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Contact: Zoe Bryanston-Cross
Tel: 03 90 21 56 92

Date: 28/10/2020

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Meeting: 1390th meeting (1-3 December 2020) (DH)

Communication from an NGO (Open Society Justice Initiative) (20/10/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1390^e réunion (1-3 décembre 2020) (DH)

Communication d'une ONG (Open Society Justice Initiative) (20/10/2020) relative à l'affaire Al Nashiri c. Roumanie (requête n°33234/12) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Open Society Justice Initiative



DGI

20 OCT. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

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

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

OCTOBER 2020

RULE 9 SUBMISSION

Executive Summary and Recommendations

This submission describes the Romanian government's ongoing failure to implement *Al Nashiri v. Romania*, a judgment delivered by the European Court of Human Rights on 31 May 2018, and responds to the government's communication of 29 September 2020.¹ The Open Society Justice Initiative served as co-counsel on behalf of Abd al Rahim Al Nashiri in proceedings before the European Court of Human Rights ("the Court").²

As explained below and in the Justice Initiative's [February 2020 submission](#) (annexed herein), all of the communications by Romania to date fail to demonstrate any action by the government with respect to: (1) establishing a timeline and deadline for finalizing its investigation; (2) seeking diplomatic assurances at high political levels against the risk of a flagrant denial of justice and the imposition of the death penalty; and (3) disclosing to all counsel for Mr. Al Nashiri the communications addressed from the Romanian government to the United States. In addition to these concerns, we are alarmed about the provisions related to the expiration of the statute of limitations, noted in the government's communication of 29 September.³ As well, as previously highlighted, the government's January 2020 communication suggests that amendments to the Criminal Code, including those related to the statute of limitation of certain crimes, have not been fully rejected and therefore remain pending. The entry into force of such amendments would seriously undermine the fight against impunity for serious human rights violations.

For these reasons, the Justice Initiative urges the Committee of Ministers to issue an interim resolution. The resolution should admonish the Romanian government for its failure to expeditiously comply with the Court's judgment and should instruct Romanian authorities to:

- Undertake specific measures to **promptly conduct an effective criminal investigation** into Romania's role in the CIA extraordinary rendition and secret detention program and the violation of Mr. Al Nashiri's rights, including but not limited to:
 - Disclosing the full terms of reference of the investigation to Mr. Al Nashiri's counsel as well as to the public;
 - Updating counsel for Mr. Al Nashiri on a regular basis on the status of developments in the pending investigation;
 - Declassifying materials of the investigation to the fullest extent possible, especially with regard to any procedural decisions made by the prosecutor;
 - Disclosing to counsel for Mr. Al Nashiri the investigative actions undertaken together with the anticipated time frame for future actions and completion of the investigation;
 - Providing a clear timeline for finalizing the investigation.
- **Seek reliable, specific, and binding diplomatic assurances from the U.S. authorities** that Mr. Nashiri will not be subjected to the death penalty and that he will not continue to be subjected to a flagrant denial of justice. An executive bilateral agreement between Romania and the United States would meet these requirements.

¹ 1390th meeting (December 2020) - Rule 8.2a Communication from the authorities (29/09/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12).

² Through litigation, research, advocacy, and technical assistance, the Open Society Justice Initiative strives to secure legal remedies for human rights abuses, and promote effective enforcement of the rule of law.

³ 1390th meeting (December 2020) - Rule 8.2a Communication from the authorities (29/09/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12), 1.

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- **Issue an official acknowledgement** from the highest level of the Romanian government that Romania hosted a secret CIA prison over 2003-2005.
- **Publicly disclose all communications to and from the U.S. government** in relation to the assurances relating to the death penalty as well as the flagrant denial of justice. At a minimum, these communications should be communicated to Mr. Al Nashiri's counsel so that counsel can monitor the Romanian government's compliance with the Court's judgment.
- With respect to the Committee of Ministers' March 2019 concerns about "amendments to the Criminal Code aimed at substantially reducing the limitation periods for a number of criminal offences, including torture," **keep the Committee of Ministers apprised of developments relating to modifications of relevant statutes of limitations.**

Status of Mr. Al Nashiri's military commission proceedings

After his capture by U.S. forces in 2002, Mr. Al Nashiri remains imprisoned in Guantanamo Bay, far away from his family, suffering severe post-traumatic stress disorder caused by his torture and abuse, exacerbated by an endless cycle of filings, motions, hearings and orders that appear to go nowhere. The Justice Initiative notes the following developments since its previous submission:

- As noted, the D.C. Circuit's April 2019 ruling paved the way for proceedings in Mr. Al Nashiri's case to resume. Army Col. Lanny Acosta has been assigned as the new military judge and a new learned counsel has been appointed to represent Mr. Al Nashiri. Notably, however, the hearing that was scheduled for April 6-10, 2020, did not occur. Many of the hundreds of motions and orders the D.C. Circuit threw out will have to be re-litigated. No trial date has been set and none is expected in the near future.
- In the U.S., so far, no hearings are planned for this year or next and no one has been able to visit Mr. Al Nashiri since February 2020. In Guantanamo Bay, Mr. Al Nashiri is not provided with privileged telephone calls and, therefore, Mr. Al Nashiri and his counsel have been able to communicate only by exchanging letters.

These developments provide further evidence that the U.S. government has failed to ensure that any trial for Mr. Al Nashiri will be fair. In addition:

(1) Romania's inadequate effort to seek diplomatic assurances

In its September 2020 communication, the Romanian government is silent as to the implementation of its obligation to seek diplomatic assurances from the U.S. authorities that Mr. Al Nashiri will not be subjected to the death penalty and that he will not continue to be subjected to a flagrant denial of justice. This strongly suggests that the Romanian government has made no progress in this respect. The government must continue to seek assurances that Mr. Al Nashiri is not subjected to a flagrant denial of justice and the death penalty, as the Court's 2018 judgment requires.

The Justice Initiative repeats here its prior observation—still true—that the Romanian government's 24 April 2019 Action Plan indicates that its attempts to seek diplomatic assurances from the U.S. authorities have been, at best, *pro forma*. The government continues to rely, for instance, on the U.S. government's incorrect position that the Military Commissions Act prohibits the use of statements obtained by either torture or cruel, inhuman or degrading

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treatment. The Committee's suggestion that the Romanian government jointly pursue the assurances with the Polish government is also still not happening. The Action Plan notes that "[c]oordination with the Polish authorities, as suggested by the Committee, *is also considered, where possible*, during such diplomatic undertakings" (emphasis added), indicating that such coordination remains an unrealized possibility.⁴ No updates regarding such joint activity have been reported.

(2) Romania's failure to conduct an effective investigation

There continues to be no meaningful progress in the investigation, and Mr. Al Nashiri has been provided with no substantial update on the status of the investigation since the Court's judgment. The updates provided in Romania's 29 September communication regarding the activities in the criminal investigation carried out in case file no. 512/P/2012 can hardly be considered "developments."⁵ While the communication notes that, "In the coming period, the judicial authorities have planned further hearings of persons which have held important management positions in the Romanian state and, according to the evolution of the evidentiary material, a solution in the file shall be adopted,"⁶ no concrete information regarding the timeline for these hearings and the deadline for the adoption of a solution is provided.

Furthermore, the Romanian government states that "Presidential Decrees no. 195/2020 and 240/2002 [sic] (declaring the state of emergency) provided, *inter alia*, the suspension of criminal investigations and of the statute of limitations for criminal liability."⁷ This suspension expired five months ago, however, on 14 May 2020, when the state of emergency was terminated.

The lack of concrete progress and commitment to an explicit timeframe regarding the investigation is characteristic of the general approach that the Romanian government has adopted in respect to this investigation. The Justice Initiative recalls that over the course of an entire year (2018), the government only interviewed two people. Since then there has been no information regarding other hearings. This silence clearly indicates the government's failure to hold other hearings.

The Romanian government's April 2019 Action Plan⁸ has also not been updated and, thus, the current plan still includes no new information as to the measures it has taken or intends to take to complete the investigation. It remains remarkable that eight years since the investigation was opened, no suspects have been identified. The investigation's lack of progress clearly indicates a lack of political will to identify those responsible for the human rights violations associated with Romania's hosting of the CIA prison.

(3) Romania's inadequate supervision of intelligence services

The communication of January 2020 from the Romanian authorities suggested that supervision over Romanian intelligence services has been strengthened on account of Romania being a member of the European Union and of NATO. The communication of 29 September further elaborates on the legislative framework regarding the oversight, scrutiny and control of the

⁴ Action plan (18/04/2019) - Communication from Romania concerning the case of Al Nashiri v. Romania (Application No. 33234/12), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680941bc4.

⁵ 1390th meeting (December 2020) - Rule 8.2a Communication from the authorities (29/09/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12), 1.

⁶ Ibid.

⁷ Ibid, 2.

⁸ Action plan (18/04/2019) - Communication from Romania concerning the case of Al Nashiri v. Romania (Application No. 33234/12), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680941bc4.

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activities carried out by national intelligence services.⁹ However, it is worth pointing out that all the legal provisions and measures cited in the September 2020 communication pre-date the European Union's technical note of 22 October 2019¹⁰ and the November 2018 report that the EU's technical note cited, which highlighted that "it is clearly important to ensure a framework where the intelligence services are under proper supervision, where crimes can be effectively sanctioned while fully respecting fundamental rights [...]." The European Union's technical note further cited a Constitutional Court decision in noting that there remains a need for the Romanian Parliament to strengthen its control over the intelligence services. For these reasons, the Justice Initiative continues to be seriously concerned about the effective supervision of Romania's intelligence services.

Conclusion

The communications provided by Romanian authorities to the Committee of Ministers, including the most recent communication of 29 September 2020, indicate that the Romanian government has grievously failed to take seriously its obligation to conduct an effective investigation. This failure, combined with Romania's shockingly inadequate concern for Mr. Al Nashiri's fundamental rights, requires the Committee of Ministers' ongoing, enhanced supervision of this judgment. The Justice Initiative further respectfully requests that the Committee issue an interim resolution in this matter.

CONTACT INFORMATION FOR THIS SUBMISSION

Amrit Singh: amrit.singh@opensocietyfoundations.org

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, The Hague, Cape Town, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.

⁹ 1390th meeting (December 2020) - Rule 8.2a Communication from the authorities (29/09/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12), 3-8.

¹⁰ European Commission, 'Commission Staff Working Document, Romania: Technical Report, accompanying the document: Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, SWD(2019) 393 final, 22 October 2019, 12. See at footnotes n61; n62.

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Contact: John Darcy
Tel: 03 88 41 31 56



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Meeting: 1369th meeting (March 2020) (DH)

Communication from an NGO (Open Society Justice Initiative) (12/02/2020) in the case of Al Nashiri v. Romania (Application No. 33234/12)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1369^e réunion (mars 2020) (DH)

Communication d'une ONG (Open Society Justice Initiative) (12/02/2020) relative à l'affaire Al Nashiri c. Roumanie (requête n° 33234/12) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS COUNCIL OF EUROPE

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

FEBRUARY 2020

DH-DD(2020)176: Rule 9.2 Communication from an NGO in *Al Nashiri v. Romania*.
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Executive Summary and Recommendations

This submission describes the Romanian government's failure to implement *Al Nashiri v. Romania*, a judgment delivered by the European Court of Human Rights on 31 May 2018. The Open Society Justice Initiative served as co-counsel on behalf of Abd al Rahim Al Nashiri in proceedings before the European Court of Human Rights ("the Court").¹

In *Al Nashiri v. Romania*, the Court held that Romania had violated Articles 2, 3, 5, 6, 8, and 13 of the European Convention on Human Rights ("the Convention") and Article 1 of Protocol No. 6 to the Convention by participating in the extraordinary rendition and secret detention of Mr. Al Nashiri in a secret CIA prison on Romanian soil, and by failing to conduct a prompt, thorough, and effective investigation into serious violations of human rights.²

The Court further concluded that Mr. Al Nashiri's transfer from Romania exposed him to a serious risk of being subjected to the death penalty and to a flagrant denial of justice due to the possibility that he would face trial before a U.S. military commission. The applicant, currently detained in the Guantanamo Bay Naval Prison, has been charged with capital offences before a U.S. Military Commission. The Court's ruling requires the Romanian government to seek diplomatic assurances from the U.S. authorities that Mr. Al Nashiri will not be subjected to a flagrant denial of justice or the death penalty.

On 8 February 2019 a communication from the Romanian authorities to the Committee of Ministers on the individual measures in the case of *Al Nashiri v. Romania* was published. On 24 April 2019 the Romanian authorities submitted its Action Plan. On 22 January 2020, the Romanian government supplemented the Action Plan with an additional communication.³ All of these communications fail to demonstrate any action by the Romanian government in respect of the following:

- **Timeline and deadline for finalizing investigation:** The Communication fails to express a commitment to complete the investigation, and lacks a clear and specific timeframe and deadline by which the investigation— now pending for **almost eight years**⁴— will be finalized. Although the applicant case provided a Romanian address in his criminal complaint, he has not been informed of any developments in the investigation since the Court's judgment.
- **Diplomatic assurances:** The Communication does not explain how and when the Romanian government will seek diplomatic assurances at high political levels against the risk of a flagrant denial of justice and the imposition of the death penalty. There is equally no commitment to disclose to all counsel for Mr. Al Nashiri the communications addressed from the Romanian government to the United States.

We are concerned that the January 2020 communication suggests that amendments to the Criminal Code, including those related to the statute of limitation of certain crimes, remain under consideration. It is clear that the entry into force of such amendments would seriously undermine the fight against impunity for serious human rights violations.

¹ Through litigation, research, advocacy, and technical assistance, the Open Society Justice Initiative strives to secure legal remedies for human rights abuses, and promote effective enforcement of the rule of law.

² *Al Nashiri v. Romania*, (App no. 33234/12), ECtHR, 31 May 2018.

³ 1369th meeting (March 2020) (DH) - Rule 8.2a Communication from the authorities on individual and general measures (21/01/2020) in the case of *Al Nashiri v. Romania* (Application No. 33234/12)

⁴ The Applicant filed a criminal complaint with the Romanian Prosecutor General on 29 May 2012. *Al Nashiri v. Romania*, (App no. 33234/12), ECtHR, 31 May 2018, paras. 171-72.

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The communication of January 2020 from the Romanian authorities also suggests that supervision over Romanian intelligence services has been strengthened on account of Romania now being members of the European Union and of NATO. However, serious concerns remain about the supervision of intelligence services. The European Union's technical note of 22 October 2019⁵ cited a report from November 2018 which highlighted that 'it is clearly important to ensure a framework where the intelligence services are under proper supervision, where crimes can be effectively sanctioned while fully respecting fundamental rights [...]'. The European Union's technical note further cites a Constitutional Court decision in noting that there remains a need for the Romanian Parliament to strengthen its control on the intelligence services.

In light of the above, we reiterate that the Romanian authorities should expeditiously:

- Issue an official acknowledgement from the highest level of the Romanian government that Romania hosted a secret CIA prison over 2003-2005.
- Undertake specific measures to promptly conduct an effective criminal investigation into Romania's role in the CIA extraordinary rendition and secret detention programme and the violation of Mr. Al Nashiri's rights, including but not limited to:
 - Disclosing the full terms of reference of the investigation to Mr. Al Nashiri's counsel as well as to the public;
 - Updating counsel for Mr. Al Nashiri on a regular basis on the status of developments in the pending investigation;
 - Declassifying materials of the investigation to the fullest extent possible, especially with regard to any procedural decisions made by the prosecutor;
 - Disclosing to counsel for Mr. Al Nashiri the investigative actions undertaken together with the anticipated time frame for future actions and completion of the investigation.
- Seek reliable, specific, and binding diplomatic assurances from the U.S. authorities relating to the death penalty and flagrant denial of justice. An executive bilateral agreement between Romania and the United States would meet these requirements.
- Disclose to Mr. Al Nashiri's counsel all communications to and from the U.S. government in relation to the assurances relating to the death penalty as well as the flagrant denial of justice so that counsel can monitor the Romanian government's compliance with the Court's judgment.
- With respect to the Committee of Minister's March 2019 concerns about "amendments to the Criminal Code aimed at substantially reducing the limitation periods for a number of criminal offences, including torture," keep the Committee of Minister apprised of developments relating to further judicial review of amendments to relevant statutes of limitations.
- Publicly disclose all communications to and from the U.S. government in relation to the assurances relating to the death penalty as well as the flagrant denial of justice.

⁵ European Commission, 'Commission Staff Working Document, Romania: Technical Report, accompanying the document: Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, SWD(2019) 393 final, 22 October 2019, 12. See at footnotes n61; n62.

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Status of Mr. Al Nashiri's military commission proceedings

Mr. Al Nashiri was captured by the US in 2002 and was charged for trial by military commission in 2008. Yet, almost 18 years since his capture, it is still unclear when a trial will be held in his case while he remains under threat of the death penalty. He remains imprisoned in Guantanamo Bay, far away from his family, suffering severe post-traumatic stress disorder caused by his torture and abuse, exacerbated by an endless cycle of filings, motions, hearings and orders that appear to go nowhere.

Moreover, as recognised by the European Court, the military commission does not possess “guarantees of impartiality and independence” and torture evidence can be admitted in these proceedings.⁶ Though the Military Commissions Act appears to prohibit the use of evidence tainted by torture and cruel, inhuman, and degrading treatment, the military commissions do, in fact, allow torture evidence. This is in part based on how this statutory prohibition has been interpreted in the binding Rules for Military Commissions, which only technically prohibit the use of statements by an accused taken “under” torture. As a practical matter, that means torture evidence is only inadmissible if the statement was taken from the accused while he was being tortured. Statements taken later, including the same day and to the same interrogators, have been ruled to be admissible so long as the accused cannot show that those specific statements were not made “involuntarily.” Furthermore, the secrecy rules, allow the prosecution to withhold evidence if it is secret, and the hearsay rules allow the prosecution to admit unsworn statements given by third-parties, furthering weakening protections for the accused. In Mr. Al Nashiri's case, all of these rules are expected to be utilized.

The facts of Mr. Al Nashiri's military commission proceedings demonstrate that he remains at risk of being subjected to a flagrant denial of justice:

- On October 6, 2017, the civilian lawyers representing Mr. Al Nashiri in military commission proceedings refused to continue in the case as the result of repeated government interference with the defense, including denial of access to the client, searching confidential attorney-client materials, and hiding microphones in the defense interview rooms. The refusal of the civilian lawyers to continue left Mr. Al Nashiri without learned counsel.
- On February 16, 2018, the case was abated until a higher court can rule on whether the lawyers should be permitted to leave the case. No pre-trial hearings have been held in the case since that date.
- On April 16, 2019, United States Court of Appeals for the D.C. Circuit granted a defense writ and ruled that all the more than 460 orders that the military commission judge, Colonel Spath, had made between November 19 2015 and the present, as well as all orders from the Court of Appeals for the Military Commission, be vacated. The court found that Col. Spath's employment application with the Justice Department created a conflict of interest because the Justice Department lawyers were active participants in Mr. Al Nashiri's case. Further, despite the Justice Department's knowledge of the judge's assignment to Mr. Al Nashiri's military commission, this information was never disclosed to the defense team.
- The D.C. Circuit's ruling paved the way for proceedings in Mr. Al Nashiri's case to resume. Army Col. Lanny Acosta has been assigned as the new military judge and a new learned

⁶ *Al Nashiri v. Romania*, para 719.

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counsel has been appointed to represent Mr. Al Nashiri. The next hearings in his case are scheduled for April 6-10, 2020. Many of the motions and orders that the DC Circuit threw out will now have to be re-litigated. No trial date has been set and none is expected in the near future.

These developments provide further evidence that the U.S. government has thus far failed to ensure that any trial for Mr. Al Nashiri will be fair. The Romanian government must continue to seek assurances that Mr. Al Nashiri is not subjected to a flagrant denial of justice and the death penalty.

Romania's obligation to seek and obtain assurances relating to the death penalty and the flagrant denial of justice

The Court found that Romania violated Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 by enabling Mr. Al Nashiri's transfer from Romania, despite the substantial and foreseeable risk that he could be subjected to the death penalty following his trial before the military commission.⁷ The Court noted that "[e]ven though the proceedings against him before the military commissions are still pending and the outcome of the trial remains uncertain, that risk still continues."⁸ Accordingly, the Court required the Romanian government "to endeavour to remove that risk as soon as possible, by seeking assurances from the US authorities that [Mr. Al Nashiri] will not be subjected to the death penalty."⁹ The Court also found that Romania had violated Article 6 §1 of the Convention by enabling his transfer from Romanian territory despite the existence of a real risk that he could face a flagrant denial of justice in a trial by military commission.¹⁰ Developments in Mr. Al Nashiri's military commission proceedings reiterate the need to seek relevant diplomatic assurances.

Romania's inadequate effort to seek diplomatic assurances

The Romanian government's 24 April 2019 Action Plan indicates that its attempts to seek diplomatic assurances from the US authorities have been, at best, *pro forma*. Pursuant to the Action Plan, the Romanian government sent "a *note verbale* approved in January 2019... to the US Embassy in Bucharest" (although the date on which the *note verbale* was sent is not indicated in the Action Plan), and, apparently, officials from the Romanian embassy to the US met with officials from the US government on March 13, 2019.¹¹

The Romanian government's January 2020 communication notes that the U.S. Department of State has stated that the Military Commission Act (the MCA) prohibits the use of statements obtained by either torture or cruel, inhuman or degrading treatment (10 U.S.C. §948r(a)), except as evidence against a person accused of torture or such treatment as evidence that the statement was made. The U.S. government's position is incorrect. As explained above (and in Mr. Al Nashiri's 2019 Rule 9 submission), although the Military Commissions Act appears to prohibit the use of evidence tainted by torture and cruel, inhuman, and degrading treatment, the military commissions do, in fact, allow torture evidence [see section '*Status of Mr. Al Nashiri's military commission proceedings*', above]. The US government's position that the military commission proceedings are fair is also

⁷ *Al Nashiri v. Romania*, paras. 739.

⁸ *Al Nashiri v. Romania*, para. 739.

⁹ *Al Nashiri v. Romania*, para. 739.

¹⁰ *Al Nashiri v. Romania*, para 721.

¹¹ Action plan (18/04/2019) - Communication from Romania concerning the case of Al Nashiri v. Romania (Application No. 33234/12), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680941bc4.

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inconsistent with the Court’s judgment in this case.¹²

The Romanian authorities should therefore continue to seek diplomatic assurances relating to a flagrant denial of justice and the death penalty.

The Committee’s suggestion that the Romanian government jointly pursue the assurances with the Polish government is clearly not happening. The Action Plan notes that “[c]oordination with the Polish authorities, as suggested by the Committee, **is also considered, where possible**, during such diplomatic undertakings,” (emphasis added), indicating that such coordination remains an unrealized possibility.¹³

The Action Plan’s assurances that “[u]pon receipt of additional information, Romania shall keep the Committee informed of future relevant developments” ring hollow given the Romanian government’s lack of vigor in pursuing diplomatic assurances thus far. The vagueness of the Action Plan in this regard suggests that high-level Romanian officials are failing to seriously press the US government for diplomatic assurances.

Romania’s obligation to conduct an effective investigation

The Court found that Romania violated the procedural aspect of Article 3 by failing to carry out a prompt, thorough and effective investigation into the applicant’s allegations of serious violations of the Convention, including inhuman treatment undisclosed detention, and also violated Article 13 of the Convention on account of the lack of effective remedies in respect of the applicant’s grievances under Articles 3, 5 and 8 of the Convention. The Court noted that “[t]he [criminal investigative] proceedings, which have been pending for over six years, are apparently still directed against persons unknown and no individuals bearing responsibility for Romania’s role in the HVD Programme have so far been identified. Neither does it seem – and nor was it pleaded by the Government – that any information from the investigation or about its conduct has been disclosed to the public.”¹⁴ The Court emphasized “that the securing of proper accountability of those responsible for enabling the CIA to run Detention Site Black on Romanian territory is conducive to maintaining confidence in the adherence by the Romanian State’s institutions to the rule of law.”¹⁵ The Court noted that the obligation incumbent on Romania under Article 46 requires all necessary steps to reactivate the pending criminal investigation without delay.¹⁶ Equally, the Court called for the criminal investigation, once reactivated, to be concluded as soon as possible, and to be given “particularly intense public scrutiny.”¹⁷

Romania’s failure to conduct an effective investigation

It has been almost eight years since Mr. Al Nashiri filed a criminal complaint with the Romanian Prosecutor General. Yet, to date, there has been no meaningful progress in the investigation, and Mr. Al Nashiri has been provided no update on the status of the investigation since the Court’s judgment.

In its 6 February 2019 information note, the Romanian government claimed that during 2018, the prosecutor administered testimonies of a former President and former Prime Minister, but that

¹³ Ibid.

¹⁴ *Al Nashiri v. Romania*, para. 655.

¹⁵ *Al Nashiri v. Romania*, para. 655.

¹⁶ *Al Nashiri v. Romania*, para 742.

¹⁷ *Al Nashiri v. Romania*, para 742.

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due to the reassignment of the file, the new prosecutor needs additional time to acquaint himself to the file. That the government only interviewed two people in a whole year demonstrates that the investigation is ineffective. Moreover, press reports indicate that that former President Basescu was interviewed a few weeks before the Court issued its judgment in *Al Nashiri v. Romania*, so the interview does not count towards executing the judgment.¹⁸ In addition, given how little was actually done during the investigation (prompting the Court to rule that the investigation was ineffective) it should not take much time for a new prosecutor to "acquaint" himself with the file.

Significantly, the Romanian government's April 2019 Action Plan includes no new information whatsoever as to measures it has taken or intends to take to complete the investigation. Indeed, it repeats in a single short paragraph what it had stated earlier in its February information note. This is a clear indication that the government does not have the political will to execute the Court's requirement that it undertake an effective investigation. The government's January 2020 communication, with its summary mention of a few requests for information and letters rogatory, similarly confirms that the current investigation is ineffective. Romania hosted the CIA prison on its territory and Romanian government officials were involved in approving this operation. As such, it is remarkable that almost eight years since the investigation was opened, the prosecutor has been unable to identify any suspects. The investigation's lack of progress clearly indicates a lack of political will to identify those responsible for the human rights violations associated with Romania's hosting of the CIA prison.

The new prosecutor should not delay in providing a clear and specific timeframe and deadline by which the investigation will be finalized. The Romanian authorities should provide the prosecutor with the necessary support in order to conclude the investigation within an expedient timeframe. We echo the Committee of Minister's call to deploy all possible means to expedite the investigation and to ensure that its effectiveness is not hampered by the statutory limitation of criminal liability.¹⁹

Conclusion

The Communication provided by Romanian authorities to the Committee of Ministers in February 2019, combined with the April 2019 Action Plan and the January 2020 update, indicate that the Romanian government has failed to take seriously its obligation to conduct an effective investigation. The failure to effectively investigate, combined with Romania's insufficient concern for Mr. Al Nashiri's fundamental rights, require the Committee of Minister's ongoing supervision of this judgment.

¹⁸ Alin Ionescu, 'EXCLUSIV Traian Bănescu a fost audiat recent în secret la Parchetul General în dosarul închisorilor CIA' *G4Media*, (Bucharest, 31 May 2018), available at: <<https://www.g4media.ro/exclusiv-traian-basescu-a-fost-audiat-recent-in-secret-la-parchetul-general-in-dosarul-inchisorilor-cia.html>>.

¹⁹ CM/Del/Doc(2019)1340/H46-14, 14 March 2019, available at: <[http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2019\)1340/H46-14E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2019)1340/H46-14E)>.

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RULE 9 SUBMISSION

CONTACT INFORMATION FOR THIS SUBMISSION

Amrit Singh: amrit.singh@opensocietyfoundations.org

John Dorber: jecdorber@gmail.com

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