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# Introduction: The Court Redefines Torture in Europe

Nahide, a mother of three, was born in Diyarbakır in southeast Turkey. Like many women in this region, she had a tragic life. Although violence against women is pervasive throughout Turkey, women in the east and southeast lead particularly difficult lives as many may lack access to education and employment opportunities, health services, and means of redress for injustices suffered.[1] Nahide's case was no different. She started living with Hüseyin Opuz in 1990, and they married five years later.[2] Hüseyin already had a pattern of abuse, but the violence grew worse after their marriage. In April 1995, he savagely beat both Nahide and her mother. They were covered with evidence of their abuse, which was confirmed by a medical report that described them as unfit to work for five days due to their injuries. Brushing aside the pain and the shame of being victims of domestic abuse, the women approached the public prosecutors and filed a complaint against Hüseyin. Afterward, they grew doubtful and withdrew their complaint. The local court discontinued their case due to a lack of evidence and the complaint's withdrawal. No protective measures were taken.

A year later, almost to the day, on April 11, 1996, Hüseyin and Nahide had another fight during which Nahide was again brutally beaten. According to the medical report, she was left with life-threatening injuries to her right eye, right ear, left shoulder, and back. Hüseyin was remanded, but, at a hearing on May 14, 1996, the public prosecutor requested that Hüseyin be released pending trial due to the nature of the offence and Nahide's quick recovery. When Hüseyin was released, Nahide withdrew her complaint, and the case was discontinued.

Almost two years later, on March 4, 1998, Hüseyin rammed into Nahide and her mother with his car, nearly killing Nahide's mother. The following

[1] Yakin Ertürk, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Mission to Turkey, *A/HRC/4/34/Add.2* (January 5, 2007), 2.

[2] The information provided in this story is taken from a court case: *Opuz* v. *Turkey*, application no. 33401/02, ECHR (June 9, 2009).



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day, Hüseyin was taken into custody again. Two weeks later, on March 20, 1998, Nahide initiated divorce proceedings after suffering Hüseyin's abuse for years. Nahide and her mother also filed a petition specifically requesting protective measures from the local authorities. Hüseyin had been threatening to kill them both if Nahide would not return to live with him. Nahide, who had been living with her mother for about a month at the time, had no intention of doing so. The authorities ignored their petition, and the local court decided to drop their case due to lack of evidence. Fearing her husband's death threats, Nahide also dropped the divorce case. She could find neither remedy nor protection in the Turkish justice system. On November 14 of that same year, Nahide reported that Hüseyin threatened to kill her again; once more, her complaint was dismissed due to lack of evidence. Five days later, her mother filed another complaint, warning of death threats that grew more and more terrifying by the day. This complaint was not taken seriously, either, and their pleas for protection were ignored. This cycle of violent attacks, court proceedings, and discontinued cases repeated over the next few years.

In the face of the Turkish government's inaction, Nahide and her mother realised that escaping their fate meant leaving their hometown, their family, and their lifelong friends. What they needed was a fresh start. With this in mind, they planned in secret to move to Izmir on the west coast of Turkey. When Hüseyin found out, he was enraged and once again threatened to kill them. The two women, however, were determined. They picked a morning in early March 2002 to leave Diyarbakır, their home, and everything else behind. Nahide's mother made arrangements with a transport company. She loaded up their few belongings onto a truck with the driver's help and sat beside the truck driver. Had she known that Hüseyin was aware of their plans, would she have chosen to take the bus instead? Would it have made a difference? After all, Hüseyin had pledged that "wherever [they] go, [he] will find and kill [them]!"[3] As they set off on their journey, a taxi pulled in front of the truck and stopped. Hüseyin got out, opened the truck door, and shot Nahide's mother dead.

On March 13, 2002, the Diyarbakır Public Prosecutor filed an indictment accusing Hüseyin of murder. In 2008, Hüseyin was finally convicted of murder and illegal possession of a gun and sentenced to life imprisonment. However, due to Hüseyin's good conduct during the trial, the local criminal trial court reduced his sentence to fifteen years and ten months plus a fine. This decision was based on the conclusion that Hüseyin had

[3] *Opuz* v. *Turkey*, §54.

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been provoked by the victim because the crime had been committed in the name of *family honor*. In many regions of the world, these two words are shockingly effective in reducing a sentence or letting the perpetrators of gender-based violence entirely off the hook. They would help Hüseyin, too. Hüseyin was released from prison because the criminal trial court counted the time he spent in pretrial detention and considered the fact that his case was pending appellate review before a higher court. Immediately following his April 2008 release, Hüseyin went right back to pursuing Nahide and issuing death threats. Nahide once again requested protection from the government, but to no avail.

In June 2008, Nahide brought her case before the European Court of Human Rights (the Court). In 2009, the Court found Turkey in violation of the European Convention of Human Rights (the Convention) for not protecting a domestic violence victim. In so doing, the Court broke new ground in European human rights law. It examined Nahide's complaint against the backdrop of "the vulnerable situation of women in south-east Turkey"[4] and the "common values emerging from the practices of European States."[5] The Court referenced relevant legal instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Belém do Pará Convention (the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women).[6] The former prohibits gender-based discrimination, and the latter sets out specific state obligations to eradicate gender-based violence. Interights, a London-based nongovernmental organization (NGO), had intervened in the proceedings to argue that states are required to be vigilant about domestic violence complaints because women are often too afraid to report abuse to the relevant authorities.[7] The Court further relied on reports provided by leading civil society organizations such as the Diyarbakır Bar Association and Amnesty International, as well as the CEDAW Committee's Concluding Comments on Turkey. Providing a detailed description of the systemic nature of discrimination against women in Turkey and state authorities' passivity toward domestic violence victims, these reports reinforced Nahide's story.[8]

In light of the evidence brought by Nahide and the abovementioned reports, the Court decided that the Turkish government had failed to

[4] Ibid., §160.
[5] Ibid., §164.
[6] Ibid.
[7] Ibid., §157.
[8] Ibid., §192–93.

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take protective measures that could have deterred Hüseyin from violating Nahide's personal integrity. It also ruled that the Turkish government bore responsibility for the abuse that Nahide had endured and that it had violated Article 3 (prohibition of torture) of the Convention. Even further, the Court found the Turkish authorities had discriminated against Nahide based on her gender, arguing that "judicial passivity in Turkey, albeit unintentional, mainly affected women."[9] Finally, it identified the episodes of violence against Nahide and her mother specifically as gender-based violence – a form of discrimination against women.[10]

The Court's judgment offered some compensation for the harm done to Nahide, but did not ask for Hüseyin's retrial or re-incarceration. Nonetheless, it became a landmark decision that opened the way for others to bring domestic violence complaints before the Court under Article 3 and inspired the 2014 Istanbul Convention on Violence against Women.[11] When the Court recognised the victimhood of Nahide and others like her, it fundamentally changed the meaning of the prohibition of torture and inhuman or degrading treatment. The decision also strengthened the principle that states may bear responsibility for acts perpetrated by private actors should they fail to protect the victims or punish the perpetrators.[12] The precedent set in this case would come to influence the lives of many domestic violence victims by allowing them to seek justice under this *expanded* meaning of the prohibition.

Indeed, treating domestic violence cases as torture or ill-treatment was not what the founders of the European human rights regime had in mind when they drafted Article 3 in 1950. The foundational premise of the prohibition against torture and inhuman or degrading treatment is to protect individuals against the acts of state authorities, not against family members or private individuals. Built on the conceptual divide between public and private spheres, the norm against torture was crafted as a protective shield against the excesses of state authorities acting in their official

[9] Ibid., §200.

[10] Article 14 (prohibition of discrimination) reads as follows: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This means that Article 14 can only be invoked in conjunction with other articles in the European Convention.

[11] Selver B. Sahin, "Combatting Violence against Women in Turkey: Structural Obstacles," *Contemporary Politics* (2021): 1–21.

[12] The origins of this obligation in relation to Article 3 go back to earlier case law such as *A.* v. *the United Kingdom*, application no. 100/1997/884/1096 (September 23, 1998).

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capacities. It did not initially mean to cover abuses committed by an individual (in their personal capacity) within the private sphere.

To understand the degree to which the meaning of the prohibition of torture has shifted over time, let us look closely at the original definition under Article 3, which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Alastair Mowbray explains that, like most other rights under the Convention, Article 3 is formulated as a *negative obligation*; that is, an obligation to refrain from violating a right.[13] Negative obligations are derived from the classical liberal idea of curbing state interference in people's lives.[14] At its core, the prohibition holds that states must refrain from subjecting their citizens to torture and inhuman or degrading treatment. The Court's ruling in Nahide's case represents a new type of obligation – a *positive obligation* to protect and guarantee the fulfilment of individual rights.[15] States incur such obligations when they possess concrete knowledge of the risk of harm.[16] They are then required to take proactive measures to ensure that individuals facing such risks may enjoy their rights.[17] This may sometimes imply that states have to mobilise their resources to protect vulnerable groups, such as domestic violence victims, minors, or refugees,[18] or offer adequate medical treatment or minimally acceptable conditions to individuals under their control, such as detainees or prisoners.[19] Compared to negative obligations,

[13] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford and Portland: Hart Publishing, 2004), 5.

[14] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London and New York: Routledge, 2012), 2.

[15] For a comprehensive assessment on the relation between positive and negative obligations, see Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge, England; Antwerp and Portland: Intersentia, 2016).

[16] Vladislava Stoyanova, "Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights," *Leiden Journal of International Law* 33, no. 3 (2020): 603.

[17] Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, 2.

[18] Moritz Baumgärtel, "Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 38, no. 1 (2020): 12–29; Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press, 2019).

[19] For a great overview on how criminal law can be mobilised to fulfill such positive duties see, Laurens Lavrysen and Natasa Mavronicola, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Oxford and New York: Hart Publishing, 2020).

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positive obligations are, therefore, more resource-intensive in nature and have a clear socioeconomic dimension.[20]

It is also interesting to note that such resource-intensive new obligations were not added to the European Convention through an official amendment procedure or by means of an additional protocol. Instead, it was the European Court itself that introduced these new obligations under the prohibition of torture and inhuman or degrading treatment in the 1990s and the early 2000s.[21] In so doing, the Court expanded the definition of what constitutes torture or ill-treatment in that period. This was a *prima facie* judicial innovation with which the Court significantly expanded the scope of individual protections under this prohibition and began prescribing more demanding obligations. It effectively took *thou shalt not torture* and made it *thou shalt prevent torture*.[22]

However, this is not to say that the Court is the protagonist in this story of change. While courts play an important role in processing and pronouncing legal change through their judgments, the origins of such change episodes are the *victims*. Victims are the real protagonists. Nahide's case is a good illustration of how real experiences of suffering and injustice come to be translated into legal language and then distilled as standards in the course of court proceedings. Their stories are where it all begins, and through their complaints, the law is refined to reflect and shape moral progress.[23] The Court's jurisprudence weaves individual experiences and the law together. They are the warp and the weft in the Court's brocade. From them, the Court derives abstract standards for appropriate behaviour.

[20] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford and New York: Hart Publishing, 2021), 128.

[21] This is not the only example where the Court took the lead by engaging in a judicial innovation. The Court played a similar role in the introduction of the pilot judgment procedure. For more, see Ezgi Yildiz, "Judicial Creativity in the Making: The Pilot Judgment Procedure a Decade after Its Inception," *Interdisciplinary Journal of Human Rights Law* 8 (2015): 81–102.

[22] Although there are also scholars who argue that there is no clear-cut ideational separation between positive and negative obligations, there are differences when it comes to the time of their introduction, the frequency of their use, as well as the Court's reasons for not finding a violation of them, as this book makes it clear. See also, for example, Sandra Fredman FBA, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

[23] Michael Goldhaber provides a brilliant account of how individual stories shape European human rights law. For more, see Michael Goldhaber, *A People's History of the European Court of Human Rights:* (New Brunswick: Rutgers University Press, 2008).

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Even if the Court effectuates legal change through its judgments and decisions, the true driving force behind this change is the victims.

## Case Selection: Positive Obligations under Article 3 and the European Human Rights System

The emergence of positive obligations under the prohibition of torture and inhuman or degrading treatment within the European human rights system is an ideal case to glean information about the conditions of *progressive legal change* – the main focus of this book. I define progressive change as expanding the range of protections afforded to victims and the correlative obligations states must comply with, and I investigate when we can expect to observe such foundational changes. The introduction of positive obligations is an unequivocal episode of progressive legal change undertaken by a court that is not unequivocally progressive.[24] Rather, it is known to have conservative origins and practices.[25] Unlike other courts and institutions, such as the Inter-American Court of Human Rights or the United Nations (UN) Treaty Bodies, which have more or less consistently followed a progressive line,[26] the European Court's record is mixed.[27] The European Court has not been as progressive compared to

[24] Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of International Law* 14, no. 3 (2003): 529–68; Ezgi Yildiz, "Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights," *Temple International and Comparative Law Journal* 34, no. 2 (2020): 309–38.

[25] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford and New York: Oxford University Press, 2017); Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights,"529–68; Ezgi Yildiz, "Extraterritoriality Reconsidered: Functional Boundaries as Repositories of Jurisdiction," in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Daniel S. Margolies et al. (Routledge, 2019), 215–27.

[26] A good comparison is the Inter-American Court, which is known to predominantly engage in progressive interpretation. For more, see Lucas Lixinski, "The Consensus Method of Interpretation by the Inter-American Court of Human Rights," *Canadian Journal of Comparative and Contemporary Law* 3 (2017): 65.

[27] See, for example the state obligation to inform the families of disappeared persons. Eduardo Ferrer Mac-Gregor, "The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System," *Mexican Law Review* 9, no. 1 (2016): 121–39. M. T. Kamminga, "The Thematic Procedures of the UN Commission on Human Rights," *Netherlands International Law Review* 34, no. 3 (1987): 299–323; David Weissbrodt, "The

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other human rights courts and tribunals and stands out as a deviant case.[28] The European Court has been rights-expansive at certain times and for certain obligations.[29] Notably, it has oscillated between the audacity of its ruling in Nahide's case and its more forbearing attitude and deference to member states in other cases. The legal change explored here is shaped by these two opposing attitudes.

The book explains why the Court needs to oscillate between forbearance and audacity, and how this oscillation has shaped the norm against torture and inhuman or degrading treatment. This explanation sheds light on a broader question: what are the conditions under which we can expect international courts to be progressive?

Focusing on the European Court's recognition of new state obligations under Article 3, this book seeks to understand what it takes for the Court to be unambiguously progressive.[30] Analyzing change in environments that are not constantly progressive presents us with richer insights into the conditions under which progressive change is more or less likely to occur.[31] The Court is a compelling case to uncover the dynamics of change – especially in the context of the prohibition of torture and inhuman or degrading treatment – for at least three other reasons.

Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law," *University of Pennsylvania Journal of International Law*, no. 4 (2010 2009): 1185–1238.

28 Deviant cases are atypical cases that stand out. They are ideal for explanatory studies that look into underspecified explanations, as is the case here. For more, see Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61, no. 2 (2008): 302.

29 See for example, Giovanna Gismondi, "Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1," *Yale Human Rights and Development Law Journal* 18 (2016): 1. See also, Christine Byron, "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies," *Virginia Journal of International Law*, no. 4 (2007 2006): 839–96.

30 Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018): 197–220; Ximena Soley and Silvia Steininger, "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights," *International Journal of Law in Context* 14, no. 2 (2018): 237–57; Malcolm Langford and Daniel Behn, "Managing Backlash: The Evolving Investment Treaty Arbitrator?," *European Journal of International Law* 29, no. 2 (2018): 551–80. Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* (2019), 1–16.

31 For a different assessment of conditions of change, see Nico Krisch and Ezgi Yildiz, "The Many Paths of Change in International Law: A Frame," in *The Many Paths of Change in International Law* (Oxford and New York: Oxford University Press, 2023).

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First, beyond Europe, the Court is relevant on a global scale as a crucial source of authority in shaping the nature and the content of fundamental human rights.[32] With particular respect to the norm against torture and inhuman or degrading treatment, European jurisprudence has shaped the definitions currently in use.[33] For example, the UN Convention against Torture (CAT) adopted its definition of torture and inhuman or degrading treatment based on the one developed by the European Commission of Human Rights in the 1969 *Greek Case* decision.[34] Similarly, the well-known "minimum level of severity" criterion was first established in a European Court judgment.[35] In its 1978 *Ireland* v. *the United Kingdom* judgment, the Court pronounced that the alleged ill-treatment "must attain a minimum level of severity" to be considered under the prohibition of torture and inhuman or degrading treatment. The Court specified that the assessment of this minimum level should be relative, depending on the case's specific circumstances, including "the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."[36]

Second, in more recent history, the Court played an important role in debates around the redefinition of torture in the aftermath of the 9/11 attacks. The European Court's initial involvement was rather controversial and involuntary. The United States (US) government attempted to revise the legal definition of the norm against torture during its War on Terror that began in 2001. Former President George W. Bush's legal team meticulously distinguished torture from other forms of ill-treatment in an August 2002 Department of Justice memo (part of a series of memoranda known as Torture Memos).[37] This document limited the definition of torture to acts

[32] Helen Keller and Alec Stone Sweet, "Introduction: The Reception of the ECHR in National Legal Order," in *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford and New York: Oxford University Press, 2008), 15.
[33] John T. Parry, *Understanding Torture: Law, Violence, and Political Identity* (Ann Arbor: University of Michigan Press, 2010), 44.
[34] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, International Courts and Tribunals Series (Oxford and New York: Oxford University Press, 2010), 195.
[35] Association for the Prevention of Torture, "The Definition of Torture: Proceedings of an Expert Seminar" (Geneva, November 10, 2001); Aisling Reidy, "The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights," Human Rights Handbooks, No. 6 (Strasbourg: Council of Europe, 2003).
[36] *Ireland* v. *the United Kingdom*, application no. 5310/71, ECHR (January 18, 1978) §162.
[37] A set of legal memoranda drafted by John Yoo, then Deputy Assistant Attorney General, and signed in by Jay S. Bybee, then the head of the Office of Legal Counsel of the Department of Justice.

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causing extremely severe pain, equivalent to what one would feel when experiencing organ failure or death.[38] In so doing, the Torture Memos effectively permitted other coercive and cruel interrogation methods falling short of this specific definition as lawful instruments under the euphemism "enhanced interrogation methods."[39] When crafting this circumscribed definition, the Torture Memos relied on the European Court's reasoning in the 1978 *Ireland* v. *the United Kingdom* judgment, where the Court indeed invoked a restricted definition of torture. However, as we will see in Chapter 4, this 1978 judgment was issued in a specific political context in which the Court had limited discretionary space. In subsequent rulings, the European Court changed its position and expanded the definition of acts that could be characterised as torture.[40] Yet, the abovementioned memos disregarded these more recent developments and referred only to *Ireland* v. *the United Kingdom.*

The European Court's direct involvement in this debate was different. The Court had a chance to weigh in on the legality of this distinction and of American interrogation practices. It did so by reviewing cases concerning European countries that aided and abetted the US extraordinary rendition program and associated interrogation practices.[41] The European Court was the first international court to characterise the US government's use of enhanced interrogation techniques as torture in *El-Masri* v. *The Former Yugoslav Republic of Macedonia*.[42] The Court was also the first international court to cite and use parts of the Senate Intelligence Committee's

[38] For more, see Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge and New York: Cambridge University Press, 2006), 362; See also, Lisa Hajjar, *Torture: A Sociology of Violence and Human Rights* (New York; London: Routledge, 2013).

[39] Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib*, 1st edition (New York: Cambridge University Press, 2005).

[40] *Selmouni* v. *France*, application no. 25803/94, ECHR (July 28, 1999).

[41] Extraordinary rendition is a War on Terror method whereby suspected individuals would be apprehended, detained, transferred, and interrogated without due process, often in secret locations with the consent or support of foreign governments. For more on extraordinary renditions, see Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," in *The United States and Torture: Interrogation, Incarceration, and Abuse* (New York and London: New York University Press, 2011).

[42] These cases are *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, application no. 39630/09, ECHR[GC] (December 13, 2012); *Al-Nashiri* v. *Poland*, application no. 28761/11, ECHR (July 24, 2014); *Husayn (Abu Zubaydah)* v. *Poland*, application no. 7511/13, ECHR (February 16, 2015); *Nasr and Ghali* v. *Italy,* application no. 44883/09, ECHR (February 23, 2016); *Al-Nashiri* v. *Romania*, application no. 33234/12, ECHR (May 31, 2018); *Abu Zubaydah* v. *Lithuania*, application no. 46454/11, ECHR (May 31, 2018).

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