

EUROPEAN COURT OF HUMAN RIGHTS

Abd al Rahim Hussayn Muhammed al Nashiri

v.

Poland

RULE 39-URGENT

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1. On 20 April 2011, military prosecutors at Guantánamo Bay, Cuba announced that they are seeking the imposition of the death penalty against the applicant, Mr. al Nashiri. The “Convening Authority,” an officer appointed by the United States Secretary of Defense, has indicated that he will accept written submissions against the death penalty until 30 June 2011, following which he will make a decision on whether capital charges should be referred to a specified military commission for trial.
2. Mr. al Nashiri’s current predicament is the consequence of the Polish government’s active complicity in his “rendition” from Polish soil. The Polish government violated Mr. al Nashiri’s rights under Article 2, Article 3 and Protocol No. 6 to the Convention by assisting the CIA in transferring him from Poland in June 2003 despite substantial grounds for believing that there was a real risk that he would be subjected to the death penalty in U.S. custody. Prior to this transfer, the Polish government actively enabled Mr. al Nashiri’s incommunicado detention in a secret CIA prison in Poland for six months, where he was brutally tortured.
3. Mr. al Nashiri requests that the President of the Court exercise his power to grant interim relief under Rule 39 by indicating to the Government of Poland that it should immediately use all available means at its disposal to ensure that he is not subjected to the death penalty. In addition, Mr. al Nashiri requests that the Court give priority to his case pursuant to Rule 41.
4. Once the Convening Authority has approved capital charges for his case, Mr. al Nashiri will be subject to years of uncertainty and anguish associated with the prospect of the death penalty. That anguish is compounded by the fact that despite his civilian status, Mr. al Nashiri will be subjected to a flagrantly unfair trial by military commission in the remote and publically inaccessible location of Guantánamo Bay. Thus, Mr. al Nashiri is at imminent risk of irreparable damage. This damage may be averted if this Court were to indicate to Poland that it use all available means to preclude the death penalty in Mr. al Nashiri’s case before 30 June 2011.

Factual Background

5. As set forth in detail in the substantive application submitted herewith, the Polish government was actively complicit in Mr. al Nashiri's torture and "rendition" on Polish territory. See *al Nashiri v. Poland*, Application at paras 34-60, 153-170.
6. In 2002 and 2003, Poland hosted a secret CIA prison at a Polish military intelligence base in Stare Kiejkuty, where Mr. Al Nashiri was detained for six months and brutally tortured. Official U.S. government documents confirm that Mr. al Nashiri was tortured during the time he was held in Poland.¹ Here, U.S. interrogators subjected Mr. al Nashiri to mock executions with a power drill as he stood naked and hooded; racked a semi-automatic handgun close to his head as he sat shackled before them; held him in "stress positions," including by lifting him off the floor by his arms while they were bound behind his back and causing their near dislocation from his shoulders; and threatened to bring in his mother and sexually abuse her in front of him.²
7. On 6 June 2003, Poland assisted the United States in secretly flying Mr. al Nashiri out of Poland, despite the real 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 Polish government to seek diplomatic assurances from the United States to avert the risk of such consequences.
8. The Polish government provided extraordinary levels of security cover for CIA rendition operations on its territory and actively assisted the United States government in secretly transporting Mr. al Nashiri in and out of the country. A 2007 Council of Europe Report confirms that Poland was "knowingly complicit" in the CIA's secret detention programme³ and that senior Polish officials "knew about and authorised Poland's role" in CIA rendition operations on Polish territory.⁴ The Polish government:
 - a) entered into an "operating agreement" with the CIA to hold high value detainees in secret detention facility on Polish territory⁵;
 - b) arranged for the Military Information Services (Wojskowe Sluzby Informacyjne), acting under the guise of the Polish Army Unit designated as the formal occupant of the Stare Kiejkuty facility, to provide "extraordinary levels of physical security by setting up temporary or permanent military-

¹ See CIA Inspector General, Special Review, Counterterrorism Detention and Interrogation Activities (September 2001—October 2003), 7 May 2004, ("CIA OIG report"), paras 91-98; Available at: http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf.

² *Ibid.*

³ Dick Marty, 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, at para. 15, 11 June 2007 (2007 Council of Europe Report). Available at: assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.2007.

⁴ 2007 Council of Europe Report at para 174.

⁵ 2007 Council of Europe Report at para 117.

style 'buffer-zones' around the CIA's detainee transfer and interrogation services⁶;

- c) provided Military Information Services (Wojskowe Sluzby Informacyjne) collaborators in other agencies including in the Polish Air Navigation Services Agency (Polska Agencja Zeglugi Powietrzne), where they assisted in disguising the existence and exact movements of incoming CIA flights; the Polish Border Guard (Straz Graniczna), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (Glowny Urzad Celny), where they resolved irregularities in the non-payment of fees related to CIA operations;⁷
 - d) granted CIA rendition planes licences and overflight permissions as well as special exemptions from adhering to the normal rules of air traffic flow management;⁸
 - e) actively assisted in landing and departure of rendition flights, including flights N63MU and N379P, which transported Mr. al Nashiri in and out of Poland respectively⁹;
 - f) assisted in the cover-up of rendition flights, including flights N63MU and N379P, which transported Mr. al Nashiri in and out of Poland respectively;¹⁰ and
 - g) cleared the runway and secured the perimeter and grounds of the airport with Polish military officers and border guards so that prisoners could be secretly transported into vans bound from Szymany airport to the Stare Kiejkuty facility.¹¹
9. After Poland assisted the CIA in transporting Mr. al Nashiri from Poland, the CIA subjected him to further incommunicado detention at a number of other secret locations outside Poland. It was not until September 2006 that the United States government first acknowledged that the CIA had secretly detained and interrogated Mr. al Nashiri outside the United States before transferring him to Guantánamo Bay.¹²

⁶ 2007 Council of Europe Report at para 170.

⁷ 2007 Council of Europe Report at para 171.

⁸ 2007 Council of Europe Report at paras 180-196; 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. 2-6. Available at: <http://www.chrgj.org/projects/docs/polishprosecutor.pdf>.

⁹ 2007 Council of Europe Report at para 197; CHRGJ report at 2-6; 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>

¹⁰ 2007 Council of Europe report at paras 180-190; CHRGJ report at 2-6; United Nations Joint Experts' Report at para 116..

¹¹ 2007 Council of Europe Report at para 197.

¹² 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> ("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

10. From the time that he was captured by the CIA in 2002 until the time of this filing, Mr. al Nashiri has never appeared in open court. Moreover, his 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 i.e., “Top Secret” level, and no procedure has been available for declassifying such communications.
11. A heavily redacted transcript of a 2007 closed proceeding held in Guantánamo Bay reveals that Mr. al Nashiri said: “[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.”¹³ The President of the tribunal asks Mr. al Nashiri to “describe the methods that were used.”¹⁴ 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.”¹⁵ He later states “they used to drown me in water. So I used to say yes, yes.”¹⁶ Further details relating to Mr. al Nashiri’s own description of his treatment are redacted from the transcript.

Capital Charges Brought

12. 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.
13. The prosecutors announced that the charges would be forwarded for independent review to Bruce MacDonald, the “Convening Authority”¹⁷ for military commissions, who will decide whether to reject the charges or to refer some, all or none of them for trial before a military commission.”¹⁸
14. Once the Convening Authority approves or “refers” capital charges, he will convene a specified military commission to try Mr. al Nashiri.¹⁹ Consequently, the likelihood of precluding the death penalty and an unfair trial by military commission is significantly greater prior to referral as compared to after referral of charges.

includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole.”). The U.S. government subsequently claimed that Mr. al Nashiri the USS Cole bombing suspect.

¹³ Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10015 at 20 , Available at: http://www.aclu.org/pdfs/safefree/csrt_alnashiri.pdf

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at:

<http://www.defense.gov/releases/release.aspx?releaseid=14424>

¹⁹ *Ibid.*

15. On 27 April 2011, Mr. MacDonald informed U.S. military defence counsel for Mr. al Nashiri that Mr. MacDonald would accept written submissions against the death penalty until 30 June 2011, following which he will make the decision on the referral of charges for trial by military commission.²⁰

Flaws in the Military Commission Procedure

16. As set forth in the substantive application, the current military commissions suffer from a number of defects the cumulative effect of which would be to flagrantly deny Mr. al Nashiri his right to a fair trial under Article 6. These defects are listed below:
- 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 commission²¹ approves charges for trial by military commission,²² and selects the commission members, who are required to be members of the armed forces on or those recalled to active duty,²³ 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. federal court on 15 May 2003.²⁴ The indictment identified him as a co-conspirator in the USS Cole bombing.²⁵
 - b) They discriminatorily apply only to non-U.S. citizens²⁶;
 - 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 requirements²⁷;
 - d) They allow for the accused to be denied access to classified information or evidence²⁸;

²⁰ Memorandum from Bruce MacDonald, Convening Authority for Military Commissions for LCDR Stephen Reyes, OMC-D, April 27, 2011 at 2.

²¹ Military Commissions Act of 2009, 10 U.S.C. § 948h (2009).

²² Military Commission Rule 601, Manual for Military Commissions. Available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf.

²³ *Ibid* at § 948i (a), (b)

²⁴ See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, Available at <http://f11.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>.

²⁵ See Indictment, *United States of America v. Jamal Ahmed Mohammed Al-Badawi and Fahd Al-Quso*, at 6. Available at

<http://f11.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>.

²⁶ Military Commissions Act of 2009, 10 U.S.C. § 948c

²⁷ *Ibid* at § 948b(d)(A).

- 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 evidence²⁹. 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;
- f) 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 justice³⁰;
- g) The military commissions will still be held in the remote location of Guantánamo Bay, thereby significantly hindering public access to Mr. al Nashiri's proceedings.
- 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 2009,³¹ and have thus far been applied in only three cases, none of which involved the death penalty.³²

Summary of Relevant Violations

17. As set forth in greater detail in the substantive application, the Polish government violated Mr. al Nashiri's rights under Articles 2 and 3 and Protocol 6 to the Convention by assisting in his transfer from Poland despite the real risk that he would be subjected to the death penalty in U.S. custody. See *al Nashiri v. Poland*, Application at paras 188-208.

Interim Relief under Rule 39

18. The Court must grant interim relief in this case due to the imminent risk of irreparable damage, as without action, Mr. al Nashiri will face years of anguish associated with the threat of death and a flagrantly unfair trial.

²⁸ *Ibid* at § 949p-4(b)(1)

²⁹ *Ibid* at § 949a(b)(3)(D)

³⁰ *Ibid* at § 948r (2009); see also Military Commission Rule 305(a)(5)(B).

³¹ See Military Commissions Act of 2009. Available at <http://www.defense.gov/news/commissionsacts.html>.

³² 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>.

The imminent risk of irreparable damage warrants Rule 39 intervention

19. This Court has recognized that “imminent risk of irreparable damage” warrants interim measures under Rule 39.³³ The capital charges brought against Mr. al Nashiri on 20 April 2011 have rendered him at imminent risk of irreparable damage in the form of a flagrantly unfair trial by military commission and the death penalty. These charges have now been forwarded for independent review to Bruce MacDonald, the “Convening Authority”³⁴ for military commissions, who will decide whether to reject the charges or to refer some, all or none of them for trial before a military commission.”³⁵
20. Mr. MacDonald has indicated that he will consider written submissions against the death penalty only until 30 June 2011, following which he will make the decision on the referral of charges for trial by military commission.
21. The Convening Authority is an officer of the executive branch. Accordingly, the question of whether Mr. al Nashiri may be subjected to the death penalty is currently susceptible to diplomatic intervention before the U.S. government. Once the Convening Authority approves capital charges, he will convene a military commission with judicial functions to try Mr. al Nashiri where diplomatic representation from a foreign body may be less effective. Consequently, the likelihood of precluding the death penalty and an unfair trial by military commission through diplomatic representations is significantly greater from now until 30 June 2011. This represents the critical window of opportunity to pursue such representations through the executive branch prior to trial, and avoid irreparable harm.

Prohibition of the death penalty in all circumstances

22. The death penalty 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.”³⁶
23. 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 2011.³⁷ 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.”³⁸ The resolution further stated that the Parliamentary

³³ *Al Saadoon and Mufdhi v. the United Kingdom*, ECtHR Judgment of 2 March 2010 at para 160 (noting that the Court in practice will make an indication under Rule 39 only if there is an imminent risk of irreparable damage).

³⁴ 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).

³⁵ DOD Announces Charges Sworn Against Detainee Nashiri, 20 April 2011. Available at: <http://www.defense.gov/releases/release.aspx?releaseid=14424>

³⁶ *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR. Judgment of 2 March 2010, at para 116.

³⁷ 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.

³⁸ *Ibid.*

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 in use (lethal injection, electric chair, firing squad) have stained the reputation of this country, which its friends expect to be a beacon for human rights.”³⁹

The death row phenomenon

24. After charges are referred, Mr. al Nashiri could remain subject to the fear of execution for about a decade or more while his case is tried by military commission and subsequently 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.⁴⁰
25. In *Soering v. United Kingdom*, this Court found that extradition of a prisoner likely to spend six to eight years on death row in the state of Virginia in the United States, “would expose him to a real risk of treatment going beyond the threshold set by Article 3.”⁴¹
26. 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.⁴² Mr. al Nashiri’s case is likely to take longer than that on direct appeal (i.e., the appeal process immediately following sentencing)⁴³, because unlike courts martials, which have been operating for decades,⁴⁴ the military commission procedures applicable to him are more uncertain and less well-established. 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 add to the number of years he is subject to the anguish associated with the prospect of the death penalty.
27. The U.S. government’s 20 April 2011 announcement of its intent to seek the death penalty in this case has exposed Mr. al Nashiri to significant anguish associated with the prospect of being put to death. Moreover, once his capital charges are approved by Mr. MacDonald and referred to a military commission, this prospect will become even more concrete, thereby further intensifying the associated anguish, which he may have to endure for almost a decade or more while his case is resolved.

³⁹ Ibid.

⁴⁰ Military Commissions Act of 2009, 10 U.S.C. §§ 950b,c,d,e,f,g (2009).

⁴¹ *Soering v the United Kingdom*, ECtHR, Judgment of 7 July 1989, at paras. 106, 111.

⁴² 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

⁴³ See Military Commissions Act of 2009, 10 U.S.C. §§ 950b,c,d,e,f,g (2009).

⁴⁴ 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.

Imposition of the Death Penalty after an Unfair trial

28. Mr. al Nashiri also faces the imminent risk of being subjected to a flagrantly unfair trial, which further exacerbates the anguish associated with the prospect of the death penalty.
29. The Grand Chamber observed in *Öcalan v Turkey* 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.”⁴⁵

Lack of remedies in Poland

30. There is no effective forum in Poland that can afford Mr. al Nashiri the interim relief that he seeks here. Despite mounting evidence of a CIA black site in Poland, a criminal investigation into CIA black sites was commenced as late as 11 March 2008, almost five years after Mr. al Nashiri was transferred from Poland. That investigation has been pending now for more than three years with no public disclosures as to its precise scope, progress, or when it is likely to conclude. Mr. al Nashiri filed an application to intervene in that investigation on 21 September 2010, but to date, the Polish prosecutor has not ruled on any of the motions for evidence included in the application. On 25 February 2011, Mr. al Nashiri filed a judicial complaint on the undue delay associated with the investigation, but on 20 April 2011, the court dismissed that complaint. That dismissal is final and cannot be appealed. There being no effective forum in Poland where Mr. al Nashiri can seek to avert the death penalty, this Court’s intervention is now critical.

Remedies under Rule 39: Post-Transfer Obligation to Intervene

31. This Court should indicate to Poland that it should use all available means at its disposal to ensure that Mr al Nashiri is not subjected to the death penalty.
32. This Court has 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. 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.⁴⁶ The Court observed that the post-transfer outcome of the applicants’ case was uncertain, i.e., that while they remained at real risk of

⁴⁵ *Öcalan v Turkey*, ECtHR (GC), Judgment of 12 May 2005, at para 169.

⁴⁶ *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR, Judgment of 2 March 2010, at para 143.

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.⁴⁷ 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.”⁴⁸ “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.

33. With regard to the appropriate remedy, 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. 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.”⁴⁹
34. 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 et al. v Bosnia and Herzegovina*, the Human Rights Chamber for Bosnia and Herzegovina found that Bosnia and Herzegovina had violated applicants’ rights under Protocol No. 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 uncertainty [did] not exclude the imposition of the death penalty against the applicants.”⁵⁰ 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

⁴⁷ *Ibid* at para 144.

⁴⁸ *Ibid* at para 135.

⁴⁹ *Ibid* at para 171.

⁵⁰ See *Boudellaa et al. v Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Judgment of 11 October 2002, at para. 300.

applicants, that the death penalty would not be imposed upon the applicants.”⁵¹

35. 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.”⁵²

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.”⁵³

Remedies Requested from the Court

36. The U.S. government’s 20 April 2011 announcement has already begun to expose Mr. al Nashiri to the anguish associated with the prospect of the death penalty, an anguish that continues each day that he remains subject to capital charges. Accordingly, Rule 39 measures are necessary to protect Mr. al Nashiri from this ongoing anguish. In addition, the likelihood of precluding the death penalty and the flagrantly unfair trial by military commission is higher prior to charges being referred by Mr. MacDonald to the military commission. This further warrants Rule 39 measures in this case.
37. Mr. al Nashiri respectfully requests that the President of the Court exercise his power in granting interim relief by indicating to the Government of Poland that it should immediately use all available means at its disposal to ensure that he is not subjected to a flagrantly unfair trial or the death penalty in violation of those rights. These measures include but are not limited to an indication to the Polish government that it immediately should:
- a) Make written submissions before 30 June 2011 to Bruce MacDonald, the Convening Authority for Military Commissions, to ensure that he does not approve the death penalty for Mr. al Nashiri’s case;
 - 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 monitor his treatment and ensure that the status quo is preserved in his case; and

⁵¹ *Ibid* at para. 300.

⁵² *Ibid* at para. 330.

⁵³ *Ibid* at para. 330.

- 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 US custody including in military, criminal or other proceedings involving his case.

Request for Prioritisation Pursuant to Rule 41

38. In addition, Mr. al Nashiri requests that the Court give priority to his case pursuant to Rule 41.
39. This Court's "priority policy" makes clear that where the applicant is at "particular risk to life or health" his application should be treated as "urgent."⁵⁴ The capital charges brought against Mr. al Nashiri on 20 April 2011 have placed him at "particular risk to life or health" and therefore warrant urgent treatment by this Court. These charges have already begun to expose him to serious ongoing harm in the form of anguish associated with the prospect of the death penalty and a flagrantly unfair trial by military commission. In addition, in the absence of relief from the Court, this anguish will likely continue for many years to come, while his case makes its way through trial, appeal and habeas review.
40. Priority treatment is also warranted under the policy for applications that raise complaints under Article 2 (right to life) and 3 (protection from torture).⁵⁵ Mr. al Nashiri is entitled to priority because his substantive application raises claims under Articles 2 and 3. See *al Nashiri v. Poland*, Application at paras 155-170, 188-208.
41. Accordingly, Mr. al Nashiri respectfully requests that the Court give priority to his case pursuant to Rule 41 so that he may procure relief directed at eliminating the risk to his life as well as the ongoing anguish associated with the prospect of the death penalty and a flagrantly unfair trial.

Conclusion

42. In the death penalty resolution it adopted on 14 April 2011, the Parliamentary Assembly of the Council of Europe took "pride in its successful contribution to ridding almost all of Europe of this inhuman and degrading punishment, by having made abolition of the death penalty a condition for accession to the Council of Europe," and 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."⁵⁶

⁵⁴ European Court of Human Rights, The Court's Priority Policy. Available at: http://www.echr.coe.int/NR/rdonlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010_Priority_policy__Public_communication.pdf

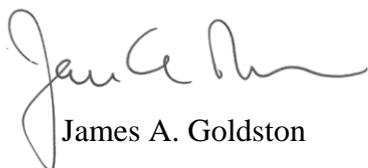
⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

43. Poland's conduct in Mr. al Nashiri's case has allowed the stain of United States death penalty practices to spread to the Council of Europe. This Court can halt that spread by granting Mr. al Nashiri the interim relief he seeks.

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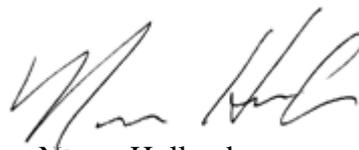


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