the question whether the proceedings against Mr. Al Nashiri should be continued before the military commission or the federal court. During the court's sitting the judges heard oral arguments in favor of the proceedings transfer to the federal court. There were indicated other cases of the proceedings concerning terrorists which were pending before the federal courts. There were arguments presented that at the time of the terrorists attacks in question the USA were not at war. The judges asked the government party for the grounds of conducting the proceedings before the military commission. Until May no decision has been made.

5) Information obtained by the Government after submission of the updated action plan of 13 May 2016

The Government would like to inform that it constantly monitors the situation of the applicants.

With regard to Mr. Abu Zubaydah, on 23 August 2016 an initial hearing concerning his motion for release from Guantánamo had been held before the Periodic Review Board. The hearing was held in order to establish whether the applicant would continue to pose a threat if released. It was the first public hearing of the applicant since his detention. A part of this hearing was broadcasted for the journalists and human rights organizations. Upon the request of the applicant the minutes of the part of the hearing held in camera were not make public.

The decision concerning the applicant's motion for release, which was expected within 30 days after the hearing, has not been published yet.

With regard to Mr. Al Nashiri it is worth to note the decision of the D.C. Circuit Court of 30 August 2016. By this decision the court adjourned consideration of the question whether the applicant's case should be decided by Military Commission or by the federal court until beginning of the proceedings and the ruling of military appeal authority.

Moreover on 9 June 2016 the U.S. Court of Military Commission Review decided to uphold the charges against Mr. Al Nashiri concerning his participation in the attack on the oil tanker MV Limburg.

The Government undertakes to seek further information concerning situation of the applicants and then forward it to the Committee of Ministers.

6) Information obtained by the Government after submission of the updated action plan of 20 October 2016

with regard to Mr. Abu Zubaydah

- since the applicant's detention no court proceedings have been conducted, no charges against him have been presented, no military legal-aid lawyer has been appointed for him;

with regard to Mr. Al Nashiri

- on 1 December 2016 the Military Commission judge denied the Defense's motion to strike the Prosecution Notice of intent to seek the death penalty on the basis of the Rules for Military Commission 1004(c)(2).(6),(8) and (11) for violation of the Ex Post Facto and for Due Process Clause;
- on 12 and 13 December 2016 the applicant was heard by the Military Commission;
- on 3 January 2017 the Military Commission's judge granted the Defense's motion to compel funding for Attorney Bernard Kleinman. In its motion the Defense stated that Mr. B. Kleinman's assistance during the interview of two witnesses who are subject to Special Administrative Measures at USP Florence ADX was necessary to secure its efficiency.

7) Information obtained by the Government after submission of the updated action plan of 23 March 2017

with regard to Mr. Abu Zubaydah

The Government have no information concerning possible trial or change of status of the applicant.

with regard to Mr. Al Nashiri

- On 8th February 2017 the applicant's defenders lodged a motion to release information about the use of data concerning mental health condition for extrajudicial (extortion) testimony. Medical data being incomplete and disordered prompted the applicant's defenders, to file a motion. The motion was denied.
- On 6th March the applicant was informed by the judge that he had a right to be present at each of his hearings before the Military Commission, but was not obliged to do so, what could have a negative impact on action taken by his defenders. Additionally the judge asked Mr. Al Nashiri whether he maintained his declaration that he did not expect scheduled breaks in prayer sessions what Mr. Al Nashiri confirmed.
- On 15th March Mr. Al Nashiri did not appear at the hearing.
- On 17th March dates for further hearings were scheduled for 2017: 31.07-04.08, 11-29.09, 6-17.11.
- On 29th March the judge denied the Defense motion in which the Defense "*alleges that "death is not an authorized punishment for crimes involving merely intentional murder or acts evincing wanton disregard for human life*". The Defense argued that

"*at the time the Accused is alleged to have committed the charged offenses, military courts "were not permitted to impose capital punishment for intentional murder or death resulting from inherently dangerous conduct*". In the justification, the judge underlined that the applicant is accused of war crimes and that "*The Commission finds that death was an authorized punishment for war crimes and grave breaches of the Geneva Conventions before the conduct alleged in the specifications".*

- On 11 April, Military Commission scheduled hearings for 2018: 16-26.01, 12-23.02, 5-23.03, 18.06-27.07, 13-31.08, 1.10-2.11.
- On June 7, the judge denied several defense motions for partial rejection of the charges because of limitation period.
- On July 7, the court ordered to suspend all the hearings due to Joint Task Force Guantanamo a new policy. According to a new policy the judges and their assistants are obliged to travel in one plane with other interested parties it is: victim family members, non-governmental organizations and witnesses. The court found new regulations as a danger to the judicial independence.
- On July 17, the prosecution motion to reconsider the court's order of July 7 has been granted and the proceedings was resumed.

3. Violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the applicants' grievances under Articles 3, 5 and 8 of the Convention

The applicants were awarded just satisfaction in the significant amounts by the Court.

Moreover Polish authorities instituted an investigation which is still pending inter alia due to the complexity of the case and obstacles to obtaining evidence. The subject will be developed under the section concerning effective investigation, below.

4. Violation of Article 3 of the Convention in its procedural aspect.

Domestic criminal proceedings.

a) <u>Information on the activities already undertaken and the activities planned for the future.</u>

- Information available until the beginning of August 2015:

In the course of a domestic investigation, the relevant prosecution authorities have recently conducted a number of activities, some of which are described below.

The authorities have procured Polish translations of numerous documents, in particular the available versions of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, the so-called Minority Report - Senate Select Committee on Intelligence Committee Study of the Central

Intelligence Agency's Detention and Interrogation Program – Minority and Additional Minority Views, the CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program, as well as English and French versions of the documents obtained from the Italian Party by way of international legal assistance.

Moreover, the Polish prosecution authorities have obtained media materials which were used for the purposes of the investigation. These materials may be important for ensuring the investigation is on the right track, and could prove useful in preparing further procedural activities planned for August and September.

Consultations with experts in various fields (including IT) have also continued.

The prosecution authorities have maintained contact and exchanged correspondence with numerous institutions and bodies.

It should be underlined that the four elements mentioned above do not reflect all efforts to collect full evidence in the case, which will allow taking the decision to move criminal proceedings to the next stage. In particular it is not possible to list all procedural activities that have been held in camera.

Neither it is possible to provide information about all procedural activities planned for the future together with their dates and nature, given the interest of the proceedings, practical considerations as well as the need to maintain discretion (for example, persons to be interviewed by the prosecution authorities should be the first to receive such information).

What can be reported is that the following procedural activities are planned for August and September 2015:

- further interviews witnesses including public officials ,
- soliciting opinions from experts in various fields,
- submission of further motions for international legal assistance,
- issuing reminders to the relevant foreign authorities about the submitted motions for international legal assistance,
- issuing reminders to the relevant entities about translations which are important for the investigation.

As was already stated in the initial information submitted to the Committee of Ministers on 15 May 2015, the prosecutor's assistant already started his work. His assistance will certainly increase the efficiency of the investigation.

- Information available until the beginning of November 2015:

Between the August and November 2015 two other witnesses were interviewed with the participation of the applicants' lawyers.

Consultations with experts in various fields (including IT) have been continued. Some data from the Police and mobile phones operators have been acquired.

Further translations of documents have been acquired.

The prosecution authorities have also maintained contact and exchange of correspondence with numerous institutions and bodies.

- Information available until the 26 January 2016:

- cooperation with the applicants' lawyers has been continued inter alia with regard to consideration of another evidence request submitted by Mr. Al Nashiri's lawyer on 10 December 2015;
- in January 2016 the prosecution requested the relevant authorities to submit whole documentation concerning the high-profile meetings between the representatives of the U.S. and Poland held in the years 2001-2003;
- the prosecution authorities have been in touch with numerous institutions and organs, f. ex. they submitted the reply to the Ombudsman's letter of 7 December 2015;
- the prosecution authorities have been assessing the materials which were submitted to them in terms of their usefulness for the investigation purposes, moreover on 7 and 20 January 2016 the prosecution replied to the persons who submitted letters containing information related to the subject of the proceedings;
- the prosecution authorities made a comprehensive analysis of the evidence requests submitted by the applicants' lawyers for their final evaluation;
- the prosecution authorities started preparations to submission to the relevant U.S. authorities the next comprehensive motion for international legal assistance;
- the prosecution authorities have been continuing activities aiming at obtainment a reply to the motion for international legal assistance addressed to Romania;
- the prosecution authorities have taken steps aiming at execution of the foreign motion for international legal assistance which is related to the subject of the proceedings.

- Information available until the 26 April 2016:

Between 22 January and 26 April 2016 the prosecution authorities conducted among others the following activities:

The prosecution authorities maintained contact and exchanged correspondence with institutions and organizations interested in monitoring the course of the proceedings including Polish Branch of Amnesty International.

The prosecution authorities submitted also a motion to the President of the Republic of Poland's Office for delivery of further documents concerning international relations and cooperation from the period of time connected to the subject of the proceedings. This request led to selecting of another group of materials. Currently there are un-going arrangements concerning the mode and timing of procedural use of these materials.

The investigation is currently pending in the Prosecutor Regional Office in Cracow which in accordance with the Law of 28 January 2016 on Prosecution (Journal of Laws of 2016 item

177) amending the structure of prosecution organizational units had replaced the former Cracow Appeal Prosecution. The investigation is prolonged until 11 October 2016.

According to information obtained from the prosecution authorities every effort is made in order to conduct the investigation thoroughly, timely and effectively despite the difficulties related to unprecedented nature of the matter of investigation as well as hitherto refusal of cooperation from the American side.

Concrete developments of the investigation to which refers the Committee of Ministers decision adopted during the DH meeting held between 8 – 10 March 2016 are dependent on the effects of the prosecution activities presented above as well as other activities planned for the further course of the proceedings.

- Information available until the 12 October 2016:

During the last few months the investigation was focused on procedural activities of classified nature. And because of that the results on these activities cannot be made public. These activities included considering of collected classified documents as well as hearings of persons obliged by law to keep secret.

Also the activities planned for the future which may have impact on the further course of the proceedings including their termination are focused on classified sources of evidence.

Currently Cracow Appeal Prosecution awaits for further acceptances of the relevant authorities for hearings of the witnesses who are obliged by law to keep the state secret.

More information about individual measures can be found in the Government's replies to the communications submitted to the Committee of Ministers by the Open Society Justice Initiative and Human Rights in Practice (DD(2015)585 and DD(2015)586.

- Information available until the 20 March 2017:

The prosecution authorities continue to carry out activities of classified nature and because of that the results of these activities cannot be made public in this document. These activities include inter alia hearings of persons obliged by law to keep a state secret. Additionally such hearings require consent of competent authorities. This question concerned three witnesses and two of them did not reach the decision yet.

Until the scheduled hearings will be completed – which cannot be carried out without the above-mentioned consents – it is not possible to determine, at least approximately, the expected date of completion of the investigation.

The nature of the activities planned, which concern classified information, does not allow to present more details.

Moreover the Government would like to inform that the following activities were recently carried out:

- hearing of the former Operation Commander of Armed Forces of the Republic of Poland (*były Dowódca Operacyjny Sił Zbrojnych RP*) as a witness,
- hearing of the former Head of the cabinet of the Chief of the State Protection Office (*były szef gabinetu Szefa Urzędu Ochrony Państwa*) as a witness,
- obtainment of translation of evidence documents from English into Polish,
- search at the Council of Ministers Office's archives,
- resuming Internet query on foreign proceedings concerning the applicants.

Due to the U.S. authorities' refusal to provide international legal assistance to Polish side prosecution authorities will examine the applicants' lawyers' proposals concerning alternative ways to process the actions which had been previously requested by them.

- Information available until the 6 June 2017:

The prosecution authorities continue to carry out activities of classified nature and because of that the results of these activities cannot be made public. These activities include inter alia hearings of persons obliged by law to keep a state secret. Such hearings require consent of competent authorities and such a consent was given recently by these authorities. At the moment there is one person to be heard, who is high ranking public officer.

Search at the Council of Ministers Office's archives has been completed and a group of documents has been given to prosecutor.

- **Information available until the 20 September 2017:**

The investigation is currently pending and National Prosecution Service decided to prolong the investigation until 11 February 2018.

The Government have to reiterate that the prosecution authorities continue to carry out activities of classified nature and because of that the results of these activities cannot be made public in this document as their disclosure could affect the accuracy of the investigation findings.

Due to the refusal of state authorities responsible for the protection of classified information, the former President and former Prime Minister may not be heard.

However after obtainment of proper consents there are conducted hearings of high ranking officer of the Foreign Intelligence Agency. The results of these hearings are crucial for further proceedings concerning the responsibilities of Polish officers of the Foreign Intelligence Agency.

The Regional Prosecutor in Cracow refused to present publicly the provision of a road-map for the steps to be taken, for the sake of investigation, but in the same time he stated that the road-map has been developed and is successively realized.

The prosecutor authorities acquainted themselves with the classified archival documents in the Council of Ministers Office. Subsequently in July 2017 copies of selected documents were transmitted to the Regional Prosecutor's Office in Cracow to be used in investigation. Currently obtained materials are analyzed.

The prosecution authorities continue to carry out internet query on foreign proceedings concerning the applicants. Recently a translation of selected publications has been obtained - relevant for determining the current situation of the applicants - and included into the case files.

Until the scheduled procedural activities of classified nature will be completed and an expert opinion in the field of international law will be prepared it is not possible to determine, at least approximately, the expected date of completion of the investigation.

b) Difficulties in obtaining legal assistance.

- Information available until the beginning of August 2015:

The prosecution authorities have submitted numerous motions for international legal assistance to the following parties:

1. Italy - the motion of 5 February 2014 concerning hearing of a witness, Mr. C. Fava and the securing of documents. The hearing was held on 18 November 2014; some materials were sent to the Polish party right afterwards, while remainder was received by the Polish prosecution authority conducting the investigation on 7 April 2015 through Italian and Polish central authorities (reminders were addressed by central authorities – inquiries of 23 April and 1 July 2014 concerning the hearing and reminder of February 2015 concerning the documents).

2. Lithuania - the motion of January 2014 for sharing the findings of a Lithuanian domestic investigation into same subject matter as the Polish one. Feedback was received on 10 March 2014, with more information exchanged at a meeting held on 16 April 2015.

3. Romania - the motion of January 2014 for sharing the findings of a Romanian domestic investigation into the same subject matter as the Polish one. To date no feedback was received. A reminder was addressed to the Romanian party in July 2015.

4. Switzerland - the motion of 26 March 2014 concerning among other things the hearing of a witness, Mr. Dick Marty. On 14 July 2014, the Cracow Appeal Prosecution was informed that Mr. Dick Marty took advantage of the immunity provided for in article 14 of *the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949*. The above mentioned motion was re-filed on 12 November 2014, this time supplemented by

possible interpretations of immunities enjoyed by the Council of Europe's parliamentarians, as well as by clear and concrete reasons for the Polish party's legitimate intentions. On 18 March 2015 the Cracow Appeal Prosecution received negative reply to its motion, identical with the previous reply.

5. United States - the following motions concerning international legal assistance were submitted to the US authorities:

- the motion of 18 March 2009 with questions about companies operating flights to Poland that are of interest to the investigation. A negative reply to this motion was received on 7 October 2009;
- the motion of 9 March 2011 for the hearing as witnesses of both applicants. To date no reply has been received;
- the motion of 24 May 2013 for the hearing of persons, believed to have been present in the Polish territory, as well as the release of documents. To date no reply has been received;
- the motion of 27 May 2013 for the delivery of documents and information that would enable the initial authentication of documents available on the Internet. To date no reply has been received;
- the motion of 2 September 2014 on basic issues related to the subject matter of the investigation. To date no reply has been received;
- the motion of 22 December 2014 requesting for the purposes of the domestic investigation - access to the original, full and uncensored version of the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency' s Detention and Interrogation Program and to the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program - Minority and Additional Minority Views, as well as to the CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program. To date no reply has been received;

The following reminders have been submitted to the US party with reference to the above-mentioned motions:

- letters of 25 July and 11 October 2012 concerning the motion of 9 March 2011 for international legal assistance; the matter was further discussed during the Polish-US consultations on 7-8 November 2012, at which the Polish party was told that proceedings concerning that motion were pending;
- subsequent reminders were sent by the letters of 30 January, 28 May, 5 December 2013 and 14 October 2014. To date no reply has been received;
- the matter of the above motions was discussed during bilateral consultations on 14-15 January 2014 with the participation of lawyers from the US Department of Justice and Department of State. The Polish party was assured that proceedings concerning the motions were pending;
- subsequent reminders were sent by the letter of 9 June 2014 and concerned the third motion of 24 May 2013, and the fourth motion of 27 May 2013;

- the matter of the above motions was also discussed during bilateral consultations on 2-3 December 2014. The Polish party was assured that proceedings concerning the motions were pending „at the highest level";
- once again the General Prosecution requested implementation of the five reminders (nos. 2 to 6) by the letter of 24 March 2015;
- the issue of implementation of all the motions was discussed at a videoconference with the US party on 23 April 2015;
- the subsequent reminder, sent by the letter of 22 June 2015, concerned the implementation of the five motions (nos. 2 to 6).

- Information available until the beginning of November 2015:

Polish prosecution authorities obtained feedback from American side to all its motions for international legal assistance. The feedback was negative.

- Information available until the end of April 2016:

The prosecution authorities submitted another, comprehensive application for international legal assistance to the relevant US authorities. This motion also includes the applicants' lawyers evidence initiative in a possible extent. The motion is also aimed at wide verifying the data on conducting the US HVD program outside the US operating in a public space. The motion includes also a postulate of admission to the activities apart Polish prosecutors also the applicants' lawyers.

The prosecution authorities conducted activities aimed at obtainment of reply from Romanian authorities to the motion for international legal assistance.

In connection with the execution of the motion for international legal assistance addressed to the United Kingdom (hereinafter the UK), Scotland, hearings of two witnesses were conducted. The hearings concerned functioning of the Szymany airport. Further hearings on this subject are already planned.

Moreover two new motions for international legal assistance were elaborated. The motions are addressed to the UK and the United Arab Emirates authorities. These motions concerned hearings of the witnesses, who could have information important for the case, in particular concerning American aircrafts, for which it was established that they used the Szymany airport in the period covered by investigation.

- Information available until the 12 October 2016:

The above-mentioned comprehensive application for international legal assistance to the relevant U.S. authorities submitted few months ago by Polish prosecution authorities was, as other similar applications, rejected.

Moreover the U.S. party replying to Polish application informed that any further motions concerning alleged CIA detention spots for persons suspected of terrorist activities will not be proceeded.

With regard to the above it should be underlined that implementation of the most of the applicants' lawyers' evidence motions depend on cooperation with the relevant U.S. authorities. Therefore Polish prosecution authorities plan to ask the applicants' lawyers to update their evidence motions pursuant to the current situation or to propose alternative ways of conducting the activities which were subjects of these motions.

- Information available until the 20 March 2017:

Polish authorities executed the Scottish request for international legal assistance.

However Polish requests for international legal assistance sent to Romania, United Kingdom and United Arab Emirates have not been implemented yet by these countries' authorities.

Moreover in order to clarify very complex nature of the present legal and factual situation prosecution authorities ordered to supplement an expert opinion in the field of international law.

- Information available until the 6 June 2017:

The investigation materials including classified materials are gradually given to the expert. According to him preparation of a written expert opinion would take a few months.

- **Information available until the 20 September 2017:**

The prosecutor authorities informed that in order to accelerate preparation of an expert opinion the review team of experts has been extended and the work of experts should be completed on October this year.

Despite the efforts of the prosecutors, Polish requests for international legal assistance sent to Romania, United Kingdom and United Arab Emirates have still not been implemented by these countries' authorities.

Polish prosecution authorities have established cooperation with the applicants' lawyers in terms of alternative ways of conducting the activities which were subjects of motions for international legal assistance submitted to relevant U.S. authorities. Recently one of the applicants' lawyers referred with a motion to prosecution authorities to prepare a written statement confirming the fact that the investigation is still pending which could be presented in the US court. At the moment the prosecution authorities asses the legal possibility of preparing such a document.

c) <u>Information on the applicants' lawyers acquaintance with the case-file</u>

- Information available until the beginning of August 2015:

The Government would like to state that cooperation with the applicants' lawyers continues. They have access to the unclassified case-file of the proceedings, while the classified case-

file is successively being made available to them. In recent months – May and June 2015 the applicants' lawyers had an opportunity to acquaint themselves with the case-file at the meetings held on the following dates:

- 6 May 2015 – Mr. Abu Zubaydah's lawyer, Mr. Bartłomiej Jankowski and agent substitute, Ms. Edyta Zalewska,
- 3 June 2015 – Mr. Bartłomiej Jankowski and Ms. Edyta Zalewska as well as Mr. Al Nashiri's lawyer, Mr. Mikołaj Pietrzak, and agent substitute, Mr. Paweł Osik (during that meeting the lawyers could also acquaint themselves with the classified materials),
- 30 June 2015 – Mr. Bartłomiej Jankowski and Ms. Edyta Zalewska (during that meeting the lawyers could also acquaint themselves with the classified materials);
- the next meeting was scheduled for 6 August 2015 for Mr. Mikołaj Pietrzak.

Moreover for 11 August 2015 one of the proceedings' activities with participation of the applicants' lawyers was scheduled.

- Information available until the beginning of November 2015:

The cooperation of the prosecution authorities with the applicants' lawyers was continued:

- at the meeting held on 6 August 2015 – Mr. Al Nashiri's lawyer, Mr. Mikołaj Pietrzak, and agent substitute, Mr. Paweł Osik acquainted themselves with the case-file including some parts of the classified materials,
- the applicants' lawyers did not appear at the above-mentioned meeting scheduled for 11 August 2015,
- on 18 August 2015 Mr. Abu Zubaydah's lawyer, Mr. Bartłomiej Jankowski acquainted himself with the case-file including some parts of the classified materials,
- in response to Mr. Al Nashiri lawyer's motion of 2 October 2015 the prosecution authorities copied and sent to him 7541 pages of documents which constituted almost whole unclassified part of the case-files,
- on 28 October 2015 a copy of the minutes of one of the witnesses' interview was also sent to one the applicants' lawyers.

- Information available until the end of April 2016:

Cooperation with the applicants' lawyers has been continued. On 18 February and 15 April 2016 the lawyers were granted access to further parts of the classified case-file. Moreover the prosecution authorities have been proceeded also procedural and formal motions filed by the applicants' lawyers.

- Information available until the 12 October 2016:

Once again it should be underlined that the applicants' lawyers have access to the case-file of the investigation including their classified part.

Moreover the applicants' lawyers each time are informed on the date of planned proceedings activities for which they have applied and have possibility to take part in these activities.

- Information available until the 20 March 2017:

It should be reiterated that the applicants' lawyers (including one substitute agent) have access to the whole case-file of the investigation including its classified part (the latter by prior appointment of the deadline at the Secretariat of the Regional (former Appeal) Prosecutor's Office in Cracow).

In this context it should be also underlined that the applicants' lawyers have a full knowledge on the domestic proceedings. They acquire copies of the documents from the case-file and they are kept informed on planned activities which had been previously requested by them. In case they are present at the investigation activities they can take active part in them f. ex. by directing questions to the witnesses.

Giving the applicants' lawyers the access to the materials of the investigation takes into account the need to protect the information collected in the course of the proceedings and is restricted in order to prevent possible disclosure of sensitive information to unauthorized persons.

Implemented in the above-mentioned way the need to ensure the proper conduct of investigation is related to the protection of the information which if made public could lead to disruption of the proceedings.

- **Information available until the 20 September 2017:**

The applicants' lawyers have constant access to the case-file of the investigation and could make marked photocopies of selected materials.

There were held consultation meetings with the applicants' lawyers, setting the steps for further procedural steps after the opinion in the field of international law would be submitted in writing. The applicants' lawyers did not submit supplementary questions to the experts, but they reserved the right to request a hearing after acquaintance with final findings.

d) Information to the Polish public on the investigation

In response to the Committee of Ministers' decision adopted in December 2015 the Polish Government would like to inform that on 28 January 2016 new *Law on Prosecution Office* was adopted.

Pursuant to Article 12 § 2 of the new law General Prosecutor and heads of prosecution organizational units or other empowered by them prosecutors may submit to the media information on pending preparatory proceedings or information concerning prosecution activities, excluding classified information, with a view to an important public interest.

The above law entered into force on 4 March 2016.

Due to the subject matter of the investigation and its personal scope the access of the media and the public to information on the proceedings is contingent upon strict rigors. However in cases of questions sent by media or NGOs Polish prosecution authorities give replies on the state of the investigation in a scope determined on the one hand by necessity of ensuring effectiveness of the proceedings and on the other hand by the need for transparency. At every such occasion it should be kept in mind that some information on the investigation belongs to the sphere of state security and as such shall not be made public.

With regard to the Committee of Ministers' decision adopted in December 2016 the prosecution authorities would like to inform that taking into account the nature of the case - the need to focus at the current stage of investigations on classified activities that are necessary to carry out the correct findings of facts - there is no concern as to the effectiveness of the investigation.

Moreover it should be underlined that the Cracow Regional Prosecution is constantly aware of the exceptional nature of the violations which are examined in the course of the domestic proceedings.

Finally the prosecution authorities would like to inform that the General Prosecutor decided to prolong the investigation until 11 September 2017.

5. Payment of just satisfaction.

    A. Internal consultations concerning payment to Mr. Abu Zubaydah.

On 3 March 2015 at Polish MFA took place a meeting aimed at determination of the question of payment to Mr. Abu Zubaydah. According to the UN Security Council 1333 (2000) resolution the applicant was listed as being associated with Al-Qaida, Usama bin Laden or the Taliban for "participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf, or in support of", "supplying, selling or transferring arms and related materiel to" or "otherwise supporting acts or activities of" Al-Qaida (QE.A.4.01) and Usama bin Laden. The decisions taken by the UN bodies were implemented by European Union through the Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network. In light of the above information it should be assumed that Mr. Abu Zubaydah was placed on the sanction list which prevents him currently from receiving the money awarded by the Court.

According to the above meeting's conclusions the Government Agent asked Ms. Geneviève Mayer, Head of the Department for the Execution of Judgments of the European Court of Human Rights, whether there was a possibility to consider depositing the just satisfaction awarded to the applicant by the Court in a designated Council of Europe's account.

On 20 March 2015 the Government received a reply from the Execution Department with some advice concerning the possible ways of payment the awarded sum to the applicant without creating a designated account at the Council of Europe.

B. Payment details.

The Government fulfilled its obligations concerning payment of the sums awarded by the Court in the above-mentioned judgments.

Mr. Al Nashiri

Pecuniary damage	Non-pecuniary damage	Costs and expenses	Total amount
-	100,000 EUR	-	**100,000 EUR**
Due on 16/05/2015			**Paid on 11/05/2015**

Mr. Abu Zubaydah

Pecuniary damage	Non-pecuniary damage	Costs and expenses	Total amount
-	100,000 EUR	30,000 EUR	**130,000 EUR**

Due on 16/05/2015

The amount of 30,000 EUR awarded as costs and expenses was **paid on 11/05/2015** to the applicant's lawyer.

With regard to the remaining **amount of 100,000 EUR** awarded by the Court as non-pecuniary damage, **on 13 May 2015** Polish MFA submitted a motion to the relevant domestic court to create a deposit account for the above amount with the court since domestic regulations do not permit payment of the awarded money to the applicant who is on the UN and EU sanction lists pursuant to paragraph 8(c) of Resolution 1333 (2000) as being associated with Al-Qaida, Usama bin Laden or the Taliban for "participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf, or in support of", "supplying, selling or transferring arms and related materiel to" or "otherwise supporting acts or activities of" Al-Qaida (QE.A.4.01) and Usama bin Laden. The decisions taken by the UN bodies were implemented by the European Union through the Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network. On 12 October 2015 the Warsaw-Śródmieście District Court issued a decision allowing the MFA's motion for payment of the just satisfaction awarded to the applicant to the court deposit account. However for this decision to become final the necessary condition is to serve it on the participant to the proceedings – i.e. Mr Abu Zubaydah in a language which he understands. Therefore the court's decision was translated into English. Subsequently the domestic court has started its efforts aiming at serving the decision on Mr. Abu Zubaydah. Because of the unusual status of the applicant's whereabouts – the U.S. Guantanamo Bay Naval Base in Cuba, the domestic court needed to establish the proper way of serving the decision on the applicant. For this reason the domestic court through Polish Embassy in Washington tried to obtain the answer on this issue from the relevant U.S. authorities. Polish Embassy in Washington contacted the U.S. authorities via diplomatic channels and subsequently by sending two diplomatic notes on 4 February and on 15 March 2016 respectively. In response to the above diplomatic notes on 6 April 2016 the U.S. Department of State informed Polish Embassy that American party is not entitled to forward of such documents to the applicant. The American party also adviced that Polish court's decision should be delivered to the applicant's lawyer and indicated that in the proceedings before the European Court the applicant's lawyer was Ms. Helen Duffy. The Polish MFA immediately forwarded the above-mentioned lawyer's contact data to the relevant domestic court. However this lawyer does not represent the applicant in the relevant domestic proceedings. Therefore Polish MFA also submitted to the court the contact data of American lawyer who most probably is in touch with the applicant – Mr Joseph Margulies. Polish lawyer, who represented the applicant in the proceedings before the European Court got the power of attorney from Mr. J. Margulies, but he couldn't get the applicant's power of attorney issued for Mr. J. Margulies since it was deposited in the U.S. in some kind of secret chancellery. Because of these obstacles the domestic court decided to serve the decision on the applicant in accordance with the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague Convention proceedings are pending. **On 28 July 217 the domestic court**

appointed a curator for the absent applicant as the above decision could not been served on the applicant himself in accordance with the Hague Convention.

II. General measures

1. Violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention in the *Al Nashiri* case and violation of Article 6§1 of the Convention in both cases.

Legislative measures

Taking into account the Committee of Ministers decision adopted at its 1243rd meeting held on 8-9 December 2015 which in para. 5 stated that:

"as regards the general measures, considered that most of the measures set out in the action plan do not address the root causes of the issues identified in the Court's judgments, namely the blatant disregard of the legal framework governing the actions of State agents, and urged the authorities to address these issues;"

The Government would like to present the following information.

Democratic control over Poland's special services is exercised by the Commission for Special Services of the Sejm, i.e. lower chamber of Polish Parliament as well as by domestic courts and prosecution offices.

- Parliamentary control

Basing on Article 95 par. 2 of the Constitution of the Republic of Poland Article 3.3 *of the Law of 24 May 2002 on the Internal Security Agency and the Intelligence Agency* (hereinafter the "ISAIA Act"), Article 3.3 of *the Law of 9 June 2006 on Military Counter-Intelligence Agency* (hereinafter the "MCA Act") and Article 5.2a of *the Law of 9 June 2006 on the Central Anti-Corruption Bureau* (hereinafter the "CAB Act"), so-called "pragmatic acts", provide that the activities of the heads of the special services – respectively – the Internal Security Agency (hereinafter the ISA), the Intelligence Agency (hereinafter the IA), the Military Counter-Intelligence Agency (hereinafter the MCA) and Central Anti-Corruption Bureau (hereinafter CAB) are controlled by Sejm.

The Sejm exercises its control via its Commission for Special Services (hereinafter the "CSS"). The Commission has among others the following control rights:
- acquaintance with information on particularly important events in the special services activities including those concerning suspicions of irregularities and violations of law by special services,
- giving its opinions on draft legislation concerning special services,
- giving its opinions on directions for special services' activities,
- consideration of annual reports by the heads of these services.

- Court and prosecution control

The court and prosecution control over special services is guaranteed by law. Its purpose is to prevent these services from abusing their powers with respect to individual civil rights and freedoms in connection with their duties and operations.

In this context it should be mentioned that on 15 January 2016 the amendment law on Police and some other acts was adopted by Sejm. This amendment was adopted in accordance with the Constitutional Court's judgment of 30 July 2014. In this judgment the Constitutional Court ruled that some legislative provisions regulating the collection of information on individuals in connection with operational activities carried out by the prosecution are unconstitutional.

This amendment introduced enhanced judicial and prosecution oversight of the operational activities of special services and increased the protection of the rights of individuals. In accordance with the new provisions the supervision is held from the initial stage of acquiring the consent to conduct operational control. Such operational control could be ordered or prolonged by court after the prior consent of prosecutor. Such oversight is executed by the obligation of informing the relevant prosecutor on the course and results of the control. There is also an obligation to inform on the control both chambers of the Parliament.

Moreover new provisions made more precise the catalogue of the offences justifying launching of operational control and determined the maximum time of such control. In order to execute the Constitutional Court's judgment the amendment law made also more precise the provisions governing destruction of the telecommunication and postal data which do not have any meaning for the authority conducting the proceedings and introduced unified rules of conduct of such data.

With regard to access of the entitled entities to the telecommunication data a judicial control was introduced. The entities entitled to acquire such data are now obliged to report to the court every six months the following information:

- number of cases involving acquiring of telecommunication, postal or Internet data during the last six months,
- a kind of such data,
- a kind of offences justifying requesting access to such data,
- number and kinds of cases justifying requesting access to such data.

In the frames of such control impartial court can acquaint itself with the materials justifying access to such data (judicial control includes also postal and Internet data).

Additionally, in accordance with the Constitutional Court's judgment there were introduced into the pragmatic acts some rules of conduct concerning treatment of the materials (which could include professional secrets) acquired in the frames of operational activities. The new provisions provide that in case of suspicion that materials acquired in the frames of operational control include information which constitute secrets relating to profession or professional position the court shall decide on its use of destruction.

In the opinion of the Government the above mentioned amendment act significantly elevates the standards of independent control of special services activities.

In addition to the above it is worth to mention the post of Coordinator of Special Services which is the Minister – a member of the Council of Ministers. One of the fundamental tasks and at the same time rights of the Coordinator is conducting a supervision and control over special services activities. The Coordinator is entitled to analyze and evaluate the execution by the special services their rights to interfere in the civil rights and freedoms in particular in the frames of conducting operational activities.

Moreover the new Coordinator who started his post on 18 November 2015 ordered the heads of the special services to hold the audit of the services also with regard to respect of human rights and fundamental freedoms. The results of this audit will be analyzed and this analysis will be the basis for further works in order to broaden the real control over the special services activities.

In accordance with recent information (received on 12 October 2016) the audit of the services has not been finished yet. However some analysis works have been already started. There have also been started some preliminary drafting works aiming at introducing legislative measures guaranteeing necessary protection of human and citizen rights and freedoms together with ensuring the highest possible standards of functioning of special services and undisturbed ability to perform its tasks in the field of national security.

The Government recognizes some shortcomings of operation of the current system of special services and intends to introduce in the near future improvements into this system. However, at the moment the Government cannot determine the scope of the planned adjustments, in particular whether the direction of these changes will lead to the establishment of an independent expert body supervising the decision process on activities of special services.

Nonetheless the Government intends to strengthen and broaden the powers of control and supervision over the activities of the special services. In this context it should be noted that under the consideration is the possibility to clarify the existing provisions concerning the principles of establishing cooperation by special services with the competent authorities and services of other states particularly by supplementing the principles of cooperation with the services of other countries with the statutory requirement to conclude the agreements in writing.

The Government would like to sustain the above statements and want to add that it recognizes some shortcomings of functioning of the supervision system over special services and intends to introduce in the near future (probably in a period of one year) improvements into this system.

However because of the current stage of the advancement of the conceptual work including elaboration of assumptions of the draft law as well as analysis of the current legal solutions and experience and a scope of the changes planned in the context of prevention of similar

violations in the future at the moment the Government cannot determine all essential details of the planned changes and the date of their adoption.

Moreover the Government would like to inform that the above-mentioned intensive conceptual work is aimed at elaboration of optimal solutions in the special services field. In particular it is planned to strengthen and refine the powers of control and supervision of the supreme organs of the Government directly supervising the activities of special services. These changes will be proceeded in such a way as to make the protection of human rights and freedoms more realistic while at the same time ensuring the highest standards of functioning of the special services.

The Government would like underline that on the one hand, the functioning of the special services is strictly related with assuring security for the society and, on the other hand, with the need to respect human rights, in particular those of a fundamental character, arising from the European Convention on Human Rights. Therefore, any changes in this area require detailed analysis, which should determine whether the proposed solutions will serve assumed objectives, while respecting human rights.

Implementing systemic changes in the special services also requires establishment of appropriate mechanisms to prevent human rights violations, both in terms of material and procedural aspects. It is obvious that conducting of such complex works, taking into account the human rights standards developed by the Court, is a long-term process. Hence the Government would like to develop and present concrete legislative solutions within a year time, as it was presented in information provided in March 2017.

Nevertheless the Government would like to inform that the reflection on the measures required to strengthen the supervision of the special services should be considered as completed. Intensive works are currently conducted on drafting comprehensive legal acts, containing detailed legal solutions aimed at assuring better functioning of the special services. These works are advanced in many aspect. However, taking into account the current stage of work, the interdependence of the various elements of the broad reform and consequently the continuous dynamic development of the final solutions, presentation of the results of these activities, will be possible once comprehensive and complementary drafts of legal acts will have been developed.

The Government undertakes to inform the Committee of Ministers on developments in the above matter.

Other measures

In order to avoid similar violations in future the Polish language versions of both judgments in the above cases have been disseminated through:

- the Ministry of Foreign Affairs' website

http://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/wybrane_orzeczenia_eptcz/tlumaczenie_na_jezyk_polski_wyrokow_w_sprawach_husayn__abu_zubaydah__oraz_al_nashiri_p__polsce

- the Ministry of Justice's website

http://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/index.html?ComplainantName=Al.%20Nashiri&ComplainantYear=0&CaseType=Decision%2cSentence
http://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/index.html?ComplainantName=Husayn%20(Abu%20Zubaydah)&ComplainantYear=0&CaseType=Decision%2cSentence

5. Violation of Article 3 of the Convention in its substantive aspect as well as violations of Articles 5 and 8 of the Convention

In order to avoid similar violations in future the Polish language versions of both judgments in the above cases have been disseminated through the Ministry of Foreign Affairs and the Ministry of Justice's websites under the above mentioned links.

6. Violation of Article 3 of the Convention in its procedural aspect.

The Government would like to inform that all the general measures undertaken in order to avoid in future similar violations of Article 3 of the Convention in its procedural aspect presented in the action plans concerning the *Kudła* group of cases and the *Dzwonkowski* group of cases are valid also for the *Al Nashiri* group of cases.

In order to avoid similar violations in future the Polish language versions of both judgments in the above cases have been disseminated through the Ministry of Foreign Affairs and the Ministry of Justice's websites under the above mentioned links.

7. Violation of Article 38 of the Convention

In order to avoid similar violations in future the Polish language versions of both judgments in the above cases have been disseminated through the Ministry of Foreign Affairs and the Ministry of Justice's websites under the above mentioned links.

Moreover, since the European Court's judgment states that Article 38 implies putting in place any such procedures as would be necessary for unhindered communication and exchange of documents with the Court, the Government started reflections on the possible solution of this issue.

Initial results of the above Government reflections are the following.

The Government analyses the possibility of amending the Code of Criminal Procedure (hereinafter the CCP). Currently the CCP includes provisions governing cooperation of the Republic of Poland with the International Criminal Court (hereinafter the ICC). These regulations include provisions governing proceedings in a case when implementation of the ICC's motion would be in breach with Polish legal order (Article 611 m of the CCP).

Moreover these regulations govern the situation in cases the ICC's motion would concern access to a document or other evidence containing classified information the reveal of which could endanger the security of the Republic of Poland (Article 611 o of the CCP).

The first analyses undertaken by the Ministry of Justice show that taking into account the differences between the procedures before the ICC and the European Court any possible amendments to the CCP would not lead to the execution of the discussed judgments.

What is more the Government would like to recall that in the proceedings before the European Court in cases of the Al Nashiri and Abu Zubaydah the problems with access to the documents did not emerge on the ground of the regulations contained in the CCP (having in mind that the relevant prosecutor issued appropriate decision allowing the European Court judges to be acquainted with the case-file) but stemmed from the way of possible further sharing of the classified information contained in these documents and possible processing of them by the European Court. In the opinion of Polish authorities the conditions of processing of classified information by the European Court did not give a guarantee that the materials would not be disclosed to the third parties.

Since there has not been in place a clear procedure governing the access and processing of classified information by the European Court there was a risk of infringement of Polish domestic provisions of the Law on the protection of classified information and in consequence of criminal responsibility of persons involved in the process. In view of the above information the Government undertakes to further analyze the possibility of introducing necessary amendments into relevant legal provisions, including the above mentioned Law on the protection of classified information.

At the same time it seems rational to simultaneously reflect under the auspices of the Committee of Ministers on the provisions governing the treatment of the Member States' classified information by the European Court. Since only such comprehensive regulation would be effective in practice.

With reference to the above the Government would like to draw the attention of the Committee of Ministers to the fact that in accordance with the conclusions of the meeting of the ECtHR's Chancellery with the Government Agents held on 5 December 2016 the Rules Committee had been asked to study the issue of provisions governing the treatment of the Member States' classified information by the European Court. The Rules Committee had been also asked to make a proposal to amend the Rules of Court in this field.

The Government Agents at the above-mentioned meeting underlined the concern to ensure that proceedings before the Court remain effective. In their opinion there was a need to reconcile the imperative of confidentiality and the right to adversarial proceedings.

Thus the Rules Committee would be studying the rules and practice of the EU courts and other relevant materials to see how the issue was dealt with in other institutions. States would be consulted in due course (new Rule 111). The issue was being treated as a priority within the Court.

During the above-mentioned meeting it was also added by a representative of the Court that the Court had been aware that there was a lacuna that must be filled, hopefully during 2017.

Therefore in the Government's opinion it seems to be reasonable to wait until the relevant procedure will be established with help of the Rules Committee and subsequently provide for its domestic procedure. Such a sequence of procedures is appropriate from the point of view of the need for adjustment of the domestic procedure to the anticipated ECtHR's one.

On September 2017 the Government referred to the Foreign Minister Advisory Committee (which is a permanent team of experts, including prominent representatives of law, especially international law) to prepare a legal opinion concerning the change of domestic procedures guaranteeing unhindered communication and exchange of documents with the European Court.

Additionally once the legal opinion is prepared the Government plans to organize a meeting of the working group to reflect on the most appropriate regulation of this issue. The working group should comprise representatives of Ministry of Justice, Ministry of Foreign Affairs, Ministry of Interior and Administration, Ministry of National Defense, National Prosecution Service, the Internal Security Agency, the Coordinator of Special Services.

III. Conclusions of the respondent state

With regard to the individual and the general measures the Government undertakes to inform the Committee of Ministers about progress made in this field.