Extraordinary Renditions: The Right to the Truth

Macedonian agents seized Khaled El-Masri from a bus and held him without charge for 23 days, accusing him of being a member of Al-Qaeda. They then drove him to Skopje airport and handed him to a CIA rendition team who flew El-Masri to Kabul as part of the U.S. “Extraordinary Rendition” program, where he was detained for four months. The Grand Chamber of the European Court of Human Rights found that his treatment amounted to torture, and that he had been effectively disappeared by the US and Macedonian authorities.

Facts
On December 31, 2003, Khaled El-Masri traveled from his home in Ulm, Germany, to Skopje in Macedonia, by bus. When he reached the border, Macedonian law enforcement officials confiscated his passport and detained him for several hours.

He was then transferred by armed officers in plainclothes to the Skopski Merak hotel in Skopje, where he was detained for 23 days, guarded at all hours by rotating shifts of armed Macedonian officers. The curtains were closed day and night, and he was not permitted to leave the room. He was interrogated repeatedly, and told to admit that he was a member of Al Qaeda. His frequent requests to see a lawyer, translator, or German consular official, or to contact his wife, were denied. When he once moved toward the door and attempted to leave, three of his captors pointed pistols at his head and threatened to shoot him. He went on hunger strike to protest his innocence.

Handover to the CIA
On January 23, 2004, seven or eight Macedonian men entered the hotel room, handcuffed and blindfolded El-Masri and placed him in a car. He was driven to Skopje airport. He was removed from the vehicle, still handcuffed and blindfolded, and was led to a building. Inside, he was told that he would be medically examined. Instead, he was beaten severely from all sides with fists and what felt like a thick stick. His clothes were sliced from his body with scissors or a knife, leaving him in his underwear. He was told to remove his underwear and he refused. He was beaten again, and his underwear was forcibly removed. He heard the sound of photographs being taken. He was thrown to the floor. His hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus.

El-Masri was pulled from the floor and dragged to a corner of the room. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in a diaper. He was then dressed in a dark blue short-sleeved track suit and placed in a belt which was connected to chains that attached to his wrists and ankles. The men put earmuffs and eye pads on him, blindfolded him, and hooded him.

Flight to Afghanistan
El-Masri was then marched to a waiting aircraft, with the shackles cutting into his ankles. Once inside, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. He felt an injection in his shoulder, and became lightheaded. He felt a second injection that rendered him nearly unconscious.

The men dressed in black clothing and ski masks were members of a United States Central Intelligence Agency (CIA) “black renditions” team, who were operating under the U.S. “extraordinary rendition” program.
Flight records show that on January 23, 2004, a Boeing 737 business jet owned by a U.S.-based corporation, Premier Executive Transportation Services, Inc., operated by another U.S.-based corporation, Aero Contractors Limited, and registered by the U.S. Federal Aviation Administration as aircraft N313P, flew El-Masri from Macedonia via Baghdad to Afghanistan. The same plane has been identified as being involved in other rendition flights.

Four-Month Detention in Afghanistan

El-Masri was detained in conditions that were inhuman and degrading, beaten by armed guards, subjected to violent and prolonged interrogations, force-fed following a 27-day hunger strike, and denied medical treatment. He was never charged, brought before a judge, granted access to German government representatives, or allowed to communicate with his family or anyone else in the outside world. He lost some thirty kilograms while in detention.

On May 28, 2004, El-Masri’s belongings were returned to him, including his passport, and he was flown on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Berat-Kuçova Aerodrome. On arrival he was driven in a car for several hours and then let out and told not to look back. Almost immediately he was arrested by the Albanian authorities and driven to Mother Theresa Airport near Tirana where he was put on a commercial flight to Frankfurt. When he arrived at his home in Ulm, Germany, he learned that his wife and children had relocated to Lebanon, not having heard from him for more than four months.

Attempts to Seek Justice

Following a complaint from El-Masri, prosecutors in Munich opened an investigation into his allegations in June 2004. During the investigation, German officials verified from eye-witnesses that El-Masri did indeed travel to Macedonia by bus at the end of 2003, and that he had been detained shortly after entering that country. Prosecutors also confirmed from stamps in his passport that he entered Macedonia on December 31, 2003, and exited on January 23, 2004. They conducted scientific tests of his hair which proved that he had spent time in a South Asian country and had been deprived of food for an extended period.

On December 6, 2005, German Chancellor Angela Merkel stated after meeting with U.S. Secretary of State Condoleezza Rice that the United States had accepted that it had made an “error” in El-Masri’s case. On January 31, 2007, the German Prosecutor filed indictments against thirteen CIA agents for their alleged involvement in the rendition.

The Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament have undertaken inquiries into the collaboration of European governments with the CIA “extraordinary renditions” program. Their inquiries corroborated the details of El-Masri’s rendition in its entirety, including his secret detention and interrogation in Macedonia and Afghanistan.

In the United States, the American Civil Liberties Union (ACLU) sued the director of the CIA, unknown CIA agents and several corporations seeking compensation and declaratory relief for violations of El-Masri’s rights. The US courts dismissed the complaint on the basis of the “state secrets privilege” on the ground that “the very subject of the litigation is itself a state secret.” The U.S. Supreme Court declined to accept jurisdiction. In April 2008, the ACLU filed a complaint against the United States with the Inter-American Commission on Human Rights.

In Spain, prosecutors have investigated the operations of the CIA rendition team that rendered El-Masri, whose itinerary included a stop in Palma de Mallorca before proceeding to pick him up in Skopje. In May 2010, a Spanish prosecutor asked a judge to issue international arrest warrants against members of the rendition team.

Proceedings in and against Macedonia

The government of Macedonia has been asked numerous times to explain what happened to El-Masri: by the German prosecutors, Spanish prosecutors, the PACE inquiry, and the European Parliament inquiry. On October 6, 2008, El-Masri filed a formal request with the Office of the Skopje Prosecutor to carry out a criminal investigation of his illegal detention and abduction and to bring criminal proceedings against those responsible. The request alleged that unnamed personnel of the Macedonian Ministry of the Interior were responsible for the unauthorized deprivation of his liberty and for the crime of torture or other cruel, inhuman, or degrading treatment or punishment. The prosecutor took no action until the statutory time limit for commencing a criminal case expired in early 2009.
On January 24, 2009, El-Masri filed a civil lawsuit for damages against the Macedonian Ministry of Interior in relation to his unlawful abduction and ill-treatment by MoI personnel in January 2004. The civil case is still pending at the Basic Court Skopje II. The civil proceedings, however, are not capable of providing effective remedies for the violation of El-Masri’s rights under the European Convention on Human Rights.

**Open Society Justice Initiative Involvement**
The Open Society Justice Initiative assisted Macedonian lawyer Filip Medarski to litigate the case through the Macedonian courts, and acted as co-counsel before the European Court of Human Rights.

**Arguments**

**Illegal Detention.** The government of Macedonia is responsible for illegally detaining El-Masri for 23 days in the Skopski Merak hotel, without charge and without bringing him before a Judge, in violation of Article 5 ECHR (liberty and security).

**Handover to the CIA Rendition Team.** Macedonian government agents stood by and did nothing while El-Masri was ill-treated by the CIA rendition team in a process that was designed to break his spirit, in violation of Article 3 (torture and inhuman or degrading treatment). In addition, Macedonia knew that by handing El-Masri to the CIA he would be flown to Kabul where there was a real risk that he would be detained without trial and in conditions that were inhuman, in further violation of Article 3 (torture) and in violation of Article 5 ECHR (liberty and security).

**No investigation.** There has never been a proper investigation into how El-Masri was detained in Skopje and then handed over to the CIA, in violation of the requirement to undertake an investigation into violations of Article 3 ECHR (torture).

**No remedy.** Despite many attempts, El-Masri has been unable to get a criminal court in Macedonia to hear his case, in violation of Article 13 ECHR (right to remedy).

**Right to the Truth.** Macedonia is hiding its role as one of the European governments that were secretly helping the CIA rendition program. El-Masri and society as a whole have a right to know the truth.

**Timeline**

**December 31, 2003.** El-Masri detained by Macedonian border guards and detained in the Skopski Merak hotel.

**January 23, 2004.** Transfer to the CIA at Skopje airport. Forcibly boarded on to CIA aircraft N313P, departing for Baghdad and Kabul. Detained for nearly 4 months.


**June 2004.** Investigation opened by the German prosecutor.

**January 22, 2006.** First report by the Parliamentary Assembly of the Council of Europe (PACE) (Marty I).

**June 15, 2006.** Report by the European Parliament (Fava Inquiry).

**January 31, 2007.** German prosecutor indicts thirteen named CIA agents. They are never arrested.

**June 7, 2007.** Second report by PACE (Marty II).

**April 9, 2008.** Petition filed to Inter-American Commission on Human Rights by ACLU.

**October 2008.** Criminal complaint filed with local Macedonian prosecutor.

**January 22, 2009.** Civil claim for damages filed against the Macedonian government.

**September 21, 2009.** Application filed to the European Court of Human Rights.

**October 8, 2010.** The European Court formally communicates the case to Macedonia, and asks the government to respond to El-Masri’s claims by late January 2011.

**January 24, 2012.** Case relinquished to the Grand Chamber of the European Court of Human Rights.

**May 16, 2012.** Hearing before the Grand Chamber of the European Court of Human Rights.

**December 13, 2012.** Judgment delivered by the Grand Chamber.

**Findings**

On December 13, 2012, the Grand Chamber of the European Court of Human Rights delivered judgment in the case, finding multiple violations of the European Convention.

**Article 3 (prohibition of torture)**

The Court found that the CIA rendition team had tortured Mr. El-Masri, and that Macedonia was responsible.
Ill-treatment at the Skopski Merak hotel. The solitary incarceration of Mr. El-Masri for 23 days caused him emotional and psychological distress, as he did not know what would happen to him next. This treatment was inflicted for the purpose of extracting a confession, and aggravated by the fact that he was kept incommunicado, outside any judicial framework. This was “inhuman and degrading treatment in breach of Article 3”.

Torture by the CIA at Skopje airport. The Court found that the use of “capture shock” techniques at Skopje airport by the CIA rendition team was of sufficient severity to amount to torture. None of the individual measures used was justified by the circumstances, and they were inflicted in combination and with premeditation, “the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant”. The Macedonian authorities “must be considered directly responsible” for the torture “since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring”.

Extraordinary Rendition. The unlawful transfer of Mr. El-Masri to the US authorities amounted to extraordinary rendition, “an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture of cruel, inhuman or degrading treatment.” The Court found that there had been no warrant for Mr. El-Masri’s arrest, and that the Macedonian authorities knew that the plane was going to Kabul. At the time there were many public reports that the US authorities were using or tolerating practices “manifestly contrary to the principles of the Convention”. El-Masri was thus exposed to “a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention”.

Article 5 (prohibition against arbitrary detention)
The Court found that Mr. El-Masri was held in the Skopski Merak hotel for 23 days “in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation ... of Article 5”. The Macedonian authorities knew that El-Masri was to be subjected to “extraordinary rendition” and it should have been clear that in handing him over he “faced a real risk of a flagrant denial of his rights under Article 5”. Because they “actively facilitated his subsequent detention in Afghanistan,” Macedonia was responsible for the entirety of Mr. El-Masri’s detention, both in Skopje and then in Afghanistan. His abduction and detention amounted to “enforced disappearance”, even though temporary. The fact that he was suspected of terrorist offences was irrelevant: “Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have carte blanche ... to arrest suspects and detain them in police custody, free from effective control by the domestic courts” and the Strasbourg Court itself.

Failure to Investigate (Article 2, Article 3, Article 5)
The Court concluded that the investigation was insufficient. The prosecutor had not interviewed Mr. El-Masri, or the staff at the Skopski Merak hotel, or sought out further information about the CIA plane, particularly the identity of the passenger that boarded at Skopje airport that night. The prosecutor relied exclusively on information provided by the Ministry of Interior, whose agents were suspected of having been the perpetrators. The decision not to investigate further fell short of what was required.

Right to Truth
In its most extensive discussion of the issue to date, the Court referred to “the right to truth” in finding that Macedonia had failed adequately to investigate credible allegations of torture. In doing so, the Court underlined “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.”

The Court rejected any attempt to rely on secrecy to evade redress in this and related cases, noting: “The concept of 'state secrets' has often been invoked to obstruct the search for the truth. State secret privilege was also asserted by the US government in the applicant's case before the US courts.... The Court considers that ... an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts”.

Article 13 (right to an effective remedy)
The Court found a violation of Article 13. Mr. El-Masri should have been able to avail himself of effective
and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation. The criminal investigation was insufficient. There was no review of the decision to transfer him to the CIA, either by a judicial authority or any other authority.

**Just Satisfaction**

Due to the “extreme seriousness” of the violations of the Convention, the Court ordered that Macedonia pay Mr. El-Masri €60,000.