

The Importance of the “Right to the Truth” in El-Masri case: lessons learned from the extraordinary rendition

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Key points of interest

- Extraordinary rendition is a human rights violation combining elements of arbitrary arrest, enforced disappearance, forcible transfer and is contrary to extradition as a legal procedure.
- The right to the truth is a right for the victim and the public to know about the abuses committed by the Government in the field of national security.
- Even in the most difficult circumstances such as the fight against terrorism and organised crime, the ECtHR prohibits in absolute terms torture and inhuman or degrading treatment.

Abstract:

Introduction: Cases in which states resorted to extraterritorial transfers that led to enforced disappearances with participation and support of other states are emerging. The UN Working Group on Enforced or Involuntary Disappearances published its latest

Report in August 2021 noting 651 new cases of enforced disappearances in just one year. Although El-Masri is not a new case, it is of particular interest due to combination of several forms of secret detention and enforced disappearance and it is the first documented case of CIA extraordinary rendition program that amounted to torture.

Method: The data that informed this paper consisted of books; articles as well as the interviews conducted with Margarita Tsatsa Nikolovska – former judge in the European Court of Human Rights and Aleksandar Bozinovski, the journalist who discovered the extraordinary rendition of Khaled El-Masri. Some of the sources were found using the Cambridge University Press database and Google Scholar, while the main aspects of the case were gathered from the HUDOC database, UN documents and reports on enforced disappearances, Dick Marty Report; Claudio Fava Report and Expert Opinion by Eric Swanidze.

Results/Discussion: Having in mind the WGEID Report, it is more than clear that the *modus operandi* in many states worldwide regarding the disappeared persons is contrary to international human rights law. Lessons learned from the El-Masri case may point to the fact that CIA rendition program is not quite active in Europe as it was (at least publicly), but enforced disappearances around the

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globe are still present and conducted by many different actors.

Conclusions: This analysis of the El-Masri case offers a valuable insight into the consequences of enforced disappearances. Although ICPPED did not exist in that time, the recent developments elaborated in the WGEID Report emphasize that there is a lack of effective investigation, impunity of national secret agencies in conducting extraterritorial transfers and that there is a need for effective measures and legislation that will sanction these acts.

Keywords: extraordinary rendition, torture, enforced disappearance, right to the truth and national security.

Extraordinary rendition as a form of enforced disappearance in the 'war on terror' and afterwards

Gathering intelligence through extraordinary rendition operations is in conflict with the general international law. Since September 2001 and other recent terrorist attacks in Europe and worldwide gave a 'carte blanche' to the states in the fight against terrorism using all kind of measures in order to achieve the purpose and protect national interests. In this war on terror, many states led by the United States used extraordinary renditions in order to capture and interrogate suspected terrorists. Although different states have different perception and legal traditions in respect of extraordinary rendition operation, so far, they have been oriented to arrest, detain and/or interrogate suspected terrorist for intelligence gathering.

The total number of extraordinary renditions to date remains unclear, there is a wide consensus that the program has accelerated since 11 September 2001 in order to strengthen the efforts in the 'war on terror'. In its present form, extraordinary rendition

usually involves a person who is not formally charged with any crime by the country conducting the abduction; instead, the person is seized abroad and transported to third country (Weissbrodt and Bergquist, 2006). The term extraordinary rendition became familiar due to the CIA agents who detained alleged terrorists from any part of the world and render them to a black site where they will be subjected to the complete control of US Government. According to Tucker, the detainees are subjected to three phases in the black sites: (a) the first is the initial phase where they are photographed and evaluated; (b) the second is the transition to interrogation phase, where the interrogators try to ascertain the detainees' responsiveness towards the release of information and (c) the third is the full blow interrogation phase, where interrogators employ different kind of techniques to achieve their goals. Detainees are subjected to a variety of physical and mental abuses during this phase, including white noise, sleep deprivation, electric shock treatment, walling, slapping, threats of sexual torture, wall standing and cramped confinement (Tucker, 2014).

In its latest Report, the UN Working Group on Enforced Disappearances (WGEID) transmitted 651 new cases of enforced disappearance to 30 states in just one year while the number of cases under active consideration that have not yet been clarified, closed or discontinued stands at 46,490 in a total of 95 States. Especially worrying are extraterritorial transfers that led to enforced disappearances with the participation and support of other states in order to capture their own nationals as part of counter-terrorism operations (WGEID Report A/HRC/48/57:2021, p.14). Some of the cases were carried out as part of covert extraterritorial operations, including extraordinary renditions where persons were blindfolded, hooded and handcuffed. In several of

the cases examined, the targeted individuals remained forcibly disappeared for a period of between 24 hours and three weeks in secret detention prior deportation. In most of the cases, no effective investigation has been conducted and no one has been held accountable for the reported human rights violations. In response to these allegations, the authorities have either denied that operations took place or maintained that they were necessary legal and proportionate to the need to neutralize imminent threat to national security (ibid, p.18). These enforced disappearances represents flagrant human rights violations and embody a denial of justice insofar as individuals are deprived of liberty in the form of secret detention and are removed from the protection of the law.

The documented cases are only a snapshot of what appears to be the increasingly practice of forcible repatriations or involuntary return by states acting on national security grounds. The *modus operandi* from the El-Masri case can be detected in many other cases where national security agencies used extraterritorial abductions in the name of national security. In 2017, Meral Kaçmaz and Mesut Kaçmaz were allegedly abducted in Pakistan by a group of agents believed to be members of the counter terrorism Department of Pakistan, then detained for 17 days and finally transmitted to Turkey. One year after, suspected members of the Azerbaijani and Turkish intelligence forces abducted Mustafa Ceylan in Azerbaijan. He was tortured and deported to Turkey. In 2020 Redwan AL Hashidi was allegedly arrested by the Yemeni security services and afterwards deported to Egypt. These cases documented by the WGEID are raising concerns that extraterritorial renditions and repatriations are still present with involvement of the security agencies because of their impunity. Measures should be undertaken by states in order to fulfill the conclusions and recommenda-

tions, to prevent cases of enforced disappearances and to conduct effective investigation to punish those responsible for these violations.

Undeniably, sovereign states have the exclusive right to use force in order to protect national security. However, the Machiavelli maxim “*the ends justifies the mean*” (from Chapter XVIII of the Prince) does not apply and cannot apply when human rights are at stake. The ‘war on terror’ hinders the search for truth and ultimately suffocates the effectiveness of the law as the right of tortured victims to redress and remedy cannot be enforced (Anwukah, 2016). The issue of creating a balance between national security and individual human rights and freedoms remains legally impossible, although *de facto* unsolved and controversial. There is no place for compromise when inviolable human rights such as right to life and prohibition of torture are in question, even in the name of national security.

Due to these reasons, extraordinary rendition is a hybrid human rights violation combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to justice, use of interrogation techniques which in many occasions amount to torture in order to get a confession for participation in terrorist or other acts. The subsequent incommunicado detention and denying the right to an effective remedy are clear proof for violation of fundamental rights. Combining these elements, it is undoubtedly clear that extraordinary rendition diminishes the legal effects of extradition as a procedure for transferring a fugitive or accused person to a third country in order to stand trial or serve a prison sentence for committed crime. Moreover, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in its Article 3 states that every enforced disappearance contains at least three elements: (1) privation of freedom;

(2) participation of the State and (3) refusal by the authorities to provide information on the whereabouts and fate of the missing person. The case of Khaled El-Masri contains all of these elements and it is a classic form of extraordinary rendition as enforced disappearance and a first case where the ECtHR ruled on the US practice of secret forced renditions which amounted to torture and violated human rights guaranteed with the European Convention on Human Rights.

El-Masri's path towards the right to the truth

Prior submitting an application before the ECtHR, El-Masri tried to get justice by initiating procedures in the United States, before the Inter-American Commission on Human Rights and national courts in Macedonia where the extraordinary rendition started as well as acts of torture and deprivation of liberty.

On 6 December 2005, EL-Masri filled a civil case in the US Federal District Court for the Eastern District of Virginia, suing the former Director of the CIA (El-Masri v. Tenet). The Court held that the case threatened the disclosure of relevant state secrets, thus it was dismissed. In April 2008, El-Masri brought proceedings against the US before the Inter-American Commission on Human Rights (IACommHR) which decided that El-Masri has not sufficiently substantiated allegations to permit the Inter-American Commission to determine, for the purposes of the admissibility of the petition, that the facts tend to establish *prima facie* violations of Article VI of the American Declaration (ACommHR Report 2016).

In October 2008, El-Masri lodges a criminal complaint with the Office of the Public Prosecutor in Skopje, Macedonia which was rejected without conducting any independent investigation as well as the civil proceedings for compensation of damage. Due to the fact

that these proceedings were dismissed or were refused on several grounds, the only remedy for seeking justice and proving violation of the guaranteed human rights was before the ECtHR where El-Masri submitted an application on 21 September 2009.

The ECtHR landmark decision in the El-Masri case

On 13 December 2012 the Grand Chamber delivered its landmark decision in the EL-Masri case declaring violation under Article 3, 5, 8 and 13 ECHR. In the submitted application, El-Masri alleged that in the period from 31 December 2003 to 23 May 2004 he had been subjected to a secret rendition operation in which agents from Macedonia had arrested him, held him incommunicado, questioned and ill-treated him. He was held 23 days in a hotel in Skopje where El-Masri started his first hunger strike. Afterwards they handed him over at Skopje Airport to CIA agents who then transferred him to Afghanistan in a secret interrogation facility called Salt Pit where he had been detained and ill-treated for over four months (ECtHR, 2012:El-Masri v. F.Y.R. Macedonia, § 17-22). The El-Masri pre-flight treatment as Skopje Airport where he was beaten, sodomized and forcibly tranquilized when he was handed over to the CIA agents was described at the CIA protocol so-called "capture shock treatment" (ibid, § 124).

The rendition was based on the determination by officers in the CIA's ALEC Station that "El-Masri known key information that could assist in the capture of other al-Qaida operatives that pose a serious threat of violence or death to US persons and interests and who may be planning terrorist activities". On 16 July 2007, the CIA inspector general issued a Report of investigation on the rendition and detention of Khaled El-Masri, concluding that available intelligence information

did not provide a sufficient basis to render and detain El-Masri and that the Agency's prolonged detention of El-Masri was unjustified (Senate Select Committee Report 2014). When it was established that El-Masri has no relevant information and is not the person of interest for the CIA, they left him in Albania near the border with Macedonia.

Many international inquiries related to El-Masri proved without reasonable doubt that El-Masri was subject of an extraordinary rendition operation conducted by the CIA agents with assistance of the Macedonian authorities. The 2006 Marty Report emphasized that the Macedonian Government did not provide explanation for the El-Masri treatment nor it proved that there was an exit stamp on his passport which could serve as an evidence that he has left Macedonia as the authorities claimed thus concluding that the case was a "case of documented rendition" (Marty Report § 3.1.2). Moreover, the Fava Inquiry established that there were identified at least 1.245 flights operated by the CIA in European space between the end of 2001 and 2005 (Fava Inquiry, 2006). The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms was deeply troubled that the United States has created a comprehensive system of extraordinary renditions, prolonged and secret detention that violates the prohibition against torture (UN Special Rapporteur 2009)

In elaborating the violation committed upon El-Masri, the Court emphasized that Article 3 does not refer only to physical force, but also to mental suffering which creates situation of fear and stress. Despite the fact that El-Masri was subjected to torture in Macedonia and afterwards in Afghanistan, the Council of Europe Report by the Secretary General established that El-Masri had a post-traumatic stress disorder and depression most likely caused by

his experience of capture and extensive maltreatment and abuse (CoE Report 2006, § 36). In addition, the most important segments of the Court's judgment reflect to: (a) lack of effective investigation by Macedonian authorities and the right to the truth which points to the possibility of abuse of the concept of state secret privilege when systematic politics and secret prisons are in stake; (b) responsibility about detention; (c) lack of requesting diplomatic assurances that El-Masri would endure no ill-treatment; (d) no legitimate request for extradition by CIA agents; (e) interference with the right to private and family life and (f) denial of the right to an effective remedy.

Establishing torture 'beyond reasonable doubt'

The obligation to prevent torture has been interpreted as a positive requirement that States exercise due diligence and thereby protect persons within their jurisdiction from acts causing severe pain and suffering. In El-Masri case, the ECtHR determined that a state is obliged to take measures to ensure that individuals within its jurisdiction are not tortured and must take measures to prevent a risk of ill-treatment about which it knew or should have known (Redress, 2016). Actually, Article 1 ECHR prescribes that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. This provision emphasizes the positive and negative obligations upon states, meaning that the states are obliged to secure to everyone the right and freedom guaranteed with the ECHR and in the same time to refrain to any possible violations upon them.

When determining torture in the El-Masri case, the ECtHR unequivocally affirmed that Article 3 ECHR enshrines one of the most fundamental values of democratic societies, which

cannot be subject to exceptions or derogations even in the event of a public emergency threatening the life of the nation, including the fight against terrorism. This clear statement of the Court also meant that the Court prohibits in absolute term torture and inhuman or degrading treatment irrespective of the conduct of the person concerned (ECtHR, 2012:El-Masri v. F.Y.R. Macedonia, § 195). Having in mind the nature of the case, this was the first time that these statements have been applied to a case of extraordinary rendition and that a state was subsequently attributed responsibility and accountability for these actions. The Court clarified that the principle of *refoulement* prohibited Contracting Parties to the ECHR from transferring a detainee to another state where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to torture or inhuman and degrading treatment.

In assessing evidence, the Court adopted the standard of proof “beyond reasonable doubt”. Moreover, the Court reiterated that Article 3 does not refer exclusively to the infliction of physical pain, but also of mental suffering which is caused by creating a state of anguish and stress by means other than bodily assault (*ibid*, § 202). It was evident from medical documentation that EL-Masri suffered emotional and psychological distress following his detention. This statement of the Court was based on the definition of torture contained in the UN Convention against Torture. The UNCAT defines torture in Article 1 as any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for obtaining from him information or a confession. From this definition, four elements can be located: (a) the requirement of intent (intentionality) which means that torture must result from a purposeful act or omission of an act; (b)

severe mental or physical suffering or pain which must be inflicted on the ‘accused’ or ‘suspect’ person clearly expressing that torture may not be only physical, but also can cause mental suffering; (c) the requirement of specific purpose which address that the act must have been inflicted for a specific purpose such as punishment, soliciting information, confession, intimidation or coercion i.e. this list is non-exhaustive and (d) the involvement of public official refers to the fact that the act of torture is inflicted at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Although there were no actual proofs of torture due to the time which passed since El-Masri was held incommunicado in Skopje and afterwards in secret detention center in Afghanistan, the ECtHR was able to held violation of Article 3 ECHR relying from the evidence from many reports as well as from the testimony of the Munich prosecutor in charge of investigating the case of El-Masri in Germany. Although tests had shown no traces of violence, beating, injections or substances used to force his to sleep, the isotope samples of his hair had indicated a “significant change in living conditions” during the time he claims to have been imprisoned (European Parliament, 2006).

Within the framework of Article 3 ECHR, the Court found that the responsibility of Macedonia was engaged with regard to the El-Masri’s transfer into the custody of the US and his transfer to Afghanistan, despite the existence of a real risk that he would be subjected to torture contrary to Article 3 ECHR. This follows the *Soering* case-law and it fits in traditional doctrine: Macedonia would be only responsible under Article 3 for its own conduct and not for the torture in Afghanistan itself. However, it is then hard to understand why the Court speaks in this context of attribution of responsibility (*ibid*, § 215)

rather than the attribution of conduct. The Court concluded that Macedonian authorities were not only responsible for the act of handing over El-Masri, but they were responsible for conduct that clearly was not its own. The Court found Macedonia responsible for the ill-treatment to which El-Masri was subjected at Skopje Airport by CIA agents. In addition, it found Macedonia to be responsible for a violation of Article 5 ECHR during the entire period of his captivity in Kabul (ibid, § 240). A striking aspect of the Court's reasoning is that it equates the responsibility of a state vis-à-vis the conduct on another state with the responsibility of a state vi-a-vis the acts of private persons. The justification of the construction then lies in the combination of the positive obligations of state party under the Convention and the fact that the conduct in question took place on its territory with its acquiescence or connivance, which in turn was incompatible with the positive obligations (Nolikaember, 2012).

The statement that Macedonia was responsible under the Convention for acts performed by foreign officials on its territory is somewhat ambiguous. Since the Court did not go as far as attributing CIA conduct to Macedonia, this wording may be taken to suggest that Macedonia would be responsible without committed a wrongful act. In El-Masri the Court goes beyond Soering and this could be explained as extension of responsibility based on criteria of foreseeability and causation. The ECtHR even pushed to the limits ordinary principles of international responsibility to hold Macedonia not only liable for the rendition of El-Masri to Afghanistan, but also for his detention and ill-treatment there. According to the Court this was to ensure full accountability under the ECHR for the extraordinary rendition. This holding by the ECtHR can be discussed as a disputable notion. Macedonia cannot be

held responsible for torture committed by CIA agents in a foreign country just because of the presumption that knew or ought to have known of such a risk. Undoubtedly, Macedonia is responsible on several accounts including the enforced disappearance and incommunicado detention, treatment that amounted to torture and transferring El-Masri to the CIA agents. Holding accountable a country for acts committed by agents of another country on a territory of a third country establishes some disputable practice, which can be used in future and in other extraordinary renditions. Even if Macedonia requested diplomatic assurances from the CIA agents that El-Masri will not be subjected to torture, these kind of assurances do not secure prohibition of torture because the jurisprudence shows numerous cases when these assurances were violated and torture has been committed.

Although the Court could not address the culpability of CIA agents, the European case-law tradition seems to confirm that whenever there is "effective control of the territory" where military forces and other operatives of state party to the Convention operate, they are obliged to apply Convention's provisions (Hadji-Janev, 2013). Along with El-Masri, the ECtHR cases such as *Lozidou v. Turkey, Cyprus v. Turkey and Issa v. Turkey* clearly attest the European human rights tradition shaped by the ECtHR's practice seriously contradicts the US approach towards extraordinary rendition operations in the global counterterrorist operations.

The right to the truth vis-à-vis secret state privilege

In the El-Masri case, the ECtHR cautiously endorsed a new paradigm of the right to truth – that is a right for the victim and the public at large to know about the abuses committed by governments in the field of national security. The judgment also left some open issue as

the Court did not and could not address the culpability of US agents who effectively tortured El-Masri. For certain, this case removed the wall of impunity that had protected the consequence from extraordinary rendition, arbitrary arrest, secret detention and enforced disappearance and offered a lesson that these kind of acts represent violation of fundamental rights and if committed will be sanctioned on highest level.

The lack of effective investigation is closely related to right to the truth where the applicant was deprived of information regarding the facts related to his incommunicado detention and prolonged suffering that he endured while he was held and subsequently when he was trying to prove what happened to him in Macedonia and afterwards in Afghanistan.

In its assessment of the obligation of the Macedonian authorities to undertake under the procedural limb of Article 3 ECHR and effective investigation on the crimes of torture and inhuman and degrading treatment, 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. On the dimension of the right of the victim to know the truth, on the one hand, the ECtHR stated that Macedonia had deprived the applicant of being informed of what had happened, including of getting on accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal (Fabbrini, 2013). In a jointly written concurrence judges Tulkens, Spielman, Sicilianos and Keller pushed in favour of fully outlining a right to the truth under the scope of Article 13 ECHR. The judges argued that the right to the truth would be more appropriately situated in the context of Article 13 ECHR especially where it is linked to the procedural obligations under Articles 3, 5 and 8. Furthermore, in the Joint concurring opinion judges

emphasized that the search for the truth is the objective purpose of the obligation to carry out an investigation and *raison d'être* of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny). For society, in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law, while for the victims and their families it represents some kind of a closure by establishing facts. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery (ECtHR, 2012:El-Masri v. F.Y.R. Macedonia, Separate opinion § 4-6). Yet the position of the ECtHR on the right to the truth drew criticism from two other judges. In a joint concurrence, judges Casadevall and Lopez Guerra expressed their view that 'as regard the violation of the procedural aspects of Article 3 ECHR on account of the failure of the respondent state to carry out an effective investigation into the applicants allegations of ill-treatment, no separate analysis as performed by the Grand Chamber was necessary with respect to the existence of the right to the truth as something different from or additional to the requirements already established in such matters by the previous case-law of the Court'. Therefore, as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 ECHR.

The right to the truth elaborated in El-Masri case was also subject of discussion in the case which Khaled El-Masri initiated in the United States against George Tenet (the Director of CIA) before submitting an application before the European Court of Human Rights in Strasbourg. In 2006, the United States filed a statement of interest and a formal claim of the state secrets privilege in order to

intervene in the suit and protect its interests and prohibit disclosure of state secrets (*El-Masri v. Tenet*, 1:05cv1417:2006).

The concept of ‘state secret privilege’ has often been invoked to obstruct the search for the truth not only by the Macedonian government, but also by other European Governments involved in renditions or even in having detention facilities operated by the CIA on their territory. Using justification in order to exclude evidence that will divulge state secrets to the public that would reasonably likely cause significant harm to national defense or to the diplomatic relations have been often used by the United State especially in torture cases (Scott, 2015).

The increased support for the right to the truth suggested by the ECtHR’s *El-Masri* decision may provide new or stronger legal remedies for enforced disappearances in future emphasizing that nobody is above the law and that the right to the truth is of utmost importance for victims of extraordinary renditions who were disappeared for days and/or months and subjected to torture.

Lessons learned from extraordinary rendition in *El-Masri* case

The execution of the judgment in *El-Masri* case took several years, when finally except the financial compensation in the name of just satisfaction, on 26 March 2018, the Minister of Foreign Affairs issued a written apology to *El-Masri* expressing unreserved regret for the tremendous suffering and damage inflicted on him as a result of the improper conduct of the authorities. This case also triggered changes in the Macedonian legislation, conducting training and awareness raising and a number of other general measures to ensure the proper handling of similar investigations by the prosecution authorities. Moreover, changes has been done in the Macedonia Criminal Code in rela-

tion to definition of torture, ill-treatment and statute of limitation for prosecution of these crimes as well as interventions in the Law on Interior Affairs and Police upon received expert opinion (Swanidze Expert Opinion Report DGI, 2018). All these amendments to the Macedonian legislation were made with a purpose to prevent such cases in future, to accept the responsibility for being part of the extraordinary rendition of *Khaled El-Masri* and to emphasize the lessons learned from acts which constitute torture and are against international human rights law and contrary to the ECHR.

Obviously, the lessons related to extraordinary renditions that amount to enforced disappearance where the perpetrators use secret state privileges in order to obstruct the right to the truth and to provide the victim with the reasons for its incommunicado detention have not been learned. The latest Strasbourg jurisprudence shows that cases of enforced disappearance with extraterritorial transfers are still present in Europe. Following the rationale in *El-Masri*, in the case of *Abu Omar* (Osama Mustafa Hassan Nasr,) the ECtHR rendered a judgment in 2016 condemning Italy for complicity with the United States in *Abu Omar*’s rendition and for the abuse of state secrecy. *Abu Omar* was abducted and taken to the Aviano air base operated by USAFE (United States Air Forces in Europe), where he was put on a plane bound for the Ramstein US air base in Germany. From there he was flown in a military aircraft to Cairo. (ECtHR: 2016, *Nasr and Ghali v. Italy*). In both decisions (*El-Masri* and *Abu Omar*), a firm stance against the use of torture even in national security related cases was embraced by condemning the enforced disappearance practice. This approach was reiterated in *AL Nashiri v. Poland* and *Abu Zubaydah v. Poland*. In *Al Nashiri v. Romania*, the Court emphasized the failure of

Romania to obtain the truth and its refusal to acknowledge, investigate and disclose details of Al Nashiri's detention, ill-treatment, enforced disappearance and rendition, which constitutes violation of Conventions' rights (ECtHR: 2018, Al Nashiri v. Romania). Furthermore, in Abu Zubaydah, the Court stressed that criminal proceedings were a critical aspect of ensuring an effective remedy for gross violations of Convention rights. They were the primary means through which the victims' right to the truth could be given effect, including in respect of identifying the perpetrators. Although there was no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities had to, where the facts so warranted, take the necessary steps to bring those who had committed serious human rights violations to justice (ECtHR:2018, Aby Zubaydah v. Lithuania). All of these cases have in common enforced disappearances with extraterritorial transfers, torture in secret detention sites and failure by states that assisted CIA to ensure the right to the truth.

States are increasingly resorting to transnational transfers that lead to enforced disappearances with participation and support by host states. The WGEID Report show that states failed to learn lessons on how to prevent enforced disappearances as a result of transnational renditions. Distinct and sophisticated patterns of enforced disappearances are emerging due to lack of accountability, effective investigation, judicial independence and impartiality in states with fragile democracies or high rates of corruption. Impunity represents major problem and gives states *carte blanche* for gross human rights violations. States and other actors involved in cases of enforced disappearance should be found accountable for violation of numerous international conventions as well as bilateral cooperation agreements. Moreover, secret state privileges and

issues concerning national security should not be used as a cover in combating terrorism, preventing access to justice on persons who are not officially charged. Steps towards accountability can help the healing process of victims. Successful prosecutions of enforced disappearance cases can contribute to uncovering the truth, delivering justice and deterring repetition. In order to prevent impunity, states should undertake effective investigations in cases of enforced disappearance, intervene in their criminal justice systems in order to penalize extraordinary renditions and to ratify or accede to the ICPPED.

Conclusion

The extraordinary rendition of Khaled El-Masri is a classic form of enforced disappearance. El-Masri was held incommunicado for almost five months in Macedonia and Afghanistan, tortured and denied the right to the truth. Although the ICPPED did not exist in the time of conducting the extraordinary rendition, the ECtHR acknowledged all of the above mentioned elements of enforced disappearance moreover affirming that the right to the truth to the victim to know about the abuses committed upon him in the name of national security. Although it was expected that the judgment will impact other enforced disappearance cases, the jurisprudence and reports show the quite opposite. The newest report of the WGEID is absolute proof that every year there are new cases on enforced disappearance, most of them containing the element of extraterritorial transfer that amounts to torture and represents violation of the *ius cogens* norms. To conclude, enforced disappearances should not be justified in the name of combating terrorism and failures by States to acknowledge such acts and to provide the truth to the victim should be punished by law.

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