Numéro de dossier
33234/12

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

al Nashiri v. Romania

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,
ainsi que des articles 45 et 47 du règlement de la Court

under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of the Court

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I. THE PARTIES

The Applicant

1. Surname: al Nashiri
2. First Names: Abd al Rahim Husseyn Muhammad
3. Nationality: Saudi Arabia
4. Date and Place of Birth: 5 January 1965, Mecca, Saudi Arabia
5. Address: The applicant is currently detained in U.S. custody in Camp 7, Guantánamo Bay, Cuba.
6. Representatives:

James A. Goldston, *Attorney, New York Bar,* Executive Director

Amrit Singh, *Attorney, New York Bar,* Senior Legal Officer

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The High Contracting Party

7. Romania

II. SUMMARY

8. This case challenges Romania's participation in the secret detention, ill-treatment and "extraordinary rendition" of Abd al Rahim Husseyn Muhammad al Nashiri on Romanian soil.

9. This Court has previously recognised that "extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention. It would be incompatible with a Contracting State's obligations under the Convention if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition. To do so would be to collude in the violation of the most basic rights guaranteed by the Convention".[2]

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[1] Mr. al Nashiri's representatives gratefully acknowledge the assistance of Justice Initiative law clerk James Tager in preparing this application.

[2] *Babar Ahmad and Others v. UK*, ECtHR, Admissibility decision, 8 July 2010, at para 114. The Court defined extraordinary rendition as "the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment." *Ibid*. at para 113. Mr. al Nashiri's case presents this kind of extra-judicial transfer.

10. Romania assisted the Central Intelligence Agency (CIA) in violating Mr. al Nashiri's most basic rights under the European Convention on Human Rights. Sometime between 6 June 2003 and 6 September 2006, Romania hosted a secret CIA prison in Bucharest, where Mr. al Nashiri was subjected to incommunicado detention and ill-treatment in violation of the European Convention.

11. According to Senator Dick Marty's 2007 report on secret detentions and illegal transfers of detainees involving Council of Europe member states, "[t]he CIA brokered 'operating agreements'" with the Romanian government to hold "high value detainees" in a secret detention facility on its territory. Romania "agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference". Drawing on "multiple sources in the US and European intelligence communities", the report confirms that the Romanian government was "knowingly complicit" in the CIA's secret detention programme and that senior Romanian officials "knew about, authorised, and stand accountable" for the CIA's secret detention and extraordinary rendition operations on Romanian territory.

12. These operations were conducted amidst unprecedented secrecy, and according to the report, the Romanian government appears to have engaged in a cover-up of those operations. Indeed, as Senator Dick Marty observed in his report, there are "formidable obstacles . . . to get to the truth about the CIA programme of secret detentions in Europe". Participating European governments "all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret".

13. At some point between 6 June 2003 and 6 September 2006, Romania assisted the CIA to land a flight bearing Mr. al Nashiri in Romania, and to transfer him to be held incommunicado in a facility codenamed "Bright Light". The specific location of this facility—the basement of a government building used as the National Registry Office for Classified Information (ORNISS)—and details of Mr. al Nashiri's ill-treatment there became publicly known for the first time on 8 December 2011. During the first month of their detention there, Mr. al Nashiri and other prisoners held in this facility were subjected to sleep deprivation, water dousing, slapping or forcible standing in painful positions.

14. At some later point between 6 June 2003 and 6 September 2006, Romania similarly assisted the United States in secretly flying Mr. al Nashiri out of Romania, despite the grave risk of his being subjected to further torture, incommunicado detention, a flagrantly unfair trial, and the death penalty in U.S. custody. There is no evidence of any attempt by the Romanian government to seek diplomatic assurances from the United States to avert the risk of such consequences.

15. After Romania assisted the CIA in transporting Mr. al Nashiri from Romania, the CIA subjected him to further prolonged arbitrary detention without charge. It was not until 6 September 2006 that the United States government first acknowledged that the CIA had secretly detained Mr. al Nashiri overseas, and

that he had since been transferred to the U.S. Naval Base in Guantánamo Bay, Cuba.

16. Mr. al Nashiri has been imprisoned in the remote location of Guantánamo Bay since his transfer there in 2006. He and his lawyers have been unable to relay his communications in public because, under current U.S. government classification guidelines, everything he says is presumed to be classified at the highest i.e., "Top Secret" level, and no procedure has been available for declassifying such communications.

17. Indeed, owing to the extraordinary secrecy imposed by the U.S. government in his case, there is only a single publicly available document, dating back to 2007, which provides a glimpse of Mr. al Nashiri's torture in his own words. A heavily redacted transcript of a closed proceeding held in Guantánamo Bay reveals that he said: "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way". Mr. al Nashiri's own descriptions of the torture methods applied on him by the U.S. government are blacked out in the transcript. He does, however, state: "Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body".

18. Mr. al Nashiri now awaits a flagrantly unfair trial by military commission at Guantánamo Bay and the death penalty if convicted. On 20 April 2011, United States military commission prosecutors brought capital charges against him relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. On 28 September 2011, Admiral Bruce MacDonald, the Convening Authority for the Military Commissions, approved these capital charges and referred them for trial by military commission in Guantánamo Bay.

19. Mr. al Nashiri will face trial by military commission despite his civilian status and the previous indictment of his alleged co-conspirators in U.S. federal court. This military commission lacks independence, impartiality, and fair trial guarantees, and its jurisdiction applies discriminatorily only to non-U.S. citizens. Indeed, the cumulative deficiencies of this commission would flagrantly deny Mr. al Nashiri's right to a fair trial.

20. In recognition of the gravity of this situation, both the European Parliament and the Parliamentary Assembly of the Council of Europe have called on member states to take measures to preclude the death penalty in Mr. al Nashiri's case.

21. This Court should hold the Romanian government accountable for violating its basic obligations under the Convention. Romania violated Article 3 and Article 8 of the European Convention by colluding in Mr. al Nashiri's incommunicado detention and ill-treatment on Romanian territory. It also violated Article 5 by permitting his incommunicado detention there.

22. The Romanian government further violated Mr. al Nashiri's rights under Article 2, Article 3 and Protocol No. 6 to the Convention by assisting in his transfer from Romania despite a real risk that he would be subjected to the death penalty; under Article 3 by assisting in his transfer despite the real risk of further

ill-treatment in U.S. custody; under Article 5 by assisting in his transfer despite a real risk of further prolonged arbitrary detention; and under Article 6 by assisting in his transfer from Romania despite the risk of his being subjected to a flagrantly unfair trial.

23. Romania has failed to conduct an effective investigation into the existence of a secret CIA prison on its territory despite being on notice of the existence of such a prison at least since 2005. The Romanian government has consistently denied that a CIA prison ever existed on its territory and as such has demonstrated that any attempt by Mr. al Nashiri to exhaust domestic remedies would be futile. A superficial Senate inquiry that categorically denied all allegations relating to CIA secret detention and rendition operations in Romania proved to be manifestly ineffective.

24. In late March 2012, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, presented an extensive dossier to the Romanian government representative in Strasbourg for the Ministry of Justice and the General Prosecutor in Bucharest. The dossier contained evidence that al Nashiri and some other "high value detainees" were transported to Bucharest in September 2003 where they were secretly detained and interrogated by CIA officials. Commissioner Hammarberg recommended a serious investigation into these circumstances. By the end of July 2012, there had been no response to this request or to the content of the dossier.

25. Because the Romanian authorities failed to conduct a serious and effective investigation into CIA prisons and the associated violation of Mr. al Nashiri's rights, it has violated the investigative requirement of articles 2, 3, 5, and 8, as well as his right to an effective remedy under Article 13. Romania's failure to acknowledge, effectively investigate, and disclose details of the CIA prisons on its territory and associated information relating to Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition has also violated his and the public's right to truth under Articles 2, 3,5,10 and 13.

26. Under these circumstances, Mr. al Nashiri is not required to exhaust domestic remedies which plainly would be ineffective. As a precautionary matter, however, in the unlikely event that the Court should ultimately determine (notwithstanding our submission to the contrary) that an effective domestic remedy in Romania is available and should be pursued, on 29 May 2012, the Open Society Justice Initiative filed a criminal complaint on his behalf before the Romanian General Prosecutor so that he will not later be prejudiced by a failure to attempt to exhaust domestic remedies. The General Prosecutor has acknowledged that the complaint has been registered and assigned a file number, and that its review is at a preliminary stage. However, thus far there has been no official decision to open a criminal investigation into Mr. al Nashiri's claims.

27. Mr. al Nashiri asks this Court to find that Romania has violated his rights under the European Convention and that he is entitled to just satisfaction and an effective investigation into his case.

28. Furthermore, the approval of capital charges for his case has placed Mr. al Nashiri at imminent risk of being subjected to a flagrantly unfair trial by military

commission and the death penalty. The announcement has also exposed him to anguish associated with the prospect of being put to death, an anguish that is compounded by the prospect of a flagrantly unfair trial by military commission, and likely to continue for many years until his case is resolved. The Court is therefore requested to direct the Romanian government to use all available means at its disposal to ensure that the United States does not subject him to the death penalty. These means include but are not limited to: (i) making written submissions against the death penalty to the United States Secretary of Defense while copying Mr. al Nashiri's military defense counsel, Lieutenant Commander Stephen Reyes; (ii) obtaining diplomatic assurances from the United States Government that it will not subject Mr. al Nashiri to the death penalty; (iii) taking all possible steps to establish contact with Mr. al Nashiri in Guantánamo Bay, including by sending delegates to meet with him to monitor his treatment and ensure that the status quo is preserved in his case; and (iv) retaining and bearing the costs of lawyers authorised and admitted to practice in relevant jurisdictions in order to take all necessary action to protect Mr. al Nashiri's rights while in U.S. custody including in military, criminal or other proceedings involving his case.

29. This Court is also requested to ask the Secretary General of the Council of Europe to request that the United States not subject Mr. al Nashiri to the death penalty.

30. Finally, this Court is requested to grant priority to this application pursuant to Rule 41 of the rules of Court because the approval of capital charges in Mr. al Nashiri's case places his life and health at "particular risk", and because this application raises as main complaints issues under Articles 2, 3, and 5(1) of the Convention. Significantly, on 30 November 2011, this Court granted priority (sought on the same grounds as the instant application) to Mr. al Nashiri's application against Poland (Application No. 28761/11).

III. STATEMENT OF FACTS

31. Abd al Rahim Husseyn Muhammad al Nashiri is a 47-year old Saudi national who is a victim of a joint U.S.-Romanian secret detention and extraordinary rendition operation. He was held incommunicado in a secret CIA prison in Romania sometime between 6 June 2003 and 6 September 2006. After his detention within Romania, the Romanian government assisted the CIA with his transfer from Romania despite the real risk that he would be subjected to further ill-treatment, prolonged arbitrary detention, a flagrantly unfair trial, and the death penalty in U.S. custody.

32. Mr. al Nashiri is currently imprisoned in United States custody in Guantánamo Bay, Cuba, where he awaits a flagrantly unfair trial by military commission and the death penalty if he is convicted.

33. The details of his treatment in the context of the post-11 September 2001 secret detention and extraordinary rendition programme are as described below.

Post-11 September 2001 Secret Detention and Extraordinary Rendition Programme

34. After 11 September 2001, the U.S. government began operating a secret detention and extraordinary rendition programme under the auspices of which the CIA, in cooperation with the governments of other countries, secretly transported prisoners without legal process to be detained and interrogated in detention facilities outside the United States where they were at risk of torture or cruel inhuman or degrading treatment.[3]

35. On 17 September 2001, U.S. President Bush issued a directive granting the CIA authority to detain terrorist suspects and to set up secret detention facilities outside the United States where it could subject "high-value detainees" to "enhanced interrogation techniques".[4]

36. President Bush publicly acknowledged the secret detention programme on 6 September 2006,[5] when he announced that "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence Agency. . . .This group includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole".[6] He also stated that fourteen prisoners had been transferred to Guantánamo.[7] Mr. al Nashiri is currently charged with the USS Cole attacks among other acts, and the U.S. government has confirmed that he was among the group of "high value detainees" (HVDs) subjected to the secret detention programme who were transferred to Guantánamo by 6 September 2006.[8]

37. An official U.S. government document in the form of a CIA memorandum dated 30 December 2004, describes the secret detention and extraordinary rendition

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[3] See Exhibit 1: Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations", Serial No. 110-28, 17 April 2007, p. 12. Available at http://foreignaffairs.house.gov/110/34712.pdf.

[4] See Exhibit 2: Human Rights Council, United Nations General Assembly, 13th Session, Agenda Item 3, "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" A/HRC/13/42, at paras 102-104, 19 February 2010 (U.N. Joint Experts' Report). Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf; see Exhibit 3: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Doc. 11302 rev, 11 June 2007, para 58 (2007 Council of Europe Report). Available at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

[5] Exhibit 3: 2007 Council of Europe Report, Summary, para 3.

[6] Exhibit 4: President George W. Bush, "Transcript of President Bush's Remarks, Speech from the East Room of the White House", 6 September 2006. Available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

[7] *Ibid*.

[8] Exhibit 5: *United States v*. *Abd al-Rahim Hussayn Muhammad al-Nashiri*, Government Motion for Protective Order to Protect Classified Information Throughout All Stages of the Proceedings, Appellate Exhibit 013, at 4-5. Available at http://www.mc.mil/CASES/MilitaryCommissions.aspx

process for "high value detainees" (HVDs) like Mr. al Nashiri.[9] The document describes flying detainees to secret detention facilities known as "black sites" and subjecting them to a range of abusive interrogation methods including "conditioning", "corrective" and "coercive" techniques.[10] See paragraphs 81-83 below.

Romania's Participation in the CIA's Secret Detention and Extraordinary Rendition Programme

38. Evidence that Romania had hosted a CIA "black site" or secret prison was first reported by Human Rights Watch on 6 November 2005.[11] In response, the Romanian government denied that such a prison existed on its territory. Adriana Saftoiu, spokesperson for the head of state said that President Traian Basescu had consulted with state institutions having jurisdiction regarding this matter, and said that "no information regarding possible CIA prisons in Romania exists".[12] Prime Minister Calin Popescu Tariceanu said that "there are no CIA bases" within the territory of Romania, and the Romanian Intelligence Service (SRI) also indicated that "they have no information regarding the existence of CIA prisons operating in Romania".[13]

39. These denials were flatly contradicted by numerous reports, including a 2007 report by the Parliamentary Assembly of the Council of Europe on secret detentions and illegal transfers of detainees involving Council of Europe member states (2007 Council of Europe Report), authored by Senator Dick Marty. Drawing on "multiple sources in the US and European intelligence communities",[14] the report states that "Romania, as [a] host countr[y] . . . [was] knowingly complicit in the CIA's secret detention programme".[15] The report "consider[ed] it factually established" that a secret detention center had existed for some years in Romania".[16]

40. The 2007 report added that "[t]he CIA brokered 'operating agreements'" with the Romanian government to hold "High-Value Detainees" in a secret detention facility on Romanian territory.[17] Romania "agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadfast guarantees of non-interference".[18] Thus, CIA secret

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[9] Exhibit 6: Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's Combined Use of Interrogation Techniques", 30 December 2004 (CIA Rendition Background Paper). Available at http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf.

[10] *Ibid*, at 1-9.

[11] Exhibit 7: Human Rights Watch, "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe", 6 November 2005. Available at http://www.hrw.org/en/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe; see also 2007 Council of Europe Report at para 7 (noting that Human Rights Watch and ABC news reported in early November 2005 that Poland and Romania had hosted secret CIA prisons).

[12] Exhibit 8: Alleged CIA prison camps, prisoner transports in East Europe denied, BBC Monitoring Europe, 7 November 2005.

[13] *Ibid*.

[14] Exhibit 3: 2007 Council of Europe Report at para 50.

[15] *Ibid*. at para 165.

[16] *Ibid*. at Summary, p.1.

[17] *Ibid*. at para 117.

[18] *Ibid*. at para 117.

detention and rendition operations in Romania were carried out with the express authorization of the Romanian government.

41. A 2006 Report by the Parliamentary Assembly of the Council of Europe on alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, also authored by Senator Dick Marty, had previously stated that Romania had been "located on [a] . . . rendition circuit".[19] During a plenary debate on that report, Gyorgy Frunda, the Chairperson of the Romanian delegation to the Parliamentary Assembly for the Council of Europe (PACE) stated: "Concerning the transfer of prisoners, from the first moment we said that **Romania collaborated with the United States and with other members of NATO. Aircraft landed in Romania and transported persons**".[20] According to sources involved in making the key bilateral arrangements between the two countries, Romania "'knew what the United States needed from its allies and in what areas we could assist them.' It was therefore perceived to be in the national interest to extend a further level of support: [having] worked on the secret flights . . . we worked directly with associates of the CIA on establishing prisons here'".[21]

42. The 2007 Council of Europe report also states that sources with knowledge of the arrangement between Romania and the U.S. said that there was an "… order [given] to [Romanian] [military] intelligence services, on behalf of the President, to provide the CIA with all the facilities they required and to protect their operations in whichever way they requested …"[22] The report notes that "the manner of protection requested by the CIA was for Romanian military intelligence officers on the ground to create an area or 'zone' in which the CIA's physical security and secrecy would be impenetrably protected, even from perceived intrusion by their counterparts in the Romanian services".[23]

43. CIA secret detention and extraordinary rendition operations in Romania were conducted under extraordinary secrecy perpetuated by both the U.S. and the Romanian governments. Indeed, the 2007 Council of Europe Report notes there are "formidable obstacles ... to get to the truth about the CIA programme of secret detentions in Europe".[24] It observes that"[t]he US Government insisted on the most stringent levels of physical security for its personnel, as well as secrecy and security of information during the operations the CIA would carry out in other countries".[25] Participating European governments "all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent

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[19] Exhibit 9: Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States", Doc. 10957, 12 June 2006, at para 56 (2006 Council of Europe Report). Available at http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

[20] Exhibit 3: 2007 Council of Europe report at para 156 (quoting Contribution of Gyorgy Frunda, Chairperson of the Delegation of Romania to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006). (Emphasis in original).

[21] Exhibit 3: 2007 Council of Europe report at para 157.

[22] *Ibid*. at para 220.

[23] *Ibid*. at para 221.

[24] Exhibit 3: 2007 Council of Europe Report at para 42.

[25] *Ibid*. at para 79.

and kept the operations, the practices, their agreements and their participation secret".[26]

44. The 2007 Council of Europe report observes that "classified information about the bilateral arrangements between the CIA and its partner services in . . . Romania was treated according to a strict security of information regime drawn from the terms of NATO's Security Policy".[27] The report adds that secrecy and security of information policies adopted by states in the NATO framework "are just as impenetrable when applied as barriers to transparency as they have proven since they were selected to act as coverage for CIA clandestine operations".[28] "To encourage even a minor departure from strict adherence to these regimes of silence, secrecy and cover-up would require a rare convergence of factors".[29]

45. According to the 2007 Council of Europe report, "the relevant sub-unit of the DGIA [General Directorate for Defence Intelligence (Directia Generala de Informatii a Apararei)] that worked with the CIA on its clandestine operations was the Directorate for Military Intelligence and Representation (Directia Informatii si Reprezentare Militara, or DIRM), also known as the 'J2' Unit".[30]

46. The 2007 Council of Europe report "concluded that the following individual office-holders knew about, authorised and stand accountable for Romania's role in the CIA's operation of "out-of-theatre" secret detention facilities on Romanian territory, from 2003 to 2005: the former President of Romania (up to 20 December 2004), Ion Iliescu; the then President of Romania (20 December 2004 onwards), Traian Basescu; the Presidential Advisor on National Security (until 20 December 2004), Ioan Talpes; the Minister of National Defence (Ministerial oversight up to 20 December 2004), Ioan Mircea Pascu; and the Head of Directorate for Military Intelligence, Sergiu Tudor Medar".[31] The report goes on to state that "[c]ollaborating with the CIA in this very small circle of trust, Romania's leadership in the fields of national security and military intelligence effectively **short-circuited the classic mechanisms of democratic ability**" during their partnership with the CIA.[32]

47. A 2007 European Parliament report on the alleged use of European countries by the CIA for the transportation and detention of prisoners "[e]xpresse[d] serious concern about the 21 stopovers made by CIA-operated aircraft at Romanian airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees".[33] A

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[26] *Ibid*. at para 39.
[27] *Ibid*. at para 160.
[28] *Ibid*. at para 42.
[29] *Ibid*. at para 43.
[30] *Ibid*. at para 206.
[31] *Ibid*. at para 211.
[32] *Ibid*. at para 212. (Emphasis in original).
[33] Exhibit 10: Report on the Alleged Use of European Countries by the CIA for the Transportation and Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007, 30 Jan. 2007, at para 162, (2007 European Parliament report). Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN. The report documented flights operated by the CIA that flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005. *Ibid*. at para 42.

working document that provides underlying analysis for the 2007 European Parliament report indicates that these flights included 14 flights with registration numbers N313P, N85VM, N379P, N2189M, N1HC, N8213G, N157A, N173S, N187D, N312ME, N4009L, N4456A, N478GS, and N4466A.[34] The working document notes that several of the CIA flights landing in Romania were en route to or originating from "suspicious locations", i.e., countries where either "the presence of secret detention centres is publicly acknowledged or has been ascertained" by the committee preparing the European Parliament report, or where "the arbitrary detentions and use of torture are common practice according to official reports by several countries and international organizations".[35] These locations included Kabul and Bagram air base in Afghanistan, Amman, Jordan, Rabat and Casablanca in Morocco, Guantánamo Bay, Baghdad, Iraq, and Baku, Azerbaijan.[36] The working document further notes that "[a]ccording to Eurocontrol data, flight logs concerning Romania have been filed with some inconsistencies. Flight Plans indicate a landing airport which does not correspond with the following taking off airport. This can be caused either because of emergency reasons or because the pilot of the aircraft hides intentionally the flight plans".[37]

48. Notably, the 2007 Council of Europe report was also "confounded by the clear inconsistencies in the flight data provided" by multiple different Romanian sources as compared to Eurocontrol flight data and other information gathered by independent investigators for the report. [38] The report concluded that there is "**no truthful account of detainee transfer flights into Romania**, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out".[39]

49. Eurocontrol flight data compiled for the 2007 Council of Europe report and analysed by the Center for Human Rights and Global Justice (CHRGJ) confirms that Jeppesen Dataplan, an aviation services provider used by the CIA, filed "dummy flight plans" for rendition flights in Poland and Romania, where secret detention facilities existed, in order to conceal detainee transfers.[40] CHRGJ further states that "dummy flight plans were filed to conceal" the actual destination of a 22 September 2003 flight registered as N313P with the Federal Aviation Administration (FAA)—Jeppesen filed flight plans which indicated that N313P's destination was Constanta while Romanian officials filed a flight plan indicating that the destination was Bucharest. [41] (Notably, as set forth in the

[34] Of these flights, N313P, N85VM, N4456A, and N478GS made multiple stopovers in Romania, and the remaining flights made one stopover each. See Exhibit 11: European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, Working Document No. 8, 16 Nov. 2006, at 47. Available at http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf.
[35] *Ibid*. at 22, 46-48.
[36] *Ibid*. at 22, 46-48.
[37] *Ibid*. at 46, n. 76.
[38] 2007 Council of Europe report at para 229.
[39] *Ibid*. Emphasis in original.
[40] Exhibit 12: Center for Human Rights and Global Justice, Data String Analysis Submitted As Evidence of Polish Involvement in U.S. Extraordinary Rendition and Secret Detention Program, (CHRGJ Report) at p. 3. Available at http://www.chrgj.org/projects/docs/polishprosecutor.pdf
[41] *Ibid*. at 4, 8.

2006 Council of Europe report, N313P was the same flight that transported rendition victim Khaled el Masri from Skopje, Macedonia to Kabul, Afghanistan on 24 January 2004.[42] The 2006 Council of Europe report also identifies N313P as a "rendition" plane that flew from Kabul to Szymany, Poland, on 22 September 2003 before flying into Bucharest and then on to Rabat on the same day.[43])

50. Significantly, CHRGJ adds that data string analysis for that flight circuit "reveals that Romanian national aviation authorities assumed a planning role that was noticeably more proactive than the planning roles generally taken by states in flight circuit planning."[44] CHRGJ concludes that "the filing of false flight plans into and out of Romania may indicate detainee transfers into and/or out of Romania."[45]

51. CHRGJ's data string analysis of flight N313P that flew in and out of Bucharest on 22 September 2003 also shows that Jeppesen's original flight plans operated under a "special status" or "STS" designation which exempted the aircraft from adhering to the normal rules of air traffic flow management such as being required to wait at airports for approved departure slots. [46] Specifically, Jeppesen invoked "STS/STATE" status for each leg of the 20-23 September 2003 circuit (including the leg into Bucharest), which amounted to "claiming an official status for the plane as a diplomatic or state aircraft, only one notch below the aircraft that carry Heads of State (STS/HEAD)."[47] CHRGJ concludes that the use of this designation "confirms that the special status of the aircraft was known and authorized by the U.S. Government and the 'host" states [including Romania] ... through which the aircraft travelled." [48] In each instance that Jeppesen invoked a special status designation for N313P, including for the 22 September 2003 landing in Bucharest, Eurocontrol's IFPS (Integrated Initial Flight Plan Processing System) operator responded by formally recognising the designation—first through inclusion of the relevant portions of the flight plan in copies to the national (including Romanian) aviation authorities via the AFTN (Aeronautical Fixed Telecommunication Network), and second, through acceptance of the flight plans in questions.[49] Such special status exemptions in their invocation alone demonstrates collaborative planning on the part of the states (including Romania) whose territory or airspace is traversed, because, according to Eurocontrol's "IFPS Users Manual", the exemptions are only granted when "specifically authorized by the relevant national authority" whose territory is being used.[50]

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[42] 2006 Council of Europe Report at para 56-62; see also 2007 Council of Europe Report at para 275.
[43] 2006 Council of Europe Report at 64-66; Exhibit 13: Appendix No. 2 to 2006 Council of Europe report at p. 2. Available at http://assembly.coe.int/CommitteeDocs/2006/20060614_Ejdoc162006PartII-APPENDIX.pdf.
[44] CHRGJ Report at 4, 14.
[45] *Ibid*. at 8.
[46] *Ibid*. at 3.
[47] *Ibid*. at 3.
[48] *Ibid*. at 3.
[49] *Ibid*. at 5, 7.
[50] *Ibid*. at 3, 7.

52. A response to a freedom of information request issued by the Romanian Civil Aeronautical Authority to the Romanian NGO, Association for the Defence of Human Rights in Romania – The Helsinki Committee (APADOR-CH), further confirms that flights associated with CIA rendition operations landed in and took off from Romanian airports. These flights included N313P that landed in Baneasa airport in Bucharest on 22 September 2003 and took off for Rabat the next day; N313P that landed in Timisoara on 25 January 2004 and took off for Palma de Mallorca the same day; and flights N478GS, N379P and N2189M.[51]

53. A 2010 U.N. report on secret detention similarly concludes on the basis of data string analysis that a Boeing 737 aircraft, registered with the Federal Aviation Administration as N313P, flew to Romania in September 2003.[52] The aircraft took off from Dulles Airport in Washington, D.C. on Saturday 20 September 2003, and undertook a four-day flight "circuit", during which it landed in and departed from six different foreign territories – the Czech Republic, Uzbekistan, Afghanistan, Poland, Romania and Morocco – as well as Guantánamo Bay, Cuba. [53]

54. Documents released by the Polish Border Guard Office in July 2010 indicate that a Boeing 737, registration number N313P, arrived in Szymany, Poland on 22 September 2003 with no passengers aboard, but took on five passengers before departing Szymany.[54] Other documents disclosed to the Helsinki Foundation for Human Rights show that this flight (operated by Jeppesen Dataplan) was in Kabul before it arrived in Szymany airport, and was bound for Constanta, Romania.[55]

55. A Lithuanian parliamentary inquiry on CIA secret detention and rendition operations in Lithuania confirmed that a "CIA-related aircraft", a Boeing 737 with registration number N787WH operated by Victory Aviation, flew in from Bucharest carrying five passengers and three crew members and landed in Palanga International Airport, Lithuania, on 18 February 2005 at 6:09 p.m. and departed at 7:30 p.m. for Copenhagen.[56] Documents released in 2011 by the

[51] Exhibit 14: Adresa nr.19062/29.07.2009 a Autoritatii Aeronautice Civile Romane.
[52] U.N. Joint Experts' Report at para 117.
[53] *Ibid*.
[54] Exhibit 15: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010. Available at http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf. English translation available at http://www.hfhr.org.pl/cia/images/stories/Letter_23_07_2010.pdf. See also "Rights group claims new proof of CIA flights to Poland", Agence France-Presse, 31 July 2010. Available at http://globalnation.inquirer.net/cebudailynews/metro/view/20100731-284150/Rights-group-claims-new-proof-of-CIA-flights-to-Poland; see generally http://www.hfhr.org.pl/cia/images/stories/Data_flights_eng.pdf.
[55] See Exhibit 16: Freedom of information response from Polish authorities. Available at http://www.soros.org/sites/default/files/disclosure-20100222_0.pdf at 11 ("LRCK" reflects Constanta airport in Romania; "EPSY" reflects Szczytno-Szymany International airport in Poland; and "OAKB" reflects Kabul International Airport) and Exhibit 17: Summary of Freedom of information response from Polish authorities. Available at http://www.soros.org/sites/default/files/flight-records-20100222.pdf.
[56] Exhibit 18: Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the Alleged Transportation and Confinement of Persons Detained by the Central Intelligence Agency of the United States of America in the Territory of the Republic of Lithuania, at 4. Available at

Lithuanian civil aviation authority to non-governmental organizations Access Info and Reprieve confirm this flight path.[57]

56. In addition, U.S. court records show at least 3 flights operated by Richmor Aviation – a company identified in the 2007 Council of Europe report as one that operated some of the CIA's rendition flights[58] – landed in and took off from Romania in 2004. These include:

- (i) a flight registered with the (U.S.) Federal Aviation Administration as N85VM that stopped in Bucharest during 25-28 January 2004 (the full circuit was Washington, Geneva, Doha, Riyadh, Amman, Bucharest and Barcelona and the flight carried 1, 5, 5, 7, 7, 5 and 5 passengers respectively for each of the segments);
- (ii) a flight registered as N85VM that stopped in Bucharest during 11-13 April 2004 (the full circuit was Washington, Guantánamo Bay, Tenerife, Bucharest, Rabat and the flight carried 6, 6, 8, 9 and 5 passengers respectively for each of the segments); and
- (iii) a flight registered as N227SV that stopped in Constanta airport over 29 September - 2 October 2004 (the full circuit was Washington, Tenerife-South, Rabat, Amman, Constanta, Prague, Shannon and the flight carried upto 7 passengers).[59]

57. The 2007 European Parliament report further noted that a flight with registration number N478GS suffered an accident on 6 December 2004 when landing in Bucharest—the aircraft reportedly took off from Bagram Air Base in Afghanistan, and its seven passengers disappeared following the accident.[60] The report expressed deep concern "that Romanian authorities did not initiate an official investigation process ... into the case of a passenger on the aircraft Gulfstream N478GS, who was found carrying a Beretta 9 mm Parabellum pistol with ammunition".[61]

Mr. al Nashiri's Rendition to a Secret CIA prison in Romania

58. On 8 December 2011, details of the secret CIA prison in Romania and the fact of Mr. al Nashiri's detention and ill-treatment in that facility were published in a

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http://www.europarl.europa.eu/document/activities/cont/201203/20120326ATT41867/20120326ATT41867EN.pdf.

[57] See Exhibit 19: Letter from Civilines Aviacijos Administracija. Available at http://www.access-info.org/documents/response_lithuania.pdf.

[58] 2007 Council of Europe Report at para 281 & p. 52, n. 228; Exhibit 20: Ben Quinn & Ian Cobain, "Mundane bills bring CIA's rendition network into sharper focus", *Guardian*, 31 August 2011; Exhibit 21: Peter Finn & Julia Tate, N.Y. billing dispute reveals details of secret CIA rendition flights,*Washington Post*, 31 August 2011. Available at http://www.washingtonpost.com/world/national-security/ny-billing-dispute-reveals-details-of-secret-cia-rendition-flights/2011/08/30/gIQAbggXsJ_story.html.

[59] Exhibit 22: Flight information, Excerpts from Record on Appeal, Vol. I, at 294, 300, 314, Richmor Aviation, Inc. v. Sportsflight Air, Inc., 82 A.D.3d 1423 (N.Y. App. Div. Mar. 17, 2011) (No. 509735).

[60] Exhibit 10: 2007 European Parliament report at para 160.

[61] *Ibid*. at para 161.

news report that cited former US intelligence officials familiar with the location and inner workings of the prison.[62]

59. This was the first time that the precise location of the prison, descriptions of its interior, and details about the ill-treatment of the prisoners—including Mr. al Nashiri—held there were publicly disclosed. Subsequently, in late March 2012, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, presented to the Romanian government an extensive dossier containing evidence that Mr. al Nashiri and some other "high value detainees" were transported to Bucharest in September 2003 where they were secretly detained and interrogated by CIA officials.

60. The CIA prison, code-named "Bright Light", was located in the basement of a government building used as the National Registry Office for Classified Information (also known as ORNISS), and where classified information from NATO and the European Union is stored.[63] The address of this building is Strada Mureş No. 4, Sector 1, Bucharest. The prison was hidden in plain sight, a couple of blocks off a major boulevard on a street lined with trees and homes, alongside busy train tracks.[64] In addition, the building in which the prison was located has a NATO flag in the front.[65] Because it was a government installation, the building reportedly provided excellent cover for secret detention operations.[66]

61. The CIA prison in Romania reportedly opened in the autumn of 2003, (after the CIA decided to empty its secret prison in Poland), and was closed in the first half of 2006.[67] Flight records for a Boeing 737 known to be used by the CIA reportedly show a flight from Poland to Bucharest in September 2003.[68] (As noted above, records disclosed by the Romanian Civil Aeronautical authority show that a flight registered as N313P with the U.S. Federal Aviation Administration, landed in Baneasa airport on 22 September 2003 and took off for Rabat the next day.[69] See paragraph 52 above.)

62. The prisoners to be held in the CIA prison were flown into Bucharest and brought to "Bright Light" in vans.[70] CIA operatives then drove down a side road, entered the building compound through a rear gate that led to the actual prison, and transferred the prisoners to the basement.[71] The basement of the building consisted of six prefabricated cells on springs, keeping them slightly

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[62]Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011. Available at http://www.independent.co.uk/news/world/europe/inside-romanias-secret-cia-prison-6273973.html.
[63] *Ibid*.
[64] *Ibid*. See also Exhibit 24: ORNISS webpage, and photographs and diagram of ORNISS building in Bucharest where "Bright Light", secret CIA prison, was located.
[65] Exhibit 25: Scott Horton, Inside the CIA's Black Site in Bucharest, 8 Dec. 2011. Available at http://harpers.org/archive/2011/12/hbc-90008343
[66] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011.
[67] *Ibid*.
[68] *Ibid*.
[69] Exhibit 14: Adresa nr.19062/29.07.2009 a Autoritatii Aeronautice Civile Romane.
[70] *Ibid*.
[71] *Ibid*.

off balance and causing disorientation among some prisoners held there.[72] Each cell had a clock and arrow pointing to Mecca.[73] During the first month of their detention in Romania, the prisoners endured sleep deprivation and were doused with water, slapped or forced to stand in painful positions.[74]

63. Mr. al Nashiri was captured in Dubai in the United Arab Emirates in October 2002.[75] By November 2002, he had been secretly transferred to the custody of the CIA.[76] He was held in various secret locations before being detained in Romania.

64. U.S. agents first took him to a secret CIA prison in Afghanistan known as the "Salt Pit".[77] In Afghanistan, interrogators subjected him to "prolonged stress standing positions", during which his wrists were "shackled to a bar or hook in the ceiling above the head" for "at least two days".[78] U.S. agents then took him to another secret CIA prison in Thailand, where he remained until 5 December 2002.[79] According to a United Nations Report, on 5 December 2002, the CIA transported Mr. al Nashiri on a chartered flight with tail number N63MU from Bangkok to a secret CIA detention site in Poland.[80] On or about 6 June 2003, Polish authorities assisted the CIA in secretly transferring Mr. al Nashiri from Poland.[81]

65. On 22 June 2011, the Council of Europe issued a declaration stating that "Mr al-Nashiri was held incommunicado in a secret CIA prison in Poland in 2002 and 2003, where he was tortured before being transferred from Poland despite the risk of the death penalty, and he was later detained for some time between 2003 and 2006 at a secret CIA prison in Bucharest in Romania".[82] The declaration also urged the Council of Europe and its member states to immediately use all available means to ensure that he is not subject to the death penalty.[83]

66. After his transfer out of Poland, between 6 June 2003 and 6 September 2006, Mr. al Nashiri was held in various secret detention facilities abroad, including a

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[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] Exhibit 26: ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, 14 February 2007, (ICRC Report) at 5. Available at www.nybooks.com/icrc-report.pdf.
[76] Exhibit 27: CIA Inspector General, Special Review, Counterterrorism Detention and Interrogation Activities (September 2001—October 2003), para 7, 7 May 2004, (CIA OIG report) ("By November 2002, the Agency had . . . another high value detainee, Abd Al-Rahim al Nashiri, in custody . . . ."). Available at http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf.
[77] Exhibit 28: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'", *CBS News*, 21 September 2010. Available at http://www.cbsnews.com/stories/2010/09/21/world/main6887750.shtml.
[78] Exhibit 26: ICRC Report at 11.
[79] Exhibit 28: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'", *CBS News*, 21 September 2010.
[80] Exhibit 2: U.N. Joint Experts' Report, at para 116.
[81] Exhibit 28: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'", *CBS News*, 21 September 2010.
[82] Exhibit 29: Parliamentary Assembly, Council of Europe, Guantánamo prisoner Abd al-Rahim al-Nashiri, Written Declaration No. 483, 22 June 2011. Available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12660.pdf.
[83] *Ibid*.

CIA prison in Bucharest, Romania.[84] He was transferred to Guantánamo Bay by 6 September 2006.[85]

67. The CIA detained Mr. al Nashiri incommunicado for almost four years from the date of his capture. It was not until 6 September 2006 that President Bush implicitly acknowledged that the CIA had detained and interrogated him in secret prisons overseas as part of the secret detention and extraordinary rendition programme.[86] In the same speech, President Bush stated that the CIA had transferred 14 detainees in its custody to the United States Naval Base at Guantánamo Bay.[87]

68. Mr. al Nashiri remains imprisoned in U.S. custody at Guantánamo Bay to date, where he awaits a flagrantly unfair trial by military commission and the death penalty if he is convicted. See paragraphs 130-47 below.

Mr. al Nashiri's secret detention, torture and ill-treatment in Romania

69. As noted above, Mr. al Nashiri was kept in incommunicado detention and solitary confinement in Romania,[88] and during the first month of detention there, he and other prisoners held there endured sleep deprivation and were doused with water, slapped or forced to stand in painful positions.[89] See paragraphs 58-66 above.

70. Because of the unprecedented secrecy surrounding CIA detention and rendition operations, it is difficult to obtain direct evidence relating to additional details of his treatment while he was held in Romania. Indeed, U.S. rules governing classified information prevent Mr. al Nashiri from publicly disclosing details of his own treatment in CIA custody. Nonetheless, as set forth below, three independent sources of information - Mr. al Nashiri's own account of his torture from the time of his detention onwards, U.S. government documents confirming its torture policies as well as its torture of Mr. al Nashiri in particular, and the ICRC's documented interviews of Mr. al Nashiri and other "high value detainees" like him who were subjected to secret CIA detention – all corroborate one another, and create further strong and concordant inferences that Mr. al Nashiri was tortured and ill-treated while held in Romania.

71. An official transcript of a 2007 Combatant Status Review Tribunal hearing records Mr. al Nashiri stating that, "[f]rom the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they

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[84] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011. Available at http://www.independent.co.uk/news/world/europe/inside-romanias-secret-cia-prison-6273973.html.

[85] *Ibid*. ; Exhibit 5: *United States v*. *Abd al-Rahim Hussayn Muhammad al-Nashiri*, Government Motion for Protective Order to Protect Classified Information Throughout All Stages of the Proceedings, Appellate Exhibit 013.

[86] Exhibit 4: President George W. Bush, "Transcript of President Bush's Remarks, "Speech from the East Room of the White House", 6 September 2006.

[87] *Ibid*.

[88] Exhibit 26: ICRC report at 4 (noting that high value prisoners including Mr. al Nashiri were subjected to "continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention.")

[89] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011.

tortured me one way and another time they tortured me in a different way".[90] The President of the tribunal asks Mr. al Nashiri to "describe the methods that were used".[91] Mr. al Nashiri's response to this question is largely redacted from the transcript of the hearing. The unredacted portion however states that: "Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body".[92] He also states at another point that "they used to drown me in water. So I used to say yes, yes".[93] Further details relating to Mr. al Nashiri's own description of his treatment are redacted from the transcript.

72. According to an official U.S. government document, i.e., a May 2004 report by the CIA Office of Inspector General (CIA OIG Report), the CIA subjected Mr. al Nashiri in two separate interrogation sessions to the "enhanced interrogation technique" known as "waterboarding",[94] which involves "binding the detainee to a bench with his feet elevated above his head", "immobilizing his head" and "plac[ing] a cloth over his mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation".[95]

73. The CIA OIG report also states that the CIA subjected Mr. al Nashiri to "enhanced interrogation" methods from November 2002 until 4 December, 2002.[96] Although Mr. al Nashiri was not held in Romania during that time, the fact that he was subjected to enhanced interrogation methods at another location creates an inference that he was subjected to similarly abusive methods while he was detained in a secret CIA prison in Romania.

74. Mr. al Nashiri was held in secret detention in a CIA prison in Poland from about 6 December 2002 to 6 June 2003.[97] The CIA OIG report notes that "[s]ometime between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information. After discussing this plan . . . the debriefer entered the cell where al Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. . . . [T]he debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill".[98] The same report notes that "[d]uring another

[90] Exhibit 30: Combatant Status Review Tribunal Hearing, ISN 10015, U.S. Naval Base Guantánamo Bay, Cuba, 14 March 2007, latest version declassified on 12 June 2009 (al Nashiri CSRT Transcript), at 16. Available at http://www.aclu.org/files/pdfs/safefree/csrt_alnashiri.pdf.
[91] *Ibid*.
[92] *Ibid*. at 17.
[93] *Ibid*. at 20.
[94] Exhibit 27: CIA OIG Report, p. 36.
[95] *Ibid*. at p. 15.
[96] *Ibid*. at p. 35-36.
[97] Exhibit 28: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'", *CBS News*, 21 September 2010.
[98] Exhibit 27: CIA OIG Report, at para 92; see also Exhibit 28: Adam Goldman and Monika Scislowska, "Poles Urged to Probe CIA 'Black Site'", *CBS News*, 21 September 2010 ("According to the former intelligence officials and an internal CIA special review of the program, an agency officer named Albert revved a bitless power drill near the head of a naked and hooded al Nashiri while he was held in the Polish prison. The CIA officer also took an unloaded semiautomatic handgun to the cell

incident . . . the same Headquarters debriefer, according to [another individual also present at the time], threatened Al-Nashiri by saying that if he did not talk, they "could get [his] mother in here", and they could "bring [his] family in here".[99] The report also notes that the CIA's Office of Inspector General "received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed Al-Nashiri backward while he was in this stress position. On another occasion, [redacted] said he had to intercede after [redacted] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [Redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Mr. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt".[100] Although Mr. al Nashiri subjected to this ill-treatment while secretly detained in Poland, this fact creates an inference that he was similarly ill-treated while secretly detained in Romania.

75. The CIA OIG report also includes a list of 10 "enhanced interrogation techniques" that the CIA used on its prisoners.[101] These include: attention grasp (grabbing the detainee with both hands and yanking him towards the interrogator); walling (pulling the detainee forward and then pushing him into a flexible false wall); facial hold (holding the detainee's head immobile by placing an open palm on either side of the detainee's face); facial or insult slap (slapping the detainee's face); cramped confinement (imprisoning the detainee in a small dark box); insects (placing a harmless insect in the small dark box with the detainee); wall standing (making the detainee stand 4 to 5 feet from a wall with his arms stretched out in front of him and his fingers resting on the wall to support all of his body weight); stress positions (including having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle); sleep deprivation (not exceeding 11 days at a time); and waterboarding.[102]

76. According to a report by the International Committee for the Red Cross (ICRC), which interviewed Mr. al Nashiri and 13 other "high-value detainees" in September 2006, after they were transferred to Guantánamo Bay: "[t]he fourteen [men] . . . described being subjected, in particular during the early stages of their detention, lasting from some days up to several months, to a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information. This regime began soon after arrest, and included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various

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where al Nashiri was shackled and racked the weapon's ammunition chamber once or twice next to his head, the review reported.")

[99] Exhibit 27: CIA OIG Report, at para 94.

[100] *Ibid*. at para 97.

[101] *Ibid*. at 15.

[102] *Ibid*.

methods either individually or in combination, in addition to the deprivation of other basic material requirements".[103]

77. According to the ICRC report, "throughout the period during which they were held in the CIA detention program—the detainees were kept in continuous solitary confinement and incommunicado detention. They had no knowledge of where they were being held, no contact with persons other than their interrogators or guards. . . . None of the fourteen had any contact with their families, either in written form or through family visits or telephone calls. They were therefore unable to inform their families of their fate. As such, the fourteen had become missing persons. In any context, such a situation, given its prolonged duration is clearly a cause of extreme distress for both the detainees and families concerned and itself constitutes a form of ill-treatment. . . . In addition, the detainees were denied access to an independent third party".[104]

78. The ICRC further notes that the fourteen men were subjected to various forms of ill-treatment during their detention in secret locations, including suffocation by water poured over a cloth placed over the nose and mouth; prolonged stress positions such as standing naked with arms held extended and chained above the head; beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against a wall; beating and kicking; confinement in a box; prolonged nudity; sleep deprivation; exposure to cold temperature; prolonged shackling; threats of ill-treatment; forced shaving; and deprivation/restricted provision of solid food from 3 days to 1 month.[105]

79. Based on its interviews with Mr. al Nashiri and thirteen other "high-value detainees", the ICRC report observed:

> "Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in different countries. ... The transfer procedure was fairly standardized in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. ... The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. ... The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. . . . The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper... On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort. ... In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and

[103] Exhibit 26: ICRC Report at 4.
[104] *Ibid*. at 7-8.
[105] *Ibid*. at 8-9.

treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. ... [T]hese transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned".[106]

80. As noted by the European Committee for the Prevention of Torture, "[t]he interrogation techniques applied in the CIA-run overseas detention facilities have certainly led to violations of the prohibition of torture and inhuman or degrading treatment".[107]

81. An official U.S. government document, in the form of a CIA memorandum dated 30 December 2004 also describes the secret detention and rendition process for "high value detainees" (HVDs) like Mr. al Nashiri.[108] The United States flew HVDs to a secret overseas detention facility known as a "black site". While in flight, the detainee was "shackled and deprived of sight and sound through the use of blindfolds, ear muffs and hoods".[109] Once suspects arrived at the black site, U.S. black site officials strip-searched them, photographed them, and performed medical exams. The prisoners were then subjected to detention conditions that included "white noise/loud sounds . . . and constant light during portions of the interrogation process"[110] and interrogations aimed at "creat[ing] a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner".[111]

82. According to the 30 December 2004 CIA memorandum, during interrogation at black sites, the prisoners were subjected to "conditioning techniques",— including nudity, dietary manipulation, and prolonged sleep deprivation via vertical shackling (with or without the use of a diaper for sanitary purposes)— used in combination to "reduce . . . [them] to a baseline dependent state". [112] The prisoners were also subjected to "corrective techniques" designed to correct behaviour or startle detainees, which included slapping suspects across the face and abdomen, holding a suspect's face in an intimidating manner, and the use of "attention grasps", in which interviewers physically restrained suspects in an attempt to demand their attention.[113] In addition, prisoners held at black sites were subjected to "coercive techniques" in order to "persuade a resistant HVD to participate with CIA interrogators".[114] These techniques included shoving prisoners against a wall ("walling") up to twenty to thirty times, dousing them with water, placing them in stress positions, and holding them in "cramped

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[106] *Ibid*. at 6-7.
[107] European Committee for the Prevention of Torture, Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010, 19 May 2011. Available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.pdf.
[108] Exhibit 6: CIA Rendition Background Paper, at 1-8.
[109] *Ibid*. at 2.
[110] *Ibid*. at 4.
[111] *Ibid*. at 1.
[112] *Ibid*. at at 4-5.
[113] *Ibid*. at 5-6.
[114] *Ibid*. at 7.

confinement" in a large box for eight to as many as 18 hours a day, or in a small box for two hours. Interrogators were expressly permitted to use multiple interrogation techniques during a single interrogation session, and techniques such as walling could be used several times without interruption.[115]

83. According to a 10 May 2005 memorandum from the Office of Legal Counsel at the U.S. Department of Justice, the CIA was authorised to simultaneously employ certain techniques from three categories of abusive interrogation methods on its "high-value" prisoners (of which Mr. al Nashiri was one): "conditioning techniques", "corrective techniques", and "coercive techniques".[116] Conditioning techniques included nudity, dietary manipulation and sleep deprivation, and were used to put the detainee in a "baseline" state, and to "demonstrat[e] to the [detainee] that he has no control over basic human needs".[117] Corrective techniques included "insult slap", "abdominal slap", "facial hold", and "attention grasp", and entailed some amount of physical abuse used "to correct, startle, or to achieve another enabling objective".[118] Coercive techniques "place the detainee in more physical and psychological stress".[119] The techniques included so-called "walling", (slamming the prisoner into a flexible wall) "water dousing", (pouring cold water on the prisoner either from a container or from a hose without a nozzle) "stress positions", (designed to induce muscle fatigue by forcing the prisoner to sit on the floor with legs extended straight out in front and arms raised above the head, kneeling on the floor while leaning back at a 45 degree angle, or leaning against a wall about three feet away from the prisoner's feet with only the prisoner's head touching the wall while his wrists are handcuffed in front or behind his back), "wall standing" (designed to induce muscle fatigue by forcing the prisoner to stand 4-5 feet from a wall with his arms stretched out in front without moving) "cramped confinement" (placing the prisoner in a dark container) and "the waterboard"(designed to induce a sensation of drowning by pouring water on a prisoner's cloth covered face while laying him on an incline).[120]

84. All of the aforementioned evidence creates a clear inference that Mr. al Nashiri was tortured and ill-treated while held in Romania.

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[115] *Ibid*. at 7-8.

[116] Exhibit 31: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees, 10 May 2005. Available at http://stream.luxmedia501.com/?file=clients/aclu/olc_05102005_bradbury_20pg.pdf&method=dl; see also Exhibit 32: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees, 10 May 2005, at 7-15 (describing interrogation techniques in detail). Available at http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf

[117] Exhibit 31: Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant, Attorney General, Office of Legal Counsel, Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees, 10 May 2005, at 5, 12.

[118] *Ibid*. at 5.

[119] *Ibid*. at at 5.

[120] *Ibid*. at at 6, 9.

Mr. al Nashiri's Transfer From Romania

85. Sometime between 6 June 2003 and 6 September 2006, Romanian authorities assisted the CIA in secretly transferring Mr. al Nashiri from Romania despite the risks of his being subjected to further torture, incommunicado detention, a flagrantly unfair trial, or the death penalty in U.S. custody. There is no evidence of any attempt by the Romanian government to seek diplomatic assurances from the United States to avert these risks.

Romania's Knowledge of Secret Detention and Extraordinary Rendition by June 2003

86. Mr. al Nashiri was transferred from Romania sometime between 6 June 2003 and 6 September 2006 to face further detention in U.S. custody. By 6 June 2003, Romania knew and should have known of the secret overseas detention and extraordinary rendition of CIA prisoners and the torture and abuse associated with these operations. It also knew and should have known that prisoners transferred from Romania faced a real risk of being subjected to further abuse, prolonged arbitrary detention, flagrantly unfair legal proceedings at Guantánamo Bay, and the death penalty in U.S. custody. As noted above, Romanian authorities at the highest levels authorized the operation and cover-up of the secret detention and extraordinary rendition programme on Romanian territory, assisted the CIA in landing flights carrying prisoners in Romanian airports and transporting prisoners to the "Bright Light" secret detention facility, and then, after a period of incommunicado detention in Romania, assisted the CIA in flying the prisoners out of Romanian airports to further arbitrary detention in U.S. custody overseas.

87. Moreover, as set forth below, by June 2003, news of the secret detention and extraordinary rendition programme had been widely reported in newspapers in Europe, including Romania, and in the United States; United Nations bodies to which Romania was party had expressed grave concerns about the U.S. secret detention and rendition programme; well-known human rights organizations had publicly documented and called attention to the human rights violations associated with the secret detention and rendition programme; and cases in courts in Bosnia and Herzegovina, Germany, and the United Kingdom challenging the system of "extraordinary rendition" had received significant publicity. In addition, Romania knew and should have known of applicable U.S. laws providing for flagrantly unfair military trials for terrorism suspects as well as for the imposition of the death penalty. Such laws, and their deficiencies, had been publicised widely in news reports, human rights organisations, and United Nations bodies. Finally, the Romanian government is presumed to have had at its disposal through its diplomatic missions information about the CIA's secret detention and extraordinary rendition programme and about the U.S. government's treatment of terrorism suspects.

Newspaper Reports

88. By 6 June 2003, the Romanian press had widely reported on the brutal interrogation techniques employed by the CIA on suspected al-Qaeda operatives, the ill-treatment of prisoners held in U.S. custody in Guantánamo

Bay, and the prisoners' lack of access to legal representation or to formal legal processes.

89. Relevant Romanian press reports prior to 6 June 3003 included: (i) "War on Terrorism – Boomerang Effect" (discussing a then-recent Amnesty International annual report that criticized conditions of more than 600 foreign citizens held in Guantánamo without charge or trial and who had been deprived of any contact with a lawyer or their families);[121] (ii) "Treatment Applied to Hostages in Afghanistan – 'Inhuman'" (reporting on a recent British official visit to Guantánamo Bay and stating that, according to these officials, the prisoners were housed in cage-like conditions. The article further refers to pictures of blindfolded, shackled, and masked detainees. The article further reports that European political officials have declared Guantánamo conditions to be "degrading treatment", "shocking", and "monstrous");[122] (iii) "The USA Cannot Prove that John Walker Killed American Citizens" (reporting on judicial proceedings for John Walker Lindh and including defense team's allegations that Lindh's confession came at a time when he was mistreated and denied his right to a lawyer, including a description of a photo depicting Lindh undressed, lying on a stretcher, and blindfolded. The subtitle of the article reads "CIA Agents – Accused of Mistreating 'the American Taliban'").[123]

90. Romanian newspapers frequently reprinted news from the international media reporting on human rights abuses by the U.S. government in carrying out counter-terrorism operations overseas. Such articles included (i) "Torture at the CIA?" (reporting on a *Washington Post* article stating that CIA investigators used stressful and violent interrogation techniques against prisoners captured in Afghanistan which fell somewhere between the "boundary of legal and inhuman", that the CIA ran a secret interrogation facility within Bagram airbase, that prisoners were placed in stress positions or were kept kneeling for several hours with their eyes covered, and that the U.S. would hand over non-cooperative prisoners to secret services who used torture. The article further notes that prisoners had been arrested and imprisoned with assistance from the United States in countries known and recognized for brutal treatment of prisoners.);[124] (ii) "American Torture Using Heavy Metal" (reporting on a *Newsweek* article revealing that prisoners in Iraq were bombarded for prolonged periods of time with heavy metal music, and Amnesty International assertions that many former prisoners complained of torture in Iraq, with at least 20 saying they were beaten and another saying he was subjected to electric shocks);[125] (iii) "'The Treatment of Prisoners at Guantánamo Bay Attracts Hundreds of New

[121] Exhibit 33: "Razboiul antiterorist - efect de bumerang", *Evenimentul Zilei*, 29 May 2003. Available [in Romanian] at: http://www.evz.ro/detalii/stiri/razboiul-antiterorist-efect-de-bumerang-617803.html.
[122] Exhibit 34: "Tratamentul Aplicat Ostaticilor din Afganistan –'Inuman,'" *Adevărul*, 22 January 2002. Available [in Romanian] at: http://www.adevarul.ro/actualitate/Tratamentul-aplicat-ostaticilor-Afganistan-inuman_0_19198483.html.
[123] Exhibit 35: "SUA nu pot Dovedi ca John Walker a Ucis Cetateni Americani", *Adevărul*, 3 April 2002. Available [in Romanian] at: http://www.adevarul.ro/actualitate/SUA-John-Walker-cetateni-americani_0_17400003.html.
[124] Exhibit 36: Tortura? La CIA", *Evenimentul Zilei*, 27 December 2002. Available [in Romanian] at: http://www.evz.ro/detalii/stiri/tortura-la-cia-512348.html.
[125] Exhibit 37: "Tortura Americana cu Heavy Metal", *Evenimentul Zilei*, 20 May 2003. Available [in Romanian] at: http://www.evz.ro/detalii/stiri/tortura-americana-cu-heavy-metal-616988.html.

Recruits to Our Ranks'" (covering recent remarks by Hamas leader Hassan Yousef to British tabloid "The Mirror" condemning the treatment of prisoners in Guantánamo and reporting that British weekly "The Mail on Sunday" had published a front page article suggesting that US investigators were interrogating prisoners under the influence of drugs, along with a picture of a prisoner who was allegedly interrogated while on a stretcher);[126] (iv) " 'American Taliban' Mistreated by Authorities" (covering a *Los Angeles Times* article describing allegations that Lindh had been mistreated, including through threats of death and torture, enforced nudity, and transport in a metal shipping container with no source of heat or lighting).[127]

91. Also prior to 6 June 2003, newspapers and media with internet publication and large global readerships had reported extensively on U.S. practices of secret detention and rendition, including reports on Mr. al Nashiri's capture and secret detention. Many articles described the locations overseas in which terrorism suspects were being detained incommunicado and tortured. These articles included: (i) "US Sends Suspects to Face Torture" (reporting that "the US has been secretly sending prisoners suspected of al-Qaida connections to countries where torture during interrogation is legal. … Prisoners moved to such countries as Egypt and Jordan can be subjected to torture and threats to their families to extract information sought by the US in the wake of the September 11 attacks . . . .[N]ormal extradition procedures have been bypassed in the transportation of dozens of prisoners suspected of terrorist connections. . . . [S]uspects have been taken to countries where the CIA has close ties with the local intelligence services and where torture is permitted".);[128] (ii) "Al Qaeda operative talking" (reporting that "Al Qaeda operative Abd Al-Rahim al Nashiri, captured last month, is talking . . . . few details were revealed about al Nashiri's capture or where he is being held . . . . [According to a U.S. official] he was captured 'in the region for which he was responsible' but would not elaborate".);[129] (iii) "Militant Planned Attacks in Gulf", (reporting that UAE authorities had arrested Mr. al Nashiri in October 2002 and handed him over to the United States and described him as "one of the top al-Qaeda suspects sought by the United States". The article further reported that the United States announced in November 2002 "that it was interrogating Abd al-Rahim al Nashiri after his detention in an undisclosed foreign state".);[130] (iv) "Qaeda Suspect Was Taking Flight Training Last Month" (reporting that Mr. al Nashiri had been arrested the prior month by the United Arab Emirates as a suspected Al Qaeda terrorist and handed over to

[126] Exhibit 38: "'Tratamentul prizonierilor de la Guantanamo Bay atrage sute de noi recruti in randurile noastre,'" *Adevărul,* 5 February 2002. Available [in Romanian] at: http://www.adevarul.ro/actualitate/Tratamentul-prizonierilor-Guantanamo-Bay-randurile_0_18599790.html.

[127] Exhibit 39: "'Talibanul American' a fost Maltratat de Autoritati", *Adevărul*, 25 March 2002. Available [in Romanian] at: http://www.adevarul.ro/actualitate/Talibanul-american-maltratat-autoritati_0_17998245.html.

[128] Exhibit 40: Duncan Campbell, *The Guardian*, 12 March 2002. Available at http://www.guardian.co.uk/world/2002/mar/12/september11.usa.

[129] Exhibit 41: CNN, 23 November 2002. Available at http://archives.cnn.com/2002/US/11/22/alqaeda.capture/.

[130] Exhibit 42: *BBC* News, 23 December 2002. Available at http://news.bbc.co.uk/2/hi/middle_east/2602627.stm.

the CIA, and "flown to a special C.I.A. interrogation site that the agency had set up in Jordan to keep Qaeda operatives for questioning in a jurisdiction removed from the United States".);[131] (v) "A CIA-Backed Team Used Brutal Means to Crack Terror Cell" (reporting that the Albanian secret police cooperated with CIA agents to capture five suspected militants living in Albania, who were interrogated by the United States and then handed over to Egypt, where they were held incommunicado for periods ranging from two to fifteen months, and reportedly tortured before appearing in court.);[132] (vi) "U.S. Behind Secret Transfer of Terror Suspects", (reporting that Indonesian intelligence apprehended Iqbal Madni at the behest of the U.S., and "two days later – without a court hearing or a lawyer – he was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt", and also noting that "[s]ince Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said. 'After September 11, these sorts of movements have been occurring all the time,' a U.S. diplomat said. 'It allows us to get information from terrorists in a way we can't do on U.S. soil.'")[133]; (vii) "CIA Accused of Torture at Bagram Base; Some Captives Handed to Brutal Foreign Agencies" (reporting that the CIA was using "'stress and duress' techniques on al-Qaida suspects held at secret overseas detention centres, as well as contracting out their interrogation to foreign intelligence agencies known to routinely use torture);[134] (viii) "Ends, Means and Barbarity" (reporting that "American intelligence agents have been torturing terrorist suspects, or engaging in practices pretty close to torture. They have also been handing over suspects to countries, such as Egypt, whose intelligence agencies have a reputation for brutality".)[135]; (ix) "U.S. Decries Abuse but Defends Interrogations" (quoting a U.S. official on the interrogation of terrorism suspects: "'[I]f you don't violate someone's human rights some of the time, you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists . . . . Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said".);[136] (x)"Questioning Terror Suspects in a Dark and Surreal

[131] Exhibit 43: Patrick Tyler, *New York Times*, 23 December 2002. Available at http://www.nytimes.com/2002/12/23/world/threats-responses-terror-trail-qaeda-suspect-was-taking-flight-training-last.html?scp=20&sq=&st=nyt.
[132] Exhibit 44: Andrew Higgins, *The Wall Street Journal*, 20 November 2001.
[133] Exhibit 45: Rajiv Chandrasekaran and Peter Finn, *Washington Post*, 11 March 2002. Available at http://www.infowars.com/saved%20pages/Police_state/torture_wapost.htm.
[134] Exhibit 46: Suzanne Goldenberg, *Guardian*, 27 December 2002. Available at http://www.guardian.co.uk/world/2002/dec/27/usa.afghanistan.
[135] Exhibit 47: "Ends, means and barbarity", *Economist*, 11 January 2003. Available at http://www.economist.com/node/1522792.
[136] Exhibit 48: Dana Priest and Barton Gellman, *Washington Post*, 26 December 2002. Available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

World" (noting that "interrogations of important Al-Qaeda operatives like Mr. [Faruq] Mohammed occur at isolated locations outside the jurisdiction of American law. Some places have been kept secret, but American officials acknowledged that the C.I.A. has interrogation centers at the United States air base at Bagram in Afghanistan and at a base on Diego Garcia in the Indian Ocean . . . . Intelligence officials also acknowledged that some suspects had been turned over to security services in countries known to employ torture".);[137] and (xi) "Army Probing Deaths of 2 Afghan Prisoners" (noting that "the inquiries by the Army's Criminal Investigation Command are proceeding as human rights groups and the International Committee of the Red Cross voice concerns about treatment of prisoners at Bagram. Some U.S. officials familiar with the Bagram detention operation have said that uncooperative prisoners are made to stand for long periods of time, are often hooded, and are deprived of sleep with the use of flashing lights or loud noises").[138]

U.N. Sources

92. In addition to newspaper articles, by 6 June 2003 multiple U.N. sources had reported on or expressed concern about the U.S. practice of extraordinary rendition and ill-treatment of prisoners overseas.

93. *U.N. Human Rights Commission*. In February 2003, the U.N. Human Rights Commission received and published on its website reports from non-governmental organizations (NGOs) concerning ill-treatment of U.S. detainees. The International Rehabilitation Council for Torture submitted a statement in which it expressed its concern over reported U.S. use of "stress and duress" methods of interrogation, among them sleep deprivation and hooding, as well as contraventions of *refoulement* provisions in Article 3 of the Convention against Torture. The report criticized the failure of governments to speak out clearly to condemn torture and emphasized the importance of redress for victims.[139]

94. On 23 April 2003, the Human Rights Commission passed Resolution 2003/32, which stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture".[140]

95. In 2002 and 2003, the U.N. Working Group on Arbitrary Detention received many communications alleging the arbitrary character of detention measures used by the U.S. Government as part of its investigations into the terrorist acts of 11 September 2001.[141] It concluded that so long as a competent tribunal in the

[137] See Exhibit 49: Don van Natta, Jr., *New York Times*, 9 March 2003. Available at http://www.nytimes.com/2003/03/09/international/09DETA.html?pagewanted=all.
[138] Exhibit 50: Mark Kaufman, *Washington Post*, 5 March 2003.
[139] Exhibit 51: UN Commission on Human Rights, "Civil and Political Rights, Including the Questions of Torture and Detention: Written Statement Submitted by the International Rehabilitation Council for Torture Victims", 59th Session, 28 February 2003, E/CN.4/2003/NGO/51. Available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.NGO.51.En?Opendocument.
[140] Exhibit 52: UN Commission on Human Rights, "Commission on Human Rights Resolution 2003/32: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", E/CN.4/RES/2003/32, 23 April 2003, para 14. Available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-32.doc.
[141] See, e.g., *Benchellali et al. v United States of America*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 33, para 13 & (2003); *Ayub Ali Khan and Azmath Jaweed v*

United States had not issued a ruling on the contested issue of whether the detainees at Guantánamo were entitled to prisoner-of-war status and protection under the Geneva Conventions, the detainees were entitled to the protection of their rights to humane treatment, to a fair trial, and to a determination of the lawfulness of their detention. The report noted that the Inter-American Commission on Human Rights had requested that the United States take urgent measures to have the legal status of detainees at Guantánamo Bay determined by a competent tribunal.[142]

96. *U.N. Special Rapporteurs*. The U.N. Special Rapporteur on Torture issued a report in July 2002, pursuant to the General Assembly's resolution 56/143 of 19 December 2001. In his report, the Rapporteur warned that "[States must] ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment".[143]

97. On 16 November 2001, the U.N. Special Rapporteur on the Independence of the Judiciary made a public statement outlining his concerns about the legal developments in the United States during the "war on terror", focusing on the establishment of military tribunals, the absence of the guarantee of the right to legal representation and advice while detained, the establishment of an executive review process to replace the right to appeal conviction and sentence to a higher tribunal, and the exclusion of the jurisdiction of any other courts or tribunals.[144] The Rapporteur stated that "[t]he very fact that such powers are available to the executive strikes at the core of the principles of the rule of law, equality before the law and the principles of a fair trial".[145]

98. *Office of the High Commissioner for Human Rights*. The High Commissioner for Human Rights made a statement on 16 January 2002 concerning the detention of Taliban and Al-Qaeda Prisoners at the U.S. Base in Guantánamo Bay. She said:

> "All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the

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United States of America, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 20, para 15-18 (2002).

[142] Exhibit 53: UN Commission on Human Rights, Report of Working Group on Arbitrary Detention, "Civil and Political Rights, Including the Question of Torture and Detention", 59th Session, 16 December 2002, E/CN.4/2003/8, para 61-64. Available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/c58095e9f8267e6cc1256cc60034de72/$FILE/G0216028.pdf.

[143] Exhibit 54: General Assembly, "Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment", 57th Session, 2 July 2002, A/47/173, para 35. Available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2107741d197b2865c1256c390032be06/$FILE/N0247560.pdf.

[144] See Exhibit 55: UN Wire, "UN Expert on independence of judiciary concerned by military order signed by US president", 16 November 2001. Available at http://www.un.org/apps/news/story.asp?NewsID=2173&Cr=terror&Cr1=law.

[145] *Ibid*.

relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees . . . must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention".[146]

Human Rights Organizations

99. By the time Mr. al Nashiri was detained in Romania, many organizations issued human rights reports on the U.S. rendition programme, the circumstances of detention, and torture and ill-treatment in CIA facilities around the world and in Guantánamo.

100. *International Committee of the Red Cross*. The International Committee of the Red Cross (ICRC) began publicly to express its concerns about the legal system the United States was using for detainees during 2003.[147] In relation to Guantánamo, the ICRC president asked the U.S. authorities "to institute due legal process and to make significant changes for the more than 600 internees held there".[148]

101. *Amnesty International*. In its 2003 Annual Report for the United States, Amnesty International provided information on events in 2002, including transfers of detainees to Guantánamo in the wake of September 11, abductions, conditions of transfer, conditions in detention, and lack of charges or access to lawyers or courts.[149] It also reported on detainees being held by the United States in undisclosed locations: "An unknown number of detainees originally in U.S. custody were allegedly transferred to third countries, a situation which raised concern that the suspects might face torture during interrogation".[150] Amnesty International also reported that year on the situation of Riduan Isamuddin:

> "On 11 August, Riduan Isamuddin aka Hambali, [a man with] suspected links to *al-Qa'ida*, was arrested in the city of Ayutthaya in Thailand. According to media reports, he is being held in U.S. custody at an undisclosed location for interrogation . . . . Amnesty International is concerned that the detention of suspects in undisclosed locations without

[146] Exhibit 56: United Nations High Commissioner for Human Rights, "Statement on detention of Taliban and Al Qaida prisoners at US base in Guantánamo Bay, Cuba", 16 January 2002. Available at http://www.unhchr.ch/huricane/huricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument.

[147] Exhibit 57: International Committee of the Red Cross, "ICRC President meets with US officials in Washington DC,' News release 03/36, 28 May 2003. Available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5mybcu?opendocument.

[148] *Ibid*.

[149] Exhibit 58: Amnesty International, "2003 Annual Report for the United States of America." (May 2003). Available at http://www.unhcr.org/refworld/category,COI,AMNESTY,ANNUALREPORT,USA,3edb47e21a,0.html.

[150] *Ibid*.

access to legal representation or to family members and the "rendering" of suspects between countries without any formal human rights protections is in violation of the right to a fair trial, places them at risk of ill-treatment and undermines the rule of law".[151]

102. *Human Rights Watch*. In a 26 December 2002 report entitled "United States: Reports of Torture of Al-Qaeda Suspects", Human Rights Watch noted:

> "[T]housands of persons have been arrested and detained with U.S. assistance in countries known for the brutal treatment of prisoners. The Convention against Torture, which the United States has ratified, specifically prohibits torture and mistreatment, as well as sending detainees to countries where such practices are likely to occur. That would include, according to the U.S. State Department's own annual human rights report, Uzbekistan, Pakistan, Jordan, and Morocco, where detainees have reportedly been sent".[152]

103. Another Human Rights Watch report from August 2002 stated that, since 11 September 2001, there had been an "erosion of basic rights against abusive governmental power" guaranteed under both U.S. and international human rights law. The report noted that most of the detainees of "special interest" to the September 11th investigations had been non-citizens, typically Muslim men. These men were subjected to arbitrary detention and legal proceedings that violated due process and the presumption of innocence, and they were secretly incarcerated in deplorable conditions of confinement and physical abuse.[153]

104. *International Helsinki Federation of Human Rights*. An April 2003 report of the International Helsinki Federation of Human Rights detailed incommunicado and prolonged overseas detention of terrorism suspects by the United States.[154]

<u>European Legal Cases</u>

105. In 2002 and 2003, a number of cases involving terrorism suspects transferred to Guantánamo or to the United States in the context of the "war on terror" were decided by European courts that put Romania on notice about the ill-treatment of rendition victims by the time of Mr. al Nashiri's transfer from Romania.

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[151] Exhibit 59: Amnesty International, *USA: Incommunicado Detention/Fear of Ill-Treatment: Riduan Isamuddin aka Hambali* (2003). Available at http://www.amnesty.org/en/library/asset/AMR51/119/2003/en/5a0bcd9d-d69f-11dd-ab95-a13b602c0642/amr511192003en.htm.

[152] Exhibit 60: Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects", 26 December 2002. Available at http://www.hrw.org/en/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects?print.

[153] Exhibit 61: Human Rights Watch, "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees", Vol. 14, No. 4 (G) – August 2002, p. 3. Available at http://www.hrw.org/legacy/reports/2002/us911/USA0802.pdf (see, in particular, summary recommendations on page 3).

[154] Exhibit 62: International Helsinki Federation for Human Rights, "Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11", pgs. 91-100, April 2003. Available at http://www.cestim.it/argomenti/09razzismo/europa/2003Apr18en_report_anti-terrorism_pdf%5B1%5D.pdf

106. *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*. In 2002, the U.K. Court of Appeal described Feroz Ali Abbasi's detention in Guantánamo Bay in combination with his inability to challenge the legitimacy of his detention as "objectionable" and commented that "Mr. Abbasi is at present arbitrarily detained in a legal black hole". The court noted with respect to the status of Guantánamo detainees, that "[t]here have been widespread expressions of concern, both within and outside the United States, in respect of the stand taken by the United States government" (referring to the policy of denying Geneva Convention protections to Guantánamo detainees).[155] The case was widely reported in European and international media.[156]

107. In *Boudellaa et al. v. Bosnia and Herzegovina*. In 2002, the Human Rights Chamber for Bosnia and Herzegovina (BiH) held that BiH violated Protocol No. 6 to the Convention by transferring suspected terrorists to U.S. custody while "fail[ing] to take all necessary steps to ensure that the applicants will not be subject to the death penalty".[157]

Publicly Available Information on Military Commission Trials and the Death Penalty

108. By the time of Mr. al Nashiri's transfer from Romania sometime between 6 June 2003 and 6 September 2006, publicly available U.S. laws—President Bush's Military Order of 13 November 2001, entitled "Detention, Treatment, and Trial for Certain Non-Citizens in the War Against Terrorism"[158] and the U.S. Defence Department's March 2002 Military Commission Order No. 1[159]—indicated that terrorist suspects captured by the United States would be subjected to a flagrantly unfair trial by military commission in Guantánamo Bay and the death penalty.

109. President Bush's administration took the position that Guantánamo detainees had no rights to the protections afforded to prisoners of war under the Geneva Conventions. At a press conference on 11 January 2002, Secretary of Defense Rumsfeld stated, they are "unlawful combatants . . . [and] technically, unlawful combatants do not have any rights under the Geneva Convention".[160]

110. The deficiencies inherent in the military commission proceedings applicable to Mr. al Nashiri were well known at the time of his transfer from Romania. Indeed, in a May 2003 Report, the Council of Europe's Parliamentary Assembly

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[155] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598, 6 November 2002. at paras 18, 64, 66.
[156] See, e.g., Exhibit 63: "UK Taleban suspect loses appeal", *BBC News* (6 November 2002), Available at http://news.bbc.co.uk/2/hi/uk_news/2409071.stm.
[157] *Boudellaa et al. v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgement of 11 October 2002 at para 300.
[158] Exhibit 64: Military Order of 13 November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", Section 4, U.S. Federal Register of 16 November 2001, Vol. 66 No. 222. Available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html.
[159] Exhibit 65: US Department of Defense, Military Commission Order No. 1, 21 March 2002 (MCO No. 1). Available at http://www.defense.gov/news/Mar2002/d20020321ord.pdf.
[160] Exhibit 66: Chronology: The New Rules of War. Available at http://www.pbs.org/wgbh/pages/frontline/torture/paper/cron.html.

publicly denounced the military commissions for detainees at Guantánamo Bay, stating:

> "The Assembly expresses its disapproval that those held in detention may be subject to trial by a Military Commission, receiving a different standard of justice than United States nationals, amounting to *a serious violation of the right to receive a fair trial* and to an act of discrimination contrary to the International Covenant on Civil and Political Rights".[161]

111. The May 2003 report also indicated that "[a]lthough Military Commission Order No 1 takes account of certain criticisms made after publication of the Presidential Order, it is clear that certain fundamental rights might not in future be respected if prisoners were tried by these military commissions".[162] The same report concluded that the Guantánamo bay military commissions' "non-separation of powers" violated the right to an independent and impartial trial.[163]

112. In June 2003, the Parliamentary Assembly of the Council of Europe adopted Resolution 1340, which affirmed its view that the military commissions were deficient in many minimum fair trial protections.[164]

113. In October 2002, the Human Rights Chamber for Bosnia and Herzegovina found that "the US President's Military Order and the Military Commission Order No. 1 establish tribunals whose independence from the executive power is subject to deep-cutting limitations. The rights to trial within a reasonable time, to a public hearing, to equality of arms between prosecution and defence and to counsel of the accused's choosing are all severely curtailed. Moreover, [individuals subject to the military commissions] are discriminatorily deprived of the guarantees enshrined in the Bill of Rights of the US constitution".[165]

114. On 27 November 2001, Human Rights Watch criticized President Bush's November 13th Military Order on the grounds that "any foreign national designated by the President as a suspected terrorist or as aiding terrorists could potentially be detained, tried, convicted and even executed without a public trial, without adequate access to counsel, without the presumption of innocence or even proof of guilt beyond reasonable doubt, and without the right to appeal".[166]

115. In a public statement dated 22 March 2002, Amnesty International criticised the military commissions on the grounds that they lacked independence from the executive branch, discriminated against non-U.S. citizens, allowed the

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[161] Exhibit 67: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay", Council of Europe, Doc. 9817, 26 May 2003, at para 8 (emphasis added). Available at http://assembly.coe.int/Documents/WorkingDocs/doc03/edoc9817.htm

[162] *Ibid*. at para 44.

[163] *Ibid*. at paras 66-70.

[164] Council of Europe Parliamentary Assembly, Resolution 1340 (2003) : Rights of persons held in the custody of the United States States in Afghanistan or Guantánamo Bay, adopted on 26 June 2003. Available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/ERES1340.htm.

[165] *Boudellaa et al*. *v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 & CH/02/8691, 11 October 2002, at para 299.

[166] Exhibit 68: Fact Sheet: Past U.S. Criticism of Military Tribunals, 27 November 2001. Available at http://www.hrw.org/en/news/2001/11/28/fact-sheet-past-us-criticism-military-tribunals.

admission of tortured and hearsay evidence, forced defendants to accept US military lawyers as counsel against their wishes, failed to guarantee that civilian defence counsel would be able to see all the evidence against their clients, permitted the use of secret evidence and anonymous witnesses, and failed to guarantee that all relevant documents would be translated for the accused.[167]

116. Amnesty International also stated that the presumption of innocence had been undermined by public comments made by the very officials that controlled the commissions. President Bush had repeatedly labelled the detainees as "killers" and "terrorists", and Defense Secretary Donald Rumsfeld had referred to Guantánamo detainees as "among the most dangerous, best-trained, vicious killers on the face of the earth", and as "hard-core, well-trained terrorists". [168]

117. Moreover, Amnesty International noted that Pentagon officials had stated that detainees could remain in detention indefinitely even if acquitted by military commissions. [169]

118. Numerous press reports put Romania on notice of the flagrantly unfair nature of the military commission proceedings applicable to Mr. al Nashiri. On 8 December 2001, the New York Times reported that the United Nations human rights commissioner, Mary Robinson, criticized the Bush administration plan to set up military commissions, saying they skirt democratic guarantees of the basic right to a fair trial. She said that the 11 September 2001 terrorist attacks were crimes against humanity meriting special measures but said that the plan for secret trials was so overly broad and vaguely worded that it threatened fundamental rights.[170]

119. Also on 8 December 2001, the New York Times reported that over 300 law professors openly opposed the military commissions as violating U.S. and international law, including binding treaties. The lawyers publicly stated that the military commissions are "legally deficient, unnecessary and unwise". [171]

120. A news report from November 2001 reported that Spanish officials would refuse to extradite persons suspected of complicity in the September 11 attacks to the United States unless they received assurances that such persons would be tried in civilian courts, as opposed to military commissions.[172]

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[167] Exhibit 69: *Military commissions: Second-class justice*, Amnesty International, 22 March 2003, AI Index AMR 51/049/2002 - News Service Nr. 53, USA - . Available at http://www.amnesty.org/en/library/asset/AMR51/049/2002/en/1fa9f425-f7f6-11dd-8935-051395860c48/amr510492002en.pdf.

[168] *Ibid*.

[169] *Ibid*.

[170] Exhibit 70: Elizabeth Olsen, "United Nations: Rights Official Criticizes U.S. Tribunal Plan", *New York Times*, 8 December 2001. Available at http://www.nytimes.com/2001/12/08/world/world-briefing-united-nations-rights-official-criticizes-us-tribunal-plan.html?src=pm

[171] Exhibit 71: Katharine Q. Seelye, "In Letter, 300 Law Professors Oppose Tribunals Plan", *New York Times*, 8 December 2001. Available at http://www.nytimes.com/2001/12/08/us/nation-challenged-military-tribunals-letter-300-law-professors-oppose-tribunals.html?src=pm

[172] Exhibit 72: Matthew Purdy, "Bush's New Rules to Fight Terror Transform the Legal Landscape", *New York Times*, November 25, 2001, p. A1, col. 1. Available at http://www.nytimes.com/2001/11/25/us/nation-challenged-law-bush-s-new-rules-fight-terror-transform-legal-landscape.html

121. A newspaper article dated 4 June 2003 reported that the military commissions for detainees at Guantánamo Bay violate international law by not comporting with the Geneva Conventions. The article cited reports from the BBC, as well as U.S. and Australian newspapers, and stated that: "[i]n violation of international law, the estimated 680 prisoners have been held without charges and without legal representation since they began arriving at the US military camp 18 months ago". Numerous other violations of international law were cited therein.[173]

122. In addition, President Bush's November 2001 order and the Department of Defense March 2002 order provided for the death penalty.[174] The President's Military Order provides that "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death".[175] The Department of Defense Order states that "Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper".[176]

123. Moreover, it is commonly known that the death penalty is imposed in the United States, and that publicly available U.S. criminal law provisions governing terrorism-related offenses provide for the death penalty.[177]

124. Finally, as a member of the Council of Europe, Romania was well aware of the risk of transferring terrorist suspects to the death penalty as well as guidelines guarding against such risks. Indeed, in July 2002, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism which directed that "[t]he extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be

[173] Exhibit 73: Kate Randall, "US prepares for military tribunals at Guantánamo Bay", 4 June 2003. Available at http://www.wsws.org/articles/2003/jun2003/trib-j04.shtml.
[174] Exhibit 64: Military Order of 13 November 2001, Section 4; Exhibit 65: MCO No. 1, Section 6(G).
[175] Exhibit 64: Military Order of 13 November 2001, Section 4(a). The US President's Military Order also provides that "it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the *laws of war* and other applicable law by military tribunals", *ibid*., at Section 1(e) (emphasis added); the laws of war in turn provide that "[t]he death penalty may be imposed for grave breaches of the law [of war.]" *United States Dep't of Army Field-Manual 27-10: The Law of Land*, Chapter 8, Section II, para 508. Available at http://www.usmc.mil/news/publications/Documents/FM%2027-10%20W%20CH%201.pdf.
[176] Exhibit 65: MCO No. 1, Section 6(G).
[177] See, e.g., 18 U.S.C. §§2332 a, b.

sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out". [178]

Diplomatic Missions of Romania

125. The Romanian government is presumed to have had at its disposal through its diplomatic missions information about the CIA's extraordinary rendition programme and about the U.S. government's treatment of terrorism suspects.

126. There is a presumption in international law that diplomatic missions abroad report to their capitals on events in the country of their posting. In the *Yerodia* case, the International Court of Justice (ICJ) reasoned that a Minister of Foreign Affairs acts on behalf of the State in matters of foreign relations, in part, because communication between embassies and consulates and their governments is presumed.[179]

127. In addition, the Vienna Convention on Consular Relations provides that consular officers have a duty, in considering the extradition and deportation of individuals, to report to their respective governments on conditions in receiving States and to protect the interests of their nationals. For instance, the Convention provides that consular functions shall include "ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested".[180]

128. Well before June 2003, it was common knowledge that the United States was running a secret rendition programme and operating extralegal "black sites" in third countries where detainees were being subjected to torture or cruel, inhuman or degrading treatment. It was also common knowledge that U.S. law provided for prolonged detention without trial of terrorism suspects, for trial by military tribunal of terrorism suspects, and for the imposition of the death penalty for categories of detainees, including "high value detainees" such as Mr. al Nashiri. See paragraphs 86-129 above.

129. Romanian diplomatic missions to the United States and elsewhere are presumed to have informed themselves about and to have reported back to their governments on these developments. Romania's representatives at the United Nations would have been fully aware of the numerous reports criticizing rendition as a violation of human rights standards.

Mr. al Nashiri's Detention and Treatment at Guantánamo Bay

130. As noted above, Mr. al Nashiri has been held at Guantánamo Bay at least since 6 September 2006, when President Bush implicitly acknowledged that the CIA

[178] Exhibit 74: Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, Section XIII, at para 2. Available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=991179.
[179] *Democratic Republic of the Congo v Belgium* [The Yerodia Case], ICJ, Gen. List No. 121, 14 February 2002, at para 53.
[180] See Vienna Convention on Consular Relations, 24 April 1963, Article 5, paras. (a) & (c)

had detained and interrogated him in secret prisons overseas as part of the rendition and secret detention programme.[181]

131. Since September 2006, Mr. al Nashiri has been imprisoned in Guantánamo Bay in a single-cell facility known as "Camp 7", where he remains to date. He is not allowed any family visits. The only way he can communicate with his family is through letters delivered by the ICRC.

132. On 14 March 2007, after almost five years of being held in U.S. custody, Mr. al Nashiri was subjected at Guantánamo Bay to a "Combatant Status Review Tribunal" hearing, which purported to review all the information related to a detainee to determine whether he met the criteria to be designated as an "enemy combatant".[182] The hearing was closed to the public. Mr. al Nashiri was not afforded legal counsel at this hearing. A "personal representative" was appointed for him, but this person did not act as counsel and Mr. al Nashiri's statements to this representative were not privileged. He did not have access to any classified evidence that was introduced against him. Nor did he have the right to confront any of the statements of his accusers that were introduced at this hearing.

133. On 30 June 2008, the U.S. government brought charges against Mr. al Nashiri for trial before a military commission, including those relating to the bombing of the USS Cole on 12 October 2000.[183] On 19 December 2008, the Convening Authority authorized the government to seek the death penalty at his Military Commissions. [184]

134. Shortly thereafter, Mr. al Nashiri's arraignment – which signifies the start of his trial before a military commission – was set for 9 February 2009.

135. On 22 January 2009, President Obama issued an Executive Order requiring that all commission proceedings be halted pending the Administration's review of all detentions at Guantánamo Bay. [185] In response to this order, the government requested a 120 day postponement for the 9 February 2009 arraignment.

136. On 25 January, 2009, the military judge assigned to Mr. al Nashiri's military commission denied the government's request for postponement of the trial. Moreover, the military judge ordered that a hearing on the defence motion regarding Mr. al Nashiri's transportation be held immediately after the

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[181] Exhibit 4: President George W. Bush, Transcript of President Bush's Remarks, "Speech from the East Room of the White House", 6 September 2006.

[182] Exhibit 75: Guantánamo Detainee Processes, Updated October 2, 2007. Available at http://www.defense.gov/news/Sep2005/d20050908process.pdf. The term "enemy combatant" was defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This included any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. *Ibid*.

[183] Charge Sheet (Sworn Charges), 20 June 2008. Available at http://www.defense.gov/news/nashirichargesheet.pdf.

[184] Charge Sheet (Referred charges), Available at http://www.defense.gov/news/alNashiriReferredChargeSheet.pdf.

[185] Exhibit 76: Executive Order, Review and Disposition of Individuals Detained At The Guantánamo Bay Naval Base And Closure of Detention Facilities, 22 January 2009. Available at http://www.whitehouse.gov/the_press_office/ClosureOfGuantánamoDetentionFacilities/.

arraignment. In response to this order, the defence filed a notice that it intended to introduce evidence of how Mr. al Nashiri was treated while in CIA custody. Hours after this notice was filed, on 5 February 2009, the U.S. government officially withdrew charges from the military commission, thus removing Mr. al Nashiri's case from the military judge's jurisdiction.

137. Military commission rules applicable to Mr. al Nashiri have changed since the time he was transferred from Romania and are now governed by the Military Commissions Act of 2009, which was enacted on 28 October 2009.[186] However, they still provide for the death penalty[187] and retain many of the deficiencies associated with the previous military commission rules. The current military commissions lack independence from the executive as well as impartiality because the United States Secretary of Defense or his designee, as the convening authority for a given commission,[188] approves charges for trial by military commission[189] and selects the commission members who are required to be members of the armed forces on or recalled to active duty, [190] and as such are subordinate to the Secretary of Defense. Moreover, military commissions still apply only to non-U.S. citizens.[191]

138. In addition, the current military commission rules place no limits on the length of time within which a suspect must be charged or tried—indeed, they expressly exempt military commissions from speedy trial requirements.[192] Furthermore, the current military commission rules allow for the accused to be denied access to classified information or evidence[193] and, unlike U.S. federal court procedures which bar the admission of hearsay, they expressly permit hearsay evidence and do not bar convictions based mainly on such evidence.[194] Mr. al Nashiri's consequent inability to confront witnesses against him is of particular concern in light of the widespread torture and abuse of U.S. terrorism suspects, whose statements could be introduced as hearsay against him. Unlike U.S. federal court procedures which bar the admission of evidence derived from coerced statements, the current military commission rules admit evidence derived from coerced statements if that evidence would have been otherwise obtained and the use of such evidence would be consistent with the interests of justice.[195] Moreover, the military commission proceedings will still be held in the remote location of Guantánamo Bay, thereby significantly hindering public access to Mr. al Nashiri's proceedings. Indeed, the general public is not allowed to attend those proceedings in Guantánamo, and the U.S. Department of Defense selects only ten applicants for observer status based on the applicant's reach, nexus to

[186] Military Commissions Act of 2009. Available at http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf.
[187] Military Commissions Act of 2009, 10 U.S.C. § 948d (2009).
[188] Military Commissions Act of 2009, 10 U.S.C. § 948h (2009).
[189] Military Commission Rule 601, Manual for Military Commissions. Available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.
[190] Military Commissions Act of 2009, 10 U.S.C. § 948i (a), (b)
[191] *Ibid* at § 948c
[192] *Ibid* at § 948b(d)(A).
[193] *Ibid* at § 949p-4(b)(1)
[194] *Ibid* at § 949a(b)(3)(D)
[195] Military Commissions Act of 2009, 10 U.S.C. § 948r (2009); see also Military Commission Rule 305(a)(5)(B).

the military commissions and extent to which the applicant has provided longstanding and frequent coverage of issues relating to military commissions.[196] Media desiring to attend proceedings also have had to apply to the U.S. Department of Defense and selections have been made based on the media outlet's reach; whether it has a history of reporting on the Department of Defense, Guantánamo Bay, military commissions, or closely related topics; whether it represents a mix of mediums; whether it includes both domestic and international news media; and whether it represent regional markets with a specific nexus to the commission proceedings.[197] Although on 9 November 2011, the Department of Defense began providing general public access to the proceedings through closed circuit television at Fort Meade, Maryland,[198] Mr. al Nashiri's recent pre-trial proceedings have largely been conducted in secret and therefore closed to the general public, as well as to observers and media outlets who obtained approval to attend the proceedings at Guantánamo.[199] Finally, there is considerable uncertainty associated with the current military commission rules, which were enacted as recently as October 2009,[200] and have been applied thus far in only three cases, none of which involved the death penalty.[201]

139. On 20 April 2011, United States military commission prosecutors brought capital charges against Mr. al Nashiri relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. [202] Mr. al Nashiri was designated for trial by military commission despite the fact that the United States government had previously indicted two of his alleged co-conspirators in the USS Cole bombing – Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso – in U.S. federal court.[203] The indictment, filed on 15 May 2003 while Mr. al Nashiri was secretly

[196] Exhibit 77: Observer Selection Criteria for viewing of military commission proceedings. Available at http://www.mc.mil/Portals/0/Observer%20Selection%20Criteria.pdf.
[197] Exhibit 78: U.S. Department of Defense, Military Commissions Media Invitation Announced, 27 June 2012. Available at http://www.defense.gov/advisories/advisory.aspx?advisoryid=3454
[198] Exhibit 79: U.S. Department of Defense, Guantanamo Bay Media Invitation Announced, 14 October 2011. Available at http://www.defense.gov/advisories/advisory.aspx?advisoryid=3396.
[199] See Exhibit 80: Carol Rosenberg, Guantánamo war court holds secret session; accused not present, 18 July 2012. Available http://www.miamiherald.com/2012/07/18/2900737/guantanamo-war-court-in-secret.html.
[200] See Military Commissions Act of 2009. Available at http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf.
[201] The three individuals tried thus far under the Military Commissions Act of 2009 are Ibrahim al Qosi, Omar Khadr, and Noor Muhammad. See http://www.defense.gov/news/commissions.html.
[202] Exhibit 81: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at http://www.defense.gov/releases/release.aspx?releaseid=14424.
[203] See Exhibit 82: Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Exhibit 83 : Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole, Washington, D.C., May 15, 2003. Available at http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.

held in CIA custody in Poland, identified him as an unindicted co-conspirator in the USS Cole bombing.[204]

140. The military commission prosecutors announced that the capital charges against Mr. al Nashiri would be forwarded for independent review to Bruce MacDonald, the "Convening Authority" [205] for the military commissions, who would decide whether to reject the charges or to refer some, all or none of them for trial before military commission".[206]

141. On 28 September 2011, the Convening Authority referred charges against Mr. al Nashiri for trial by military commission at Guantánamo Bay.[207] Moreover, these charges were referred to a capital military commission, meaning that if convicted, Mr. al Nashiri could be sentenced to death.[208]

142. On 9 November 2011, Mr. al Nashiri was arraigned. The military judge considered his challenge to the fact that the government was reading legally privileged material from Mr. al Nashiri's lawyers, and found that procedures involving a review of detainee's cells, including reading attorney-client correspondence, "infringe[d] on the attorney-client privilege".[209]

143. Mr. al Nashiri's counsel also filed a motion asking the Commission to order the government to provide a factual statement on whether Mr. al Nashiri would be released from custody if he were acquitted.[210] The United States Government opposed the motion, asserting that while it had the authority to continue to detain Mr. al Nashiri even if he were acquitted following a military commission trial, the commission did not have the authority to determine the detention status of an accused following completion of Commission proceedings.[211] At the arraignment, the military judge denied Mr. al Nashiri's motion with leave to make a subsequent amended pleading when jury instructions would be considered.[212]

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[204] See Exhibit 82: Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, at 6. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf.

[205] The "Convening Authority" is a United States official designated by the United States Secretary of Defense for convening military commissions. See Military Commissions Act of 2009, 10 U.S.C. § 948 h(2009).

[206] Exhibit 81: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at http://www.defense.gov/releases/release.aspx?releaseid=14424

[207] Exhibit 84: DOD Announced Charges Referred Against Detainee Al Nashiri, 28 Sep. 2011. Available at http://www.defense.gov/releases/release.aspx?releaseid=14821.

[208] *Ibid*.

[209] See Exhibit 85: Transcript of Proceedings of a Military Commission, 9 November 2011, at 168-169. Available http://www.mc.mil/CASES/MilitaryCommissions.aspx.

[210] See Exhibit 86: *United States v. al Nashiri*, Motion for Appropriate Relief: To Determine if the trial of this case is one from which defendant may be meaningfully acquitted, 19 October 2011. Available at http://www.mc.mil/CASES/MilitaryCommissions.aspx.

[211] Exhibit 87: *United States v. al Nashiri*, Government Response to Defense Motion for Appropriate Relief: To Determine if the trial of this case is one from which defendant may be meaningfully acquitted, 27 October 2011, at 1, 6. Available at http://www.mc.mil/CASES/MilitaryCommissions.aspx.

[212] See Exhibit 85: Transcript of Proceedings of a Military Commission, 9 November 2011, at 66-67. Available at http://www.mc.mil/CASES/MilitaryCommissions.aspx.

144. Mr. al Nashiri's trial by military commission is not expected to commence for at least another year from the date that this application to the European Court is being filed.

145. Pursuant to United States government classification guidelines, everything that Mr. al Nashiri says is presumed to be classified at the highest, i.e., "Top Secret" level. Accordingly, Mr. al Nashiri's U.S. counsel can only relay his communications to persons with the requisite security clearance, a determined "need to know" by the United States government, and in a special top secret facility. No procedure has been available for declassifying Mr. al Nashiri's communications. Thus, his U.S. lawyers have been unable to relay his communications in public, and nothing in this pleading is based on information provided by Mr. al Nashiri to his counsel. Nor is anything in this pleading obtained from any classified source. The U.S. government's stated explanation for such presumptive classification is as follows: "Because the Accused . . . [was] detained and interrogated in the CIA program, [he was] exposed to classified sources, methods, and activities. Due to [his] exposure to classified information, the Accused [is] in a position to reveal this information publicly through their statements. Consequently, any and all statements by the Accused . . . are presumptively classified until a classification review can be completed."[213]

146. A 2011 Council of Europe report on the abuse of state secrecy and national security notes that, "[t]he work of al-Nashiri's lawyers has been made extremely difficult by state secrecy issues because everything Mr al-Nashiri says is presumed to be classified. Lieutenant Commander Stephen Reyes, Mr al-Nashiri's military defence counsel, has provided the following description of events:

> "A few months ago, I was asked by the government for the correct spelling of my client's name, according to him. I was unable to answer this simple question, because any statements made by my client are presumed to be top secret". [214]

147. On 2 October 2008, counsel for Mr. al Nashiri had filed a petition for writ of *habeas corpus* on Mr. al Nashiri's behalf in a federal district court of the District of Columbia. That petition is still pending to date with no decision from the court.

Romanian Senate Proceedings

148. On 21 December 2005, a Senate Committee of Inquiry was established under Article 1 of Decision No. 29 of the Senate, Parliament of Romania, to investigate the allegations regarding the use of Romanian territory for CIA

[213] Exhibit 5: *United States v. Abd al-Rahim Hussayn Muhammad al-Nashiri*, Government Motion for Protective Order to Protect Classified Information Throughout All Stages of the Proceedings, Appellate Exhibit 013, at 4.

[214] Exhibit 88: Parliamentary Assembly, Council of Europe, Abuse of state secrecy and national security: obstacles toparliamentary and judicial scrutiny of human rights violations at para 13, 16 Sep. 2011. Available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12714.pdf.

detention facilities or flights by CIA-chartered aircraft.[215] The Chairperson of the Committee was Senator Norica Nicolai, supported by Vice-Chair George Cristian Maior and Secretary Ilie Petrescu.[216] In May 2008, the inquiry published its final report, and concluded that CIA detention centers did not exist in Romania, no flights transported detainees through Romania, and no Romanian institutions participated in the CIA programme.[217] Annexes to the report remain classified to this date. Moreover, as described below, the inquiry did not investigate any of the rendition flights that landed in Romania.

149. The Senate inquiry was subjected to extensive criticism. The 2007 Council of Europe report found it "disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions' . . . [rather than aimed at producing] coherent findings based on objective fact-finding".[218] The report observed that "the categorical nature of the Committee's conclusions cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in light of the material and testimony [Dick Marty, author of the 2007 Council of Europe Report] received from sources in Romania, the Committee does not appear to have engaged in a credible or comprehensive inquiry. . . [T]he Romanian Government and Parliament have preferred to keep control of information by directing everything through the Senate Committee and ultimately reverted to their position of complete denial".[219]

150. The 2007 Council of Europe report noted three principal concerns with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania: "far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources".[220]

151. Regarding inconsistencies in Romanian flight and airport data, the 2007 Council of Europe report elaborates that, in response to its authors' inquiries, "multiple different Romanian sources" provided flight data yielding "clear

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[215] Exhibit 3: 2007 Council of Europe report at 46, n. 200; see also Exhibit 89: Report of 22/04/2008, Published in the Official Monitor, Part I, no. 350, of 07/05/2008, of the Investigation Committee for investigating the statements regarding the existence of CIA detention facilities or of some flights of planes leased by CIA on the territory of Romania. Available at http://www.jurisprudenta.com/lege/hotarare-15-2008-vzsqe/.
[216] Exhibit 3: 2007 Council of Europe report at 46, n. 200.
[217] Exhibit 89: Report of 22/04/2008, Published in the Official Monitor, Part I, no. 350, of 07/05/2008, of the Investigation Committee for investigating the statements regarding the existence of CIA detention facilities or of some flights of planes leased by CIA on the territory of Romania, Chapter 6: Final Conclusion, paras 1-8.
[218] Exhibit 3: 2007 Council of Europe report at para 230.
[219] *Ibid*.
[220] *Ibid*. at para 228.

inconsistencies". The report declares that "[t]he disagreement between these sources is too fundamental and widespread to be explained away by simple administrative glitches, or even by in-flight changes of destination by Pilots-in-Command, which were communicated to one authority but not to another. There presently exists **no truthful account of detainee transfer flights into Romania**, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out".[221]

152. The Romanian Senate itself admitted, in its correspondence with Romanian NGO APADOR-CH, the superficial nature of the Senate Commission inquiry.[222] Thus, the Romanian Senate, under the signature of its president at the material time, responded to a Freedom of Information request from APADOR-CH, stating that "The Inquiry Commission has not asked for data from the competent institutions, has not made any investigations and does not hold any information on the scope of the flights with tail numbers mentioned in Chapter 5 point 3".[223] (Chapter 5 point 3 was a section of the Inquiry Commission's report entitled "Conclusions resulted from the investigations of flights on which questions were raised" which purported to address Swiss Senator Dick Marty's concerns about specific flights suspected of being involved in transporting CIA prisoners in and out of Romania).[224] It is evident the Senate inquiry was not effective because it did not conduct any investigations relating to these suspicious flights or attempt to uncover information relating to their scope.

153. The 2007 European Parliament report similarly noted deep concerns with the lack of adequate investigation by Romanian authorities, and called the conclusions drawn by the Romanian Senate inquiry "premature and superficial".[225] The report also noted that "the Romanian inquiry committee heard no testimony from journalist, NGOs, or officials working in airports" before arriving at their conclusions.[226]

154. More recently, a 2011 Council of Europe Report observed that the Romanian parliament had "conducted no more than a superficial inquiry", and called on the judicial authorities of Romania "to finally initiate serious investigations following the detailed allegations of abductions and secret detentions".[227]

155. Similarly, in September 2011, Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stated that "Romania has . . . been found complicit in CIA secret detentions. A CIA Black Site was opened near Bucharest on 23 September 2003, immediately after the closure of the Polish facility. It is known that at least one of the HVDs from Poland was delivered

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[221] *Ibid*. (Emphasis in original.)
[222] Exhibit 90: Adresa nr.I/512/13.X.2008 a Senatului Romaniei
[223] *Ibid*.
[224] Exhibit 89: Report of 22/04/2008, Published in the Official Monitor, Part I, no. 350, of 07/05/2008, of the Investigation Committee for investigating the statements regarding the existence of CIA detention facilities or of some flights of planes leased by CIA on the territory of Romania.
[225] Exhibit 3: 2007 European Parliament report, at para 159.
[226] *Ibid*.
[227] Exhibit 88: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human rights, Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, 16 September 2011, at paras 11, 41.

directly to Baneasa Airport in the middle of the night".[228] He added, "[u]nfortunately, the Romanian authorities have demonstrated little genuine will to uncover the whole truth of what happened on Romanian territory. The only official response has been denial, supported by a Senate Committee report refuting all allegations. A prosecutorial investigation, or a public inquiry with the power to compel classified evidence, must no longer be avoided". [229]

156. In late March 2012, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg presented an extensive dossier to the Romanian government representative in Strasbourg for the Ministry of Justice and the General Prosecutor in Bucharest. The dossier contained evidence that al Nashiri and some other "high value detainees" were transported to Bucharest in September 2003 where they were secretly detained and interrogated by CIA officials. Commissioner Hammarberg recommended a serious investigation into these circumstances. By the end of July 2012, there had been no response to this request or to the content of the dossier.

157. On 29 June 2012, British NGO Reprieve further documented failures associated with the Senate inquiry. Significantly, the inquiry failed to notice key suspicious flights in and out of Romania that were operated by Computer Sciences Corporation (CSC), a company that operated secret CIA rendition flights and disguised the itineraries of its flights by filing false flight plans and using two planes to complete a trip so that no single plane's flight plan recorded the entire journey.[230] These suspicious flights included:

    a) Gulfstream IV with tail number N288KA that flew from Kabul via Amman to Bucharest on 31 July 2004, and stayed less than 90 minutes in Bucharest before returning to Washington D.C. via Prague and Gander;

    b) Gulfstream IV with tail number N308AB that flew from Romania to Morocco and then on to Kabul and Algeria during 23-28 August 2004;

    c) Gulfstream IV with tail number N789DK that flew from Romania to Kabul via Amman on 20 October 2004;

    d) Boeing 737 with tail number N787WH that flew from Morocco to Romania and onwards to Lithuania on 18 February 2005 on a false flight plan giving its destination as Gothenburg, Sweden (a Lithuanian parliamentary inquiry on secret prisons confirmed its arrival in Lithuania from Romania);

    e) Gulfstream IV with tail number N308AB that flew from Romania to Tirana, Albania, arriving there on 5 October 2005, where its pilot was instructed to "drop all PAX [passengers]. N787WH, also contracted by CSC, was already waiting for them and left Tirana soon after, heading to Lithuania, although it had filed a flight plan to Tallinn in Estonia;

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[228] Exhibit 91: Thomas Hammarberg, Europeans must account for their complicity in CIA secret detention and torture, 5 September 2011. Available at http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=175.
[229] *Ibid*.
[230] Exhibit 92: Reprieve, Multiple failures revealed in Romania's "Whitewash" Rendition Inquiry, 29 June 2012. Available at http://reprieve.org.uk/press/2012_06_29_romania_whitewash_rendition_inquiry/.

f) Gulfstream IV with tail number N1HC that flew from Romania and arrived just after midnight on 6 November 2005 in Amman where another Gulfstream, N248AB, took off about 30 minutes later for Kabul.[231]

2012 Criminal Complaint pending before Romanian authorities

158. On 29 May 2012, the Open Society Justice Initiative filed a criminal complaint on Mr. al Nashiri's behalf before the General Prosecutor of Romania, alleging violations of Romanian law and of his rights under the European Convention arising from his secret detention in Romania, and seeking an effective investigation into these violations.[232]

159. On 5 July 2012, Romanian NGO, APADOR-CH, in its capacity as the point of contact between the Open Society Justice Initiative and the General Prosecutor's Office with respect to Mr. al Nashiri's complaint, mailed a letter to that office asking for the number assigned to the criminal file that was formed as a result of Mr. al Nashiri's complaint and about the status of investigation into his complaint.[233]

160. In a letter dated 20 July 2012, the General Prosecutor acknowledged that the complaint has been registered and assigned a file number, and that its review is at a preliminary stage. However, thus far there has been no official decision to open a formal criminal investigation into Mr. al Nashiri's claims.[234]

IV. ALLEGED VIOLATIONS OF THE CONVENTION

161. This Court has previously recognised that "extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention. It would be incompatible with a Contracting State's obligations under the Convention if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition. To do so would be to collude in the violation of the most basic rights guaranteed by the Convention".[235]

162. By colluding in Mr. al Nashiri's secret detention and extraordinary rendition, the Romanian government violated its basic obligations under the Convention. Romania is responsible for violating Mr. al Nashiri's rights under Articles 2, 3, 5, 6, 8 and 13 and Protocol No. 6 to the Convention, as well as for violating his and the public's right to truth. These violations arise from:

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[231] *Ibid*.
[232] Exhibit 93: Criminal Complaint filed on behalf of al Nashiri before the Romanian General Prosecutor, 29 May 2012.
[233] Exhibit 94: Letter from APADOR-CH to General Prosecutor, 5 July 2012.
[234] Exhibit 95: Letter from General Prosecutor to APADOR-CH, 20 July 2012.
[235] *Babar Ahmad et al v. UK*, ECtHR, Admissibility decision 8 July 2010, at para 114. The Court defined extraordinary rendition as "the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment." *Ibid*. at para 113. Mr. al Nashiri's case presents this kind of extra-judicial transfer.

- *A. Treatment in Romania*. Romania violated Articles 3, 5 and 8 of the European Convention by colluding in Mr. al Nashiri's ill-treatment and incommunicado detention on Romanian territory.
- *B. Transfer from Romania*. Romania violated Mr. al Nashiri's rights under Articles 2 and 3 and Protocol No. 6 to the Convention by assisting in his transfer from Romania despite a real risk of his being subjected to the death penalty; under Article 3 by assisting in his transfer despite the real risk of further ill-treatment in U.S. custody; under Article 5 by assisting in his transfer despite the real risk of further prolonged arbitrary detention; and under Article 6 by assisting in his transfer from Romania despite the risk of his being subjected to flagrantly unfair trial
- *C. Failure to conduct an effective investigation*. Romania has violated Articles 2, 3, 5, and 8, as well as Mr. al Nashiri's right to an effective remedy under Article 13 by failing to conduct an effective investigation into the secret prison on its territory and the associated violation of his rights.
- *D. Failure to disclose the truth*. Romania has violated Mr. al Nashiri's and the public's right to truth under Articles 2, 3, 5, 10 and 13 by failing to acknowledge, investigate, and disclose details of Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition.

Standard and Burden of Proof

163. Although in assessing evidence, the Court generally applies the standard of proof "beyond reasonable doubt", there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment.[236] The Court "adopts conclusions that are, in its view supported by the free evaluation of all evidence including inferences as may flow from the facts and the parties' submissions".[237] "[P]roof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".[238] Moreover, "the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake".[239] "The Court is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of every kind",[240] including "circumstantial evidence, based on concrete elements".[241]

164. This Court has also repeatedly recognised that "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a

[236] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at para 107.
[237] *Ibid*.
[238] *Ibid*.
[239] *Ibid*. See also *Creanga v. Romania*, ECtHR, Judgement of 23 February 2012, at paras 89, 90-94, 100.
[240] *Ireland v. the United Kingdom*, ECtHR, Judgment of 18 January 1978, at para 209.
[241] *Cakici v. Turkey*, ECtHR, Judgment of 8 July 1999, at para 85.

satisfactory and convincing explanation".[242] In the absence of such an explantion, the Court can draw "inferences which may be unfavourable for the respondent Government".[243] Thus, in *Iskandarov v. Russia*, the applicant alleged he had been abducted by Russian agents and transferred to Tajikistan, where he was subsequently tortured, but no witnesses had seen the applicant's abduction, and the Russian government denied involvement in the applicant's abduction, claiming that his allegations had been disproved by a domestic investigation.[244] The Court relied on supporting evidence--such as U.S. State Department reports that the Tajik Ministry of Foreign Affairs had officially informed UNHCHR that the applicant had been extradited by Russian law enforcement agencies, and the Russian government provided no version capable of explaining how the applicant, last seen in Moscow, had arrived in Tajikistan--in order to find that the applicant was abducted by Russian agents and transferred to Tajikistan as he alleged, where he was subsequently tortured and convicted of various crimes.[245] The court noted that the Russian government merely stated that the investigation into the applicant's kidnapping had not obtained any information supporting his hypothesis, and that it had not produced any evidence from the investigation capable of showing what measures had been taken to disprove the applicant's allegations.[246] Accordingly, the Court concluded that while the applicant had made out a prima facie case that he had been arrested and transferred to Tajikistan by Russian officials, the Russian government had failed to persuasively refute his allegations and to provide a satisfactory and convincing explanation as to how the applicant had arrived in Tajikistan.[247]

165. As set forth in the 2007 Council of Europe report, CIA rendition and detention operations in Romania were approved in a "very small circle of trust" at the highest levels of the Romanian government and conducted amidst unprecedented secrecy.[248] See paragraph 46 above. The Romanian government, furthermore, engaged in a cover-up of those operations. Notably, the 2007 Council of Europe report was "confounded by the clear inconsistencies in the flight data provided" by multiple different Romanian sources as compared to Eurocontrol flight data and other information gathered by independent investigators for the report.[249] The report concluded that there is "no truthful account of detainee transfer flights into Romania and the reason for this situation is that the Romanian authorities probably do not want the truth to come out".[250]

166. Moreover, the U.S. government, while acknowledging that it engaged in secret detention operations, has refused to confirm the precise locations where its

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[242] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at para 108. See also *Khadzhialiyev and others v Russia*, ECtHR, Judgment of 6 November 2008, at paras 79, 83, 86, 89, 91-93; see also *Takhayeva and Others v. Russia*, ECtHR, Judgment of 18 September 2008, at paras 68, 77, 80.
[243] *Buntov v. Russia*, ECtHR, Judgment of 5 June 2012, at para 117; see also *Orhan v. Turkey*, ECtHR, Judgment of 18 June 2002, at para 274.
[244] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at paras 97-99.
[245] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at paras 109-11.
[246] *Ibid*. at para 111.
[247] *Ibid*. at paras 114-115.
[248] 2007 Council of Europe Report at paras 158-166, 211-12.
[249] 2007 Council of Europe Report at para 229.
[250] *Ibid*.

prisoners were held. In addition, U.S. rules governing classified information prevent Mr. al Nashiri from publicly disclosing details of his own detention and treatment in CIA custody. Indeed, as noted in the Statement of Facts above, everything he says is presumptively classified and there is no procedure currently in place for declassification.

167. A single document—dating back to 2007—provides an account of Mr. al Nashiris's torture during his secret detention in his own words. As noted above, this document is a transcript of a 2007 Combatant Status Review Tribunal hearing that records Mr. al Nashiri as stating in that, "[f]rom the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way".[251] (This five year period includes the period that Mr. al Nashiri was held in Romania. See paragraphs 58-66 above.) The President of the tribunal asks Mr. al Nashiri to "describe the methods that were used".[252] Mr. al Nashiri's response to this question is largely redacted from the transcript of the hearing. The unredacted portion however states that: "Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body".[253] He also states at another point that "they used to drown me in water. So I used to say yes, yes".[254] Mr. al Nashiri's account of his torture and the stark contrast between his health prior to his being secretly detained creates strong and concordant inferences that he was ill-treated in Romania.[255]

168. In addition to this transcript, as set forth above, numerous other records, including U.S. government documents describing abusive interrogation methods including those applied on Mr. al Nashiri, and an ICRC report recording the treatment of Mr. al Nashiri and thirteen other "high value detainees" like himself create additional strong and concordant inferences that Mr. al Nashiri was tortured and ill-treated while secretly detained in a CIA prison in Romania. See paragraphs 69-84 above.

State Responsibility under the Convention

169. Romania is responsible under Article 1 for Mr. al Nashiri's secret detention and torture on Romanian territory because it knowingly, intentionally and actively collaborated and colluded with the CIA's extraordinary rendition programme, thereby enabling the CIA to subject him to such treatment in Romania. It is also responsible under Article 1 for exposing Mr. al Nashiri to a real risk of further

[251] Combatant Status Review Tribunal Hearing, ISN 10015, U.S. Naval Base Guantánamo Bay, Cuba, 14 March 2007, latest version declassified on 12 June 2009 (al Nashiri CSRT Transcript), at 16. Available at http://www.aclu.org/files/pdfs/safefree/csrt_alnashiri.pdf.
[252] *Ibid*.
[253] *Ibid*. at 17.
[254] *Ibid*. at 20.
[255] See *Selmouni v*. *France*, ECtHR [GC], Judgment of 28 July 1999, at para 87 ("where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention"); see also *Aksoy v*. *Turkey*, ECtHR, Judgment of 18 December 1996, at para 61.

incommunicado detention, ill-treatment, a flagrantly unfair trial and the death penalty in U.S. custody, which were not merely the "proximate repercussions" but the direct and foreseeable results of Romania's assistance to the CIA in transporting Mr. al Nashiri out of Romania.

170. Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention". This Court has found that "[t]he undertakings given by a Contracting State under Article 1 of the Convention include, in additional to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory".[256] "In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals . . . may engage the State's responsibility under the Convention". [257] Thus, the Court has held that a Contracting State has positive obligations under the Convention with respect to individuals deprived of their rights by non-state actors within its territory even in circumstances where the State does not have effective control over that territory.[258] Furthermore, "[a] State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction".[259]

171. As noted in the 2007 Council of Europe Report, Romania was "knowingly complicit in the CIA's secret detention programme[260] and senior Romanian officials – former President of Romania, Ion Iliescu; former President of Romania, Traian Basescu; Presidential Advisor on National Security, Ioan Talpes; Minister of National Defence, Ioan Mircea Pascu; and Head of Directorate for Military Intelligence, Sergiu Tudor Medar – "knew about, authorised, and stand accountable for Romania's role" in the CIA's secret detention and rendition operations on Romanian territory.[261]

172. As set forth above in the Statement of Facts, the Romanian government actively collaborated with CIA secret detention and rendition operations by:

    a) Signing a bilateral technical agreement giving the US "the full extent of permissions and protections it sought" for conducting secret detention and rendition operations on Romanian territory. [262]

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[256] *Ilascu et al v Moldova and Russia,* ECtHR [GC], Judgment of 8 July 2004, at para 313.
[257] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para 318 (citing *Cyprus v. Turkey*, ECtHR [GC], Judgment of 10 May 2001, at para 81).
[258] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para 2, 331, 339 (holding that even in the absence of effective control over Transdniestra, a region of Moldova which proclaimed its independence but was not recognised by the international community, Moldova had a positive obligation under Article 1 to take measures within its power to re-establish its control over Transdniestrian territory and to ensure that the applicants' rights were respected in that territory).
[259] *Ilascu et al v Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para 317.
[260] 2007 Council of Europe Report, at para 165.
[261] *Ibid*. at para 211.
[262] *Ibid*. at para 220.

b) Issuing an order to Romanian military intelligence services on behalf of the President to provide the CIA with all the facilities they required and to protect their operations in whichever way they requested.[263]

c) Directing Romanian military intelligence officers on the ground to create a "zone" in which the CIA's "physical security and secrecy would be impenetrably protected" while conducting secret detention and rendition operations in Romania.[264]

d) Providing the use of Romanian government building for hosting the "Bright Light" secret prison where Mr. al Nashiri was detained.[265]

e) Actively assisting the landing, departures and stopovers of secret CIA rendition flights with special "STS" status and dummy flight plans in Romanian airports,[266] including the flights which transported Mr. al Nashiri in and out of Romania; and

f) Failing to disclose the truth and effectively investigate the existence of a secret prison and rendition flights in Romania. [267]

A. TREATMENT AT THE BRIGHT LIGHT FACILITY, BUCHAREST

173. Romania knew and should have known about the CIA's secret detention and extraordinary rendition programme, the secret CIA prison in Romania, and the torture and cruel, inhuman and degrading treatment to which the CIA subjected "high value detainees" as part of this programme. Yet, Romania knowingly and intentionally assisted the CIA in detaining Mr. al Nashiri in the "Bright Light" facility, thereby allowing the CIA to subject him on Romanian territory to: (1) treatment that amounted to torture in violation of Article 3 of the Convention; (2) detention without any legal basis in violation of Article 5; and (3) arbitrary detention, abuse, and deprivation of any access to or contact with his family, in violation of Article 8.

1. Torture and Ill-Treatment: Article 3

174. As noted above, Mr. al Nashiri was kept in incommunicado detention and solitary confinement in Romania,[268] and during the first month of detention there, he and other prisoners held there reportedly endured sleep deprivation and

[263] *Ibid*. at para 220.
[264] *Ibid*. at para 221.
[265] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec 2011.
[266] 2007 Council of Europe Report, at paras 156-57; 2007 European Parliament Report at para 162.
[267] 2007 Council of Europe Report, at paras 227-229; 2007 European Parliament Report, at paras 160-161. See also Exhibit 11: Working Document No. 8.
[268] Exhibit 26: ICRC report at 4 (noting that high value prisoners including Mr. al Nashiri were subjected to "continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention.")

were doused with water, slapped or forced to stand in painful positions.[269] This treatment by itself amounted to a violation of Article 3.

175. Because of the unprecedented secrecy associated with CIA detention and rendition operations, direct evidence of additional details relating to Mr. al Nashiri's treatment in the secret CIA prison in Bucharest is unavailable. As noted in the Statement of Facts above, U.S. rules governing classified information prevent Mr. al Nashiri and his U.S. lawyers from publicly disclosing details of his treatment in CIA custody. Indeed, the U.S. government's explanation for presumptively classifying everything Mr. al Nashiri says is that the interrogation methods applied on him under the CIA program amount to "classified sources methods and activities" which cannot be publicly disclosed. See paragraph 145 above. In other words, Mr. al Nashiri and his U.S. lawyers are precluded from publicly disclosing details of his torture because those details are considered classified. However, as set forth in the Statement of Facts above, three separate and independent sources of information—Mr. al Nashiri's general account of his torture from the time of his detention onwards, U.S. government documents confirming its torture policies as well as its torture of Mr. al Nashiri in particular, and the ICRC's documented interviews of Mr. al Nashiri and other "high value detainees" like him who were subjected to secret CIA detention—corroborate one another and further create clear, strong, and concordant inferences that he was tortured and ill-treated while held in Romania. See paragraphs 69-84 above.

Legal Standards: Torture and Ill-Treatment

176. *Positive obligation*. The Court has found that states' obligations under Article 3 include a positive obligation to protect detainees within their jurisdiction from ill-treatment. In *A. v the United Kingdom*, the Court found that taken together, Article 1 and Article 3 "[require] States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such treatment administered by private individuals".[270]

177. *Absolute prohibition*. The Article 3 prohibition of torture and inhuman and degrading treatment is absolute. "[T]he requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals . . . It should also be borne in mind that the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct and – where detainees are concerned – the nature of the alleged offence".[271]

178. *Definition of torture and inhuman and degrading treatment*. The Court defines torture as the "deliberate inhuman treatment causing very serious and cruel suffering".[272] By deliberate, the Court has clarified that it means suffering which

[269] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011.
[270] *A v. the United Kingdom,* ECtHR, Judgment of 23 September 1998, at para 22.
[271] *Dikme v. Turkey*, ECtHR, Judgment of 11 July 2000, at para 90.
[272] *Ireland v. the United Kingdom*, ECtHR, Judgment of 18 January 1978, para 167.

is intentionally inflicted for a purpose, such as obtaining evidence, punishment or intimidation.[273] In considering whether treatment meets the degree of "severity" that constitutes torture the Court will consider "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases the sex, age and state of health of the victim".[274] Inhuman treatment must "caused either actual bodily harm or intense physical or mental suffering".[275] Degrading treatment occurs where the ill-treatment is "such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them"[276] or it "humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral or physical resistance".[277]

179. Thus, the Court has also held that failure to protect detainees from ill-treatment by third parties – including other prisoners – constitutes a violation of Article 3.[278] Further, the Court has found violations of Article 3 in situations where the State knew that an individual was at risk of being targeted by non-state actors and did not take specific measures to protect him.[279]

180. The Court has found that a combination of different forms of ill-treatment over a period of time can amount to torture. In *Selmouni v. France*, the abuse included periodic beatings and assault, together with threats of sexual assault or demands to perform non-consensual sexual acts, being urinated on and threatened with a blowlamp and a syringe endured over a number of days of questioning, which the Court found rose to the level of torture.[280] In the case of *Aydin v. Turkey*, the Court found treatment to qualify as torture where the applicant was detained over a period of three days during which she was deliberately disoriented by being kept blindfolded, beaten, subjected to humiliation such as public nudity, and pummelled with high pressure water while being spun around in a tire.[281]

181. The Court has found some of the specific techniques used against Mr. al Nashiri to violate Article 3. Two of the five techniques condemned by the Court in *Ireland v the United Kingdom* in 1979 – hooding and wall-standing – were employed against Mr. al Nashiri in 2003, techniques which the Court considered caused "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation".[282]

182. *Secret detention as violation of Article 3*. The Court has also condemned solitary confinement, because "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman

[273] *Ilhan v. Turkey,* ECtHR, Judgment of 27 June 2000, para 85.
[274] *Selmouni v. France*, ECtHR [GC], Judgment of 28 July 1999, at para 100
[275] *Kudla v. Poland*, ECtHR [GC], Judgment of 26 October 2000, at para 92.
[276] *Ibid*.
[277] *Pretty v. the United Kingdom*, ECtHR, Judgment of 29 July 2002, at para 52.
[278] *Pantea v. Romania*, ECtHR, Judgment of 3 June 2003, at paras 189-196.
[279] *Kaya v. Turkey,* ECtHR, 28 March 2000, at paras 115 & 116.
[280] *Selmouni v. France*, ECtHR [GC], Judgment of 28 July 1999, at paras 102-105.
[281] *Aydin v. Turkey*, ECtHR [GC], Judgment of 25 September 1997, at para 84.
[282] *Ireland v the United Kingdom*, ECtHR, Judgment of 18 January 1978, at paras 96, 167-168.

treatment which cannot be justified by the requirements of security or for any other reason".[283]

183. Other jurisdictions are in accord. In *Yussef El-Megreisi v. Libyan Arab Jamahriya*, the U.N. Human Rights Committee found that the incommunicado detention of an individual in a secret location for three years amounted to torture and cruel and inhuman treatment.[284] In *Polay Campos v. Peru*, the Human Rights Committee held that the total isolation of an individual for a period of a year and denial of family contact during that time constituted inhuman treatment within the meaning of Article 7 of the International Covenant on Civil and Political Rights.[285] The Inter-American Court of Human Rights has stated that "the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person".[286]

184. Moreover, secret detention amounts to an enforced disappearance, which has also been recognised to amount to torture and cruel inhuman or degrading treatment. Article 1 of the U.N. Declaration on Enforced Disappearances states that "[a]ny act of enforced disappearance . . . constitutes a violation of the rules of international law guaranteeing, inter alia . . . the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment". The U.N. Human Rights Committee has found disappearances to amount to torture.[287] The Working Group on Enforced or Involuntary Disappearances has similarly found that every disappearance itself constitutes ipso facto torture or other prohibited ill-treatment, as "the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture".[288]

185. In addition, secret or incommunicado detention facilitates the commission of acts of torture.[289] In *Kurt v. Turkey*, this Court recognised that "[p]rompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention".[290] Where a state is on notice of secret detention, it is therefore on notice of possible torture, and its failure to take measures to avoid torture amount to a violation of the positive obligations enshrined in Article 3.

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[283] *Ilascu et al v. Moldova and Russia,* ECtHR, Judgment of 8 July 2004, at para 432.
[284] *Yussef El-Megreisi v. Libyan Arab Jamahriya*, UNHRC, Comm. No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990, 23 March 1994, at para 5.4.
[285] *Polay Campos v. Peru*, UNHRC, Comm. No 577/1994, U.N. Doc. CCPR/C/61/D/577/1994, 6 November 1997, at para 8.6.
[286] *Velasquez Rodriguez* case, Inter-American Court of Human Rights, (Ser. C); No. 4 (1988), Judgment of 29 July 1988, at para 187.
[287] See *María del Carmen Almeida de Quinteros et al. v. Uruguay*, UNHRC Comm. No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).
[288] See U.N. Working Group on Enforced Disappearances Report, U.N. Doc. E/CN.4/1983/14, at para 131.
[289] See U.N. Joint Experts' Report at para 33; see also UN General Assembly, Resolution 60/148.
[290] *Kurt v. Turkey*, ECtHR, Judgment of 25 May 1998, at para 123.

Torture and Inhuman and Degrading Treatment in Romania Violated Article 3

186. As noted above, Mr. al Nashiri was kept in incommunicado detention and solitary confinement in Romania,[291] and during the first month of detention there, he and other prisoners held there reportedly endured sleep deprivation and were doused with water, slapped or forced to stand in painful positions.[292] See paragraph 69 above. As such, he was subjected to treatment in violation of Article 3.

187. Direct evidence relating to additional details of his treatment in Romania is currently unavailable because of the extraordinary secrecy surrounding CIA secret detention and rendition operations and the fact that Mr. al Nashiri is prohibited by U.S. classification rules from publicly disclosing details of his treatment. However, in light of his own general account of being tortured since the time of his capture, an ICRC report documenting torture and ill-treatment inflicted on him and other high value prisoners held in secret detention, U.S. government documents describing torture methods applied on him during the time he was held in Poland, as well U.S. government documents setting forth the CIA's practice of using abusive "enhanced interrogation techniques" on high value prisoners like Mr. al Nashiri, see paragraphs 69-84 above, additional strong and concordant inferences can be drawn to the effect that he was subjected to treatment in violation of Article 3 while in Romania.

188. As noted in the Statement of Facts above, at his combatant status review tribunal hearing in 2007, Mr. al Nashiri stated that he had been tortured for the past five years in various ways.[293] See paragraph 71 above. Those five years included the time that he was secretly detained in Romania.

189. In addition, the ICRC's report, based on interviews with Mr. al Nashiri and thirteen other "high value detainees" like him who were subjected to secret detention and "enhanced interrogation techniques", documents the fact that the prisoners were throughout the period of their CIA detention subjected to continuous solitary confinement and incommunicado detention.[294] The report documents various forms of torture and ill-treatment inflicted on the fourteen men, including suffocation by water, prolonged stress positions, beatings by use of collar held around the detainee's neck and used to forcefully bang the head and body against a wall, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, threats of ill-treatment, forced shaving, and deprivation/restricted provision of solid food from 3 days to 1 month.[295]

190. Mr. al Nashiri was deliberately subjected for a prolonged period of time to a wide range of abusive interrogation methods known as "enhanced interrogation techniques" often used in combination. These techniques were specifically

[291] ICRC report at 4 (noting that high value prisoners including Mr. al Nashiri were subjected to "continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention.")
[292] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011.
[293] Exhibit 30: al Nashiri CSRT Transcript at 16.
[294] Exhibit 26: ICRC Report at 7-8.
[295] *Ibid*. at 8-9.

designed to elicit information by inflicting psychological and physical suffering on Mr. al Nashiri. Indeed, official U.S. government documents state that the "goal of interrogation [was] to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner", and outline in detail interrogation procedures used "to persuade High-Value Detainees (HVD) to provide threat information and terrorist intelligence in a timely manner".[296] As such, the interrogation methods applied on Mr. al Nashiri constituted torture, i.e., "deliberate inhuman treatment causing very serious and cruel suffering".[297]

191. As set forth in detail in the Statement of Facts above, the CIA OIG report includes a list of 10 abusive "enhanced interrogation" methods applied by the CIA on its prisoners. In addition, a 30 December 2004 CIA memorandum and a 10 May 2005 Justice Department memorandum further confirm that the CIA was authorised to apply abusive methods in combination on prisoners like Mr. al Nashiri who were secretly detained. See paragraphs 75-84 above.

192. The CIA OIG report also notes that Mr. al Nashiri was twice subjected to "waterboarding." See paragraph 72 above. In addition, the report shows that during the time he was detained in a secret CIA prison in Poland, Mr. al Nashiri was subjected to mock executions, forced nudity, hooding, handcuffing, shackling, stress positions that could have caused arm dislocation, threats of sodomy, as well as threats of injury (including of a sexual nature) to his mother and family. The same document confirms that an interrogator "used an unloaded semi-automatic handgun to frighten al Nashiri into disclosing information". [298] The interrogator "entered the cell where al Nashiri sat shackled and racked the handgun once or twice close to al Nashiri's head". [299] The interrogator also "revved" a power drill next to Mr. al Nashiri's ears while he stood hooded and naked.[300] See paragraph 74 above. The fact that Mr. al Nashiri was subjected to such abusive treatment in a secret CIA prison in Poland creates a clear inference that he was subjected to abusive methods in a secret CIA prison in Romania.

193. Mr. al Nashiri has produced additional cogent evidence creating clear, strong and concordant inferences that he was subjected to additional interrogation methods that amounted to torture and inhuman and degrading treatment in violation of Article 3. By failing to take measures to protect Mr. al Nashiri from such ill-treatment while he was on Romanian territory, Romania violated Mr. al Nashiri's rights under Article 3 of the Convention. In contrast, the Romanian authorities have issued only unsubstantiated denials – in direct contravention of contrary findings by the Council of Europe and other investigative bodies – that a prison existed on its territory, and has entirely failed to conduct an effective investigation into the matter. Romania's failure to provide a plausible explanation relating to credible reports of a secret CIA prison on its territory entitles this Court to draw inferences against it.

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[296] Exhibit 6: CIA Rendition Background Paper at 3.
[297] *Ireland v. the United Kingdom*, ECtHR, Judgment of 18 January 1978, at para 167.
[298] CIA OIG Report, at para 92.
[299] *Ibid*.
[300] *Ibid*.

2. Prolonged Incommunicado Detention: Article 5

194. Romania violated Mr. al Nashiri's rights under Article 5 by enabling the CIA to hold him in incommunicado, unacknowledged and secret detention in Romania without ever being brought before a judge or involved in any other judicial proceedings.

Legal Standards: Unlawful Detention

195. This Court has found the right to liberty and security under Article 5 to be of "primary importance in a democratic society" within the meaning of the Convention.[301] Detention must be for one of the purposes enumerated in Article 5(1). It must also be lawful and "[w]here lawfulness of detention is at issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law".[302] Detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities; where the domestic authorities have neglected to attempt to apply the relevant legislation correctly; or where judicial authorities have authorized detention for a prolonged period of time without giving any grounds for doing so in their decisions. [303] Article 5 creates a positive obligation on the State to prevent any unlawful deprivation of liberty by non-state agents. The state is also "obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent deprivation of liberty of which the authorities have or ought to have knowledge".[304]

196. The Court has found that informal captures and abductions violate the Convention. In *Isakandarov v. Russia*, this Court found that the applicant's abduction and detention for two days by state agents in Russia preceding his transfer to Tajikistan violated Article 5(1) as it was not pursuant to a lawful process.[305] The Court observed that:

> "[I]t is deeply regrettable that such opaque methods were employed by State agents as these practices could not only unsettle legal certainty and instil a feeling of personal insecurity in individuals, but could also generally risk undermining respect for and confidence in the domestic authorities.
>
> The Court further emphasises that the applicant's detention was not based on a decision issued pursuant to national laws. In its view, it is inconceivable that in a State subject to the rule of law a person may be deprived of his liberty in the absence of any legitimate authorization for it. . . . The applicant's deprivation of liberty . . . was in pursuance of an unlawful removal designed to circumvent the Russian General Prosecutor's Office's dismissal of the extradition request, and not to 'detention' necessary in the

[301] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at para 143.
[302] *Ibid*. at para 144.
[303] *Ibid*. at para 146.
[304] *Storck v. Germany*, ECtHR, Judgment of 16 June 2005, at para 101.
[305] *Iskandarov v. Russia*, ECtHR, Judgment of 23 September 2010, at paras 148-152.

ordinary course of 'action . . . taken with a view to deportation or extradition'".[306]

197. Similarly, in *Bozano v France,* after the Courts had refused to order extradition to Italy, the executive issued a deportation order, and the applicant was driven by police across France to the Swiss border where he was arrested by Swiss police. The domestic courts subsequently found the deportation order was invalid. In finding a violation, this Court concluded that the deprivation of liberty "was neither 'lawful', within the meaning of Article 5(1)(f), nor compatible with the 'right to security of person.' Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent" the domestic judicial decisions.[307]

198. *No exception in terrorism cases*. The Court has held the threat of terrorism does not mean that the "authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence."[308] In *Aksoy v. Turkey,* fourteen days of incommunicado detention was found to violate Article 5, as "insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him". [309]

199. *Unacknowledged detention grave violation of Article 5*. Significantly, in *Iskandarov*, where the applicant was temporarily disappeared by Russian agents, the Court found the State's failure to acknowledge or log an applicant's detention in any arrest or detention records to constitute "a complete negation of the guarantees of liberty and security of person contained in Article 5 of the Convention and a most grave violation of that Article".[310] Indeed, this Court has repeatedly held that a person's unacknowledged detention and/or disappearance is "a most grave violation" of Article 5.[311] In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. [312] Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to

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[306] *Ibid*. at paras 148-149.
[307] *Bozano v France,* ECtHR, Judgment of 18 December 1986, at para 60.
[308] *Dikme v Turkey*, ECtHR, Judgment of 11 July 2000, at para 60-67 (holding that detention of sixteen days during which applicant was deprived of all contact with the outside world and had no access to a judge or other judicial officer violated Article 5).
[309] See *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para 83.
[310] *Iskandarov v. Russia*, ECtHR, Judgement of 23 September 2010, at para 150.
[311] *Kurt v Turkey,* ECtHR, Judgment of 25 May 1998, at para 124. See on disappearances generally: *Cakici v. Turkey*, ECtHR [GC], Judgment of 8 July 1999, at para 104; *Cicek v. Turkey*, ECtHR, Judgment of 27 February 2001, at para 164; *Imakayeva v. Russia*, ECtHR, Judgment of 9 November 2006, at para 171; and *Luluyev and Others v. Russia*, ECtHR, Judgment of 9 November 2006, at para 122 (finding a "a very grave violation of Article 5")
[312] *Luluyev and Others v. Russia*, ECtHR, Judgment of 9 November 2006, at para 122.

safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.[313] The initial failure to record the fact and details of detention (date, time and location), and the ongoing failure to account for the detainee's further whereabouts constitute "a most serious failing" since they facilitate the official cover-up of future violations.[314]

Prolonged Incommunicado Detention in Romania Violated Article 5

200. Romania violated Mr. al Nashiri's rights under Article 5 by assisting in his secret and incommunicado detention in Romania. As noted in the Statement of Facts above, the ICRC report states that, "throughout the period during which they were held in the CIA detention programme—the detainees [including Mr. al Nashiri] were kept in continuous solitary confinement and incommunicado detention. They had no knowledge of where they were being held, no contact with persons other than their interrogators or guards. ... None of the fourteen had any contact with their families, either in written form or through family visits or telephone calls. They were therefore unable to inform their families of their fate. As such, the fourteen had become missing persons. In any context, such a situation, given its prolonged duration is clearly a cause of extreme distress for both the detainees and families concerned and itself constitutes a form of ill-treatment. ... In addition, the detainees were denied access to an independent third party".[315]

201. In violation of Article 5(1), Mr. al Nashiri's detention in Romania was not carried out "in accordance with a procedure prescribed by law" and was not justified by any of the purposes enumerated in that provision; in violation of Article 5(2), he was not properly informed of the reasons for the deprivation of his liberty or of the charges against him; in violation of Article 5(3), he was not brought before a judge or other judicial officer of any country or sent to trial; in violation of Article 5(4), he was denied any possibility of challenging the lawfulness of his detention; and in violation of Article 5(5), Mr. al Nashiri was never compensated for his detention.

3. Ill-treatment and Incommunicado Detention: Article 8

202. Romania violated Mr. al Nashiri's rights under Article 8 by enabling the CIA to ill-treat and detain him incommunicado in Romania without any access to his family.

Legal Standards: Physical and Psychological Integrity and Family Life

203. The essential object of Article 8 is to prevent arbitrary action by governments.[316] Article 8 protects the physical and psychological integrity of the individual.[317] This includes the protection of dignity and personal autonomy.[318] Article 8 also

[313] *Ibid*.
[314] *Kurt v*. *Turkey*, ECtHR, Judgment of 25 May 1998, at para 125.
[315] Exhibit 26 : ICRC Report at 7-8.
[316] *Kroon and Others v Netherlands*, ECtHR, Judgment of 27 October 1994, at para 31.
[317] *Pretty v United Kingdom*, ECtHR, Judgment of 29 April 2002, at para 61.
[318] *Ibid*. at paras. 61 and 65.

includes "the right to establish and develop relationships with other human beings".[319] The Court has noted that the concept of " '[p]rivate life' is a broad term not susceptible to exhaustive definition . . . . Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. . . . The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life".[320]

204. Article 8 also protects the right to family life. An essential ingredient of family life is the right to live together so that family relationships may develop normally[321] and so that members of a family may enjoy each other's company.[322]

205. "Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves".[323] The Court has found a violation of Article 8 in instances where a State fails to adequately prosecute and punish infringements of a person's physical integrity.[324] The Court has held that, under Article 8 that "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions".[325]

Ill-treatment and Incommunicado Detention in Romania Violated Article 8

206. Romania violated Mr. al Nashiri's Article 8 right to private and family life by enabling his abuse and incommunicado detention on Romanian territory.

207. As set forth above, Mr. al Nashiri was held in incommunicado detention, sleep deprivation and water dousing, slaps or standing stress positions in Romania, and there is a clear inference that he was subjected to additional abusive interrogation methods during that time.

208. Such physical mistreatment interfered with Mr. al Nashiri's physical and moral integrity and resulted in a severe deterioration of his physical well-being and mental health, in violation of his Article 8 rights.

209. Indeed, as set forth in official U.S. government documents, the entire purpose of the rendition programme to which Mr. al Nashiri was subjected, was to disorient him and interfere with his psychological and physical integrity in order to extract information from him. Indeed, a 30 December 2004 CIA memorandum states that the "goal of interrogation is to create a state of learned helplessness

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[319] *Niemietz v. Germany,* ECtHR, Judgment of 16 December 1992, at para 29.
[320] *Bensaid v. United Kingdom*, ECtHR, Judgment of 6 February 2001, para 47.
[321] *Marckx v Belgium*, ECtHR, Judgment of 13 June 1979, at para 31.
[322] *Olsson v. Sweden*, ECtHR, Judgment of 24 March 1988, at para 59.
[323] *M.C. v. Bulgaria,* ECtHR, Judgment of 4 December 2003, at para 150.
[324] See *X and Y v. the Netherlands,* ECtHR, Judgment of 26 March 1985 (finding that the State failed to provide "practical and effective protection" against the crime of rape where a handicapped minor could not bring a complaint herself, and was not allowed to have her guardian do so on her behalf); see also *M.C. v. Bulgaria,* ECtHR, Judgment of 4 December 2003.
[325] *M.C. v. Bulgaria,* ECtHR, Judgment of 4 December 2003, at para 150; See also *X and Y v. the Netherlands,* ECtHR, Judgment of 26 March 1985.

and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner".[326] This is fundamentally at odds with the right to respect of private life protected by Article 8 of the Convention.

210. In addition, Mr. al Nashiri's secret, unacknowledged detention in Romania interfered with his right to family life under Article 8. As noted above, according to the ICRC, who interviewed Mr. al Nashiri and thirteen other "high-value detainees", "throughout the entire period during which they were held in the CIA detention programme . . . the detainees were kept in continuous solitary confinement and incommunicado detention".[327]

B. TRANSFER FROM ROMANIA

211. In knowingly and intentionally enabling Mr. al Nashiri's transfer from its territory, Romania (1) violated his rights under both Articles 2 and 3 of the Convention as well as Protocol 6 to the Convention by allowing him to be transferred to a jurisdiction where there were substantial grounds for believing that there was a real risk of the death penalty; (2) violated his rights under Article 3 by allowing him to be transferred from Romania despite substantial grounds for believing that there was a real risk of further ill-treatment; (3) violated his rights under Article 5 by allowing him to be transferred despite substantial grounds for believing that there was a real risk of further prolonged arbitrary detention; and (4) violated his rights under Article 6 by allowing him to be transferred to a jurisdiction where there were substantial grounds for believing that there was a real risk that he would be subjected to a flagrantly unfair trial.

212. In determining whether substantial grounds have been shown for believing that a real risk of violations exists, the Court asses the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*.[328] The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the transfer; the Court is not precluded, however, from having regard to information which comes to light subsequent to the transfer.[329] This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears.[330]

1. Transfer to the Death Penalty: Article 2, Article 3, Protocol No. 6

213. Romania violated Mr. al Nashiri's rights under Article 2 and Protocol 6 to the European Convention, as well as Article 3, by permitting his transfer from Romania despite substantial grounds for believing that there was a real risk that he would be subjected to the death penalty, and that this would follow an unfair

[326] Exhibit 6: CIA Rendition Background Paper at 3.
[327] ICRC Report, at 7-8.
[328] *Mamatkulov and Askarov v. Turkey*, ECtHR [GC], Judgement of 4 February 2005, at para 69.
[329] *Ibid*.
[330] *Ibid*.

trial. The death penalty has no place in a democratic society. The Council of Europe's "principled opposition to the death penalty in any circumstances" is reiterated in a resolution adopted by its Parliamentary Assembly on 14 April 2011. This resolution "urge[d] the United States of America . . . as [an] observer state . . . to join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty".[331] The resolution further stated that the Parliamentary Assembly "regrets that the arbitrary and discriminatory application of the death penalty in the United States and the public scandals surrounding the different methods of execution used (lethal injection, electric chair, firing squad) have stained the reputation of this country, which its friends expect to be a beacon for human rights". [332]

214. The European Parliament and the Council of Europe have specifically recorded their opposition to the death penalty in Mr. al Nashiri's case. On 9 June 2011, the European Parliament issued a resolution noting, *inter alia*, that Mr. al Nashiri had been tortured in Poland and calling on the U.S. not to impose the death penalty on him.[333] The resolution also called on the High Representative, Catherine Ashton, the Council Presidency, the Commission and the Member States "to raise the issue as a matter of urgency with the US authorities and to make strong representations to the US in an effort to ensure that Abd al-Rahim al-Nashiri is not executed".[334]

215. On 22 June 2011, the Parliamentary Assembly of the Council of Europe issued a similar declaration, noting that Mr. al Nashiri had been detained and tortured in a secret prison in Poland and subsequently held in another secret prison in Bucharest, Romania, calling on the U.S. not to impose the death penalty upon Mr. al Nashiri, and urging the Council of Europe and its member states to immediately use all available means to ensure that he is not subject to the death penalty.[335]

Legal Standards: the Death Penalty

216. Article 2 protects the right to life. Article 3 prohibits torture or inhuman or degrading punishment, which includes the threat of the death penalty. Article 1 of Protocol No. 6 to the Convention abolishes the death penalty in all peacetime situations. Romania ratified Protocol No. 6 on 20 June 1994. The Protocol entered into force on 1 July 1994. Romania ratified Protocol No. 13 to the Convention on 7 April 2003, and the Protocol entered into force on 1 August 2003.

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[331] The death penalty in Council of Europe member and observer states: a violation of human rights, Resolution 1807, 14 April 2011. Available at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1807.htm#P16_141.
[332] *Ibid*.
[333] See European Parliament resolution of 9 June 2011 on Guantánamo: imminent death penalty decision. Available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0271&language=EN&ring=B7-2011-0371.
[334] *Ibid*.
[335] See Parliamentary Assembly, Council of Europe, Guantánamo prisoner Abd al-Rahim al-Nashiri, Written Declaration No 483, 22 June 2011. Available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12660.pdf.

217. As this Court recognized in *Al Saadoon and Mufdhi v. United Kingdom*, there has "been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the Member States of the Council of Europe".[336] The Court found that "consistent State practice in observing the moratorium on capital punishment", together with the fact that "[a]ll but two of the member States have now signed Protocol No. 13[337] and all but three of the States which have signed have ratified it", to be "strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances".[338] Accordingly, the Court concluded that "Article 2 of the Convention ... prohibit[s] the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there".[339] Significantly, in July 2002, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism which directed that "[t]he extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out". [340]

218. This judgment that the death penalty is prohibited in all circumstances evolved from the previous position of the Court in *Őcalan v Turkey*, in which the Grand Chamber held that the imposition of the death penalty following an unfair trial would amount to an "arbitrary deprivation of life" in violation of Article 2[341] and would also violate Article 3 by subjecting the person "wrongfully to the fear that he will be executed",[342] and "a significant degree of anguish" which "cannot be dissociated from the unfairness of the proceedings underlying the sentence".[343] More recently, in *Al-Saadoon*, the Court found an Article 3 violation arising out of "psychological suffering" associated with the applicants' fear of being executed after being transferred by the United Kingdom to Iraqi authorities.[344]

219. There is a further violation of Article 3 where an individual is subjected to the "death row phenomenon" by waiting for many years under sentence of death

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[336] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR. Judgment of 2 March 2010, at para 116.
[337] Protocol 13 to the European Convention, which has now been ratified by forty-three member states of the Council of Europe, abolishes the death penalty in all circumstances, including in times of war or national emergency. Every member state of the Council of Europe, with the exception of Russia, has ratified Protocol No. 6 to the European Convention.
[338] *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 120. At this time, only two States that have signed Protocol 13 have not ratifie dit. Amnesty International, Death Penalty: Ratification of International Treaties. Available at http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties.
[339] *Ibid*. at para 123.
[340] Exhibit 74: Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, 11 July 2002, Section XIII, at para 2.
[341] *Őcalan v. Turkey*, ECtHR (GC), Judgment of 12 May 2005, at paras. 166-169.
[342] *Ibid*. at para 169.
[343] *Ibid*. at para 169.
[344] *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at paras 135-36, 144.

while the legal process continues, which the Court considered would "expose him to a real risk of treatment going beyond the threshold set by Article 3".[345] The Court found that because Article 3 covers not just violations that had already taken place but also the "foreseeable consequences in the requesting country", the imposition of the death penalty need not be certain or even probable.[346]

220. *Diplomatic Assurances*. Sending States may sufficiently decrease the likelihood of the use of the death penalty such that Article 3 does not come into play by securing diplomatic assurances from the receiving State that it will not execute the person.[347] However, general assurances of protection against mistreatment are not sufficient.[348] Similarly, the existence of domestic laws and the ratification of international treaties which affirm fundamental rights are insufficient to ensure protection against risk of ill-treatment in a State where reliable sources have reported practices which convene the principles of the Convention.[349] Additionally, where a sending State has already transferred a person without seeking such assurances, the sending State can remedy a consequent violation of Article 3 by taking "all possible steps to obtain an assurance" that he will not be subjected to the death penalty.[350]

221. Taking this principle further, the Human Rights Chamber for Bosnia and Herzegovina (BiH) has found that sending States have an *obligation* to seek assurances that receiving States will not impose the death penalty. In *Boudellaa et al. v Bosnia and Herzegovina,* a case closely analogous to the present matter, the Chamber found that BiH had violated applicants' rights under Article 1 of Protocol 6 to the Convention by transferring them to U.S. custody and thereby placing them at risk of the death penalty and trial by military commission at Guantánamo Bay under the same rules applicable to Mr. al Nashiri at the time of his transfer from Romania. The Chamber observed that:

> "US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave rise to an obligation on the respondent Parties to seek assurances from the United States, prior to the

[345] *Soering v. the United Kingdom*, ECtHR, Judgment of 7 July 1989, at paras. 88-111
[346] *Ibid*. at paras 90, 94.
[347] *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Judgment of 17 January 2012, at paras 186-188; *Soering v. the United Kingdom*, ECtHR, Judgment of 7 July 1989, at paras 91, 93-99.
[348] *Ibid*. at paras 92, 105-107; *Saadi v. Italy,* ECtHr, Judgment of 28 February 2008, at paras 128, 142, 148-149 (indicating that the "weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time").
[349] *Saadi v. Italy,* at para 147; *M.S.S. v. Belgium and Greece*, ECtHR, Judgment of 21 January 2011, at para 353; *Hirsi Jamaa and Others v. Italy*, ECtHR, Judgment of 23 February 2012, at para 128.
[350] See *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at paras 170-171.

hand-over of the applicants, that the death penalty would not be imposed upon the applicants". [351]

222. The Chamber further observed that "in accordance with Article 1 of Protocol No 6 to the Convention, the imposition of the death penalty is prohibited and the death penalty is abolished" which "for purposes of international co-operation in criminal matters" means that "the extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted". [352] It held that in failing to "take all necessary steps to ensure that the applicants will not be subject to the death penalty", upon their transfer to U.S. custody, the respondent states violated Article 1 of Protocol no. 6 to the Convention. [353] The Chamber ordered Bosnia and Herzegovina to "take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants", including through procuring post-transfer diplomatic assurances from the United States.[354]

Transfer to Real Risk of the Death Penalty Violated Articles 2 and 3 and Protocol No. 6

223. As set out in the Statement of Facts above, by the time of Mr. al Nashiri transfer from Romania (sometime between 6 June 2003 and 6 September 2006), it was a matter of public record that detainees held in US custody as suspects in the "war on terror" were likely to be subjected to the death penalty, as well as an unfair trial by military commission. See paragraphs 108-129 above, see also section B(4) below. In November 2001, the U.S. President issued a Military Order that provided that "[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death". [355] Military Commission Order No. 1 similarly provided that "[u]pon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence *may include death*, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper".[356] Both these orders were published and publically available.

224. Long before Mr. al Nashiri's transfer from Romania, non-governmental organizations had also put Romania on notice of the real risk of transfer to an

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[351] *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 & CH/02/8691, 11 October 2002, at para 300.
[352] *Ibid*. at para 273.
[353] *Ibid*. at para 300.
[354] *Ibid*. at para 330.
[355] See Exhibit 64: Military Order of 13 November 2001, Section 4(a). The US President's Military Order also provides that "it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the *laws of war* and other applicable law by military tribunals", *Ibid*., at Section 1(e) (emphasis added). The laws of war in turn provide that "[t]he death penalty may be imposed for grave breaches of the law [of war]." *United States Dep't of Army Field-Manual 27-10: The Law of Land*, Chapter 8, Section II, at para 508. Available at http://www.usmc.mil/news/publications/Documents/FM%2027-10%20W%20CH%201.pdf.
[356] Exhibit 65: MCO No. 1, at Section 6(G) (emphasis added).

unfair trial followed by the death penalty. On 17 January 2002, Amnesty International reported that six Algerian men were at risk of imminent transfer from Bosnia-Herzegovina to US custody to stand trial in connection with their alleged participation in "international terrorism".[357] Amnesty International observed that the men could be transferred without sufficient guarantees of their rights, and subjected to the risk that they would be sentenced to death: "These men should only be transferred to U.S. custody following proper extradition proceedings before a court of law and after the Federation authorities have obtained firm guarantees that they will not be tried before the special military commissions *or face the death penalty"*.[358] Amnesty reported on 18 January 2002 that the six men were illegally handed over to American officials, and that they were to be imminently transported to U.S. territory.[359]

225. Court decisions also put Romania on notice of the risk of transfer to an unfair trial and the death penalty. In *Boudellaa et al. v. Bosnia and Herzegovina*, the Human Rights Chamber for Bosnia and Herzegovina (BiH) held that BiH violated Protocol No. 6 to the Convention by transferring suspected terrorists to U.S. custody while "fail[ing] to take all necessary steps to ensure that the applicants will not be subject to the death penalty".[360]

226. Romania violated Mr. al Nashiri's rights under Articles 2 and 3 as well as under Protocol 6 to the Convention by enabling his transfer from Romania despite substantial grounds for believing that he would face a real risk of being subjected to the death penalty in U.S. custody. By permitting his transfer to face the death penalty with the face of the additional risk of an unfair trial, Romania further violated his rights under Article 3.

227. Mr. al Nashiri remains at a real risk of being subjected to the death penalty under military commission rules currently applicable to his case.[361] As set forth in the Statement of Facts above, on 20 April 2011, U.S. military commission prosecutors brought capital charges against Mr. al Nashiri relating to his alleged role in the attack on the USS Cole in 2000 and the attack on the French civilian oil tanker MV Limburg in the Gulf of Aden in 2002. [362] On 28 September 2011, Admiral Bruce MacDonald, the Convening Authority for the Military

[357] Amnesty International, Press Release, "Bosnia-Herzegovina: Transfer of six Algerians to US custody puts them at risk", 17 January 2002, AI Index EUR 63/001/2002 - News Service Nr. 10. Available at http://www-secure.amnesty.org/en/library/asset/EUR63/001/2002/en/7e62e4d7-d8a0-11dd-ad8c-f3d4445c118e/eur630012002en.html.
[358] *Ibid*. (emphasis added).
[359] Amnesty International, Public Statement, "Bosnia-Herzegovina : Letter to the US Ambassador regarding six Algerian men" 18 January 2002, AI Index EUR 63/003/2002-News Service Nr. 11. Available at http://www.amnesty.org/en/library/asset/EUR63/003/2002/en/5b3d504b-d89e-11dd-ad8c-f3d4445c118e/eur630032002en.pdf.
[360] *Boudellaa and Others v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgement of 11 October 2002 at para 300.
[361] See Military Commissions Act of 2009, 10 U.S.C. § 948d (2009).
[362] Exhibit 81: U.S. Department of Defense, DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at http://www.defense.gov/releases/release.aspx?releaseid=14424.

Commissions, approved these capital charges and referred them for trial by military commission in Guantánamo Bay.[363]

228. Romania therefore has a duty to use all available means – including diplomatic representations to the U.S. – at its disposal so as to ensure that Mr. al Nashiri is not subjected to the death penalty.[364]

2. Transfer to ill-treatment in U.S. Detention: Article 3

229. Romania also violated Article 3 by assisting with Mr. al Nashiri's transfer from Romania in circumstances where there were substantial grounds to believe that the conditions of his detention would violate Article 3. The inhuman treatment of detainees in U.S. custody in Guantánamo Bay and elsewhere overseas was known to Romania at the time of transfer, see paragraphs 86-107, and has been recognized by this Court. Indeed, in *Al Moayad*, this Court stated that it was "gravely concerned by the worrying reports that have been received about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism", especially with respect to "prisoners detained by the US authorities outside the national territory, notably in Guantánamo Bay (Cuba), Bagram (Afghanistan) and some other third countries".[365]

Legal Standards: Transfer to Ill-Treatment

230. A decision by a Contracting State to transfer an individual outside its territory may engage the responsibility of that State under Article 3 of the Convention "where substantial grounds have been shown for believing that the person concerned . . . faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment" after transfer. [366] The establishment of such responsibility requires an assessment of the conditions in the requesting country against the standards of Article 3.[367]

231. In considering "whether there existed a real risk of ill-treatment in case of extradition . . . and whether this risk was assessed prior to taking the decision on extradition, with reference to the facts which were known or ought to have been known at the time of the extradition",[368] the Court has found an Article 3

[363] Exhibit 84: See DOD Announces Charges Referred Against Detainee Al Nashiri, Sep. 28, 2011. Available at http://www.defense.gov/releases/release.aspx?releaseid=14821

[364] See *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 171 (ordering the United Kingdom to take all possible steps to obtain post-transfer assurances from the Iraqi government that it would not impose the death penalty on individuals transferred from British custody); see also *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para 330-331 (holding that Bosnia and Herzegovina was under a continuing obligation to "take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants" after their transfer to U.S. custody and to retain and bear the costs of lawyers admitted to practice in the relevant jurisdictions to protect the applicants' rights while in U.S. custody).

[365] *Al-Moayad v. Germany*, ECtHR, Decision of 20 February 2007, at para 66 (Admissibility).

[366] *Soering v. the United Kingdom*, ECtHR, Judgment of 7 July 1989, at para 91.

[367] *Saadi v. Italy*, ECtHR (GC), Judgment of 28 February 2008, at para 125 (deportation). *Cruz Varas and Others v. Sweden*, ECtHR, Judgment of 20 March 1991, at para 70 (expulsion).

[368] *Garabayev v. Russia*, ECtHR, Judgment of 7 June 2007 (GC), at para 77.

violation where information had been available about the risk of ill-treatment but the extraditing state failed to seek adequate assurances or to request medical reports or visits by independent observers prior to extradition.[369]

Transfer from Romania Despite Real Risk of Further Ill-Treatment Violated Article 3

232. Romania knew and should have known that there were substantial grounds for believing that following his transfer from Romania, Mr. al Nashiri faced a real risk of further ill-treatment – including solitary confinement and incommunicado detention – in U.S. custody.

233. As set out in the Statement of Facts above, the torture, inhuman and degrading treatment and incommunicado detention associated with the CIA's secret detention and rendition programme were well known as of the time of his transfer, which occurred sometime between 6 June 2003 and 6 September 2006. See paragraphs 86-129 above.

234. Significantly, after being subjected to solitary confinement and incommunicado detention on Romanian territory, Mr. al Nashiri was likely held incommunicado in other secret overseas locations until about 6 September 2006, by which point he was transferred to Guantánamo Bay.[370]

235. By permitting Mr. al Nashiri's transfer from Romania despite substantial grounds for believing that he faced a real risk of torture and inhuman or degrading treatment, Romania violated his rights under Article 3.

3. Transfer to Prolonged Arbitrary Detention: Article 5

236. By assisting in Mr. al Nashiri's transfer from Romania despite substantial grounds for believing that he faced a real risk of being subjected to prolonged arbitrary detention, the Romanian government also violated Article 5. [371]

Legal Standards: Transfer to Arbitrary Detention

237. In *Othman (Abu Qatada) v. United Kingdom*, where the applicant alleged that a pre-trial detention period of 50 days would result in conduct prohibited under Article 5, the Court acknowledged that "a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial".[372] The Court also recalled its examination of the

[369] *Ibid*. at para 79, 83.
[370] Exhibit 28: Adam Goldman and Monika Scislowska, " Poles Urged to Probe CIA 'Black Site', " *CBS News*, 21 September 2010.
[371] See *M.A.R. v United Kingdom*, Decision of the European Commission on Human Rights, 16 January 1997 (Admissibility).
[372] *Othman (Abu Qatada) v United Kingdom*, ECtHR, Decision of 17 January 2012, at para 233.

applicant's Article 6 complaint in *Al-Moayad v. Germany*,[373] in which it stated "[a] flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release", and concluded that "[g]iven that this observation was made in the context of the applicant's complaint that he would be detained without trial at Guantánamo Bay, the Court finds that these observations must apply with even greater force to Article 5 of the Convention".[374] In addition, the Court concluded that it would be "illogical" for an applicant who faced imprisonment without a trial to be bereft of protection under Article 5 to prevent his expulsion.[375]

238. Similarly, in *Z. and T. v. United Kingdom*, the Court accepted that a valid claim under Article 5 might be made against a government that expels an individual to a country where "the prospect of arbitrary detention was sufficiently flagrant".[376] Similarly, in *M.A.R. v United Kingdom*, where the applicant alleged that his deportation to Iran would violate Article 5 because it presented "a real risk of being detained in a system which does not 'even contemplate' the legal safeguards of Article 5 "[377] the European Commission on Human Rights held that this claim was not manifestly ill-founded. [378] The UN Human Rights Committee has similarly admitted claims relating to the alleged violation of Covenant rights due to extradition to a country that allows for prolonged preventative detention.[379]

239. As noted above, this Court has found the right to liberty and security under Article 5 to be of "primary importance in a democratic society" within the meaning of the Convention. [380] Moreover, it has held that unacknowledged detention amounts to "a complete negation of the guarantees of liberty and security of person contained in Article 5 of the Convention and a most grave violation of that Article".[381] Article 5 protections are critical for the "prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention".[382]

240. Accordingly, transfer to a country "where substantial grounds have been shown for believing that the person concerned . . . faces a real risk"[383] of being subjected to unacknowledged detention violates Article 5.

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[373] ECtHR, Judgment of 20 February 2007.
[374] *Othman (Abu Qatada) v United Kingdom*, ECtHR, Decision of 17 January 2012, at para 231.
[375] *Ibid*. at para 232.
[376] *Z and T v.. The United Kingdom*, ECtHR, Decision of 28 February 2006 (Admissibility).
[377] *M.A.R. v. United Kingdom*, Decision of the European Commission on Human Rights (Admissibility), 16 January 1997.
[378] *M.A.R. v .United Kingdom*, Decision of the European Commission on Human Rights (Admissibility), 16 January 1997.
[379] *G.T. v. Australia*, CCPR, Views of 4 December 1997, paras 3.3, 5.12.
[380] *Iskandarov v. Russia*, ECtHR, Judgement of 23 September 2010, at para 143.
[381] *Ibid*. at para 150.
[382] *Kurt v. Turkey*, ECtHR, Judgment of 25 May 1998, at paras 123-124.
[383] *Soering v. the United Kingdom*, ECtHR, Judgment of 7 July 1989, at para 91.

Transfer to Prolonged Incommunicado Detention Violated Article 5

241. As set out in the Statement of Facts above, by 6 June 2003 (which was the earliest possible time that Mr. al Nashiri could have been transferred from Romania), it was widely known that the U.S. rendition programme involved prolonged secret detention in overseas locations. See paragraphs 86-129 above. Accordingly, Romania knew and should have known that there were substantial grounds for believing that Mr. al Nashiri faced a real risk of being subjected to further incommunicado detention after being transferred from Romania. Indeed, the U.S. government did not publicly acknowledge it was holding Mr. al Nashiri until at least September 2006. By knowingly and intentionally enabling Mr. al Nashiri's transfer despite this risk, Romania violated his rights under Article 5.

4. Transfer to Flagrantly Unfair Trial: Article 6

242. Romania violated Mr. al Nashiri's rights under Article 6 by permitting his transfer from Romanian soil despite the risk that he would be subjected to a flagrant denial of the right to a fair trial. Military commissions applicable to Mr. al Nashiri at the time of his transfer (that occurred sometime between 6 June 2003 and 6 September 2006) were neither independent nor impartial; they were not established by law; and they violated a range of fair trial guarantees.

Legal Standards: Unfair Trial

243. This Court has repeatedly affirmed that "the right to a fair trial in criminal proceedings as embodied in Article 6 holds a prominent place in a democratic society".[384] Indeed, it has noted that "[e]ven the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the very essence of a fair trial as guaranteed by Article 6".[385] Accordingly, the Court has reiterated that "an issue might exceptionally arise under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country".[386] In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases.[387] Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice.[388] Where such evidence is adduced, it is for the Government to dispel any doubts about it. [389]

Transfer Despite Risk of Flagrant Denial of Fair Trial Violated Article 6

244. Romania violated Article 6 by colluding in Mr. al Nashiri's transfer from Romania despite the risk that he would be subjected to a flagrantly unfair trial in U.S. custody. By 6 June 2003, the earliest date that Mr. al Nashiri could have

[384] *Al-Moayad v. Germany*, ECtHR, Judgment of 20 February 2007, at para 101; *Soering v. The United Kingdom*, ECtHR, Judgment of 7 July 1989, at para 113.
[385] *Al-Moayad v. Germany*, ECtHR Judgment of 20 February 2007, at para 101.
[386] *Ibid*. at para 100.
[387] *Othman (Abu Qatada) v. The United Kingdom*, ECtHR, Judgment of 17 January 2012, at para 261.
[388] *Ibid*.
[389] *Ibid*.

been transferred from Romania, the Romanian government knew and should have known of this risk. As set out in the Statement of Facts above, by the time of Mr. al Nashiri's transfer from Romania, the deficiencies of the military commission procedures applicable to terrorist suspects in U.S. custody at that time had been publicly criticised in the May 2003 Report of the Parliamentary Assembly of the Council of Europe; by the same Parliamentary Assembly's Resolution 1340; by the Human Rights Chamber for Bosnia and Herzegovina; by non-governmental organizations including Human Rights Watch and Amnesty International; as well as in news reports. See paragraphs 108-129 above.

245. Moreover, by the time of Mr. al Nashiri's transfer from Romania, orders governing the military commission procedures to which he would likely be subjected—set forth in President Bush's Military Order of November 13, 2001, entitled "Detention, Treatment, and Trial for Certain Non-Citizens in the War Against Terrorism"[390] (November 13 Order) and the U.S. Defense Department's Military Commission Order No. 1 (MCO No. 1) – had been published, and were publicly available and widely debated in international media. As set forth below, the text of these orders demonstrated that the military commissions were deficient in many respects, and taken together, these deficiencies would have amounted to a flagrant denial of Mr. al Nashiri's right to a fair trial.

a) Right to an independent and impartial tribunal

246. As noted above, the existence of the risk of a flagrantly unfair trial must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the transfer; the Court is not precluded, however, from having regard to information which comes to light subsequent to the transfer. [391]

247. The U.S. military commissions established by the time of Mr. al Nashiri's transfer from Romania were neither independent nor objectively impartial, in appearance or reality. Although the applicable military commission rules were subsequently revised in October 2006[392] and again in 2009,[393] they currently still lack the requisite independence and impartiality.

248. In determining whether a body can be considered to be sufficiently "independent" to satisfy Article 6, this Court "has regard to the manner of appointment of its members and the duration of their term in office, the existence of guarantees against outside pressures, and the question of whether the body presents an appearance of independence".[394] The manner and circumstances in which a judge can be removed are also considered a key indicator of independence.[395] A judge who gives the appearance of being "subordinate to his superiors and loyal to his colleagues", in the executive branch has been held to "undermine the confidence which must be inspired by

[390] Exhibit 64: Military Order of 13 November 2001, at Section 4, U.S. Federal Register of 16 November 2001, Vol. 66 No. 222.
[391] *Mamatkulov and Abdurasulovic v. Turkey*, ECtHR, Judgement of 5 February 2005, at para 69.
[392] See Military Commissions Act of 2006, Public Law 109-366, 120 Stat. 2600 (Oct. 17, 2006).
[393] See Military Commissions Act of 2009, Public Law 111-84, 123 Stat. 2190 (Oct. 28, 2009).
[394] *Campbell and Fell v. the United Kingdom*, ECtHR Judgment of 28 June 1984, at para 78.
[395] *Ibid*. at para 80.

the courts in a democratic society" and violate Article 6(1)'s requirement of independence and impartiality.[396] Article 6(1) requires adjudicative bodies to be "objectively" impartial, which entails the absence of "ascertainable facts which may raise doubts as to . . . impartiality"—"in this respect, even appearances may be of some importance". [397] This Court has recognised the importance of "subjective" impartiality, which entails the absence of bias arising from the personal conviction or interest of a given judge in a particular case.[398] The Court has "consistently held that certain aspects of the status of military judges sitting as members of national security courts made their independence from the executive questionable".[399] In cases in which military judges have tried civilians, the Court has consistently found violations of Article 6(1), indicating that the civilian defendants' legitimate fears that the military court in which they were tried lacked independence and impartiality were objectively justified.[400]

249. Especially in light of his civilian status, the transfer of Mr. al Nashiri to the risk of trial by U.S. military commission violated the independence and impartiality requirements of Article 6(1). Military commission members were appointed by the United States Secretary of Defense (the "Appointing Authority") or his designee and could be removed by the same authority for good cause.[401] Those members were further subordinate to the Secretary of Defense or his designee because they all were required to be commissioned officers of the United States armed forces.[402] Moreover, post-trial review was conducted by a review panel consisting of three military officers also designated by the Secretary of Defense.[403] A Military Commission finding as to a charge and sentence became final when the President, or if designated by the President, the Secretary of Defense made a final decision thereon.[404] For all of these reasons, the military commissions at that time were neither independent nor objectively impartial and violated Article 6(1).

250. Nor were the military commissions subjectively impartial. Indeed, as set forth above, President Bush and Defense Secretary Rumsfeld repeatedly referred to individuals detained at Guantánamo Bay as guilty parties, despite the fact that Mr. Rumsfeld had the authority to appoint and remove military commission

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[396] See *Belilos v. Switzerland*, ECtHR Judgment of 29 April 1988, at para 66-67 (holding, in challenge to conduct of police force, that review by local Police Board, which consisted of a lawyer from police headquarters violated article 6(1)).
[397] *Kyprianou v. Cyprus*, ECtHR Judgment of 15 December 2005, at para 118.
[398] *Ibid*.
[399] *Ocalan v. Turkey*, ECtHR, Judgment of 12 May 2005, at para 112 ; *Incal v. Turkey*, ECtHR, Judgment of 9 June 1998; aee also *Findlay v. UK*, ECtHR, Judgment of 27 February 1997 (finding a lack of impartiality in a court-martial due to the senior command of the convening officer); *Morris v. UK*, ECtHR, Judgment of 26 February 2002 (finding the reformed system still violated Article 6, due to the lack of independence of ordinary members of the tribunal); *Grieves v. UK*, ECtHR (GC), Judgment of 16 December 2003 (finding that the Royal Navy court martial system was not impartial as the judge advocates were not civilians); and *Cooper v. UK*, ECtHR (GC), Judgment of 16 December 2003 (finally finding that reforms to the Army courts-martial system did guarantee independence).
[400] *Incal v. Turkey*, ECtHR Judgment of 9 June 1998, at para 71, 73; *Ergin v. Turkey (No.6)*, ECtHR Judgment of 4 May 2006, at para 44; *Ocalan v. Turkey*, ECtHR Judgment of 12 May 2005, at para 118.
[401] Exhibit 65: MCO No. 1, § 2, § 4A (1), (2) & (3).
[402] Exhibit 65: MCO No. 1 § 4A (3).
[403] Exhibit 65: MCO No. 1 § 6(H)(4).
[404] Exhibit 65: MCO No. 1, § 6H(2)-(5)-(6).

members[405] and both the President and Mr. Rumsfeld had the authority to confirm the commission's decisions. [406]

b) Tribunal established by law

251. Tribunals are not "established by law" if they violate domestic legal provisions relating to the establishment and competence of judicial organs or those relating to the particular rules governing tribunals.[407] Military commissions established under MCO No.1 violated the laws of the United States – including the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions – which were publically available as of the time of Mr. al Nashiri's transfer from Romania. Moreover, the Bush administration took the position that the Geneva Conventions did not apply to prisoners held at Guantánamo, and the illegality of the military commission procedures under U.S. law had been widely recognised by the time of Mr. al Nashiri's transfer from Poland. See paragraphs 96-117. Indeed, the United States Supreme Court subsequently confirmed that military commissions established by MCO No. 1 "lacked power to proceed" because their structure and procedures violated both the UCMJ and the Geneva Conventions".[408] Accordingly, military commissions applicable to Mr. al Nashiri at the time of his transfer were not "tribunals established by law" and therefore violated Article 6(1).

c) Fair trial guarantees

252. The military commission procedures violated Mr. al Nashiri's fair trial rights under Article 6(1) and Article 6(3) because MCO No. 1 violated a number of fair trial guarantees including the bar on discrimination in the administration of justice, the right to a trial within a reasonable time, the bar on admission of evidence obtained by torture or inhuman or degrading treatment, the right of the accused to be present at his proceedings, the right to equality of arms, the right to a public trial, and the right not to be convicted on hearsay evidence alone (Article 6(3)(d)). Taken together, these deficiencies were a flagrant denial of the right to a fair trial.

253. *Discrimination in the administration of justice*. The military commission procedures applicable to Mr. al Nashiri at the time of transfer violated Article 6 taken in conjunction with Article 14 because they applied only to non-U.S. citizens suspected of being al Qaeda members or being involved in various ways with perpetrating international terrorism.[409] This difference of treatment between U.S. citizens and non-U.S. terrorist suspects was discriminatory because it had "no objective and reasonable justification". [410]

254. *Right to trial within a reasonable time*. The excessive delays and indefinite detention that characterize military commissions violate the Article 6(1) right to

[405] Exhibit 65: MCO No. 1, § 2, § 4A (1), (2) & (3).
[406] Exhibit 65: MCO No. 1, § 6H(2)-(5)-(6).
[407] *DMD Group A.S. v. Slovakia*, ECtHR, Judgment of 5 Oct. 2010, at para 59-61.
[408] *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 623-35 (2006).
[409] Exhibit 64: President's Military Order of November 13, 2000, Section 2 (a).
[410] *Gaygusuz v. Austria*, ECtHR Judgment of 16 September 1996, at paras 42-52 (holding that the Austrian government breached Article 14 by discriminating between Austrians and non-Austrians with regard to their entitlement to emergency assistance)

a "fair and public hearing within a reasonable time". The aim of this provision "is to protect […] against excessive procedural delays" and "in criminal matters, especially, […] to avoid that a person charged should remain too long in a state of uncertainty about his fate"[411] as well as to ensure justice is rendered "without delays which might jeopardise its effectiveness and credibility".[412] Less leeway is afforded States with regard to the length of proceedings in criminal cases than might be allowed in civil actions.[413] The Court takes particular note of what is at stake for the applicant, including the possibility of life-time imprisonment or a serious criminal conviction.[414] Furthermore, the Court has held that "persons held in detention pending trial are entitled to 'special diligence' on the part of the competent authorities", and that ongoing detention is "a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met".[415]

255. The delays permitted by the military commissions were known at the time of the transfer. Neither the President's Military Order of 2001 nor MCO No. 1 attempt to limit the length of time within which a suspect had to be charged or tried, thereby violating Article 6(1). As set forth above, there had been extensive criticism of these orders in light of the fact that they would allow for prolonged indefinite detention without charge or trial. Indeed, the May 2003 report of the Parliamentary Assembly of the Council of Europe indicated that the arbitrary detention without trial within a reasonable time at the Guantánamo Bay detention facility constituted a violation of the right to fair trial.[416]

256. *Admission of evidence obtained through torture or inhuman or degrading treatment*. At the time of transfer, it was known that the military commissions allowed the use of evidence obtained by torture. This Court has held that "the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings".[417] The use of "incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or . . . torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the

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[411] *Stögmüller v. Austria*, ECtHR judgment of 10 November 1969, at para 5 ("As to the Law" Section).
[412] *H. v. France,* ECtHR Judgment of 24 October 1989, at para 58.
[413] See *Baggetta v. Italy*, ECtHR, Judgment of 25 June 1987, at para 24.
[414] *Henworth v. United Kingdom*, ECtHR, Judgment of 2 November 2004, at para 25
[415] *Abdoella v. the Netherlands*, ECtHR, Judgment of 25 November 1992, at para 24-25 (finding a violation of Article 6 because of a period of apparent inactivity of 21 months within 52 months of proceedings was "well beyond what can still be considered 'reasonable' for the purposes of Article 6(1)" where the applicant remained in detention); see also *Kalashnikov v. Russia*, ECtHR, Judgment of 15 July 2002, para 132, 134 (finding a violation of Article 6 with regard to proceedings that lasted 5 years and 1 month) ; *Kudla v. Poland*, 26 October 2000, ECtHR, Judgment of 26 October 2000, at paras 114, 130-31 (observing pre-trial detention of applicant for three years and four months with negative psychological impact required "particular diligence" on the part of the Government, and that delay of year and eight months between the quashing of his initial conviction and beginning of his retrial violated Article 6).
[416] Exhibit 67: Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay", Council of Europe, Doc. 9817, 26 May 2003, at Section II (d).
[417] *Jalloh v. Germany*, ECtHR Judgment of 11 July 2005, at para 105.

Convention sought to proscribe" or to "afford brutality the cloak of law".[418] The Court has considered the admission of tortured evidence to be "manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial", and has accordingly stated that "[i]t would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial".[419] The Court has similarly held that the use of evidence obtained as a result of inhuman or degrading treatment rendered proceedings "unfair" in violation of Article 6.[420]

257. As set forth above in the Statement of Facts, Romania was on notice at the time of Mr. al Nashiri's transfer of the widespread torture and abuse of terrorist suspects held in U.S. custody overseas, as well as of MCO No. 1, which deemed evidence admissible merely if the Presiding Officer or a majority of the Commission was of the opinion that the evidence "would have probative value to a reasonable person".[421] By potentially allowing the admission of evidence obtained through torture or inhuman or degrading treatment, MCO No. 1 would have violated Mr. al Nashiri's right to a fair trial.

258. *Equality of arms and right to an adversarial trial*. The military commissions at the time of transfer violated fair trial rights as they allowed for unreasonable limits on the ability of the accused and his counsel to participate in the proceedings. The principles of equality of arms and the closely related right to an adversarial trial are fundamental to Article 6(1). Equality of arms requires that ". . . each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent".[422] In determining whether there is equality of arms, the Court will consider the appearance of equality, as well as the seriousness of what is at stake for the applicant.[423] The Court has held that it is not necessary for an applicant to show that they suffered actual prejudice resulting from a procedural inequality in order to find a violation of Article 6.[424]

259. The adversarial proceedings requirement is satisfied when both the prosecution and defence are given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[425] "Thus, the

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[418] *Ibid*. at para 105.
[419] *Othman (Abu Qatada) v United Kingdom*, ECtHR, Judgement of 17 January 2012, at para 267.
[420] *Jalloh v. Germany*, ECtHR Judgment of 11 July 2005, at para 105, 108 (finding that use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair); *Ozen v. Turkey*, ECtHR Judgment of 12 April 2007, at para 104 (finding that applicant's confession while being subjected to inhuman treatment in absence of his counsel "rendered his trial as a whole unfair" in violation of Article 6).
[421] Exhibit 65: MCO No.1, at Section 6(D)(1).
[422] *Foucher v. France*, ECtHR, Judgment of 18 March 1997, at para 34.
[423] *A.B. v. Slovakia,* ECtHR, Judgment of 4 March 2003, at para 55.
[424] *Ibid*. at paras 56, 61, 63 (finding a violation of Article 6 where the regional court failed to take a formal decision on the applicant's request for the appointment of a lawyer and by proceeding with the case in the applicant's absence, but not determining whether the applicant suffered actual prejudice); See also *Bulut v. Austria*, ECtHR, Judgment of 22 February 1996, para 49, 50 (finding a violation of Article 6 and the principle of equality of arms but not requiring a showing of "quantifiable unfairness flowing from a procedural inequality").
[425] *Rowe and Davis v. the United Kingdom*, ECtHR, Judgment of 16 February 2000, at para 60; see also *Edwards and Lewis v. United Kingdom*, ECtHR, Judgment of 27 October 2004, at para 46, p. 17.

'fairness' principle requires that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument".[426] The prosecution must disclose to the defence all material evidence in their possession for or against the accused.[427] The defence must also be given "adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings".[428]

260. In addition, the Court has held that "omissions and lack of clarity" in procedural rules violates article 6 by generating uncertainty and rendering the defence vulnerable to the "abuse of authority".[429] With regard to criminal cases, the European Court has held that Article 6 entitles individuals accused of criminal activity to be present at the trial hearing.[430]

261. MCO No. 1 cumulatively violated the principle of equality of arms and the right to an adversarial trial because the procedural rules were newly created and untested, and as such were uncertain to the detriment of the defence; the accused and civilian defence counsel could be excluded from key parts of the proceedings;[431] and the defence could be denied access to evidence in possession of the prosecution.[432]

262. *Right to a public trial*. At the time of Mr. al Nashiri's transfer from Romania, it was known that any trial would be held on the US naval base at Guantánamo Bay, with no effective public access for observers. Article 6(1)'s requirement of a public hearing is met "only if the public is able to obtain information about the [trial's] date and place. . . and if this place is easily accessible to the public".[433] Even if the public is not formally excluded, "hindrance in fact" can contravene the Convention just like a legal impediment.[434] The Inter-American Court of Human Rights has held that even where military tribunals on military bases are in theory open to the public, they violate the right to a public trial where, in effect, the location and procedures exclude the public.[435] The military commissions applicable to Mr. al Nashiri after transfer from Romania almost certainly violated the right to a "public hearing" under Article 6(1) because they

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[426] *Mirilashvili v. Russia*, ECtHR, Judgment of 11 December 2008, at para 162.
[427] *Rowe and Davis v. the United Kingdom*, ECtHR, Judgment of 16 February 2000, at para 60; see also: *Ruiz-Mateos v. Spain*, ECtHR Judgment of 23 June 1993, at para 63.
[428] *Mirilashvili v. Russia*, ECtHR, Judgment of 11 December 2008, paras 163, 223, 226-229 (finding a violation of Article 6 where the defence was placed at a disadvantage because they were not allowed to question witnesses or to submit written statements by witnesses retracting statements they claimed ot have made under pressure).
[429] *Coeme and Others v. Belgium*, ECtHR, Judgment of 22 June 2000, paras 101-103.
[430] *Ekbatani v. Sweden*, 26 May 1988, at paras 25,32,33, (finding a violation of Article 6 where the Court of Appeals was considering the case as to the facts and the law and "had to make a full assessment of the question of the applicant's guilt or innocence", noting that "there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person.")
[431] Exhibit 65: MCO No. 1, at Section 6(B)(3)
[432] Exhibit 65: MCO No. 1, at Section 6(B)(5)(b)
[433] *Riepan v. Austria*, ECtHR Judgment of 14 November 2000, at para 29.
[434] *Ibid*. at para 28.
[435] *Palamara Iribarne vs. Chile*, IACtHR Judgment of November 22, 2005, at para 174, Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf; *Castillo Petruzzi et al. v. Peru*, IACtHR Judgment of 30 May 1999, (Ser. C.) No. 52, at para 172-73. Available at www.corteidh.or.cr/docs/casos/articulos/seriec_173_ing.doc.

would have been held in the remote location of a United States naval base in Guantánamo Bay, which was impossible for the general public to access.

263. *Hearsay evidence*. Article 6(3)(d) guarantees a person charged with a criminal offence the right "to examination of witnesses on his behalf under the same conditions as witnesses against him". In *Unterpretinger v. Austria*, this Court held that a conviction based mainly on a witness statement read to the judge, where the witness did not testify in person and the applicant had no opportunity to question the witness at any prior stage of the proceedings, violated Article 6(3)(d).[436] MCO No. 1 placed no bar on the admission of hearsay evidence, thereby potentially allowing conviction mainly on the basis of such evidence in violation of Article 6(3)(d).[437]

Conclusion

264. In light of the widespread public criticism of the military commission procedures applicable to Mr. al Nashiri at the time of his transfer from Romania as well as the numerous deficiencies apparent from the text of the military orders governing his proceedings, Romania knew and should have known that Mr. al Nashiri would be subjected to a flagrant denial of his right to a fair trial after transfer from Romania. By permitting his transfer despite this risk, Romania violated his rights under Article 6.

265. Although the military commission rules applicable to Mr. al Nashiri have changed since the time he was transferred from Romania, they still provide for the death penalty.[438] On 20 April 2011, the U.S. government announced that it would seek the death penalty in Mr. al Nashiri's case, and on 28 September 2011, the Convening authority approved capital charges for his case. Moreover, the current rules retain a number of deficiencies described below which, especially when considered in the context of a death penalty case, cumulatively amount to a flagrant denial of justice under Article 6:

    a) The current military commissions lack independence from the executive as well as impartiality because the United States Secretary of Defense or his designee, as the convening authority for a given commission[439] approves charges for trial by military commission,[440] and selects the commission members, who are required to be members of the armed forces on or those recalled to active duty, [441] and as such are subordinate to the Secretary of Defense. Mr. Al Nashiri's status as a civilian further underscores the unfairness of subjecting him to trial by military commission in a death penalty case, instead of in U.S. federal court. Significantly, two of his alleged co-conspirators in the USS Cole bombing were indicted in U.S.

[436] See *Unterpertinger v. Austria*, ECtHR, Judgment of 24 November 1986, at para 33; *see also Barbera, Messegue and Jabardo v. Spain*, ECtHR, Judgment of 6 December 1988, at paras 86 & 89.
[437] Exhibit 65: MCO No. 1, at Section 6(D)(1).
[438] Military Commissions Act of 2009, 10 U.S.C. § 948d (2009). Available at http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf.
[439] Military Commissions Act of 2009, 10 U.S.C. § 948h (2009).
[440] Military Commission Rule 601, Manual for Military Commissions. Available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.
[441] Military Commissions Act of 2009, 10 U.S.C. § 948i (a), (b)

federal court on May 15, 2003.[442] The indictment identified him as a co-conspirator in the USS Cole bombing.[443]

b) They discriminatorily apply only to non-U.S. citizens;[444]

c) There are no limits on the length of time within which a suspect has to be charged or tried, and the applicable rules expressly exempt military commissions from speedy trial requirements;[445]

d) They allow for the accused to be denied access to classified information or evidence;[446]

e) Unlike U.S. federal court procedures which bar the admission of hearsay, the military commission rules expressly permit hearsay evidence, and do not bar convictions based mainly on such evidence[447]. Mr. al Nashiri's consequent inability to confront witnesses against him is of particular concern in light of the widespread torture and abuse of U.S. terrorism suspects, whose statements could be introduced as hearsay against him, see paragraphs 75-83 and 86-107 above;

f) Unlike U.S. federal court procedures which bar the admission of evidence derived from coercion, the current military commission rules allow for the admission of evidence derived from coercion under a variety of circumstances;[448]

g) The military commission proceedings will still be held in the remote location of Guantánamo Bay, where the general public is not allowed. See paragraph 138 above. Although on 9 November 2011, the Department of Defense began providing general public access to the proceedings through closed circuit television at Fort Meade, Maryland,[449] Mr. al Nashiri's recent pre-trial proceedings have largely been conducted in secret and therefore closed

[442] See Exhibit 82: Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole, Washington, D.C., May 15, 2003. Available at http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.

[443] See Exhibit 82: Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, at 6. Available at http://fl1.findlaw.com/news.findlaw.com/cnn/docs/cole/usalbadawi051503ind.pdf; Exhibit 83: Remarks of Attorney General John Ashcroft. Indictment for the Bombing of the U.S.S. Cole, Washington, D.C., May 15, 2003. Available at http://www.justice.gov/archive/ag/speeches/2003/051503agremarksusscole.htm.

[444] Military Commissions Act of 2009, 10 U.S.C. § 948c.

[445] *Ibid* at § 948b(d)(A).

[446] *Ibid* at § 949p-4(b)(1)

[447] *Ibid* at § 949a(b)(3)(D)

[448] Military Commissions Act of 2009, 10 U.S.C. § 948r (2009); see also Military Commission Rule 304.

[449] Exhibit 79: U.S. Department of Defense, Guantanamo Bay Media Invitation Announced, 14 October 2011. Available at http://www.defense.gov/advisories/advisory.aspx?advisoryid=3396.

to the general public, as well as to observers and media outlets who obtained approval to attend the proceedings at Guantánamo[450]; and

h) The principle of equality of arms is significantly undermined by the considerable uncertainty associated with the current military commission rules, which were enacted as recently as October 2009,[451] and have been applied thus far in only three cases, none of which involved the death penalty.

i) The cumulative effect of the aforementioned deficiencies in the military commissions would flagrantly deny Mr. al Nashiri his right to a fair trial. Accordingly, Romania is now under a duty to use all available means at its disposal—including diplomatic representations to the United States—so as to ensure that Mr. al Nashiri is not subjected to the currently applicable military commission proceedings.[452]

C. FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION

266. By failing to conduct an effective investigation into the secret CIA prison on its territory and the associated ill-treatment of Mr. al Nashiri in that prison, Romania has violated his rights under articles 2, 3, 5, 8 and 13.

Legal Standards: Effective Investigation

267. The procedural limb of Article 2 creates an affirmative obligation on the part of states to conduct an effective official investigation into violations of the right to life.[453] The investigation must be capable of leading to the identification and punishment of those responsible.[454] The Court has further held that investigations that do not lead to a decision to prosecute, provide no reasons for the lack of prosecution and make "no information […] available either to the applicant or the public which might have provided reassurance that the rule of law had been respected", do not conform to the obligations of the Convention.[455] The Court has found lack of "transparency" and "public scrutiny" to be a significant factor contributing to the ineffectiveness of an investigation,[456] holding that "there must be a sufficient element of public scrutiny of [an]

[450] See Exhibit 80: Carol Rosenberg, Guantánamo war court holds secret session; accused not present, July 18, 2012, available http://www.miamiherald.com/2012/07/18/2900737/guantanamo-war-court-in-secret.html.
[451] See Military Commissions Act of 2009.
[452] *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at paras 330-31 (ordering Bosnia and Herzegovina "to use diplomatic channels in order to protect the basic rights of the applicants" after being transferred to U.S. custody, as well as to "retain lawyers authorised and admitted to practice in relevant jurisdictions"--including military proceedings--to protect "applicants' rights while in US custody" and bear the costs of attorneys fees and expenses of such lawyers).
[453] *See Edwards v. The United Kingdom*, ECtHR, Judgment of 14 March 2002, para 69; *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 191.
[454] *McCann and Others v. the United Kingdom*, ECtHR, Judgment of 27 September 1995, at para 161; *Kaya v. Turkey*, ECtHR, Judgment of 28 March 2000, at para 86; *Yaşa v Turkey*, ECtHR, Judgment of 2 September 1998, at para 98
[455] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, at para 83.
[456] *McKerr v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, at paras 157- 160.

investigation or its results to secure accountability in practice as well as in theory".[457]

268. Similarly, the Court has held that Article 3 requires an "effective official investigation" where there is an arguable claim of serious ill-treatment".[458] States are obliged to investigate all Article 3 violations once they know, or should know, that an arguable claim of a violation exists, and this obligation applies even in situations where an applicant did not explicitly communicate his or her mistreatment to the State.[459] These investigations must be expeditious,[460] as well as "thorough".[461] "[I]nertia displayed by the authorities in response to… allegations [of ill-treatment is] inconsistent with the procedural obligation which devolves upon them under Article 3 of the Convention".[462] The failure to conduct an effective investigation constitutes an ongoing violation of applicant's rights under the Convention.[463]

269. This Court has also found that Article 5 requires the authorities to conduct a prompt and effective investigation into arguable claims that the article has been violated.[464]

270. Furthermore, the Court has recognized that "the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation".[465] In *M.C. v. Bulgaria*, the Court established that "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice *through effective investigation and prosecution*".[466]

271. The purpose of such an investigation is to ensure that domestic laws are implemented and, if State agents or bodies are involved in violations, to ensure their accountability.[467] The investigation must thus be capable of leading to the identification and punishment of those responsible,[468] including the senior or intellectual authors as well as the physical perpetrators, and its conclusions must

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[457] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, at paras 71, 84; *see also Kelly and Others v United Kingdom,* ECtHR, Judgment of 4 May 2001, at para 98.
[458] *Assenov and Others v Bulgaria*, ECtHR, Judgment of 28 October 1998, at para 102.
[459] *See Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para 56 (holding that Turkey violated the applicant's Article 3 right since there were visually perceptible injuries on the applicant's person that he did not have when he entered prison); *Osman v the United Kingdom*, ECtHR, Judgment of 28 October 1998.
[460] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008 at para 48; see also *Labita v Italy*, ECtHR, Judgment of 6 April 2000 (noting that the slow pace of the investigation was a factor in rendering it ineffective in violation of Article 3).
[461] *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, at para 56.
[462] *Sevtap Veznedaroglu v Turkey,* ECtHR, Judgment of 11 April 2000, at para 35.
[463] See e.g., *Varnava and Others v. Turkey,* ECtHR (GC), Judgment of 18 September 2009, at para 194.
[464] *Cakici v. Turkey,* ECtHR, Judgment of 8 July 1999, at para 104.
[465] *M.C. v. Bulgaria*, ECtHR, Judgment of 4 December 2003, at para 152.
[466] *Ibid*. at para 153. (Emphasis added).
[467] *Mizigarova v. Slovakia*, ECtHR, Judgment of 14 December 2010, at para 91.
[468] *Kaya v. Turkey*, ECtHR, Judgment of 28 March 2000, at paras 86, 102, 108; *McCann and Others v. the United Kingdom*, ECtHR, Judgment of 27 September 1995, at para 161; *Assenov v. Bulgaria*, ECtHR, Judgment of 28 October 1998, at para 102.

be based on "thorough, objective, and impartial analysis of all relevant elements".[469] The failure to conduct an effective investigation constitutes an ongoing violation of applicant's rights under the Convention.[470]

272. The Court has repeatedly found that "failing to follow an obvious line of inquiry undermines the investigation's ability to establish the circumstances of the case and the person responsible".[471] This includes investigating senior officials who may be implicated in the crimes: for example, in *Enukidze and Girgvliani v. Georgia*, the Court held that an investigation that fails to probe links between the direct perpetrators and individuals higher-up in the chain of authority, when such ties are strongly suggested by the evidence, violates Article 2.[472] "Such selective approach by the domestic authorities is unacceptable for the Court because, in order for an investigation to be effective, its conclusions must always be based on thorough, objective and impartial analysis of *all* relevant elements".[473]

273. The importance of identifying intellectual authors of crimes has also been recognized by the Inter-American Commission on Human Rights, which has held that the duty to investigate and prosecute perpetrators of human rights violations "requires punishment not only of material authors, but also of the intellectual authors of those acts".[474] Both the Inter-American Court and the Commission have found this obligation in the State's "duty to guarantee the full exercise of human rights by victims and their relatives" and also "the right of society to know what happened".[475]

274. Article 13 applies whenever an arguable claim of a Convention violation exists.[476] It protects the right to a domestic remedy that ensures either the prevention of the alleged violation, or the provision of adequate redress, including compensation, for a victim of a violation.[477] The remedy required by Article 13 must be "effective" in practice as well as in law, meaning the ability of an individual to exercise her right to a remedy must not unjustifiably be hindered by the acts or omissions of the authorities of the respondent State.[478]

275. In considering the adequacy of the investigatory component of a remedy, the Court considers the speed of the investigatory procedure as one measure of

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[469] *Kolevi v. Bulgaria*, ECtHR, Judgment of 5 November 2009, at para 192; see *Nachova and Others*, ECtHR, Judgment of 6 July 2005, para 165.
[470] See e.g., *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 194.
[471] *Kolevi v. Bulgaria*, ECtHR, Judgment of 5 November 2009 at para 201; see *Nachova and Others*, ECtHR, Judgment of 6 July 2005, para 167-68; *Ramsahai* and Others, ECtHR, Judgment of 15 May 2007, at para 321, *Anguelova v. Bulgaria*, ECtHR, Judgment of 13 June 2002, at para 144.
[472] *Enukidze and Girgvliani v. Georgia*, ECtHR, Judgment of 26 April 2011, at para 264,266.
[473] *Ibid*. at para 266. (Emphasis in original).
[474] *Corumbiara Massacre v. Brazil*, IACommHR, Decision of 11 March 2004, at para 256.
[475] See e.g. *Manoel Leal de Oliveira v. Brazil*, IACommHR, Report No. 37/10 of 17 March 2010, at para 138, citing *Juan Humberto Sanchez v. Honduras*, Inter-Am. Ct. H.R., Judgment of 7 June 2003, at para 134.
[476] *Silver v United Kingdom*, ECtHR, Judgment of 25 March 1983, at para113.
[477] *Kudla v Poland*, ECtHR, Judgment of 26 October 2000, at para 152.
[478] *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para 95.

effectiveness. The Court has stated that investigations must be expeditious,[479] as well as "thorough"[480] and "effective".[481] The Court has also found that "[t]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".[482]

276. The Court has stated that Article 35 "has a close affinity" with Article 13 in that both assume there to be "an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights".[483] In *Bryn v. Denmark*, the Commission found that domestic compensation proceedings that were ongoing for more than two years "cannot, due to their excessive length, be considered to be an effective or adequate remedy within the meaning of Article 26 [Now Article 35] of the Convention". [484]

Romania's Failure to Conduct an Effective Investigation Violates Articles 2, 3, 5, 8 and 13

277. The Romanian authorities have not conducted a criminal investigation into CIA prisons on their territory, and thereby failed to meet the requirement of an investigation "capable of leading to the identification and punishment of those responsible." Moreover, as set forth in the Statement of Facts above, Romania has denied the existence of a secret CIA prison since 2005, when reports of such a prison first emerged. Notwithstanding the fact that grave human rights violations such as torture and incommunicado detention were at issue, it did not conduct a criminal investigation into the subject, and the Senate inquiry into the matter was manifestly ineffective and unreliable. A Council of Europe report found it "disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions' . . . [rather than aimed at producing] coherent findings based on objective fact-finding".[485] The report observed that "the categorical nature of the Committee's conclusions cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence";[486] and a more recent 2011 Report observed that the Romanian parliament had "conducted no more than a superficial inquiry".[487] The manifest failings of this inquiry, and the complete absence of any criminal investigation, violate a

[479] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008, at para 48; *See also Labita v Italy*, ECtHR, Judgment of 6 April 2000, at para 133 (noting that the slow pace of the investigation was a factor in rendering it ineffective in violation of Article 3).
[480] *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, at para 55.
[481] *Sulejmanov v The Former Yugoslav Republic of Macedonia*, ECtHR Judgment of 24 April, 2008, at para 47.
[482] *Kelly and Others v United Kingdom*, ECtHR, Judgment of 4 May 2001, at para 98
[483] *Kudla v. Poland*, 26 October 2000, ECtHR, Judgment of 26 October 2000, at para 152.
[484] *Byrnn v. Denmark*, ECtHR Judgment of 1 July 1992, at para 3 (Admissibility).
[485] Exhibit 3: 2007 Council of Europe report at para 230.
[486] *Ibid*. at para 230.
[487] Exhibit 88: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human rights, Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, 16 Sep. 2011, at para 11. Available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12714.pdf.

number of the requirements of an effective investigation under the Convention. In addition, as noted above, in late March 2012, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg presented to the Romanian government an extensive dossier containing evidence that Mr. al Nashiri and some other "high value detainees" were transported to Bucharest in September 2003 where they were secretly detained and interrogated by CIA officials. Commissioner Hammarberg recommended a serious investigation into these circumstances. By the end of July 2012, however, there had been no response to this request or to the content of the dossier. See paragraph 156 above.

The Investigation was Incapable of Identifying or Prosecuting the Perpetrators

278. The Senate inquiry was by its very nature ineffective because it was not a criminal inquiry. As such, the inquiry was not capable of "leading to the identification and punishment of those responsible". [488] Indeed, the Senate is a political and not a criminal investigative body. Although the General Prosecutor has issued in a preliminary response to the criminal complaint filed on Mr. al Nashiri's behalf, thus far no official decision has been taken to open a formal criminal investigation into his claims.

279. As noted above, States are obliged to investigate all Article 3 violations once they know, or should know, that an arguable claim of a violation exists, and this obligation applies even in situations where an applicant did not explicitly communicate his or her mistreatment to the State.[489] Yet, the Romanian authorities did not initiate a criminal investigation despite being on notice since 2005 of a secret CIA prison on its territory where article 3 violations likely occurred. Indeed, had it conducted an investigation into CIA prisons on its territory, it would have encompassed an investigation of Mr. al Nashiri's claims and also identified high level officials who were responsible for the violation of his rights.

280. Notably, as noted above, the 2007 Council of Europe report identified a "small circle" of officials at the highest level of government who "knew about, authorised and stand accountable for Romania's role in the CIA's operation of "out-of-theatre" secret detention facilities on Romanian territory, from 2003 to 2005". [490] Accordingly, in this case, any investigation must be capable of identifying not only those who directly inflicted the abuses on Mr. al Nashiri, but also the senior officials who's decisions led to his arbitrary detention and abuse in Romania. Exhaustive and impartial investigations are essential in bringing to justice not only the immediate perpetrators of crimes, but also their intellectual authors.

281. In addition, the superficial nature of the Senate inquiry meant that it was also incapable of identifying the perpetrators or leading to their criminal

[488] See e.g. *Imakayeva v Russia*, ECtHR, Judgment of 9 November 2006, at para 194.
[489] *See Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, at para 56 (holding that Turkey violated the applicant's Article 3 right since there were visually perceptible injuries on the applicant's person that he did not have when he entered prison); *Osman v the United Kingdom*, ECtHR, Judgment of 28 October 1998.
[490] Exhibit 3: 2007 Council of Europe Report at paras 211-12.

investigation or prosecution. Even where domestic proceedings are initiated, if they have "not been conducted with the diligence and determination necessary for there to be any realistic prospect of identifying and apprehending the perpetrators" then there will be a violation of the obligation to conduct an effective investigation.[491] "Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness".[492] The Senate Inquiry did not determine high level official participation and responsibility, and thereby failed to meet the standards of an effective investigation.

The Investigation Was Neither Thorough Nor Effective

282. Given the nature of the violations at issue, the Senate inquiry alone, without accompanying criminal investigations and prosecutions, could not be sufficient to meet the requirements of an effective investigation under the European Convention. However, even this limited inquiry failed to effectively examine the evidence or investigate the violations. The Court has explained that any investigation must be "thorough",[493] and in order to conduct an effective investigation the authorities must take "reasonable steps available to them to secure the evidence".[494]

283. Here, the inquiry was superficial and made no serious effort to obtain or critically examine substantial bodies of relevant evidence. The 2007 Council of Europe report noted with concern "the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources".[495] For example, the report identified "far-reaching and unexplained inconsistencies in Romanian flight and airport data",[496] yet the Romanian Senate admitted that it did not even request data on these suspect flights. See paragraph 150-52 above. As a result, and as noted above, the 2011 Council of Europe Report observed that the Romanian parliament had "conducted no more than a superficial inquiry", and this report thus called on the judicial authorities of Romania "to finally initiate serious investigations following the detailed allegations of abductions and secret detentions".[497] The investigation therefore was not adequate or thorough.

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[491] *Kaya v. Turkey*, ECtHR, Judgment of 28 March 2000, para 108

[492] *Nachova and Others v. Bulgaria*, ECtHR [GC], Judgment of 6 July 2005, at para 113; see *Kelly and Others v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, at paras 96-97.

[493] *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, at para 55.

[494] *Kelly and Others v. The United Kingdom*, ECtHR, Judgment of 4 May 2001, at para 96.

[495] Exhibit 3: 2007 Council of Europe report, at para 228.

[496] *Ibid*.

[497] Exhibit 88: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human rights, Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, 16 Sep. 2011, at paras 41 and at Draft Resolution 11(4). Available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12714.pdf.

The Investigation Was Neither Independent Nor Impartial

284. The Senate inquiry was not an effective investigation as it was neither independent nor impartial. The Court has held that for an investigation to be effective, "the persons responsible for and carrying out the investigation must be independent and impartial. … This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence".[498] An impartial investigation must be directed at uncovering the facts regarding what happened to the victim. Such an investigation cannot "rely on hasty … conclusions to close their investigation or as the basis of their decision".[499]

285. Here, the Senate inquiry adopted a role of defending the Romanian government rather than independently investigating the role of the government and its officials in the alleged abuses. The 2007 Council of Europe report found it "disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions' . . . [rather than aimed at producing] coherent findings based on objective fact-finding".[500] The investigation also was not impartial, as it refused to investigate evidence or pursue leads which showed the complicity of the Romanian authorities in the abuses, and as a result the Council of Europe report characterised the Inquiry "as an exercise in denial and rebuttal, without impartial consideration of the evidence".[501]

There Was No Public Scrutiny of the Inquiry

286. The investigation also provided inadequate public scrutiny. The Court has found a lack of "transparency" and "public scrutiny" to be a significant factor contributing to the ineffectiveness of an investigation,[502] holding that "there must be a sufficient element of public scrutiny of [an] investigation or its results to secure accountability in practice as well as in theory".[503] It has also held that investigations that do not lead to a decision to prosecute, provide no reasons for the lack of prosecution and make "no information […] available either to the applicant or the public which might have provided reassurance that the rule of law had been respected", do not conform to the obligations of the Convention.[504]

287. Here, the limited and defective nature of the Inquiry and failure to initiate any criminal investigations has precluded any meaningful public scrutiny of the events. Although the Inquiry issued a public report, this has been characterised by the Council of Europe's report as "an exercise in denial and rebuttal" based

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[498] *Kolevi*, at para 193; see *Ramsahai and Others v. Netherlands*, ECtHR, Judgment of 15 May 2007, at para 325, 333-346; *Scavuzzo-Hager and Others v. Switzerland*, ECtHR, Judgment of 7 February 2006, at para 78, 80-86.
[499] *Corsacov v. Moldova*, ECtHR, Judgment of 4 April 2006, at para 69.
[500] Exhibit 3: 2007 Council of Europe report, at para 230.
[501] Exhibit 3: 2007 Council of Europe report, at para 230.
[502] *McKerr v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, paras 157- 160.
[503] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, at paras 71, 84; *see also Kelly and Others v United Kingdom*, ECtHR, Judgment of 4 May 2001, at para 98.
[504] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, para 83.

on unsustainable and "categorical" conclusions.[505] The report gave no adequate explanation for the lack of prosecution, and such a report cannot provide the necessary "reassurance that the rule of law had been respected".[506] It therefore falls short of the standards required for an effective investigation.

288. Romania's consistent denials for the last seven years that a CIA prison existed on its territory and its refusal to conduct an effective investigation into CIA prisons in Romania and the associated violation of Mr. al Nashiri's rights thus violate articles 2, 3, 5, 8 and 13.

D. RIGHT TO TRUTH

289. The Romanian government failure to acknowledge, effectively investigate, and disclose details about the CIA prison on Romanian territory and Mr. al Nashiri's secret detention, ill-treatment, enforced disappearance and rendition, violate his and the public's right to truth under Articles 2, 3,5,10 and 13.

Legal Standards: Right to Truth

290. Although this Court has not yet explicitly recognized the right to truth, it has upheld key aspects of this right in the context of addressing Convention violations. In addition, the wealth of international legal authority supports the Court's express recognition of the right to truth in this case.

291. *Right to Truth Closely Intertwined with Obligations to Investigate Convention Violations*. This Court has found the state's withholding of information relevant to Convention violations to be incompatible with its obligation to investigate Convention violations. Indeed, the Court has found that the purpose of an effective investigation is to "enable . . . the facts to become known to the public and in particular to the relatives of any victims".[507] Thus, in *Kelly and Others v the United Kingdom*, a case brought by the next of kin of nine men who had been shot dead by soldiers in Northern Ireland, the Court addressed the government's failure to disclose its reasons for deciding not to prosecute any of the soldiers. The Court found that this situation "crie[d] out for explanation. The applicants . . . were not informed of why the shootings were regarded as not disclosing a criminal offence or as not meriting a prosecution of the soldiers concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case".[508] Similarly, in *Ramsahai v Netherlands*, in examining the effectiveness of an investigation into an Article 2 violation, the Grand Chamber of the Court underscored the importance of "public confidence in the State's monopoly on the use of force".[509] Further, in *Association 21 December 1989 v. Romania*, examining the claim of two applicants who lost their son during anti-government

[505] Exhibit 3: 2007 Council of Europe report, at para 230.
[506] *Finucane v. United Kingdom*, ECtHR, Judgment of 1 July 2003, para 83.
[507] *Sieminska v Poland*, ECtHR, Decision of 2001 (Admissibility), at 6.
[508] *Kelly and Others v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, at para 118.
[509] *Ramsahai and Others v. Netherlands*, ECtHR (GC), Judgment of 15 May 2007, at para 325.

demonstrations in December 1989 that the investigation into his death had been ineffective, the Court emphasised "the importance for Romanian society of learning about the truth" of abuses connected to these events, and recognized that the right of the victims to know what had happened "implicates the right to an effective judicial investigation and the eventual right to reparations".[510]

292. Moreover, this Court has recognized that the obligation to investigate Convention violations is directed at disclosing the truth. Thus, in *Skendzic and Krznaric v. Croatia*, the Court observed that delays and other shortcomings in the investigation of an enforced disappearance "compromised the effectiveness of the investigation and could not but have had a negative impact on the prospects of establishing the truth".[511] The Court noted this as a factor in holding that there had been a violation of Article 2.[512] Similarly, in *Jularic v. Croatia*, the Court noted that an ineffective investigation would hamper the ability to establish the truth behind the killing of the applicant's husband, in violation of Article 2.[513]

293. *Right to Truth Supported by Article 10 Case law*. This Court has consistently recognized "that the public has a right to receive information of general interest" [514] and has "recently advanced towards a broader interpretation of the notion of 'freedom to receive information and thereby towards the recognition of a right of access to information".[515] In this context, the Court has upheld the right under Article 10 of civil society organisations and other entities—that function, like the press, as social "watchdogs"—to receive and impart information held by the state, particularly where such information is in the exclusive possession of the government.[516] There can be little dispute that a full and truthful accounting regarding gross violations of core Convention rights constitutes "information of general interest" to which the public is entitled under this Court's Article 10 jurisprudence.

Right to Truth Under International Law

294. The right to truth under international law has been discussed most extensively in relation to missing persons and forced disappearances. The origins of this right have been traced to Additional Protocol I to the Geneva Conventions, which recognizes the right of families to know the fate of their relatives and requires states parties to an armed conflict to search for persons reported missing.[517] The International Committee of the Red Cross considers these state obligations to be

[510] Association 21 December 1989 v. Romania, EctHR, Judgment of 24 May 2011, at para 194, 144. (French only).
[511] *Skendzic and Krznaric v. Croatia*, ECtHR, Judgment of 20 January 2011, at para85.
[512] *Ibid*. at paras 85, 91.
[513] *Jularic v. Croatia*, ECtHR, Judgment of 20 January 2011, at para 49, 51.
[514] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para 26.
[515] *Ibid*. at para 35.
[516] *Ibid*. at para 28, 36; *see also Kenedi v. Hungary*, ECtHR, Judgement of 26 May 2009 at para 43 (holding that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right under Article 10 to freedom of expression).
[517] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 32-33.

norms of customary international law.[518] In a recent resolution, the U.N. Human Rights Council recognized "the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and respect human rights".[519] Perhaps the most explicit recognition of the right to truth for victims of disappearance appears in the recent *International Convention for the Protection of All Persons from Enforced Disappearances*, which entered into force on 23 December 2010 and provides that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person".[520]

295. In the last several decades, the Inter-American Commission on Human Rights[521] and the Inter-American Court of Human Rights,[522] the General Assembly of the Organization of American States,[523] the U.N. Human Rights Committee,[524] the U.N. Working Group on Enforced or Involuntary Disappearances,[525] the Parliamentary Assembly of the Council of Europe,[526] and the Human Rights Chamber for Bosnia and Herzegovina[527] (relying on the European Convention), among others, have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons.

296. In the *Almeida de Quinteros* case, the Human Rights Committee addressed the plight of the mother of a victim of enforced disappearance, noting that "[it] understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has *the right to know* what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter".[528] Furthermore, the Committee has declared that the

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[518] ICRC, *Customary International Humanitatian Law*, Volume I, Rules (Cambridge University Press, 2005), Rule 117, pg. 421.
[519] Human Rights Council, "Resolution 9/11. Right to Truth", 18 September 2008, p. 3, at para 1. Available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf ("Human Rights Council Resolution 9/11").
[520] As of 1 August 2012, 91countries have signed and 34 countries have ratified the Convention. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en. Romania has signed but not ratified the Convention. *Ibid*.
[521] See, e.g., Annual Reports 1985-86, p. 205; *Manuel Bolanos v Ecuador*, IACommHR, Report of 12 September 1995; and *Bamaca Velasquez v Guatemala*, IACommHR, Report of 7 March 1996.
[522] See, e.g., *Velasquez Rodriguez v Honduras*, IACtHR, Judgment of 29 July 1988, at para181 ("the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims"); *Castillo Paez v Peru*, IACtHR, Judgment of 24 January 1998; and *Bamaca Velasquez v Guatemala*, IACtHR, Judgment of November 25, 2000, at paras. 74-76 (stating that the right to truth is recognized in international human rights law and by this court).
[523] *See, e.g*. OAS AG/Res. 2509 (XXXIX-O/09) on the Right to Truth, June 4, 2009.
[524] *Almeida de Quinteros v Uruguay*, UNHRC, Comm. 107/1981, views of 21 July 1983.
[525] First Report of the U.N. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1435, at para 187.
[526] Resolutions 1056(1987), para 17(ii); 1414(2004), para 3; and 1463(2005), para 10(2).
[527] *Palic v Republika Srpska*, Judgment of 11 January 2001; and the *Srebrenica Cases*, Judgment of 7 March 2003, at para 220(4).
[528] *Almeida de Quinteros et al v*. *Uruguay*, Comm. 107/1981, Views of 21 July 1983, at para 14 (emphasis added).

right to the truth is essential to ending or preventing the mental suffering of the relatives of victims of enforced disappearances and secret executions.[529]

297. In *Gomes Lund and Others v. Brazil*, the Inter-American Court of Human Rights recently recognized a legally enforceable right to the truth for victims and society as a whole under the right to information enshrined in Article 13 of the American Convention in addition to Articles 8 and 25 of that Convention.[530] That case affirmed the Inter-American Court's earlier recognition in *Barrios Altos v. Peru* and *Almonacid-Arellano v. Chile* of a right to the truth about gross human rights violations under Articles 8 (duty to investigate grave violations) and 25 (judicial protection of rights) of the American Convention.[531] In addition, in *Moiwana Community v Suriname*, the Inter-American Court had previously held that "all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations".[532]

298. The Inter-American Commission has gone even further by emphasizing the particular importance of state compliance with the right to the truth in those cases in which legal or historical developments, such as extensive amnesties, have made difficult or impossible the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses.[533]

299. Human rights bodies and authorities including the U.N. Human Rights Committee,[534] the Inter-American Court,[535] the U.N. Human Rights Council,[536] and the Office of the U.N. High Commissioner for Human Rights (OHCHR)[537] have defined the scope of the right to truth to include a state obligation to shed light on all serious or gross human rights violations, such as torture or extrajudicial executions. The OHCHR's 2006 study of the right to truth concluded that "[t]he right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels".[538] The increasingly universal recognition of the right to truth solidifies its importance in international law.

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[529] *Sarma v. Sri Lanka*, UNHRC, 16 July 2003, at para 9.5; *Lyashkevich v Belarus*, UNHRC, 3 April 2003, at para 9.2.
[530] *Gomes Lund and Others v. Brazil*, IACtHR, Judgment of 24 November 2010.
[531] *Barrios Altos v. Peru*,IACtHR, Judgment of 14 March 2001. *Almonacid-Arellano v. Chile*, IACtHR, Judgment of 26 September 2006.
[532] *Moiwana Community v. Suriname,* IACtHR, Judgment of 15 June 2005, para 204.
[533] See, among others, *Parada Cea and Others v El Salvador*, IACommHR, Report of 27 January 1999; *Ignacio Ellacuria v El Salvador*, IACommHR, Report of 22 December 1999.
[534] *Concluding Observations on Guatemala*, 3 April 1996, CCPR/C/79/add.63, at para 25.
[535] See *Moiwana Community v Suriname*, IACtHR, Judgment of 15 June 2005.
[536] Human Rights Council, "Resolution 9/11. Right to Truth", Available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf .
[537] Office of the United Nations High Commissioner for Human Rights, E/CN.4/2006/91, *Study on the Right to the Truth*, 8 February 2006.
[538] *Ibid*. at para 55.

300. *Public Component of the Right to Truth*. Many authorities have construed the right to truth to include a public component, above and beyond the right to know of victims and their families. The 2005 Updated Principles on Impunity adopted by the U.N. Commission on Human Rights declare that "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances that led, through massive or systematic violations, to the perpetration of those crimes".[539]

301. Similarly, the United Nations' 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth".[540] The Inter-American Court has held that "society as a whole must be informed of everything that has happened in connection" with severe violations, such as extrajudicial executions.[541] The Bosnian Human Rights Chamber in the Srebrenica cases, as well as the highest courts of Argentina, Colombia and Peru, have reached similar conclusions in respect of the public's right to the truth.[542]

302. Although the elements of the right to the truth are in a process of evolution and may vary across jurisdictions, the OHCHR has concluded that this right has crystallized to include at its core "knowing the full and complete truth about events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them".[543] In cases of enforced disappearances and related abuses, the right to the truth also has the specific component of a right to know the fate and whereabouts of the direct victim.[544]

Romania Violated the Right to Truth

303. The Romanian government's failure to acknowledge, effectively investigate, and disclose details of secret CIA prisons on its territory and Mr. al Nashiri's detention, ill-treatment, enforced disappearance and rendition violates his and the public's right to truth under Articles 2, 3,5,10 and 13.

304. Mr. al Nashiri was secretly detained, and likely interrogated and tortured on Romanian territory by CIA officials who worked with the knowledge and cooperation of Romanian government personnel. While being detained without charge, he was denied his right to legal counsel and access to a court and prevented from challenging the Romanian state's violation of his rights and from gaining factual knowledge as to the reasons for his detention. To this date,

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[539] Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102/Add.1, at principle 2.
[540] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by U.N. General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b). Available at http://www2.ohchr.org/english/law/remedy.htm.
[541] *Mack Chang v Guatemala*, IACtHR, Judgment of 25 November 2003, at para 274. *See also Moiwana Community v. Suriname*, IACtHR, Judgement of 15 June 2005, at para 204.
[542] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, at para 36. Available at http://www.unhcr.org/refworld/docid/46822b6c2.html.
[543] *Ibid*. at para 59.
[544] *Ibid*.

however Romania has denied that CIA prisons existed on its territory, and failed to conduct a criminal investigation into the matter. A Senate investigation into the subject was manifestly ineffective. The Romanian authorities have not responded to Council of Europe Human Rights Commissioner, Thomas Hammerberg, On 29 May 2012, a criminal complaint was filed before the Romanian General Prosecutor on Mr. al Nashiri's behalf. In a letter dated 20 July 2012, the General Prosecutor acknowledged that the complaint has been registered and assigned a file number, and that its review is at a preliminary stage. However, thus far there has been no official decision to open a formal criminal investigation into Mr. al Nashiri's claims.

305. As a direct victim of enforced disappearance, Mr. al Nashiri and his family have a right under the Convention and other international human rights law to the full truth about the circumstances of his abduction and extraordinary rendition. Moreover the public – in Romania and in Europe as a whole – is entitled to know the full truth about the Romanian government's role in his ordeal.

306. Indeed, this Court's intervention is particularly necessary in light of the fact that CIA secret detention and extraordinary rendition operations in Europe as a whole were conducted under extraordinary secrecy perpetuated by all governments involved. Indeed, the 2007 Council of Europe Report notes there are "formidable obstacles . . . to get to the truth about the CIA programme of secret detentions in Europe".[545] It observes that"[t]he US Government insisted on the most stringent levels of physical security for its personnel, as well as secrecy and security of information during the operations the CIA would carry out in other countries".[546] It adds that European governments "all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret".[547]

307. In fulfilment of the right to truth, the Romanian government should provide, through appropriate and credible means, a full account of the facts of Mr. al Nashiri's enforced disappearance and rendition to Romania; the reasons and processes that led to these actions, including Romania's role in the United States-led "war on terror;" the reasons for the failures of any mechanisms that should have been in place to prevent such abuse; the responsibilities of officials and agencies at all levels of the Romanian government; and, where appropriate, the identification of those responsible for the multiple Convention violations.

V. STATEMENT RELATIVE TO ARTICLE 35 OF THE CONVENTION

308. Romania's consistent denials that a CIA prison existed on its territory and its refusal to conduct an effective investigation into the matter demonstrate that it would be futile for Mr. al Nashiri to attempt to exhaust domestic remedies. An introductory complaint was filed on behalf of Mr. al Nashiri before this Court on

[545] Exhibit 3: 2007 Council of Europe Report at para 12.
[546] Exhibit 3: 2007 Council of Europe Report at para 79.
[547] Exhibit 3: 2007 Council of Europe Report at para 39.

1 June 2011, within six months of applicant's counsel becoming aware, through a news report of 8 December 2011,[548] of the precise location of the prison where the applicant was detained incommunicado on Romanian territory. This application is filed before 2 August 2012, the filing deadline indicated by the Court's Registry in its 7 June 2012 communication to the applicant. The application is therefore submitted in compliance with the 6-month rule (Article 35.1).

309. As a precautionary matter, however, in the unlikely event that the Court should ultimately determine (notwithstanding our submission to the contrary) that an effective domestic remedy in Romania is available and should be pursued, on 29 May 2012, the Open Society Justice Initiative filed a criminal complaint on his behalf before the Romanian General Prosecutor so that he will not later be prejudiced by any argument made by the government that he failed to attempt to exhaust domestic remedies.

310. The subject matter of this application has not been submitted to any other international procedure (Article 35.2(b)).

Victim Status

311. Mr. al Nashiri is the direct victim of multiple violations of his rights under Convention, as submitted in this application.

Exhaustion of Available Remedies

312. Given the forceful political statements at the highest level that there had been no secret CIA prisons in Romania, the biased nature of the Senate Inquiry that made clear its purpose to dismiss the allegations, and the failure of Romanian authorities to undertake any type of criminal investigation into the well-founded allegations of wrongdoing that have been pending since 2005, or to cooperate with any of the international inquiries, it is clear to the applicant that there is no chance of an effective investigation of his allegations. In these circumstances, there is no requirement to exhaust. Out of an abundance of caution, an official request for an investigation was filed on 29 May 2012. In a letter dated 20 July 2012, the General Prosecutor acknowledged that the complaint has been registered and assigned a file number, and that its review is at a preliminary stage. However, thus far there has been no official decision to open a formal criminal investigation into Mr. al Nashiri's claims. See paragraphs 158-60.

313. While the national authorities have had knowledge since November 2005 of the presence of secret prisons in Romania, which was sufficient to trigger the duty to investigate *proprio motu*, only on 8 December 2011 did the applicant obtain specific evidence of the circumstances of his detention, sufficient to present an arguable case to the domestic authorities and to satisfy the victim requirement of Article 34.

[548] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011. Available at http://www.independent.co.uk/news/world/europe/inside-romanias-secret-cia-prison-6273973.html.

Legal Principles: Obligation to Exhaust

314. *Flexible application*. The Court has repeatedly emphasised that the requirement that a complaint exhaust all domestic remedies "must be applied with some degree of flexibility and without excessive formalism", giving "due allowance that it is being applied in the context of machinery for the protection of human rights".[549]

315. *No obligation to exhaust ineffective remedies*. As this Court recognised in *Paksas v. Lithuania*, "the only remedies which Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness".[550] Moreover, as set forth in *Akdivar and Others v, Turkey*, "the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant".[551]

316. *Special Circumstances exemption*. The Court has also recognised in *Aksoy v. Turkey* that according to the "generally recognised rules of international law", there may be special circumstances dispensing the applicant from the obligation to avail him or herself of the domestic remedies available.[552] The Court in *Aksoy* found that the failure of the public prosecutor to enquire regarding the applicant's severe injuries that were clearly visible to the prosecutor during his meeting with the applicant, along with the fact that the applicant had prior to this meeting been detained in police custody for at least fourteen days without access to legal or medical assistance, made it "understandable" that the applicant had "formed the belief that he could not hope to secure concern and satisfaction through national legal channels".[553] The Court therefore concluded that "special circumstances" absolved the applicant from his obligation to exhaust domestic remedies.[554] Special circumstances absolving the applicant from exhausting domestic remedies may also exist "[w]here authorities remain "passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance".[555]

317. *Repetition of Acts and Official Tolerance*. "The [exhaustion] rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities

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[549] *Akdivar and Others v. Turkey*, ECtHR, Judgment of 16 September 1996, at para 69; see also *Aksoy v. Turkey*, ECtHR, Judgment of 26 November 1996, at para 53; *Ringeisen v. Austria*, ECtHR, Judgment of 16 July 1971, at para 89.
[550] *Paksas v. Lithuania*, ECtHR, Judgment of 6 January 2011, at para 75; see also *Sejdovic v. Italy*, ECtHR, Judgment of 1 March 2006 (GC), at para 45.
[551] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para 77 (citing *Akdivar and Others v. Turkey*, ECtHR, Judgment of 16 September 1996, at para 69).
[552] *Sejdovic v. Italy*, ECtHR, Judgment of 1 March 2006 (GC), at para 45 (citing *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, at para 52)
[553] *Aksoy v. Turkey*, ECtHR, Judgment of 26 November 1996, para 56-57.
[554] *Ibid*. at para 57.
[555] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para 76.

has been shown to exist, and is of such a nature as to make proceedings futile or ineffective".[556]

318. *Disproportionate obstacle to individual petition*. In cases where requiring the applicant to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention, the Court concludes that the applicant is dispensed from that requirement.[557]

319. *Burden of proof*. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was effective and available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success.[558]

Mr. Al Nashiri Is Not Required To Exhaust Domestic Remedies Which Plainly Would be Ineffective.

320. As set forth in the Statement of Facts in paragraphs 148-157 above, Romania has failed to conduct an effective investigation into the existence of a secret CIA prison on its territory despite being on notice of such existence at least since 2005. Indeed, the Romanian government denied in 2005 that such a prison existed on its territory, and continues to maintain this denial to the current day.

321. While Romania did conduct a Senate inquiry into allegations of a secret CIA prison, that investigation was not a criminal investigation, and therefore did not meet Romania's obligations under the Convention.[559] Further, as described in paragraphs 148-157 above, this inquiry was manifestly ineffective, functioning less as a serious investigation than as an "exercise in denial and rebuttal, without impartial consideration of the evidence".[560] Indeed, in responding to an information request from the Romanian NGO APADOR-CH, the Romanian Senate itself admitted that it "ha[d] not asked for data from the competent institutions, ha[d] not made any investigations and [did] not hold any information on the scope of the flights" identified as being potentially involved in transporting CIA prisoners in and out of Romania.[561] The NGO "Reprieve" has documented several suspicious rendition flights that flew in and out of Romania that the Senate inquiry failed to notice. See paragraph 157 above. The lack of an effective investigation has been criticised by the European Parliament and the Parliamentary Assembly for the Council of Europe. See paragraphs 149-55 above.

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[556] *Aksoy v. Turkey*, ECtHR, Judgment of 26 November 1996, at para 52 (citing *Akdivar and Others v. Turkey*, ECtHR, Judgment of 16 September 1996, at paras 66-67).
[557] *Veriter v. France*, ECtHR, Judgment of 14 October 2010, at para 27; *Gaglione and Others v. Italy*, ECtHR, Judgment of 21 December 2010, at para 22.
[558] *Sejdovic v. Italy*, ECtHR, Judgment of 1 March 2006 (GC), at para 46 (citing *Akvidar and Others*, ECtHR, Judgment of 16 September 1996, at para 68).
[559] *Assenov and Others v Bulgaria*, ECtHR, Judgment of 28 October 1998, at para 102 (holding that contracting state is required to conduct an "effective official investigation . . . capable of leading to the identification and punishment of those responsible.")
[560] Exhibit 3: 2007 Council of Europe Report, at para 230.
[561] Exhibit 90: Adresa nr.I/512/13.X.2008 a Senatului Romaniei

322. As such, Romania's consistent denials that a CIA prison existed on its territory and its refusal to conduct an effective investigation demonstrate that it would be futile for Mr. al Nashiri to exhaust domestic remedies. Indeed, under these circumstances, Mr. al Nashiri is not required to exhaust domestic remedies which plainly would be ineffective.

323. Consequently, this case is ripe for this Court's consideration, especially in light of the gravity of the Convention violations Mr. al Nashiri has endured, the anguish he is currently exposed to as a result of the U.S. government's announcement that it intends to seek the death penalty in his case, and the imminent risk of his being subjected to a flagrantly unfair trial followed by the death penalty.

324. In addition, as set forth above, the "general legal and political context" in Romania has been marked by a reluctance to seriously investigate wrongdoing associated with the CIA black site in Romania. As noted above, the Romanian government has denied the existence of the prison since 2005. Moreover, it has maintained this denial in the face of mounting evidence on the existence of the CIA prison in Romania. See paragraphs 38-66 above. Indeed, the 2007 Council of Europe report explained the lack of any truthful account of detainee transfer flights into Romania by stating that "the reason for this situation is that the Romanian authorities probably do not want the truth to come out".[562] The Romanian government's passivity in the face of mounting evidence of a CIA prison in Romania constitutes "special circumstances" that further warrant this Court's intervention in this case.[563]

Six-Month Rule

325. Article 35 (1) requires that applicants submit their complaint within six months of the final decision that represents the exhaustion of domestic remedies. This Court has stated that "[a]s a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant.[564]

326. Moreover, Rule 47(5) of the Rules of Court states that "[t]he date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall as a general rule be considered to be the date of the first communication from the applicant setting out, even summarily, the subject matter of the application, provided that a duly completed application form has been submitted within the time limits laid down by the Court".[565]

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[562] Exhibit 3: 2007 Council of Europe Report, at para 229.
[563] *Selmouni v. France*, ECtHR, Judgment of 28 July 1999, at para 76.
[564] *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 157 (citing *Dennis and Others v. the United Kingdom*, ECtHR, Decision of 2 July 2002).
[565] *See also Kemevuako v. Netherlands*, ECtHR, Decision of 1 June 2010, at para 19.

327. Romania's consistent denials—dating back to 2005 and continuing to the present day--that a CIA prison existed on its territory, as well as its refusal to conduct an effective investigation into the matter make it "clear from the outset that no effective remedy is available to the applicant".[566] While Mr. al Nashiri was detained in Romania sometime between 6 June 2003 and 6 September 2006, sufficient details relating to his detention there only became available on 8 December 2011, through the publication of a news report that provided for the first time the precise location of the prison in Bucharest and details of Mr. al Nashiri's ill-treatment there.[567] The fact of his detention in Bucharest was further confirmed in a dossier provided in late March 2012 to the Romanian government by Council of Europe Human Rights Commissioner, Thomas Hammerberg. See paragraph 156 above. An introductory complaint was filed on Mr. al Nashiri's behalf before this Court on 1 June 2011, within six months of 8 December 2011, the date this news report was published. This application is filed before 2 August 2012, the filing deadline indicated by the Court's Registry in its 7 June 2012 communication to the applicant. Accordingly, the applicant has complied with the six-month rule.

328. In any event, the six month time limitation is not applicable with respect to the violation of Mr. al Nashiri's right to truth or his right to an effective investigation under Articles 2,3,5,6, 8 and 13, because these are ongoing violations of the Convention.

329. The six-month rule is not applicable where there is an ongoing situation caused or continued by the State that violates the Convention.[568] "[T]he six month time-limit does not apply as such to continuing situations . . . this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end".[569]

VI. STATEMENT OF THE OBJECT OF THE APPLICATION

330. Mr. al Nashiri seeks a declaration from the Court that his rights have been violated under Article 2, Article 3, Article 5, Article 6, Article 8, and Article 13 of the Convention, a declaration that his right to truth has been violated, and a finding that there must be a full investigation into his rendition to Romania, his detention, ill-treatment and likely torture in Romania, and his subsequent transfer from Romania. Mr. al Nashiri will also seek just satisfaction under Article 50 (pecuniary and non-pecuniary damages together with legal costs and expenses) as well as general measures to ensure that Romania will not commit or cover up such violations in the future. Mr. al Nashiri will submit detailed information in connection with the claim for just compensation at the appropriate time in the proceedings.

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[566] *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para 157

[567] Exhibit 23: Adam Goldman and Matt Apuzzo, "Inside Romania's secret CIA prison", *The Independent*, 8 Dec. 2011.

[568] *Iordache v. Romania*, ECtHR, Judgment of 14 October 2008, at para 49.

[569] *Varnava and Others v. Turkey,* ECtHR (GC), Judgment of 18 September 2009, at para 159; see also *Agrotexim Hellas S.A and Others v. Greece*, European Commission decision of 12 February 1992, DR 71, at para 148; and *Cone .v Romania,* ECtHR, Judgment of 24 June 2008, at para 22.

Post-Transfer Obligation to Intervene

331. This Court has recognised the post-transfer obligations of states to ensure that applicants transferred from their territory in violation of the Convention are not subjected to the death penalty or a flagrantly unfair trial. Thus, in *Al-Saadoon and Mufdhi v. United Kingdom*, this Court found that the United Kingdom "failed to take proper account of [its] obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13" by transferring two Iraqi applicants from British custody in Iraq to stand trial before the Iraqi High Tribunal on charges carrying the death penalty without obtaining "binding assurances" from the Iraqi authorities that the applicants would not be subjected to the death penalty.[570] The Court observed that the post-transfer outcome of the applicants case was uncertain, i.e., that while they remained at real risk of execution since their case had been remitted for reinvestigation, it could not be predicted whether or not they would be retried on charges carrying the death penalty, convicted, sentenced to death and executed.[571] That uncertainty did not change the duty to obtain such assurances, as in such circumstances, the Court did "not consider that the risk of applicants' being executed ha[d] been entirely dispelled".[572] "Whatever the eventual result, however", the Court found that "through the actions and inactions of the United Kingdom authorities the applicants ha[d] been subjected . . . to the fear of execution by the Iraqi authorities", that "causing the applicants psychological suffering of this nature and degree constituted inhuman treatment", and that there had been a violation of Article 3 of the Convention.

332. With regard to the appropriate remedies, the Court further observed that "[w]hile the outcome of the proceedings before the [Iraqi High Tribunal] remain[ed] uncertain", the "mental suffering caused by the fear of execution" continued.[573] The Court therefore held that "compliance with . . . Article 3 of the Convention require[d] the Government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that [the applicants] will not be subjected to the death penalty".[574]

333. The remedy which the applicant seeks is similar to that previously granted pursuant to the Convention in a case involving transfer to Guantánamo Bay and the risk of execution and an unfair trial by military commission. In *Boudellaa and Others v. Bosnia and Herzegovina*, the Human Rights Chamber for Bosnia and Herzegovina found that Bosnia and Herzegovina had violated applicants' rights under Protocol 6 by transferring them to United States custody and exposing them to the risk of the death penalty following trial by military commissions at Guantánamo Bay. The Chamber found that "considerable uncertainty exist[ed] as to whether the applicants" would be charged with a criminal offense, what charges would be brought against them, which law will be deemed applicable, and what sentence would be sought, but that "this

[570] *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at paras 134, 143.
[571] *Ibid*. at para 144.
[572] *Ibid*. at para 134.
[573] *Ibid*. at para 171.
[574] *Ibid*. at para 171.

uncertainty [did] not exclude the imposition of the death penalty against the applicants".[575] The Court observed:

> "On the contrary, the US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave risk to an obligation on the respondent Parties to seek assurances from the United States, prior to the hand-over of the applicants, that the death penalty would not be imposed upon the applicants".[576]

334. Since Bosnia and Herzegovina had already transferred the applicants over to the United States by the time of the Chamber's decision, the Chamber ordered Bosnia and Herzegovina to "use diplomatic channels in order to protect the basic rights of the applicants".[577]

335. In particular, the Chamber ordered Bosnia and Herzegovina to "take all possible steps to establish contacts with the applicants and to provide them with consular support",; "to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the United States via diplomatic contacts that the applicants will not be subjected to the death penalty"; and to retain and bear the costs of lawyers authorised and admitted to practice in the relevant jurisdictions "in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible, military, criminal or other proceedings involving the applicants".[578]

336. As noted above, capital charges have been approved for Mr. al Nashiri's case and he is now at imminent risk of being subjected to a flagrantly unfair trial by military commission followed by the death penalty. He therefore asks this Court to direct the Romanian government to use all available means at its disposal to ensure that the United States does not subject him to the death penalty. These measures include but are not limited to an indication to the Romanian government that it immediately should:

    a) make written submissions against the death penalty to the United States Secretary of Defense while copying Mr. al Nashiri's military defense counsel, Lieutenant Commander Stephen Reyes;

    b) obtain diplomatic assurances from the United States Government that it will not subject Mr. al Nashiri to the death penalty;

    c) take all possible steps to establish contact with Mr. al Nashiri in Guantánamo Bay, including by sending delegates to meet with him to

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[575] See *Boudellaa and Others v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para 300.
[576] *Ibid*.
[577] *Ibid*. at para 330.
[578] *Ibid*. at para 330-331.

monitor his treatment and ensure that the status quo is preserved in his case; and

d) retain and bear the costs of lawyers authorised and admitted to practice in relevant jurisdictions in order to take all necessary action to protect Mr. al Nashiri's rights while in U.S. custody including in military, criminal or other proceedings involving his case.

337. Mr. al Nashiri also requests that this Court ask the Secretary General of the Council of Europe to request that the United States does not subject Mr. al Nashiri to the death penalty.

VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

338. At the present time, there are no other international proceedings relating to Mr. al Nashiri's treatment in and transfer from Romania.

VIII. REQUEST FOR PRIORITY PURSUANT TO RULE 41 OF THE RULES OF COURT.

339. The Court is invited to give priority to this case pursuant to Rule 41. Mr. al Nashiri requests prioritisation of his application against Romania on the same grounds as those presented to this Court in his request for prioritisation of his previously filed application against Poland (Application No. 28761/11). Significantly, this Court granted priority to the application against Poland on 30 November 2011. For the same reasons that it granted priority status to the application against Poland, the Court should also grant priority status to Mr. al Nashiri's application against Romania.

340. Rule 41 of the Rules of Court, as amended in June 2009, provides that "[i]n determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application". As set out below, the approval of charges carrying the death penalty in Mr. al Nashiri's case places his life and health at "particular risk", thereby warranting the highest priority for his case (Category I). Prioritisation is also warranted because Mr. al Nashiri's application raises as main complaints issues under Articles 2, 3 and 5(1) of the Convention (Category III).

Category I claim: Particular Risk to Life or Health of the Applicants

341. In accordance with amended Rule 41, the Court's priority policy makes clear that claims that include "particular risk to life or health of the applicants", will receive the highest priority as "Category I" claims.[579] This case warrants the highest level of prioritisation by this Court so that it may direct Romania to use all available means—including diplomatic assurances from the United States—to preclude the death penalty in Mr. al Nashiri's case.

[579] European Court of Human Rights, The Court's Priority Policy.

342. As set out above, on 28 September 2011, Mr. Bruce MacDonald, the Convening Authority for military commissions, approved capital charges against Mr. al Nashiri, thereby placing his life and health at "particular risk" on account of (a) the real risk of the death penalty, (b) the prolonged anguish associated with the prospect of the death penalty that he may have to endure for a decade or more as his case is resolved, and (c) an anguish exacerbated by the prospect of a flagrantly unfair trial. In addition, (d) this Court should hear this case at the earliest possible time so that its decision relating to Mr. al Nashiri's treatment in Romania may inform the military commission proceedings against Mr. al Nashiri and be used in support of arguments to preclude the death penalty.

Prohibition Of The Death Penalty In All Circumstances

343. Mr. al Nashiri's life is at risk through the imposition of the death penalty, which has no place in a democratic society. Indeed, as this Court recognized in *Al Saadoon and Mufdhi v. United Kingdom*, there has "been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the Member States of the Council of Europe".[580]

344. The Council of Europe's "principled opposition to the death penalty in any circumstances" is underscored by the resolution adopted by its Parliamentary Assembly on 14 April 2011.[581] This resolution "urged the United States of America . . . as [an] observer state . . . to join the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty". The resolution further regretted that the death penalty practices of the United States had "stained the reputation of this country, which its friends expect to be a beacon for human rights".

Death Row Phenomenon

345. Mr. al Nashiri's health is also at particular risk due to the anguish that he will suffer as a result of the attempts by the government of the United States to achieve a death sentence, and the years he will remain on death row if it manages to do so. In *Soering v. the United Kingdom*, this Court found that extradition of a prisoner likely to spend six to eight years on death row in the United States, "with the ever present and mounting anguish of awaiting execution of the death penalty", "would expose him to a real risk of treatment going beyond the threshold set by Article 3".[582] Significantly, the European Commission gave priority to the application in *Soering*.

346. As noted above, even though capital charges were approved for Mr. al Nashiri's case on 28 September 2011, his trial will not begin for at least another year from the filing of this application.[583] The approved capital charges have already begun to expose Mr. al Nashiri to serious ongoing harm in the form of anguish associated with the prospect of the death penalty he would have to endure for a decade or more while his case is tried by military commission and subsequently

[580] *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR. Judgment of 2 March 2010, at para 116.
[581] The death penalty in Council of Europe member and observer states: a violation of human rights, Resolution 1807, 14 April 2011. Available at http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1807.htm#P16_141.
[582] *Soering v the United Kingdom*, ECtHR, Judgment of 7 July 1989, at paras. 106, 111.
[583] See Exhibit 85: Transcript of Proceedings of a Military Commission, 9 November 2011, at 171.

reviewed by the Convening Authority, the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia, and the Supreme Court.[584]

Imposition of the Death Penalty after an Unfair Trial

347. There is also a risk to life through its arbitrary deprivation following a flagrantly unfair trial. In *Őcalan v Turkey*, the Grand Chamber held that the imposition of the death penalty following an unfair trial would amount to an "arbitrary deprivation of life" in violation of Article 2 and would also violate Article 3".[585] The Court observed that:

> "to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence, which, given that human life is at stake, becomes unlawful under the Convention".[586]

348. As set out above, the military commissions rules cumulatively amount to a flagrant denial of justice under Article 6, as they lack independence, discriminatorily apply only to non-U.S. citizens, allow for unreasonably lengthy proceedings, allow for the accused to be denied access to classified evidence, allow convictions to be based mainly on the evidence of un-confronted witnesses, and allow for the admission of evidence derived from coerced statements. In addition, as noted in paragraph 145 above, and as set out at paragraph 11 of the substantive application, Mr. al Nashiri's U.S. lawyers have been unable to relay his communications in public because, under current U.S. government classification guidelines, everything he says is presumed to be classified at the highest "Top Secret" level, and no procedure has been available for determining whether such communications are, in fact, classified. In addition, the military judge recently held that the United States government had infringed upon legal professional privilege by reading Mr. al Nashiri's correspondence from his lawyers. [587]

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[584] U.S. courts martial death penalty cases—which are most analogous to Mr. al Nashiri's case—take an average of more than eight years between sentencing and resolution of the direct appeal alone. Mr. al Nashiri's case is likely to take longer than that on direct appeal (the appeal process immediately following sentencing) because unlike courts martials, which have been operating for decades, the military commission procedures applicable to him are more uncertain and less well-established. See Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2 (2006). Available at http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/189-fall-2006.pdf. Indeed, the rules governing the military commissions were enacted as recently as October 2009, have been applied thus far only in three cases, and have never been applied to a death penalty case. In addition, Mr. al Nashiri may pursue habeas review in U.S. federal court (collateral appeal that follows direct appeal and alleges violations of U.S. federal law), which would further add to the length of appeal proceedings.

[585] *Őcalan v*. *Turkey*, ECtHR (GC), Judgment of 12 May 2005, at paras 166-169.

[586] *Ibid*. at para 169.

[587] Exhibit 85: Transcript of Proceedings of a Military Commission, 9 November 2011, at 168-169.

349. As noted above, the United States government maintains that it can continue to detain Mr. al Nashiri even if he was acquitted after a military commission trial.[588]

350. Under these circumstances, the prospect of an unfair trial and an arbitrary deprivation of life is likely to exacerbate the anguish associated with the prospect of the death penalty in Mr. al Nashiri's case.

Informing Military Commission Proceedings Including Through Post-Transfer Obligations To Preclude the Death Penalty

351. A judgment of the European Court as to the treatment of Mr al Nashiri in Romania will be relevant to both the guilt and punishment phase of the trial, and would also lead to diplomatic representations against the death penalty in the event of judgment for the applicant.

352. Prioritisation of this case is necessary so that this Court's decision can inform the military commission proceedings against Mr. al Nashiri at the earliest possible time. The treatment of Mr. al Nashiri in Romania is directly relevant to his trial. A finding by the European Court that Mr. al Nashiri was tortured or ill-treated in Romania could potentially inform both the guilt and the penalty phase of his trial. It could inform the guilt phase by casting doubt on the evidence introduced against him. Such a finding could also be used at the penalty phase in support of arguments to mitigate the death penalty. The sooner the Court issues such a judgment, the sooner it is likely to be considered by the military commission.

353. Furthermore, and as previously set out above, in the event of judgment in his favour, Mr. al Nashiri asks this Court to direct the Romanian government to use all available means at its disposal—including through diplomatic assurances obtained from the United States—to ensure that the United States does not subject him to the death penalty.[589]

354. The fact that Mr al Nashiri is no longer in Romania is not relevant. As noted above, this Court has previously recognised the post-transfer obligation of states to ensure that applicants transferred from their territory in violation of the Convention are not subjected to the death penalty or a flagrantly unfair trial. See paragraphs 220-222 and 331-35 above. Thus, in *Al Saadoon and Mufdhi v. United Kingdom*, the Court found that the UK "failed to take proper account of [its] obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13" by transferring two Iraqi applicants from British custody in Iraq to stand trial before the Iraqi High Tribunal on charges carrying the death penalty without first obtaining "binding assurances" from the Iraqi authorities that the applicants would not be subjected to the death penalty, and that any uncertainty as to their eventual fate did not change the duty to obtain such assurances where the Court did "not consider that the risk of applicants' being

[588] Exhibit 87: *United States v. al Nashiri*, Government Response to Defense Motion for Appropriate Relief: To Determine if the trial of this case is one from which defendant may be meaningfully acquitted, 27 October 2011, at 1, 6.

[589] *Al Nashiri v. Poland*, Application at para 297. Mr. al Nashiri also requests that this Court ask the Secretary General of the Council of Europe to request that the United States does not subject Mr. al Nashiri to the death penalty. *Ibid*. at para 298.

executed ha[d] been entirely dispelled.[590] Well after the transfer had taken place, the Court required the UK government "to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that [the applicants] will not be subjected to the death penalty". [591]

355. Other courts have realised that time is of the essence in order to affect a capital trial for terrorism charges in the United States. In *Mohamed v. President of the Republic of South Africa and six others*,[592] the South African Constitutional Court was considering a case brought by an individual who was at the time standing trial before a US federal court, charged with capital offences for involvement in the 1998 Nairobi bombings carried out by al Qaeda. He alleged that the South African authorities had violated his rights by arresting and detaining him and by handing him over to FBI agents for removal to the United States without first obtaining an assurance from the United States government that it would not subject him to the death penalty. The South African Constitutional Court expedited the case and "foreshortened" the preliminary steps for a hearing based on the express recognition that the relief sought by the applicant in South Africa "could have a bearing" on the criminal trial in New York.[593] The Court rejected the argument that it should not give instructions to the executive, and held that "it would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case", as "important issues of legality and policy [were] involved and it [was] necessary that [the court] say plainly what [its] conclusions as to those issues [were]".[594] Moreover, the Court observed that "it [was] desirable that [its] views be appropriately conveyed to the trial court", in light of the fact that the Constitutional Court's decision had a bearing on the case pending in New York.[595] The Court further directed that the full text of its judgment be drawn to the attention of the federal court in New York "as a matter of urgency".[596] In October 2011, he was sentenced to life without parole, and is currently detained in the "supermax" super maximum security federal facility known as ADX Florence in Colorado.

356. Prioritising this case would enable the Court to direct Romania to use all available means—including diplomatic assurances obtained from the United States government—to preclude the death penalty in Mr. al Nashiri's case. In *Soering,* the Court was able to conclude consideration of the case in 11 months. If the same were done in this case, a judgment could be delivered immediately prior to the trial, which is expected to commence no later than November 2012.

[590] *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 143.
[591] *Ibid*. at para 171.
[592] CCT 17/01, 2001.
[593] *Ibid*. at paras 1-5.
[594] *Ibid*. at para 71.
[595] *Ibid*. at para 71.
[596] *Ibid*. at para 74.

Category III claims: Applications raising issues under Articles 2, 3 and 5(1) of the Convention.

357. This Court's priority policy states that "applications which on their face raise as main complaints issues under Articles 2, 3, 4 or 5(1) of the Convention ("core rights"), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings" will also receive priority as Category III claims.

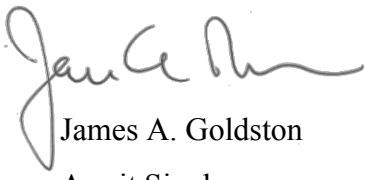
358. Accordingly, priority treatment is further warranted for this application because it raises on its face as main complaints issues under Article 2 (right to life); Article 3 (protection from torture); and Article 5(1) (deprivation of liberty not in accordance with a procedure prescribed by law). Mr. al Nashiri is entitled to priority because his substantive application raises claims under Articles 2, 3 and 5(1), which have given rise to direct threats to his physical integrity and dignity. See paragraphs 162, 173-201 and 213-241 above.

359. For all of the foregoing reasons, the Court is invited to give priority to this case pursuant to Rule 41.

IX. DECLARATION AND SIGNATURE

360. I hereby declare that to the best of my knowledge and belief, the information I have given in the present application is correct.

New York
2 August 2012



James A. Goldston

Amrit Singh

Rupert Skilbeck

Open Society Justice Initiative

X. LIST OF EXHIBITS

Exhibit 1: Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations", Serial No. 110-28, 17 April 2007. Available at http://foreignaffairs.house.gov/110/34712.pdf.

Exhibit 2: Human Rights Council, United Nations General Assembly, 13th Session, Agenda Item 3, "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" A/HRC/13/42, 19 February 2010 (U.N. Joint Experts' Report). Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf.

Exhibit 3: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Council of Europe, Doc. 11302 rev, 11 June 2007 (2007 Council of Europe Report). Available at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

Exhibit 4: President George W. Bush, "Transcript of President Bush's Remarks, Speech from the East Room of the White House", 6 September 2006. Available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

Exhibit 5: United States v. Abd al-Rahim Hussayn Muhammad al-Nashiri, Government Motion for Protective Order to Protect Classified Information Throughout All Stages of the Proceedings, Appellate Exhibit 013. Available at http://www.mc.mil/CASES/MilitaryCommissions.aspx

Exhibit 6: Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's Combined Use of Interrogation Techniques", 30 December 2004 (CIA Rendition Background Paper). Available at http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf

Exhibit 7: Human Rights Watch, "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe", 6 November 2005. Available at http://www.hrw.org/en/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe

Exhibit 8: Alleged CIA prison camps, prisoner transports in East Europe denied, BBC Monitoring Europe, 7 November 2005.

Exhibit 9: Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States", Doc. 10957, 12 June 2006 (2006 Council of Europe Report). Available at http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

Exhibit 10: Report on the Alleged Use of European Countries by the CIA for the Transportation and Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007, 30 Jan. 2007 (2007 European Parliament report). Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN

Exhibit 11: European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, Working Document No. 8, 16 Nov. 2006. Available at http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf.

Exhibit 12: Center for Human Rights and Global Justice, Data String Analysis Submitted As Evidence of Polish Involvement in U.S. Extraordinary Rendition and Secret Detention Program, (CHRGJ Report) at p. 3. Available at http://www.chrgj.org/projects/docs/polishprosecutor.pdf.

Exhibit 13: Appendix No. 2 to 2006 Council of Europe report. Available at http://assembly.coe.int/CommitteeDocs/2006/20060614_Ejdoc162006PartII-APPENDIX.pdf.

Exhibit 14: Adresa nr.19062/29.07.2009 a Autoritatii Aeronautice Civile Romane (in Romanian and English).

Exhibit 15: Letter from Polish Border Guard to Helsinki Foundation for Human Rights, 23 July 2010. Available at http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf. English translation available at http://www.hfhr.org.pl/cia/images/stories/Letter_23_07_2010.pdf (in Polish and English).

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