

Macedonian Government responsible for torture, ill-treatment and secret rendition of a man suspected of terrorist ties

In today's Grand Chamber judgment in the case of [El-Masri v. "the former Yugoslav Republic of Macedonia"](#) (application no. 39630/09), which is final¹, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights on account of the inhuman and degrading treatment to which Mr El-Masri was subjected while being held in a hotel in Skopje, on account of his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the United States authorities, thus exposing him to the risk of further treatment contrary to Article 3; **a violation of Article 3** on account of the failure of "the former Yugoslav Republic of Macedonia" to carry out an effective investigation into Mr El-Masri's allegations of ill-treatment;

violations of Article 5 (right to liberty and security) on account of his detention in the hotel in Skopje for 23 days and of his subsequent captivity in Afghanistan, as well as on account of the failure to carry out an effective investigation into his allegations of arbitrary detention;

a violation of Article 8 (right to respect for private and family life); and,

a violation of Article 13 (right to an effective remedy).

The case concerned the complaints of a German national of Lebanese origin that he had been a victim of a secret "rendition" operation during which he was arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated for over four months.

The Court found Mr El-Masri's account to be established beyond reasonable doubt and held that "the former Yugoslav Republic of Macedonia" had been responsible for his torture and ill-treatment both in the country itself and after his transfer to the US authorities in the context of an extra-judicial "rendition".

Principal facts

The applicant, Khaled El-Masri, a German national of Lebanese origin, was born in 1963 and lives in Ulm (Germany). According to his submissions, having arrived in "the former Yugoslav Republic of Macedonia" by bus on 31 December 2003, he was arrested at the border crossing by the Macedonian police. They took him to a hotel in Skopje, where he was kept locked in a room for 23 days and questioned in English, despite his limited proficiency in that language, about his alleged ties with terrorist organisations. His requests to contact the German embassy were refused. At one point, when he stated that he intended to leave, he was threatened with being shot.

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

On 23 January 2004, Mr El-Masri, handcuffed and blindfolded, was taken to Skopje Airport, where he was severely beaten by disguised men. He was stripped of his clothes, then sodomised with an object and later placed in a nappy and dressed in a tracksuit. Shackled and hooded, and subjected to total sensory deprivation, he was forcibly taken to an aircraft, which was surrounded by Macedonian security agents. When on the plane, he was thrown to the floor, chained down and forcibly tranquilised. According to Mr El-Masri, his treatment before the flight at Skopje Airport, most likely at the hands of a rendition team of the CIA, was remarkably consistent with a subsequently disclosed CIA document describing so-called "capture shock" treatment.

Mr El-Masri was flown to another country, where it was warmer outside than in Skopje, which was sufficient for him to conclude that that he had not been returned to Germany, as he had been told. He later deduced that he was in Afghanistan. According to his submissions, he was kept for over four months in a small, dirty, dark concrete cell in a brick factory near Kabul, where he was repeatedly interrogated and was beaten, kicked and threatened. His repeated requests to meet with a representative of the German Government were ignored. During his confinement, in March 2004, Mr El-Masri started a hunger strike to protest about being kept in detention without charges. In April, 37 days into his hunger strike, he claims that he was force-fed through a tube, which made him severely ill and bedridden for several days. In May 2004, he allegedly started a second hunger strike.

On 28 May 2004, he was taken, blindfolded and handcuffed, by plane to Albania and subsequently to Germany. Mr El-Masri then weighed about 18 kilos less than a few months earlier when he had left Germany. Immediately after his return to Germany, he contacted a lawyer and has brought several legal actions since. In 2004, an investigation was opened in Germany into his allegations that he had been unlawfully abducted, detained and abused. In January 2007, the Munich public prosecutor issued arrest warrants for a number of CIA agents, whose names were not disclosed, on account of their involvement in Mr El-Masri's alleged rendition.

A claim filed in the United States in December 2005 by the American Civil Liberties Union on Mr El-Masri's behalf against the former CIA director and certain unknown CIA agents was dismissed. The court decision, which became final with the US Supreme Court's refusal to review the case in October 2007, stated in particular that the State's interest in preserving State secrets outweighed Mr El-Masri's individual interest in justice.

A criminal complaint lodged by Mr El-Masri's representative in October 2008 in "the former Yugoslav Republic of Macedonia" against unidentified law-enforcement officials on account of his unlawful detention and abduction was dismissed by the Skopje public prosecutor in December 2008.

The position of the Government of "the former Yugoslav Republic of Macedonia" has been that Mr El-Masri had entered the country on 31 December 2003, had been interviewed by the police as suspected of travelling with false documents, had been allowed entry into the country and then had left over the border crossing into Kosovo².

There have been a number of international inquiries into allegations of "extraordinary renditions" in Europe and the involvement of European Governments, which have referred to Mr El-Masri's case. In particular, in 2006 and 2007, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, under the rapporteurship of Senator Dick Marty of Switzerland, investigated those allegations. The 2007 Marty Report concluded that Mr El-Masri's case was "a case of documented

² All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

rendition” and that the Macedonian Government’s version of events was “utterly untenable”. The report relied in particular on the following evidence:

Aviation logs confirming that a business jet registered by the US Federal Aviation Administration had landed at Skopje Airport on 23 January 2004 and had left Skopje on the same evening for Kabul via Baghdad; flight logs confirming that a CIA-chartered aircraft had taken off from Kabul on 28 May 2004 and landed at a military airbase in Albania; scientific testing of Mr El-Masri’s hair follicles, conducted in the framework of the German criminal investigation, confirming that he had spent time in a South Asian country and had been deprived of food for an extended period of time; geological records that confirmed Mr El-Masri’s recollection of minor earthquakes in Afghanistan which had happened during his alleged detention; and, sketches that he had drawn of the Afghan prison, which had immediately been recognisable to another rendition victim who had been detained by US officials in Afghanistan.

In April 2006, the German *Bundestag* appointed a parliamentary inquiry committee to review the activities of the secret services, in the context of which Mr El-Masri was heard. Its 2009 report concluded in particular that his account of his imprisonment in “the former Yugoslav Republic of Macedonia” and in Afghanistan was credible.

In the proceedings before the European Court of Human Rights, H.K., who was at the time of Mr El-Masri’s captivity Minister of the Interior of “the former Yugoslav Republic of Macedonia”, submitted a written statement in March 2010. He confirmed, in particular, that the Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had detained Mr El-Masri and kept him incommunicado in Skopje under the constant supervision of agents of the State Intelligence Service. He had later been handed over to the custody of a CIA “rendition team” at Skopje Airport and had been flown out of the country on a CIA-operated aircraft.

Complaints, procedure and composition of the Court

Relying on Article 3, Mr El-Masri complained of being ill-treated while kept in the hotel in Skopje, subjected to a “capture shock” by a CIA rendition team at the Skopje airport and ill-treated while in Afghanistan, and that there had been no effective investigation into those complaints. Relying on Article 5, he complained that he had been detained unlawfully and kept incommunicado, without any arrest warrant having been issued, that he had never been brought before a judge, that “the former Yugoslav Republic of Macedonia” was responsible for his entire period of captivity until his transport to Albania in May 2004, and that there had been no prompt and effective investigation into his complaints. He further alleged, in particular, that his secret and extrajudicial abduction and arbitrary detention had violated his right to respect for private life under Article 8, and that he had had no effective remedy in respect of his complaints under Articles 3, 5 and 8, in breach of Article 13.

The application was lodged with the Court on 20 July 2009. On 24 January 2012, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. The following organisations made written submissions as third parties: United Nations High Commissioner for Human Rights, Interights, Redress, Amnesty International and the International Commission of Jurists. A Grand Chamber hearing was held on 16 May 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (United Kingdom), *President*,
 Françoise **Tulkens** (Belgium),

Josep **Casadevall** (Andorra),
 Dean **Spielmann** (Luxembourg),
 Nina **Vajić** (Croatia),
 Peer **Lorenzen** (Denmark),
 Karel **Jungwiert** (Czech Republic),
 Khanlar **Hajiyev** (Azerbaijan),
 Isabelle **Berro-Lefèvre** (Monaco),
 Luis **López Guerra** (Spain),
 Ledi **Bianku** (Albania),
 Işıl **Karakas** (Turkey),
 Vincent A. **de Gaetano** (Malta),
 Julia **Laffranque** (Estonia),
 Linos-Alexandre **Sicilianos** (Greece),
 Erik **Møse** (Norway),
 Helen **Keller** (Switzerland),

and also Michael **O'Boyle**, *Deputy Registrar*.

Decision of the Court

As to the facts of the case, the Court noted that Mr El-Masri's account, contested by the Government, had been very detailed, specific and consistent throughout the whole period following his return to Germany. His account was furthermore supported by a large amount of indirect evidence obtained during the international inquiries and the investigation by the German authorities, on the basis of which the Marty Report had concluded that there had been a "documented rendition" and that the Government's version of events was untenable. Finally, the statement by the former Macedonian Minister of the Interior submitted to the Court was confirmation of the facts established in the course of the other investigations and of Mr El-Masri's consistent and coherent description of events.

In view of that evidence, the burden of proof was shifted to the Government. However, they had failed to demonstrate conclusively why that evidence could not serve to corroborate Mr El-Masri's allegations nor had they presented the Court with any reason to cast doubt on the former Minister's credibility. The Court therefore considered that it could draw inferences from the available material and the authorities' conduct and found Mr El-Masri's allegations sufficiently convincing and established beyond reasonable doubt

Article 3

While Mr El-Masri was kept in the hotel, no physical force had been used against him. However, his solitary incarceration there as part of a secret operation – in a permanent state of anxiety due to the uncertainty about his fate during the interrogations, being kept incommunicado for 23 days – had to have caused him emotional and psychological distress. Such treatment had been intentionally used with the aim of extracting information about his alleged ties with terrorist organisations. Furthermore, the threat that he would be shot if he left the hotel room had been real and immediate. In that light, the Court concluded that Mr El-Masri's **treatment in the hotel amounted on various counts to inhuman and degrading treatment in violation of Article 3.**

Mr El-Masri's **treatment at Skopje Airport** at the hands of the CIA rendition team – being severely beaten, sodomised, shackled and hooded, and subjected to total sensory deprivation – had been carried out in the presence of State officials of "the former Yugoslav Republic of Macedonia" and within its jurisdiction. Its Government was consequently responsible for those acts performed by foreign officials. It had failed to submit any arguments explaining or justifying the degree of force used or the necessity of the invasive and potentially debasing measures. Those measures had been used with

premeditation, the aim being to cause Mr El-Masri severe pain or suffering in order to obtain information. In the Court's view, such treatment had **amounted to torture, in violation of Article 3**.

Finally, the Court found that the Government of "the former Yugoslav Republic of Macedonia" was **responsible for exposing Mr El-Masri to the risk of further treatment in violation of Article 3** by having transferred him into the custody of the US authorities. The Court noted that there was no evidence that the transfer had been pursuant to a legitimate request for his extradition. As was evident from the aviation records, the Macedonian authorities had had knowledge of the destination of the flight. Furthermore, reports about the practices used by the US authorities on those suspected of involvement in terrorism, which were manifestly contrary to the principles of the Convention, had previously been made public. The Macedonian authorities therefore knew or ought to have known that there was a real risk Mr El-Masri would be exposed to treatment contrary to Article 3, but had not sought any assurances from the US authorities to avert this risk. His transfer had constituted an "extraordinary rendition".³

The Court observed that Mr El-Masri had brought his allegations of ill-treatment to the attention of the Macedonian public prosecutor, supported by evidence which had emerged from the international and other foreign investigations. The State had therefore been under an obligation to carry out an effective investigation. However, other than contacting the Ministry of the Interior for information, the public prosecutor had not undertaken any investigative measure to examine those allegations before rejecting the complaint for lack of evidence. In particular, she had not interviewed Mr El-Masri or the personnel working in the hotel in Skopje at the time of his alleged captivity there. Nor had any steps been taken to establish why the aircraft suspected of having been used to transfer Mr El-Masri to Afghanistan had landed or to investigate the identity of the passenger who had boarded it that night. The public prosecutor's relying exclusively on the report of the Ministry – whose officials were suspected of having been involved in Mr El-Masri's alleged treatment – fell short of what could have been expected of an independent authority. In its submissions before the Court, the Government had also conceded that the investigation had not been effective, but had alleged that this was due to the late submission of the complaint and the fact that it had been filed against an unidentified perpetrator.

The Court underlined that the case was important not only for Mr El-Masri, but also for other victims of similar crimes and for the general public, who had the right to know what had happened. It concluded that the summary investigation that had been carried out could not be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth. There had accordingly been a further **violation of Article 3 as concerned the lack of an effective investigation into Mr El-Masri's allegations**.

Article 5

The Court found that the Government of "the former Yugoslav Republic of Macedonia" was responsible for violating Mr El-Masri's rights under Article 5 during the entire period of his captivity. There had been no court order for his detention, as required under national law, and no custody records of his confinement in the hotel, a detention place outside any judicial framework. He had been deprived of any possibility of being brought before a court to test the lawfulness of his detention, having been left entirely at the mercy of the officials holding him. Furthermore, by handing Mr El-Masri over to the US

³ In a previous decision (*Babar Ahmad and Others v. the United Kingdom* 24027/07, 11949/08 and 36742/08 of 6 July 2010), the Court adopted the definition of "extraordinary rendition" used by the United Kingdom Intelligence and Security Committee and took it to mean "the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment."

authorities, it should have been clear to the Macedonian authorities that he faced a real risk of a flagrant violation of his rights under Article 5. Finally, having regard to its finding that there had been no effective investigation into his complaints of ill-treatment, the Court held that, for the same reasons, there had been no meaningful investigation into his allegations of arbitrary detention, in further violation of Article 5.

Article 8

Having regard to its conclusions concerning the responsibility of “the former Yugoslav Republic of Macedonia” under Articles 3 and 5, the Court considered that the State was also responsible for the interference with Mr El-Masri’s right to respect for private and family life. In view of the established evidence, the Court considered that that interference had been unlawful and thus in violation of Article 8.

Article 13

Mr El-Masri’s arguable complaints under Articles 3, 5 and 8 had never been the subject of any serious investigation. The ineffectiveness of the criminal investigation had moreover undermined the effectiveness of any other remedy, including a civil action for damages. He had therefore been denied the right to an effective remedy, in violation of Article 13.

Just satisfaction (Article 41)

The Court held that “the former Yugoslav Republic of Macedonia” was to pay Mr El-Masri 60,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions

Judges Tulkens, Spielmann, Sicilianos and Keller expressed a joint concurring opinion. Judges Casadevall and López Guerra expressed a separate joint concurring opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.