

11th January 2022

By email

Council of Europe
PACE Rapporteur on the implementation of judgments
Mr. Constantinos Efstathiou

Dear Mr. Efstathiou,

Request to continue monitoring the Committee of Ministers' decisions in the Al Nashiri and Abu Zubaydah cases and press for their full implementation

The Open Society Justice Initiative, Mr. Mikołaj Pietrzak and Prof. Helen Duffy submit this letter to update you on the status of the implementation of a group of extraordinary rendition and torture cases: *Al Nashiri v Romania* (Appl. No. 33234/12), *Al Nashiri v Poland* (Appl. No. 28761/11), *Abu Zubaydah v Poland* (Appl. No. 7511/13), and *Abu Zubaydah v Lithuania* (Appl. No. 46454/11). An overview of the status of the implementation of these judgments is presented in the Annex to this letter.

These cases were highlighted in your 2020 report on the Implementation of Judgments of the European Court of Human Rights as cases that “reveal a worrying timid reaction of the Committee of Ministers towards the situation where a transfer of detainees may amount to a risk of imposition of the death penalty or to the flagrant denial of justice”.¹ There is some cause for concern in light of the last decisions (September 2021) of the Committee of Ministers’ (“CM” or “the Committee”) in reaction to these countries’ ongoing failure to implement the judgments.² The Committee’s decisions continue to undertake a ‘timid’ approach, despite growing evidence of the stark failure to implement the judgements of the Court. While the situation in the three states differ, there is troubling consonance across them in terms of the lack of effective investigation, ongoing failure to acknowledge the truth and provide reparations, or to take adequate measures individually and collectively to obtain reliable assurances from the US (that Mr. Al Nashiri will not be subjected to the death penalty and that Mr. Abu Zubaydah will not continue to be held unlawfully without charge or trial, as well as that the flagrant denial of justice to which both men are currently subjected will be brought to an end).

¹ PACE, 2020, “The implementation of judgments of the European Court of Human Rights Report”, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Constantinos Efstathiou, Doc. 15123, <https://www.ecoi.net/en/file/local/2033883/document.pdf>, para. 25.

² 1411th meeting, 14-16 September 2021 (DH) H46-26 Al Nashiri v. Romania (Application No. 33234/12), CM/Del/Dec(2021)1411/H46-26, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a3c233; 1411th meeting (DH), 14-16 September 2021 - H46-24 Al Nashiri group v. Poland (Application No. 28761/11), CM/Del/Dec(2021)1411/H46-24, [https://hudoc.exec.coe.int/eng/?i=CM/Del/Dec\(2021\)1411/H46-24E](https://hudoc.exec.coe.int/eng/?i=CM/Del/Dec(2021)1411/H46-24E); 1411th meeting (DH), 14-16 September 2021 - H46-21 Abu Zubaydah c. Lithuania (Application No. 46454/11), CM/Del/Dec(2021)1411/H46-21, [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22CM/Del/Dec\(2021\)1411/H46-21E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2021)1411/H46-21E%22]}).

Compliance with these judgments is a critical aspect of meaningful accountability for European complicity in the CIA's secret detention and torture program. Twenty years after the attacks of September 11, these cases stand amongst the very few judgments to shed light on the gross human rights violations perpetrated in the name of the so-called "War on Terror". In the context of the pervasive lack of accountability that has characterized the response to this "war", these judgments have been the rare exception. Yet the Court's and Committee of Ministers' credibility is increasingly threatened by the failure to ensure that these judgments are meaningfully implemented. At this particular juncture, efforts to implement these judgments must be redoubled.

We urge you to continue to monitor the Committee's decisions regarding the implementation of these judgments and call for a more robust approach, reflecting the significance of these cases and their non-implementation to date. Specifically, we urge you to:

1. Follow up on these cases in your next report on the implementation of ECtHR judgments;
2. Attend the next Human Rights meeting of the Committee of Ministers, when these cases will be discussed, in March 2022;
3. As per PACE Recommendation 2193 (2021), encourage a joined-up approach to press for the full implementation of these judgments together with the Secretary General, the Committee of Ministers and the European Commissioner for Human Rights,³ including by diplomatically engaging with the new US administration in order to obtain assurances that neither Mr. Al Nashiri nor Mr. Abu Zubaydah would be at risk of the death penalty and/or a flagrant denial of justice.

Collectively, we have kept the Committee of Ministers apprised of the insufficient and inadequate implementation of the individual and general measures that Romania, Poland, and Lithuania through periodic Rule 9 submissions and by orally briefing members of the Committee on September 7th, 2021, before the Committee's 1411th meeting Human Rights meeting during an online convening organized by the European Implementation Network. All these communications can be found on the HUDOC EXEC webpage and we invite you to review these documents, which provide an in-depth analysis of the limitations of these judgements' implementation.

Seven and, respectively, three years have passed since these judgements. Yet the failure of implementation – recognition, investigation/accountability and concerted representations to remedy ongoing violations – is striking. The judgements were rightly lauded as historic when issued. They provide a rare promise of accountability in the notorious context of impunity surrounding "war on terror" violations. The importance of their implementation is heightened in the context of a growing perception that the same complicity that led to these egregious violations now safeguards impunity for them. This erodes the legitimacy of the Convention system, undermines rule of law, and feeds the narratives of violent extremist groups globally.

Our call for an interim resolution, making clear the states' failure to adequately implement the judgments to date and the need for urgent measures remedy this situation, was unsuccessful and the decisions issued by the Committee of Ministers were mild and failed to capture the reality of non-compliance. We urge you,

³ PACE Recommendation 2193 (2021), The Implementation of Judgments of the European Court of Human Rights, <https://pace.coe.int/en/files/28997/html>, para. 2.8.

as PACE Rapporteur on implementation of judgments, to employ your mandate to ensure more effective implementation of these historic, but as yet underutilized, ECtHR judgments.

Thank you for considering the significance of these judgments and their non-implementation to date, and for escalating supervisory measures until the full implementation of the Court's judgments is achieved.

Sincerely,

Amrit Singh
Director of Accountability Division at Open Society Justice Initiative

Mikołaj Pietrzak
Counsel for Mr. Al Nashiri

Helen Duffy
Counsel for Mr. Abu Zubaydah, Director at Human Rights in Practice

Annex

SUMMARY OF THE CASES

In *Al Nashiri v Romania* (Appl. No. 33234/12), *Al Nashiri v Poland* (Appl. No. 28761/11), *Abu Zubaydah v Poland* (Appl. No. 7511/13), and *Abu Zubaydah v Lithuania* (Appl. No. 46454/11), the European Court of Human Rights (“the Court” or “ECtHR”) found the respondent states to be in violation of the European Convention on Human Rights (“the Convention”) and concluded that Romania, Poland and Lithuania violated the Convention by participating in the CIA’s extraordinary rendition programme under which Mr. Abd al Rahim al Nashiri and Mr. Husayn Abu Zubaydah were unlawfully detained, tortured and subject to multiple additional violations of the European Convention. Now detained at Guantanamo Bay since 2006, both men were found to be subject to an on-going “flagrant denial of justice” through indefinite detention without charge or trial and/or the risk of a death sentence.

Years after the ECtHR ordered Romania, Poland, and Lithuania to undertake prompt, effective and transparent domestic investigations, there has been no meaningful progress in any of these cases. In Romania, the investigation in the *Al Nashiri* case has already been closed. In Poland, the investigation has been partially closed on account of the statute of limitations and a remarkable finding that the alleged facts do not constitute a crime under domestic law. In Lithuania, there are no indications whatsoever of any meaningful steps to undertake an effective investigation. There has been no meaningful effort to confront the truth, publicly recognize responsibility and ensure non-repetition. While purporting to comply, it is a regrettable fact that, in effect, all three countries have dismissed key, and in some cases the majority, of the ECtHR’s findings and challenged the binding nature of its judgments.

FAILURE TO IMPLEMENT THE COURT’S JUDGMENTS

Al Nashiri v Romania

Domestic investigation. As communicated in OSJI’s submission to the Committee of Ministers in May 2021,⁴ in March 2021, Romanian authorities dismissed the domestic investigation into Mr. Al Nashiri’s rendition, secret detention and ill-treatment in Romania, claiming that the alleged facts did not take place.⁵ Romanian authorities ignored the ECtHR’s 2018 judgment and its factual findings, including that a “Detention Site Black”

⁴ 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of *Al Nashiri v. Romania* (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD\(2021\)566E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%7B%22DH-DD(2021)566E%22%7D%7D).

⁵ Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p. 78; Later the decision was upheld through Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 23/II/2/2021, 10 May 2021.

existed on Romanian territory⁶ and that Romanian state officials assisted the CIA in its “high value detainees” programme.⁷

In the ordinance to dismiss the investigation, the Prosecutor stated that even if a suspect had been identified, the crimes of torture and deprivation of liberty could not be charged because the statute of limitations for such crimes had expired.⁸ As underlined in OSJI’s appeal to the Prosecutor’s decision (later rejected) and in the last submission to the CM,⁹ Romania cannot avail itself of the statute of limitations where its own delay and failure to conduct a prompt and effective investigation was the cause of the limitation period expiring. In any event, as explained in OSJI’s Rule 9 communication of May 2021, the prohibition of torture is a *jus cogens* norm for which statutory limitations do not apply.¹⁰

In its last decision on this case,¹¹ the CM expressed its disappointment with the quality of the investigation but did not ask for its reopening, asking Romania instead to indicate whether the facts as established by the Court could receive a different legal classification, which would enable them to pursue the investigation. The CM framed the expiry of the statutory limitation period for the crimes of unlawful deprivation of liberty and torture as precluding pursuing a criminal investigation based on those offences, despite the fact that the expiration of the statute of limitation was a *formal* argument expressed by the Prosecutor, only stating that even if the investigation had led to charging certain individuals, their prosecution would not have been possible because of the expiration of the statute of limitation.

Right to truth and public apology. In the event that Romanian authorities “cogently establish” that resuming the criminal investigation is not a viable option, the CM, in its September 2021 decision, requested Romanian authorities to inform the Committee on how they intend to ensure that the circumstances of Romania’s knowledge and involvement in the implementation of the CIA “High-Value Detainee Programme” are further elucidated and they thus secure the right to the truth in this case.¹² The CM did not ask, as in previous decisions, for Romania’s acknowledgement of its role and responsibility in the CIA secret rendition operations but did express satisfaction that Romania made declarations about its general commitment to zero tolerance for torture. OSJI’s request for the CM to ask Romania to issue an apology was completely ignored.

The violations that Mr. Al Nashiri has been subjected to and continues to be subjected to, as a result of Romanian authorities’ actions and inactions - as recognized by the ECtHR in the 2018 judgment -, as well as

⁶ Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p. 78; Later the decision was upheld through Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 23/II/2/2021, 10 May 2021.

⁷ Prosecutor’s Office attached to the High Court of Cassation and Justice, Ordinance no. 512/P/2012, 29 March 2021, p.82.

⁸ Ibid.

⁹ 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)566E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)566E%22%5D%7D).

¹⁰ Ibid, pp. 5-6.

¹¹ 1411th meeting, 14-16 September 2021 (DH) H46-26 Al Nashiri v. Romania (Application No. 33234/12), CM/Del/Dec(2021)1411/H46-26, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a3c233.

¹² Ibid.

the ongoing denial of justice demand an official apology.¹³ It is worth highlighting that in a similar CIA secret rendition case before the ECtHR (*El Masri v FYRM*),¹⁴ the Committee of Ministers had previously asked for such a measure¹⁵ and State authorities complied with this demand.¹⁶

Diplomatic assurances. Romania has still not obtained binding assurances from US authorities that Mr. Al Nashiri will not be subjected to the death penalty and other violations of fair trial procedures. The Romanian government's attempts to seek diplomatic assurances from US authorities have been, if viewed generously, *pro forma*. At a minimum, as long as the risk of the death penalty and the denial of due process persist, the CM should keep both of Mr. Al Nashiri's cases – against Romania and against Poland – under enhanced supervision.

In its September 2021 decision, the CM turned to US authorities, noting “with profound concern that the United States authorities persist in their position not to support requests for diplomatic assurances that the applicant will benefit from the guarantees of a fair trial and that he will not be subjected to the death penalty”, and agreed to invite the Office of the Permanent Observer of the United States to the CoE to attend the next examination of this case (as well as the cases against Poland and Lithuania). While US non-cooperation is regrettable and hinders this process, it is not definitive. The Committee asked, again, Romania to engage with US authorities at “a higher level” and to consider intervening as an *amicus curiae* in any relevant proceedings pending in the United States.¹⁷

Expiry of the statute of limitations. The Committee of Ministers previously has decided that, in order to implement the *Al Nashiri* judgment, Romania has to remove the statute of limitations for the crime of torture “in all instances”.¹⁸ Disappointingly, in its September 2021 decision, the CM expressed “great satisfaction” at the legislative reform enacted by the Romanian Parliament, which removed the prescription period for torture but only prospectively, i.e. from the time that the law enters into force, rather than at the time when the crime of torture occurred. Going back on its previous demands, the CM stated, incorrectly, that the law now “fully disapplies the statute of limitations to the crime of torture”.¹⁹

¹³ See: ICTJ, 2016, “What Makes a Public Apology Meaningful?”, <https://www.ictj.org/news/ictj-report-explores-apologies-past-abuses>.

¹⁴ *El Masri v Former Yugoslav Republic of Macedonia*, Application no. 39630/09.

¹⁵ Committee of Ministers, 1302 meeting (DH) - H46-29 *El-Masri v. “the former Yugoslav Republic of Macedonia”* (Application No. 39630/09), CM/Del/Dec(2017)1302/H46-29, [https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec\(2017\)1302/H46-29E%22%5D%7D](https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec(2017)1302/H46-29E%22%5D%7D), para. 3.

¹⁶ 1318th meeting (June 2018) (DH) - Action plan (11/04/2018) - Communication from "the former Yugoslav Republic of Macedonia" concerning the case of *EL-MASRI v. "the former Yugoslav Republic of Macedonia"* (Application No. 39630/09), [https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2018\)384E%22%5D%7D](https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%5B%22DH-DD(2018)384E%22%5D%7D), pp. 3-4.

¹⁷ 1411th meeting, 14-16 September 2021 (DH) H46-26 *Al Nashiri v. Romania* (Application No. 33234/12), CM/Del/Dec(2021)1411/H46-26, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a3c233.

¹⁸ Committee of Ministers Decision in *Al Nashiri v Romania*, CM/Del/Dec(2020)1390/H46-17, 3 December 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec\(2020\)1390/H46-17E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec(2020)1390/H46-17E%22%5D%7D), para. 13.

¹⁹ 1411th meeting, 14-16 September 2021 (DH) H46-26 *Al Nashiri v. Romania* (Application No. 33234/12), CM/Del/Dec(2021)1411/H46-26, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a3c233.

Al Nashiri v Poland

Domestic investigation. As communicated in OSJI's submission to the Committee of Ministers in May 2021,²⁰ Poland's domestic investigation in the case of Mr. Al Nashiri, rather than being "prompt", "effective" and "thorough" as required by the ECtHR,²¹ has been inadequate, shrouded in secrecy, and marked by excessive delays.

Recent developments in the investigation conducted by the Prosecutor's Office in Krakow illustrates how dramatically ineffective these proceedings have been. On 30 November 2020,²² the Prosecutor decided to partially close the criminal investigation, effectively absolving all Polish authorities, officials and officers who were engaged in the operation of the CIA's secret prison of responsibility, including the one person who has faced charges to date.²³ At an earlier stage, the Prosecutor had already partially closed the investigation on account of the expiration of the statute of limitations.²⁴

The Prosecutor concluded that the suspect had not committed the alleged offence, as a result of extraordinary circumstances and his lack of knowledge at the relevant time. The Prosecutor also concluded that Polish officials could not have suspected that the Americans would not respect provisions of the international law within the Stare Kiejkuty facility and that activities taken by other Polish authorities and officers do not constitute an offence under Polish law.

The Prosecutor's decision has been challenged by Mr. Al Nashiri's counsel. The District Court in Warsaw, by its decision of 7 September 2021, case files no. XVIII Kp 280/21, upheld the Prosecutor's decision on partial closure of the investigation. The grounds for the Court's decision remain classified. The Court examined the complaint against the Prosecutor's decision in the courtroom enabling protection of classified information.

Earlier in the year, on 26 February 2021, the Prosecutor issued another concerning decision,²⁵ suspending the rest of the investigation while waiting for a response from the US authorities to the Prosecutor's mutual legal assistance request. This decision has also been challenged.

The secrecy surrounding the investigation is extremely problematic. In its judgment, the ECtHR made it clear that, "the Polish public has a legitimate interest in being informed of the investigation and its results. It therefore falls to the national authorities to ensure that, without unacceptably compromising national

²⁰ 1406th meeting (June 2021) (DH) - Rule 9.2 - Communication from an NGO (Open Society Justice Initiative) (21/05/2021) in the case of Al Nashiri v. Romania (Application No. 33234/12), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)566E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)566E%22%5D%7D).

²¹ See, for example, Al Nashiri v Poland, para. 499.

²² Decision of the Prosecutor of the Regional Prosecutor's Office in Krakow (postanowienie prokuratora Prokuratury Regionalnej w Krakowie) of 30 November 2020, case files no. RP II Ds 16.2016.

²³ The Prosecutor informed Mr. Al Nashiri's counsel that the name of the person who faced charges is classified.

²⁴ Decision of the Prosecutor of the Regional Prosecutor's Office in Krakow (postanowienie prokuratora Prokuratury Regionalnej w Krakowie) of 30 December 2015, case files no. V Ds 97/15/S.

²⁵ Decision of the Prosecutor of the Regional Prosecutor's Office in Krakow (postanowienie prokuratora Prokuratury Regionalnej w Krakowie) of 26 February 2021, case files no. RP II Ds 16.2016.

security, a sufficient degree of public scrutiny is maintained in the present case”.²⁶ Since the Court’s judgments no efforts have been undertaken to inform the Polish public about the progress of the investigation. Even more, most of important documents – including the grounds for the court’s decision and important part of the grounds for the Prosecutor’s decision – remain classified as top secret. In a strong indication of the ongoing secrecy surrounding the investigation, neither the Prosecutor’s nor the court’s decision on partial closure of the investigation have been made public.

Assurances from the United States. In its 2014 judgment in the *Al Nashiri* case, the ECtHR explicitly ordered the Polish government to remove the risk of death penalty “as soon as possible” by “seeking assurances from the US authorities that he will not be subjected to the death penalty.”²⁷ Poland’s efforts to obtain such assurances from US authorities, however, have been sporadic, minimal, and, ultimately, ineffective. In its July 2021 communication to the CM, Poland vaguely indicates a meeting between the Polish Deputy Ambassador and the Deputy Assistant Secretary of the US Department of State but with no concrete advance on the point of obtaining diplomatic assurances regarding the applicants.²⁸ Whilst in their submission the CM Polish authorities list a series of documents exchanged with U.S. authorities, aimed at obtaining diplomatic guarantees, no copies have been provided to the CM, the applicants or to the applicants’ counsels. This is particularly problematic given that Mr. Al Nashiri’s counsel initiated administrative proceedings to access the content of those documents.²⁹ Renewed, persistent and more creative methods should therefore be undertaken to implement the judgment’s requirement that such assurances be sought.

Acknowledgement and apology. The Committee of Ministers has repeatedly called on Polish authorities to “provide details about the measures taken or envisaged to acknowledge Poland’s role in and responsibility for the human rights violations that occurred in these cases without any further delay”.³⁰ This has yet to happen. Poland’s last communication to the CM does not explain how and when it will issue a public acknowledgement of its role in the rendition program and the treatment of Mr. Al Nashiri or Mr. Abu Zubaydah. Neither does Poland’s updated Action Plan provide any details on this matter.³¹ Polish authorities continue to refuse to apology for human rights violations and even acknowledge the unlawful detention and torture of Mr. Al Nashiri and the state’s role in the CIA’s secret rendition program.

²⁶ *Al Nashiri v Poland*, para. 497.

²⁷ *Al Nashiri v Poland*, para. 589.

²⁸ 1411th meeting (September 2021) (DH) - Rule 8.2a Communication from the authorities (20/07/2021) concerning the *Al Nashiri* group of cases v. Poland (Application No. 28761/11), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a34847, p. 2.

²⁹ *Ibid.*

³⁰ 1369 meeting (DH) March 2020 - H46-19 *Al Nashiri* group v. Poland (Application No. 28761/11), CM/Del/Dec(2020)1369/H46-19, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec\(2020\)1369/H46-19E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec(2020)1369/H46-19E%22%5D%7D), para. 12.

³¹ Poland’s Action Plan for the implementation on *Al Nashiri* and *Abu Zubaydah* judgments, 2020, [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2020\)100E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2020)100E%22%5D%7D).

Abu Zubaydah v Poland and Abu Zubaydah v Lithuania

Domestic investigation. The lack of effective investigation, and excessive ongoing secrecy and lack of transparency are realities in both states. The Court’s judgements made clear both states’ failure to conduct an effective investigation, and that ongoing failure would amount to a continuing violation. Neither states report positive efforts to investigate in recent action plans, which instead serve to clarify the lack of effective investigation, and reveal a trajectory towards limiting or closing investigations, rather than overcoming investigative challenges.

Poland. With regard to investigation in Poland, we endorse the comments made on behalf of Mr. al Nashiri (above) in relation to suspension and partial discontinuation of the investigation, which was also challenged without success by counsel for Mr. Abu Zubaydah. The reasons given for the partial closure – in particular the purported lack of knowledge of wrongfulness of a whole group of Polish suspects – contradict available facts and the conclusions of the ECtHR that such lack of knowledge was ‘inconceivable’. The state described the closure as ‘partial’, without clarifying the scope of this and no information whatsoever is provided to indicate that there is any active investigation. The Polish states has provided none of the transparency that the Court found essential to restore public confidence, as epitomized by the fact that the entire file surrounding the challenge to the partial closure of the investigation is secret and cannot be shared with the victim or the public. This clearly falls far short of the satisfaction of the ‘right to truth’ required by the judgments. In its response to the CM, Poland notes vaguely that the investigation is ‘stayed’ not definitively closed³² and may be reopened if evidence presents itself, which provides little solace in practice. Evidence will not gather itself. There is no indication of the thorough effective coordinated action necessary to take forward a robust investigation, as required by the Court.

Lithuania. Regarding Lithuania, the Committee emphasized in its December 2020 session, as previously, the “necessity to conduct an effective investigation *rapidly* to establish the *truth* about what happened and how so that it can never happen again”.³³ The government’s response of July 2021 made clear this has not happened and showed no commitment to change course. Unlike Poland, the government can be credited with frequent references to “ongoing investigations”, and (albeit vaguely) to their openness to considering other action. However, it has provided no indication at all of investigative steps taken. As such, even on its own account, since the governments’ submissions of last year nothing had happened in the investigation.

Instead, the government has focused on excusing this situation, principally by reference to non-cooperation from the United States. However, there is nothing to indicate real efforts by the government to address this issue with the new US administration. While US non-cooperation is undoubtedly regrettable, and an obstacle, it is not, and cannot be allowed to be, definitive. CM has been clear that states should take ‘alternative’ steps to ensure effective investigation. Yet neither Lithuania nor Poland seem to have taken measures available to them to pursue effective cooperation internationally from other sources. These may

³² See e.g. Poland’s submission in September 2021, 1411th meeting (September 2021) (DH) - Rule 9.6 - Reply from the authorities (13/08/2021) to a communication from NGOs (Open Society Justice Initiative and Human Rights in Practice) (27/07/2021) in the cases of Al Nashiri and HUSAYN (ABU ZUBAYDAH) v. Poland (Applications No. 28761/11, 7511/13), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a38527.

³³ 1390th meeting, 1-3 December 2020 (DH), H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), CM/Del/Dec(2020)1390/H46-15, [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22CM/Del/Dec\(2020\)1390/H46-15E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2020)1390/H46-15E%22]), para. 11

include active engagement in collaborative investigation, seeking cooperation as necessary from other states in Europe or beyond, or from European institutions such as Europol and Eurojust. While the government made vague references to the fact that the International Criminal Court (“ICC”) was looking into the issue, this had no relevance for its own obligations, and in any event is rendered moot by the ICC prosecutor’s decision to deprioritise the relevant investigation. The state does not appear to have reached out and sought support from the ICC Office of the Prosecutor either. The office’s strategic goal for developing partnership with national prosecutions, and indeed recent statements by the Office on the focus of its own investigation being complemented by strengthening partner capacity,³⁴ would suggest this as one of a number of unexploited routes that could be pursued were the government serious about conducting an effective investigation.

Recognition, acknowledgement, and apology. Neither state has acknowledged responsibility or apologised to Mr. Abu Zubaydah. The governments should be asked to confirm in clear terms that they accept the facts the Court found established beyond reasonable doubt in the Courts judgements as it is striking that they have never done so.

Assurances regarding cessation of ongoing flagrant denial of justice. States have in turn failed to seriously engage with the responsibility to make representations to end or mitigate the ‘flagrant denial of justice’ in Guantanamo, as required by the Court and CM. The Court and the CM have been clear on the importance of representations by Poland and Lithuania to US given the ongoing violation of Mr. Abu Zubaydah’s rights, amounting to almost twenty years of flagrant denial of justice, with no change in sight. The committee has repeatedly expressed concern, including in its 2020 December decision, that “the consequences of the violation of the Convention for the applicant have not been remedied as Mr. Abu Zubaydah remains subjected to a flagrant denial of justice, notably due to his indefinite detention”. The Committee stressed that the government should pursue and intensify diplomatic efforts, including other forms of intervention at a higher level, and “consider other avenues to address the situation including intervening [as amicus curiae] in domestic proceedings for example”.³⁵

None of that creative coordinated or reinvigorated effort to ensure the effectiveness of representation has been made by either state and nor have they been put under pressure to do so. The Prosecutors office did not intervene in proceedings in US courts brought by the victim in relation to Polish proceedings, seeking access to the psychologists involved in his detention and torture.³⁶ Nor is there any indication of outreach to other states or institutions to intervene collectively as requested and anticipated in earlier CM recommendations, to render representations more compelling and effective. This could involve collective action by the range of states responsible for contributing to his ongoing flagrant denial of justice (in this

³⁴ Statement of the Prosecutor of the ICC, Karim A. A. Khan GC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan, 27 September 2021 <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>

³⁵ 1390th meeting (1-3 December 2020) (DH) - H46-15 Abu Zubaydah v. Lithuania (Application No. 46454/11), CM/Del/Dec(2020)1390/H46-15, [https://hudoc.exec.coe.int/eng/?i=CM/Del/Dec\(2020\)1390/H46-15E](https://hudoc.exec.coe.int/eng/?i=CM/Del/Dec(2020)1390/H46-15E). See also: 1411th meeting (DH), 14-16 September 2021 - H46-21 Abu Zubaydah c. Lithuania (Application No. 46454/11), CM/Del/Dec(2021)1411/H46-21, [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22CM/Del/Dec\(2021\)1411/H46-21E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2021)1411/H46-21E%22]}).

³⁶ Pending before the US Supreme Court, United States (petitioner) v. Zayn Al-Abidin Muhammad Husayn aka Abu Zubaydah et al (respondents), no. 20-287, 6 October 2021 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-827_16gn.pdf

case at least 6 states beyond the US).³⁷ The states could also engage the broader Council of Europe community of states and institutions to seek effective collective action at the highest level in respect of the flagrant denial of justice of our client as reflected in earlier CM decisions.

After almost 20 years of arbitrary detention without charge or trial, torture and other violations, Mr. Abu Zubaydah's release is an essential part of bringing to an end the 'flagrant denial of justice' condemned by the Court. There is sadly no indication of Poland, Lithuania or other states having pressed for his release, or offered to facilitate relocation (with his consent) or provide essential rehabilitation. The relevance of this failure to his case is clear, including from the decisions of the superficial Periodic Review Board process, which noted the lack of offers of relocation when purporting to justify continued detention. This discussion is especially timely today, on the twentieth anniversary of the opening of the arbitrary detention site at Guantanamo. More robust and effective engagement is plainly required to bring the continuing violations at the heart of these cases to an end. States should make public their individual and collective efforts in this respect.

³⁷ In April 2021 a case was brought against six states to the UN Working Group on Arbitrary Detention: Abu Zubaydah v Governments of USA, Thailand, Poland, Morocco, Lithuania, Afghanistan, UK:
<https://static1.squarespace.com/static/5b82ab175b409b90d4c99071/t/609c1e66cc584609980b82d/1620844135983/30042021+AZ+v+US+filed+-public.pdf>