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Historic ruling on European country's involvement in US-led rendition programme

On 13 December 2012, the Grand Chamber of the European Court of Human Rights for the first time held a European state responsible for its complicity in the covert US-led rendition and secret detention programmes giving judgment in a case concerning the detention and rendition of German national Khaled El-Masri. Amnesty International and the International Commission of Jurists (ICJ) consider the ruling a milestone in the fight against impunity.

The European Court held unanimously that the former Yugoslav Republic of Macedonia (Macedonia) was responsible for Khaled El-Masri's unlawful detention, enforced disappearance, torture and other ill-treatment.

The Court also held Macedonia responsible for his transfer out of Macedonia to Afghanistan where he faced torture, with Macedonia being directly responsible for his enforced disappearance in Afghanistan at the hands of the CIA.

This judgment recognised that the CIA rendition and secret detention programmes involved torture and enforced disappearances and confirmed Macedonia's role in these programmes. The Court's judgment is a step toward accountability for European involvement in torture and enforced disappearance and will have ramifications beyond this immediate case, especially as it highlights the principle that both victims and the public have the right to know the truth about these serious violations.

Macedonia is not the only government to have been directly involved and/or complicit in these US-led operations. Many other European governments colluded with the USA to abduct, unlawfully transfer, "disappear" and torture people in the course of rendition operations. While Amnesty International and the ICJ believe that this historic judgment represents progress, much more needs to be done to ensure accountability for these violations of human rights, across Europe and in the USA.

The judgment affirms without doubt that in Europe at least there can be no impunity for the grave human rights violations that the covert US-led programmes entailed. Europe must be a place of redress, accountability and truth, where international human rights law obligations are not bypassed but fulfilled. In the light of this, the Grand Chamber's judgment highlights the total absence of accountability and remedy in the USA in relation to the CIA's rendition and secret detention programmes operated during the administration of President George W. Bush.

Khaled El-Masri, a German national of Lebanese descent, was arrested by the Macedonian authorities after he crossed into the country from Serbia on 31 December 2003.

They held him incommunicado in a hotel in Skopje, subjecting him to enforced disappearance, repeated interrogations and to ill-treatment, until 23 January 2004 when they handed him over to CIA agents at Skopje airport.

At Skopje airport CIA agents beat him severely, before he was stripped, sodomised with an object, shackled and hooded, then thrown onto a plane, tranquillised and transferred to

Afghanistan. The Court underlined that Macedonia was directly responsible for the torture inflicted on El-Masri at Skopje airport by CIA agents because Macedonian officials were present and failed to do anything to stop the torture.

He was then taken to Afghanistan where he was illegally held, without being charged with any crime and without access to any procedure to challenge his detention. Further, he was denied access to a lawyer. His whereabouts were not acknowledged, and he was held incommunicado. As a result he was subjected to enforced disappearance for over four months. While in Afghanistan, he alleged he was subjected to torture and other ill-treatment.

In the ruling, the Court held Macedonia responsible for actively facilitating the CIA in the violations perpetrated against Khaled El-Masri. Noting that “a person should not be treated in a way that causes a loss of dignity”, the Court also found that Macedonia had violated El-Masri’s right to privacy and family life.

In its judgment the European Court also confirmed, in line with the joint submissions made by Amnesty International and the ICJ, that Macedonia was responsible for multiple egregious violations of Khaled El-Masri’s human rights as a consequence of transferring him to CIA custody in the knowledge that he would face a real risk of torture and other ill-treatment and enforced disappearance. The Court held that Macedonia knew or ought to have known of such a risk, citing a number of contemporary reports by Amnesty International, as well as the inquiries of Senator Marty for the Parliamentary Assembly of the Council of Europe and other reports describing US interrogation methods and practices that “are manifestly contrary to the principles” of the European Convention on Human Rights.

Separately, Macedonia was also directly responsible for his enforced disappearance at the hands of the CIA in Afghanistan between January and May 2004 following his transfer out of Macedonia. The Court underlined that Khaled El-Masri’s enforced disappearance was a continuing violation “characterised by an ongoing situation of uncertainty and unaccountability” that persisted for the length of his captivity.

That was because the Macedonian authorities handed him over to US agents even though “it should have been clear to the Macedonian authorities” that El-Masri faced “a real risk of a flagrant violation” of his right to liberty. The Macedonian authorities knew or ought to have known that the USA was engaged in arbitrary and secret detentions in the pursuit of counterterrorism operations. The Court recognised that these operations involved “extraordinary rendition”, that is, detention “‘outside the normal legal system’ and which, ‘by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention’”.

These findings have an important bearing on the accountability of other European states for their collusion in the rendition and secret detention programmes. Other states may be considered to have had similar knowledge of the rendition programme at that time – as the Court noted the material cited in the judgment “was in the public domain” before El-Masri’s transfer to the CIA in January 2004.

The Court also highlighted the failure of the Macedonian government to undertake an effective investigation into its involvement in Khaled El-Masri’s case and to provide him with effective redress.

In Macedonia, a request by Khaled El-Masri to launch a criminal investigation into his treatment was not pursued. The Court said that the “summary investigation” carried out by the Macedonian authorities could not be regarded as effective. In this context, the Court emphasised how the inadequate investigation by the Macedonian authorities deprived Khaled El-Masri of his right to being informed and obtaining an accurate account of what had happened to him, including the role of those responsible for the violations of his rights. As such, the failings of the Macedonian investigation violated El-Masri’s right to the truth.

In the light of those failures, the Court held that Macedonia had violated Khaled El-Masri's right to a remedy and to the truth and Macedonia's procedural obligation to investigate allegations of torture and enforced disappearance.

Amnesty International and the ICJ have documented and highlighted how most implicated European governments have hidden behind the shield of 'state secrecy' and have refused to disclose the truth about their involvement in the CIA operations. The Court also confirmed these findings in its judgment in this case. As both organizations have pointed out, torture and enforced disappearance are not state secrets, they are crimes under international law.

Amnesty International and the ICJ have urged other European governments to take note of this historic judgment and take urgent measures to ensure that the truth is told, that thorough, effective, independent and impartial investigations are carried out and those responsible are held accountable.

Macedonia is not the only state to have failed to investigate serious allegations regarding the case of Khaled El-Masri. A flawed German parliamentary inquiry that lacked the full cooperation of the German government concluded in July 2009 that neither the German government nor its agents were involved in the human rights violations perpetrated against Khaled El-Masri. Amnesty International has called on the German authorities to re-open an investigation into its possible role in Khaled El-Masri's rendition.

Macedonia's and Germany's failures are but two instances in a broader pattern of systematic individual and collective failures by many European states to ensure accountability for their involvement in the rendition and secret detention programmes, as highlighted in the report of the ICJ's Eminent Jurist Panel *Assessing Damage, Urging Action*. For example, Amnesty International has also documented credible evidence that Poland, Lithuania, and Romania hosted secret detention centres run by the CIA. The reports of Senator Marty for the Parliamentary Assembly of the Council of Europe also provide detailed information on the operation of the renditions and secret detention programmes in Europe.

In this connection, further cases are pending before the European Court of Human Rights. Abu Zubaydah and 'Abd al Rahim al-Nashiri, both currently detained at the US naval base at Guantánamo Bay, Cuba, have lodged complaints with the European Court.

The Court is due shortly to hear the cases of al-Nashiri against Poland and Romania, while the case of Abu Zubaydah against Lithuania has been lodged and Lithuania has been informed of the case.

Despite the existence of credible allegations, and states' obligations under international human rights law, European states have failed to carry out prompt, thorough, effective, independent and impartial investigations into their involvement in the US-led rendition and secret detention programmes.

Isolated attempts at prosecuting such complicity have occurred in some Council of Europe Member States, but have generally been shrouded in secrecy and failed to achieve proper accountability and the truth about what happened.

A recent exception to this occurred in Italy where in September 2012 the Court of Cassation upheld the convictions of CIA and some Italian intelligence operatives in connection with the kidnapping of Abu Omar, albeit *in absentia* for the CIA agents, which was partly a result of the broader failure of the Italian government to cooperate with the judicial investigations. Furthermore, the Court of Cassation ordered the retrial of high-level Italian intelligence officials against whom the cases had previously been dismissed on the basis of the secret of state doctrine, which the Court held had been misapplied by the lower courts.

Accountability has also been notable only by its absence in the USA. A lawsuit against the CIA brought by Khaled El-Masri was dismissed by the US federal courts after the administration invoked the "state secrets privilege". The European Court noted this outcome, and also that

“the concept of ‘State secrets’ has often been invoked to obstruct the search for truth”. Courts in the USA have consistently refused to hear the merits of lawsuits seeking redress for human rights violations committed in this context, citing national security, secrecy and various forms of immunity under US law.

Both the administration of President George W. Bush and that of President Barack Obama have argued for judicial dismissal of such lawsuits, while at the same time failing to ensure other routes to accountability and remedy.

The operational details of and particular practices employed in the past detention, rendition and interrogation activities of the CIA remain generally classified ‘Top Secret’ and exempted from disclosure under the Freedom of Information Act. Criminal investigations into the CIA secret detention and interrogation programme have been shut down by the US Department of Justice. Khaled El-Masri’s case against the USA is currently pending before the Inter-American Commission on Human Rights.

The US authorities should now take note of the European Court’s findings, including that Khaled El-Masri was subjected to torture by the CIA rendition team at Skopje airport and to enforced disappearance for the duration of his detention in US custody.

Further reading, including Amnesty International and ICJ submissions in this case

The third-party written submissions on behalf of Amnesty International and ICJ in the case of *El-Masri v “The Former Yugoslav Republic of Macedonia”*, Application No.39630/09, filed pursuant to Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of the European Court of Human Rights, can be found here: <http://www.amnesty.org/en/library/info/EUR65/001/2012/en>

For further information about Amnesty International and ICJ’s concern about European states’ involvement in the US-led secret detention and rendition programme, including the case of Khaled El-Masri, please see the hyperlinks below to selected documents by way of illustration.

- Joint submissions of Amnesty International and ICJ the case of *Al Nashiri v Poland*, 5 November 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/ICJAI-AmicusBrief-AlNashiri_v_Poland.pdf
- Press Release, *EU Parliament raises pressure for CIA flights, torture, prisons probe*, 11 September 2012, <http://www.amnesty.eu/en/press-releases/all/0587-0587/>
- Amnesty International and ICJ joint Public Statement, *European Court of Human Rights hears key case concerning European complicity in the US-led secret detentions and renditions programme*, EUR 65/002/2012, 16 May 2012, <http://www.amnesty.org/en/library/info/EUR65/002/2012/en>
- Public Statement, *Europe: “What is new on the alleged CIA illegal detention and transfers of prisoners in Europe?”*, EUR 01/006/2012, March 2012, <http://www.amnesty.org/en/library/info/eur01/006/2012/en>
- Public Statement, *“Current Evidence: European Complicity in the CIA Rendition and Secret Detention Programmes”*, European Parliament, Background paper for the European Parliament Sub-Committee on Human Rights, EUR 01/001/2011, 25 January 2011, <http://www.amnesty.org/en/library/asset/EUR01/001/2011/en/77663b6e-6013-4636-9cd3-6b1ddb2c7181/eur010012011en.pdf>
- Report, *Open secret: Mounting evidence of Europe’s complicity in rendition and secret detention*, EUR 01/023/2010, 15 November 2010, <http://www.amnesty.org/en/library/info/EUR01/023/2010/en>
- *Assessing Damage, Urging Action*, Report of the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009, <http://www.icj.org/dwn/database/EJP-Report.pdf>

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