

SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES



Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 06/11/2020

DH-DD(2020)969-rev

Document distributed under the sole responsibility of its author, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1390th meeting (December 2020) (DH)

Reply from the authorities (06/11/2020) following a communication from an NGO (Open Society Justice Initiative) (23/10/2020) concerning the case of AL NASHIRI GROUP v. Poland (Application No. 28761/11).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * *

Document distribué sous la seule responsabilité de son auteur, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1390^e réunion (décembre 2020) (DH)

Réponse des autorités (06/11/2020) suite à une communication d'une ONG (Open Society Justice Initiative) (23/10/2020) concernant le groupe d'affaires AL NASHIRI c. Pologne (Requête n° 28761/11) **[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



RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS COUNCIL OF EUROPE

CASE OF AL NASHIRI V. POLAND
(APPLICATION NO. 28761/11)

OCTOBER 2020

Executive Summary and Recommendations

This submission describes the Polish government's ongoing failure to implement the judgment *Al Nashiri v. Poland* delivered by the European Court of Human Rights ("the Court") on 24 July 2014 and responds to the government's 15 October 2020 submission to the Department for the Execution of Judgments.¹ As explained further below and in the Justice Initiative's [February 2020 submission](#) (annexed herein), Polish authorities have made no progress whatsoever since the Committee of Ministers last reviewed this case. For that reason, we continue to urge the Committee to issue an interim resolution and, also, to debate this judgment at the earliest possible opportunity. That resolution should admonish the Polish government for its failure to comply with the Court's order and should instruct Polish authorities to:

(I) Conduct an effective and transparent criminal investigation into Poland's role in the CIA extraordinary rendition and secret detention programme and the violation of Mr. Al Nashiri's rights. This includes, but is not limited to, the following elements:

- Provide a clear and specific timeframe and deadline by which the investigation will be completed.
- Make information about the non-classified materials of the investigation publicly available within a specified timeframe;
- Declassify materials of the investigation to the fullest extent possible, especially with regard to any procedural decisions made by the prosecutor;
- Redouble efforts in the domestic investigation, in deploying additional resources to the prosecution service in charge of these cases;
- Update Mr. Al Nashiri's counsel regularly on the status of the investigation;

(II) Officially acknowledge, at the highest level of government, that Poland hosted a secret CIA prison on its territory in 2002 and 2003.

(III) Continue and renew efforts to procure diplomatic assurances at the highest levels to ensure that Mr. Al Nashiri will no longer be subjected to treatment that is contrary to the Convention, which includes, but is not limited to, the following elements:

- Seek diplomatic assurances 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;
- Disclose, at a minimum, to Mr. Al Nashiri's counsel communications between Polish and U.S. authorities concerning assurances relating to the death penalty and a flagrant denial of justice.

(IV) Strengthen the supervision over intelligence sources, which includes but is not limited to the following elements:

- Update the Committee of Ministers on the action being taken in this regard, including providing information on envisaged legislative proposals;
- Explain what impact the newly established Council of Minister's Committee for National Security and Defense Affairs is envisaged to concretely have on strengthening the supervision of intelligence services, and in what timeframe. The

¹ *Al Nashiri v. Poland*, (Application no. 28761/11), ECtHR, 24 July 2014; 1390th meeting (December 2020) (DH) – Communication from the authorities (15/10/2020) in the Al Nashiri group of cases v. Poland (Application No. 28761/11)

RULE 9 SUBMISSION

government should report specific recommendations to and changes made by the intelligence services as a result of this new Council in its next submission to the Department of Execution of Judgments.

- Issue a clear message from the highest authorities to the intelligence and security services on the unacceptability of and zero tolerance towards arbitrary detention, torture and secret rendition operations.

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 previously 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 take place. 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 year 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. Nashiri and his counsel have been able to communicate only by exchanging letters.

With respect to the 15 October communication from the Polish government (p. 3), the Justice Initiative wishes to correct several inaccuracies regarding the status of Mr. Al Nashiri's proceedings, specifically:

- Mr. Al Nashiri has had contact with his representatives since January 2020 but, as noted above, it has been by letter. No counsel has been able to visit him, and he has had no telephone or video calls.
- Mr. Libretto has never been a judge on Mr. Al Nashiri's case.
- Capt. (not Mr.) Brian L. Mizer did apply for resignation from the position as defense counsel of Mr. Al Nashiri, but it was due to his pending demobilization from Active Duty, not retirement.
- On 29 January 2020 the military commission did reject the defense's motion to dismiss the charges against Mr. Al Nashiri, but not because of his "difficulties in contacts" with his lawyer; rather; it was for improper service, the actions of the previous judge, and because the prosecution severed the attorney-client relationship.
- On 19 December 2019 and 19 March 2020, the military commission did reject the defense's motions to waive the death penalty requested by the prosecution. The defense has repeatedly asked to waive the death penalty as an "alternative" remedy. The 19 December 2019 ruling denied the request of the defense to disqualify Judge Spath from the case and overturn all of his rulings, not just those the D.C. Circuit Court previously overturned. The request was based on Judge Spath covering up his extensive

RULE 9 SUBMISSION

involvement with the family of a victim in a death penalty case he previously worked on as a prosecutor.

In light of the above, Mr. Al Nashiri's military commission proceedings demonstrate that he remains at risk of being subjected to a flagrant denial of justice. In addition:

(1) Poland must conduct an effective investigation

Since the Open Society Justice Initiative's February 2020 submission, no meaningful progress has been made in the criminal investigation into Poland's hosting of the secret prison where Mr. Al Nashiri was detained and tortured. Indeed, to a large extent the Court's assessment in its 2014 judgment remains true today: no meaningful progress in the investigation has been achieved. Six years since the Court's judgment was published, little information has been made public regarding the progress or results of the *Al Nashiri* investigation.

According to the government's communication, the investigation was once again extended to 31 October 2020 (p. 2). Unfortunately, neither this communication nor the Polish government's Updated Action Plan explain why these repeated prolongations of investigation were necessary. Notably, the legal representative of Mr. Al Nashiri was not informed of any activities in the investigation planned by the authorities in the course of 2020.

Furthermore, the government's communication erroneously proposes that the burden of undertaking evidence activities lies with the representatives of the applicant (p. 2). It wrongly suggests, for instance, that the extension of the investigation could be attributed to the applicant's representatives, noting that the "Regional Prosecutor's Office in Cracow has not received from applicants' representatives any information on the results of [their] activities abroad aimed at alternatively obtaining evidence on the territory of the United States."² The representative of Mr. Al Nashiri informed the regional prosecutor that neither he nor his colleagues have undertaken such activities and emphasized that, in his view, the evidence gathered so far in the course of the investigation already allows the prosecutor to make an appropriate procedural decision to close the investigation.

While the Polish authorities have stated that they cannot report on activities of a classified nature that they have carried out or plan to undertake,³ they have not demonstrated that they have heeded the calls from the Committee of Ministers to redouble their efforts in the domestic investigation, or to deploy additional resources to the prosecution service in charge of these cases.⁴ The Justice Initiative reiterates that providing such information would be a welcome signal of their determination in the full implementation of this judgment.

(2) Poland must continue to seek assurances relating to the death penalty and the flagrant denial of justice

² 1390th meeting (December 2020) (DH) – Communication from the authorities (15/10/2020) in the *Al Nashiri* group of cases v. Poland (Application No. 28761/11), 2.

³ *Ibid.*; 1369th meeting (March 2020) (DH) - Updated action plan (03/02/2020) - Communication from Poland concerning the *AL NASHIRI* group of cases v. Poland (Application No. 28761/11).

⁴ CM/Del/Dec(2019)1348/H46-18, 6 June 2019.

It is vital that the Polish government continues to seek and obtain diplomatic assurances in relation to Mr. Al Nashiri's being subjected to a flagrant denial of justice and to the death penalty.⁵ The government's submission of 15 October states that, on 24 February 2020, Polish authorities submitted to the Embassy of the United States in Warsaw a diplomatic note, to which on 19 May 2020 the U.S. authorities reaffirmed that the Polish authorities' requests "cannot be supported" (p. 1).⁶ As explained in the government's communication, no actions have been undertaken by the government regarding diplomatic assurances since May 2020 "due to the situation caused by the COVID-19 pandemic" (p. 2); however, the government does not provide an explanation as to how the pandemic has actually hindered its ability to continue these efforts or why no new actions could not be taken.

The Justice Initiative reiterates its request that all communications between Polish and U.S. authorities in relation to the death penalty and a flagrant denial of justice be disclosed, at a minimum, to Mr. Al Nashiri's counsel.

(3) Poland must strengthen its supervision of intelligence services

As noted in the Justice Initiative's February 2020 submission, Polish intelligence services continue to gain more extensive surveillance powers without any comprehensive independent supervision of their use of authority.⁷ The government's communication of 15 October notes that on 9 October the Prime Minister issued order no. 162, which establishes a "Council of Minister's Committee for National Security and Defense Affairs," whose task is to ensure the "coordination of preparations, activities, and efficient decision-making in matters of state security and defense" (pp.3-4). The government avers that this Committee is "a significant enhancement of the democratic oversight of special services responsible for national security."

The Justice Initiative does not believe that the establishment of this Committee is an adequate measure to genuinely strengthen independent oversight of Poland's intelligence and security services. The tasks and modes of operation of the Committee appear to be only vaguely regulated by order no. 162, which is little more than a page long and very general in nature.⁸ The very composition of the Committee also shows that it is not an independent body, but rather a political one.⁹ Finally, it appears to have been created in the course of reorganization of the

⁵ See, 1348th meeting (June 2019) (DH) - Rule 9.2 Communication from a NGO (03/05/2019) in the case of *Al Nashiri v. Romania* (Application No. 33234/12), 4-5.

⁶ 1390th meeting (December 2020) (DH) - Communication from the authorities (15/10/2020) in the *Al Nashiri group of cases v. Poland* (Application No. 28761/11),1.

⁷ The report "Saddle the Pegasus"; ("Osiodłać Pegaza") published by the Office of the Commissioner for Human Rights (the Ombudsman) in September 2019 stated the need to establish a special, independent body that would supervise the activities of all special services and would have the ability to consider individual complaints concerning the operation of these services The report is available in Polish here: https://panoptikon.org/sites/default/files/osiodlac_pegaza_-_jak_powinien_wygladac_nadzor_nad_sluzbami_raport_ekspertow.pdf.

⁸ Zarządzenie Nr 162 Prezesa Rady Ministrów w sprawie Komitetu Rady Ministrów do spraw Bezpieczeństwa Narodowego i spraw Obronnych z dnia 9 października 2020 r. (M.P. z 2020 r. poz. 918), available in Polish here:

<http://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20200000918/O/M20200918.pdf>, para. 2.

⁹ According to para. 3 of Order no.162 (referenced above), the Committee is comprised of the Deputy Prime Minister designated by the Prime Minister, Minister of Defence, Minister of Internal Affairs, Minister of Justice, Minister responsible for coordination of special services (if one was appointed), and

RULE 9 SUBMISSION

government, rather than as a response to this judgment. Indeed, the government's communication fails to explain how the Committee's creation would address the particular concerns expressed in the Court's 2014 judgment as to the lack of supervision of intelligence and security services.

The Justice Initiative underscores the continued need for Polish authorities to issue an official statement at the highest level to intelligence and security services that there will be zero tolerance of complicity in secret detention, torture and extraordinary rendition. We further regret that no concrete information as to legislative reforms that will strengthen supervision over intelligence and security services has been provided.

Conclusion

Polish authorities have repeatedly failed to submit updates reflecting meaningful, tangible progress on implementation despite the Committee's repeated calls for information over the past years. The Justice Initiative therefore respectfully requests that the Committee of Ministers continues to keep this case under enhanced supervision and that it issue an interim resolution ordering Polish authorities to (1) conduct an effective and transparent criminal investigation; (2) acknowledge that Poland hosted a secret CIA prison on its territory; and (3) adopt genuine legislative reforms that will strengthen the civilian supervision of intelligence and security services. We further urge the Committee to debate this judgment at the earliest possible opportunity.

Minister of Foreign Affairs. Other persons can be invited to join the works of the Committee as advisors, however, only at the invitation of the Chairman of the Committee (para. 4.1). The Chairman may order that the whole or part of the meetings of the Committee is confidential (para. 4.2).

SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

Contact: John Darcy
Tel: 03 88 41 31 56

DGI

23 OCT. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Date: 21/02/2020

DH-DD(2020)177

Document distributed under the sole responsibility of its author, without prejudice to the legal or political position of the Committee of Ministers.

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

Communication from an NGO (Open Society Justice Initiative) (12/02/2020) and reply from the authorities (20/02/2020) in the AL NASHIRI group of cases v. Poland (Application No. 28761/11)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

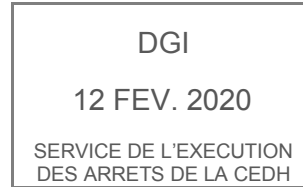
* * * * *

Document distribué sous la seule responsabilité de son auteur, sans préjuger de la position juridique ou politique du Comité des Ministres.

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

Communication d'une ONG (Open Society Justice Initiative) (12/02/2020) et réponse des autorités (20/02/2020) relative au groupe d'affaires AL NASHIRI c. Pologne (requête n° 28761/11)
[anglais uniquement]

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS COUNCIL OF EUROPE

CASE OF AL NASHIRI V. POLAND
(APPLICATION NO. 28761/11)

FEBRUARY 2020

Executive Summary and Recommendations

This submission describes the Polish government's failure to implement the judgment *Al Nashiri v. Poland* delivered by the European Court of Human Rights ("the Court") on 24 July 2014.¹ The Open Society Justice Initiative ("Justice Initiative") represented Mr. Al Nashiri as co-counsel before the European Court of Human Rights.

In *Al Nashiri v. Poland*, the Court held that Poland violated Articles 2, 3, 5, 6 § 1, 8 and 13 of the European Convention on Human Rights 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 Polish soil and by failing to conduct a prompt, thorough, and effective investigation into serious violations of human rights.

The Court further found that by refusing to comply with its evidentiary requests, the Polish authorities had failed to discharge their obligations under Article 38 of the Convention. The Court concluded that Mr. Al Nashiri's transfer from Poland exposed him to a flagrant denial of justice and a risk of being subjected to the death penalty, due to the possibility that he would face trials before a U.S. military commission. The applicant, currently detained in Guantanamo Bay, was subsequently charged with capital offences before the military commission. The judgment required the Polish government to seek diplomatic assurances from the U.S. authorities that Mr. Al Nashiri will not be subjected to a flagrant denial of justice and the death penalty and to pay to the applicant €100,000 in damages.

The Polish government has failed to implement the Court's judgment in this case. The Justice Initiative supports an interim resolution in this case² because:

1. Yet again, the Polish government's Updated Action Plan **fails to provide a clear and specific timeframe and deadline by which the investigation will be completed**, despite the Committee of Ministers repeated concerns on this issue.³ It has been nearly **six years** since the Court issued its judgment in this case and almost **12 years since** the Polish government opened the investigation into a secret CIA prison on its territory.⁴ Yet, to date, the Polish government has failed to fully implement the judgment's requirement that it conduct an effective investigation into the violation of Mr. Al Nashiri's rights in a secret CIA prison in Poland.
2. The plan **fails to describe when and by what means the Polish government intends to publicly acknowledge** its role in the CIA extraordinary rendition and secret detention programme and in the violation of Mr. Al Nashiri's rights.
3. The plan **fails to commit to disclose, at a minimum, to all counsel for Mr. Al Nashiri all communications between the Polish government and the United States in relation to diplomatic assurances** against the risk of a flagrant denial of justice and the imposition of the death penalty.

¹ *Al Nashiri v. Poland*, (Application no. 28761/11), ECtHR, 24 July 2014.

² CM/Del/Dec(2019)1348/H46-18, 6 June 2019.

³ See, for example : CM/Del/Dec(2019)1348/H46-18, 6 June 2019; CM/Del/Dec(2018)1324/14, 20 September 2018.

⁴ *Al Nashiri v. Poland*, (Application no. 28761/11), ECtHR, 24 July 2014, para. 488.

RULE 9 SUBMISSION

In light of the above deficiencies, we respectfully request that the Committee of Ministers recommend that the Polish authorities:

(I) Conduct an effective criminal investigation into Poland's role in the CIA extraordinary rendition and secret detention programme and the violation of Mr. Al Nashiri's rights, which includes but is not limited to the following elements:

- Make information about the non-classified materials of the investigation publicly available within a specified timeframe;
- Declassify materials of the investigation to the fullest extent possible, especially with regard to any procedural decisions made by the prosecutor;
- Redouble efforts in the domestic investigation, in deploying additional resources to the prosecution service in charge of these cases;
- Update Mr. Al Nashiri's counsel regularly on the status of the investigation.

(II) Officially acknowledge, at the highest level of government, that Poland hosted a secret CIA prison on its territory in 2002 and 2003.

(III) Continue and renew efforts to procure diplomatic assurances at the highest levels to ensure that the applicant will no longer be subjected to treatment that is contrary to the Convention, which includes but is not limited to the following elements:

- Seek diplomatic assurances 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;
- Disclose, at a minimum, to Mr. Al Nashiri's counsel communications between Polish and US authorities concerning assurances relating to the death penalty and a flagrant denial of justice.

(IV) Strengthen the supervision over intelligence sources, which includes but is not limited to the following elements:

- Update the Committee of Ministers on the action being taken in this regard, including providing information on envisaged legislative proposals;
- Issue a clear message from the highest authorities to the intelligence and security services on the unacceptability of and zero tolerance towards arbitrary detention, torture and secret rendition operations.

RULE 9 SUBMISSION

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. 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.⁵ 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 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 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

⁵ *Al Nashiri v. Poland*, (Application no. 28761/11), ECtHR, 24 July 2014, para 562-68. 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.

ensure that any trial for Mr. Al Nashiri will be fair. The Polish government must continue to seek assurances that Mr. Al Nashiri is not subjected to a flagrant denial of justice and the death penalty.

(I) Poland must conduct an effective investigation

In *Al Nashiri v. Poland*, the Court observed that “Where an individual raises an arguable claim that he has been ill-treated by agents of the State, the notion of an ‘effective remedy’ entails [...] a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”.⁶ Almost twelve years have elapsed since the opening of a criminal investigation into the applicant’s allegations of serious violations of the Convention. The investigation was extended a number of times and remains pending, without any indication that charges may be brought against those responsible for the alleged violations.

The Court noted in its judgment that “no meaningful progress in the investigation has been achieved”.⁷ It further observed that “at advanced stages of the investigation two successive prosecutors in charge of it were disqualified from dealing with the case, and subsequently, the case was transferred to prosecutors in another region [...] [these decisions] unavoidably contributed to the prolongation of the proceedings.”⁸ Even though the investigation is ongoing, to a large extent the Court’s assessment remains true today: no meaningful progress in the investigation has been achieved.

Equally, almost six years since the Court’s judgment was published, little information has been made public regarding the progress or results of the *Al Nashiri* investigation. No steps have been taken by the government or the Prosecutor General to inform either the Committee of Ministers or the public about the timeframe, scope, or result of the investigation.

The Polish Action Plan of February 2020 states 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.”⁹ It is stressed here that Polish counsel have not been notified of any advances in the investigation plan for over a year. We request that Polish authorities provide Mr Al Nashiri’s counsel with the investigation plan along with updates and notice of extensions.

While the Polish authorities have stated that they cannot include on activities of a classified nature that they have carried out or plan to,¹⁰ they have not demonstrated any evidence that they have heeded the calls from the Committee of Ministers to redouble their efforts in the domestic investigation, or to deploy additional resources to the prosecution service in charge of

⁶ *Al Nashiri v. Poland*, para 547

⁷ *Al Nashiri v. Poland*, para 493.

⁸ *Al Nashiri v. Poland*, para 493.

⁹ 1369th meeting (March 2020) (DH) - Updated action plan (03/02/2020) - Communication from Poland concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11), 9.

¹⁰ 1369th meeting (March 2020) (DH) - Updated action plan (03/02/2020) - Communication from Poland concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11)

RULE 9 SUBMISSION

these cases.¹¹ Providing information on whether they have or intended to take any such steps would be a welcome signal of their determination in the full implementation of this judgment.

(II) Poland should continue to seek assurances relating to the death penalty and the flagrant denial of justice

It is vital that Poland continue to seek and obtain diplomatic assurances in relation to Mr. Al Nashiri's being subjected to a flagrant denial of justice and the death penalty.¹²

The Court's judgment in 2014 made clear that the very active and deliberate participation by a Member State in extraordinary rendition and secret detention is incompatible with their obligations under the European Convention on Human Rights, and States should be held responsible for the consequences of their wrongdoing. The Court noted that "compliance with their obligations under Article 2 and 3 taken together with Article 1 of Protocol 6 to the Convention requires the [Polish] Government to seek to remove that risk as soon as possible, by seeking assurances from the US authorities that he will not be subjected to the death penalty".¹³

The Updated Action Plan of February 2020 states that Polish authorities have prepared a diplomatic note to be transmitted to the U.S. Embassy in Warsaw. The Open Society Justice Initiative request that all communications between Polish and US authorities in relation to the death penalty and a flagrant denial of justice be disclosed, at a minimum, to Mr. Al Nashiri's counsel.

(III) Poland should strengthen the supervision over intelligence sources

As the Committee of Ministers has previously stated, to avoid similar abuses and grave human rights violations in the future, it is imperative that real efforts are made to establish the truth about what happened and how.¹⁴

Poland has been held responsible by the Court for human rights violations suffered by Mr. Al Nashiri.¹⁵ The highest level of Polish authorities should now issue an official statement to intelligence and security services that there will be zero tolerance of Polish complicity in secret detention, torture and extraordinary rendition. Thus far, Polish authorities have resisted recommendations from the Committee of Ministers to release such a statement. Polish authorities have also declined to take steps to acknowledge Poland's role and responsibility for the human rights abuses at issue in this case. Polish authorities have again remained silent on plans to acknowledge such responsibility in their latest action plan of February 2020.¹⁶

¹¹ CM/Del/Dec(2019)1348/H46-18, 6 June 2019.

¹² See, 1348th meeting (June 2019) (DH) - Rule 9.2 Communication from a NGO (03/05/2019) in the case of *Al Nashiri v. Romania* (Application No. 33234/12), 4-5.

¹³ *Al Nashiri v. Poland*, para 589.

¹⁴ CM/Del/Dec(2019)1348/H46-18, 6 June 2019, para 12.

¹⁵ *Al Nashiri v. Poland*, para 517.

¹⁶ 1369th meeting (March 2020) (DH) - Updated action plan (03/02/2020) - Communication from Poland concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11)

RULE 9 SUBMISSION

The Open Society Justice Initiative echoes the Committee of Minister's recommendation to the Polish authorities to acknowledge Poland's role and responsibility in this case. The authorities should also undertake enhanced measures to strengthen the supervision of intelligence and security services. In their Action Plan of June 2018, Polish authorities "recognize[d] some shortcomings of functioning of the supervision system over special services and intend[ed] to introduce in the near future (probably in a period of one year) improvements".¹⁷ Despite the Committee of Ministers asking, *inter alia*, for concrete information on these developments by 1 December 2019, this information has not been provided. Although the authorities committed in April 2019 to inform the Committee of Ministers on the implementation of general measures,¹⁸ to date, they have not provided the Committee with the results of audits that were commissioned by the Coordinator of Special Services in 2015.

Polish intelligence services continue to gain more extensive surveillance powers without any comprehensive independent supervision of their use of authority. The report "Saddle the Pegasus"; ("Osiodłać Pegaza") published by the Office of the Commissioner for Human Rights (the Ombudsman) in September 2019 stated the need to establish a special, independent body that would supervise the activities of all special services and would have the ability to consider individual complaints concerning the operation of these services.¹⁹ The lack of information from the Polish government regarding the steps taken to strengthen supervision over intelligence services implies that none have been taken.

The Open Society Justice Initiative regrets that no information as to the legislative reforms that will strengthen supervision over intelligence and security services has been provided since the Polish authorities Action Plan of 2018 and suggests a failure to take seriously its obligation to expeditiously and fully undertake such action.

Conclusion

Poland has failed to implement the Court's judgment with respect to individual and general measures. In addition, Polish authorities have repeatedly failed to submit updates reflecting meaningful, tangible progress on implementation despite the Committee's repeated calls for information over the past 24 months.

This failure requires the Committee of Minister's ongoing supervision of this judgment.

In light of the above, the Open Society Justice Initiative respectfully requests that the Committee of Ministers continues to keep this case under enhanced supervision, and recalls the recommendations that it made at the top of this submission.

¹⁷ 1324th meeting (September 2018) (DH) - Action plan (21/06/2018) - Communication from Poland concerning the case of AL NASHIRI v. Poland (Application No. 28761/11), 35.

¹⁸ 1348th meeting (June 2019) (DH) - Rule 8.2a Communication from the authorities (26/04/2019) in the AL NASHIRI group of cases v. Poland (Application No. 28761/11),

¹⁹ "Osiodłać Pegaza": Przestrzeganie praw obywatelskich w działalności służb specjalnych – założenia reformy, Adam Bodnar et al, 2019, available in Polish here: https://panoptykon.org/sites/default/files/osiodlac_pegaza_-_jak_powinien_wygladac_nadzor_nad_sluzbami_raport_ekspertow.pdf

CONTACT INFORMATION FOR THIS SUBMISSION

Amrit Singh: amrit.singh@opensocietyfoundations.org

John Dorber: jecdorber@gmail.com

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.



Warsaw, 20 February 2020

Republic of Poland
Ministry
of Foreign Affairs

Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPT.432.120.2019/101

DGI

20 FEV. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Mr Fredrik Sundberg
Head of the Department for the Execution
of Judgments of the European Court
of Human Rights
Council of Europe
Strasbourg

Dear Sir,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 12 February 2020 by the Open Society Justice Initiative concerning the execution of the judgments of the European Court of Human Rights in the case of *Al Nashiri v. Poland* (application no. 28761/11), I should like to submit the following comments.

Yours faithfully,

Jan Sobczak
Government Agent

Encl.

al. J. Ch. Szucha 23
00-580 Warsaw

phone: +48 22 523 93 19
fax: +48 22 523 88 06
dpopc.sekretariat@msz.gov.pl



Enclosure

In reply to the communication of 12 February 2020 of the Open Society Justice Initiative concerning execution of the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Poland*, the Government of Poland should like to submit the following comments.

Firstly, with regard to the issue of the domestic investigation and the implementation of the general measures (reform of the democratic oversight of special services) the Government should like to point to the information presented in its latest Action Plan of 3 February 2020 (see the document DH-DD(2020)100).

Secondly, with regard to the Open Society Justice Initiative's recommendation to disclose, at least to Mr Al Nashiri's counsels, the Government's communications with the U.S. government concerning the requests for diplomatic assurances that the applicant will not be subjected to the death penalty and that he will not continue to be subjected to a flagrant denial of justice, the Government should like to reiterate that these communications constitute a diplomatic correspondence, which, due to its form and content, is covered by the diplomatic confidentiality, in accordance with Vienna Convention on Diplomatic Relations of 1961.

It should be also noted that the issue of disclosing to the public the diplomatic notes transmitted by the Government of Poland to the U.S. government in realisation of its obligation to seek diplomatic assurances for, *inter alia*, Mr Al Nashiri, is the subject of two sets of ongoing administrative proceedings before administrative courts in Poland. These proceedings, instituted by the appeals filed by Polish citizens against the Ministry of Foreign Affairs' decisions to reject their respective requests for access to public information (disclosure of the diplomatic correspondence concerning the Government's requests for diplomatic assurances for the applicants) due to them being covered by the diplomatic confidentiality in accordance with the international law and practice, are still pending before the Warsaw Administrative Court, although in one of these cases the domestic court has already dismissed the appeal against the MFA's decision (the judgment is not final yet). The court has also acquainted itself with the diplomatic notes in question in the other case.

At the same time, the Government should like to emphasise that in all communications to the U.S. government seeking the diplomatic assurances for, *inter alia*, Mr Al Nashiri, the Government's obligations stemming from Article 46 of the Convention of Human Rights and Fundamental Freedoms have been invoked, the context of the execution of the European Court of Human Rights' judgments has been provided, an explicit reference has been made to the Committee of Ministers' decisions adopted in the *Al Nashiri v. Poland* group of cases and all previous attempts have been recalled. More detailed information on the content of each attempt was provided by the Polish Government in its previous Action Plans and other communications pertaining to urgent individual measures, submitted to the Committee of Ministers and available online at the Hudoc-Exec website.



Warsaw, 6 November 2020

Republic of Poland
Ministry
of Foreign Affairs

Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DGI

06 NOV. 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

DPT.432.120.2019/118

Ms Clare Ovey

Head of Department

**Department for the Execution of Judgments of
the European Court of Human Rights**

Council of Europe

Strasbourg

Dear Madam,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 23 October 2020 by the Open Society Justice Initiative concerning the execution of the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Poland* (application no. 28761/11), I should like to submit the following comments.

Yours sincerely,

Jan Sobczak

Government Agent

Encl.

Enclosure

In reply to the communication of 23 October 2020 of the Open Society Justice Initiative concerning the execution of the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Poland*, the Government of Poland should like to submit the following comments.

Firstly, with regard to the issue of the domestic investigation and the implementation of the general measures (reform of the democratic oversight of special services) the Government should like to point to the information presented in its previous information submitted to the Committee of Ministers, including the last one of 15 October 2020 (see document DH(2020)900). In particular, the Government should like to recall that the prosecution authorities maintain that due to the accuracy of the investigation the information presented cannot include the assessment of the undertaken activities of a classified nature nor can indicate in detail the planned activities.

Thus, it is not possible to make public the so called road map of the investigation and, at the same time, to indicate the general direction of the conducted proceedings and the scope of undertaken activities. As regards the democratic oversight of the special services the Government should like to reiterate that the implementation of the legislative and organizational solution, such as the appointment of the Council of Minister's Committee for National Security and Defense Affairs, which is chaired by the Deputy Prime Minister, is a significant enhancement of the democratic oversight of special services responsible for the national security.

Secondly, as concerns the issue of continuation of requesting for the diplomatic assurances to the applicant, in its last communication (document DD(2020)900) the Government ensured the Committee of Ministers that further actions will be considered in this scope. With regard to the Open Society Justice Initiative's recommendation to disclose, at minimum to Mr Al Nashiri counsel, communications between Polish and the US authorities, the Government should like to refer in this respect to its reply of 20 February 2020 to the Open Society Justice Initiative's communication submitted on 12 February 2020. It should be reiterated that the more detailed information on the content of each Government's diplomatic attempt to seek diplomatic assurances in the applicant's case was provided by the Polish Government in its previous action plans and communications submitted to the Committee of Ministers and available online at the Hudoc-Exec website.

Lastly, with regard to the Open Society Justice Initiative's recommendation that an interim resolution should be issued by the Committee of Ministers in the present case, the Government is of the opinion that this kind of measure is premature. The numerous actions taken by the Government in the process of execution of the European Court of Human Rights' judgment in the present case so far, presented in detail in its previous action plans and other communications submitted to the Committee of Ministers on a regular basis, indicate that the Polish authorities attach the greatest

importance their obligations stemming from Article 46 § 1 of the Convention. Therefore, deciding on an interim resolution in the present case would be not only too early but also unfounded.