Numéro de dossier **39630/09**

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

El-Masri v Macedonia

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme, ainsi que des articles 45 et 47 du règlement de la Court

under Article 34 of the European Convention on Human Rights And Rules 45 and 47 of the Rules of the Court

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I. THE PARTIES

A. THE APPLICANT

1. Surname: El-Masri 2. First name(s:) Khaled

Sex: male

3. Nationality: German 4. Occupation: Unemployed

5. Date and place of birth: 29 June 1963, Kuwait.

6. Permanent Address: ------- -------- , ---------- , ----------

7. Tel. No.:

8. Present address (if different from 6.):

9. Name of Representatives:

10. Occupation of Representatives:

11. Address of Representatives:

12. Tel No.

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SUMMARY

i. For more than four months during the first half of 2004, Khaled El-Masri, a German national traveling to Macedonia, was unlawfully detained, tortured and transferred to the custody of the CIA in Afghanistan as part of a U.S. government rendition program which has since been repudiated, on the basis of information since shown to be incorrect. Mr. El Masri asks this Court to find that Macedonia breached his rights under the Convention for its substantial role in his ill-treatment, and to order just satisfaction.

ii. On 31 December 2003, Mr. El-Masri, who was carrying a German passport, was detained when he crossed into Macedonia by border guards who questioned him for several hours. He was then driven to the Skopski Merak hotel in Skopje where he was detained for 23 days under armed guard, during which time he was denied access to a lawyer, his family or anyone else. He was continuously interrogated with information obtained from his home town of Ulm in Germany, about his acquaintances, his Muslim faith, and his Lebanese descent. He was threatened with a gun when he attempted to leave. For the last ten days of his captivity, he refused to eat.

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iii. On 23 January 2004, Mr. El-Masri was handcuffed, blindfolded and driven to Skopje airport where he was handed to a CIA rendition team. He was beaten, stripped, sodomised and humiliated. He was then blindfolded, shackled, hooded and forcibly marched across the tarmac to a waiting CIA plane surrounded by a detail of armed Macedonian security guards. On the plane he was thrown to the floor, chained down, and injected with a substance that made him lose consciousness.

iv. The plane few to Afghanistan, where he was detained for a further four months in appalling conditions. He was kept through the Afghan winter in a filthy cell, with no bed or proper bedding, no fresh water, little light and no contact with the outside world. He was constantly interrogated about his life in Ulm by American interrogators who were fully briefed with detailed information from Germany. He went on a hunger strike to protest against his treatment for 37 days, after which he was humiliatingly force fed. He was constantly in fear of his life, and told that he was in a country with no laws and that no-one knew where he was. He may have been seized because his name is similar to that of a man connected with the "Hamburg cell" of Al-Qaeda. Long after senior U.S. officials were informed that he was innocent, he was finally ordered to be released. In order to cover up the mistake, he was flown back to Albania in a "reverse rendition;" from where he made his way home to Germany.

v. The entire process, conducted and/or facilitated by Macedonia, was illegal, secret and wholly outside the law, further aggravating the human rights violations suffered by Mr. El-Masri. The process was carefully designed to inflict the greatest psychological damage in order to terrify and debase him for the purposes of interrogation. His detention in close confinement under armed guards in the Skopski Merak hotel, where he was threatened with a gun, violated Article 3. The brutal transfer at the airport conducted jointly by Macedonia and U.S. agents was designed to humiliate him and amounts to torture. His subsequent ill-treatment in Afghanistan was entirely foreseeable by Macedonia, as the excesses of the U.S. "extraordinary rendition" programme were by then common knowledge, such that Macedonia is also responsible for the subsequent Article 3 violation.

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vi. The Government of Macedonia also colluded in directly facilitating a violation of Article 5. From the moment that he left the border crossing, Mr. El-Masri was illegally detained. There was never a warrant of arrest, he was never brought before a judge and he never saw a lawyer or a German consular official. Despite his requests to contact them, his family had no idea where he was. Macedonia effected this violation for 23 days in the Skopski Merak hotel, for several hours in Skopje airport and in giving him to the CIA so that the Article 5 violation would continue. As such, they are directly responsible for the entire period of unlawful detention.

vii. Although Mr. El-Masri has sought legal redress in Macedonia, Germany, and the United States, no-one has ever been held to account for these violations of the Convention. Despite substantial inquiries by the Parliamentary Assembly of the Council of Europe and the European Parliament, the full truth of what occurred remains shrouded in secrecy. In the face of convincing evidence documenting Macedonia's complicity in Mr. El-Masri's abuse, the government maintains a total denial in public, while stating in private that the incident was "a favour" to the Americans. Senior U.S. officials have on several occasions privately admitted that the rendition was a "mistake."

viii. Khaled El-Masri has the right to an effective and impartial investigation under Article 3 and Article 5, the right to a remedy and an apology under Article 13, and the right to the truth and to the rule of law under Article 10, together with Articles 3, 5 and 13. More than that, the public in Macedonia and in Europe has the right to the truth and to be reassured of the rule of law.

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II. STATEMENT OF THE FACTS

1. The main source of evidence of the facts is the declaration of Mr. El-Masri dated 6 April 2006 that was prepared for litigation before the U.S. Courts. Significant additional sources of evidence include the report of the Inquiry of the Parliamentary Assembly of the Council of Europe ("the Marty Inquiry" – see paragraphs 105-113 below) and the Temporary Committee on Extraordinary Renditions of the European Parliament ("the Fava Inquiry" or "the TDIP Committee" – see paragraphs 114-120 below).

Abduction and Detention in Macedonia

2. Khaled El-Masri is a German citizen, currently living in Ulm, Germany with his wife and five children. A Muslim of Lebanese descent, he was born in Kuwait on 29 June 1963 and had moved to Germany in 1985.

3. On 31 December 2003, Mr. El-Masri boarded a bus in Ulm, Germany, intending to visit Skopje, Macedonia, for a brief holiday, as he was having problems with his marriage. He was carrying with him his recently-issued German passport. At around 3 p.m. the bus arrived at the Serbian/Macedonian border crossing at Tabanovce. As at all other border crossings, the bus driver collected everyone's passports. When the passports had been checked, the bus driver approached Mr. El-Masri and instructed him to get off the bus. A border official asked Mr. El-Masri questions such as the purpose of his trip to Macedonia, and the length and location of his intended stay. He answered that he intended to stay in Macedonia for a week, and that he did not have a specific hotel in mind. Another bus passenger translated for Mr. El-Masri, as he did not speak any Macedonian. Mr. El-Masri was then instructed to return to the bus, and to report to the local police as soon as he arrived in Skopje.[1]

4. Shortly after the bus left the border crossing, Mr. El-Masri realized that the officials had not returned his passport. He inquired about his passport with the bus driver, who turned the bus around and drove back to the border. Mr. El-

[1] Exhibit 1: Declaration of Khaled El-Masri, at para. 8

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Masri got off the bus and asked the officials for his passport. The official advised him to remain behind, allowing the bus to leave, and indicated that, after the passport issue was resolved, Mr. El-Masri would be dropped off at a hotel in Skopje.[2] Around 6 p.m., Mr. El-Masri was taken to a narrow room about eight meters from the border station. One official accompanied him. Mr. El-Masri was seated, and the official searched all of Mr. El-Masri's belongings. After the search was complete, another official appeared who was about 1.75 metres tall and appeared to be in his early thirties. This second official interrogated Mr. El-Masri for about one hour. Another man then turned up who was "a little bigger" and appeared to be around 30 years old. He conducted a second phase of interrogation.[3]

5. Mr. El-Masri was asked if he knew of several Islamic organizations or groups and if he had anything to do with them. He said that he had heard of most of them, but that he had no involvement or contact with any of them. He was also questioned regarding whether there were any mosques in the area near where he lived, and if he had ever invited someone to Islamic activities at the Mosque or if he had been ever invited to services. He answered no to all of these questions. He was offered alcohol, which he refused. He was also asked if he prayed or fasted. He replied that he sometimes did both. The interrogation ended at 10 p.m.[4]

6. Mr. El-Masri was eventually led out of the office and onto the road. He saw three vehicles parked on the road that did not have licence plates. He was driven to Skopje and was accompanied by plain-clothed men who were armed. When they approached a police barricade on the route, they were able to pass through without stopping.[5]

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[2] *Ibid.* at para. 9
[3] *Ibid.* at para. 10
[4] *Ibid.* at para. 11
[5] *Ibid.* at para. 13

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7. The Macedonian government has stated that Mr. El-Masri arrived at the border on 31 December 2003 at 16:00 and was suspected of having a forged passport.[6] He was detained while an Interpol record check was carried out. He was then allowed to enter the Republic of Macedonia at 20:57 hours. He stayed at the Skopski Merak hotel in Skopje.[7]

8. Witnesses from within the Macedonian administration who spoke to the Marty Inquiry in confidence indicated that, rather than checking his details with Interpol, the Macedonian intelligence service, the *Uprava za Bezbednosti Kontrarazuznavanje* ("UBK") in fact liaised with the Central Intelligence Agency (CIA) of the United States, who requested that the Macedonians detain Mr. El-Masri.[8] Further witnesses told the Marty Inquiry that approximately 20 Macedonian officials were involved, including four or five politically responsible persons in the Government.[9]

9. The fact that Macedonian border police initially stopped and interrogated Mr. El-Masri for several hours on 31 December 2003 at the Tabanovce border crossing has not been contested by the Macedonian Government. In addition, the stop and interrogation have been established by the Munich prosecutor's investigation (see paragraphs 121-125 below) among other sources.

10. Mr. El-Masri's passport bears a Macedonian entry stamp dated 31 December 2003.

Incommunicado Detention in the Skopski Merak Hotel

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[6] Exhibit 56: Macedonian Ministry of Foreign Affairs, "Additional Answers to the Questions Contained in the Letter of Mr. Terry Davis dated 7 March 2006," 3 April 2006, pg. 3. Available at: http://www.coe.int/t/E/Com/Files/Events/2006-CIA/annexes2/FYROM.pdf ("Second Macedonian Response under Article 52")

[7] Exhibit 60: European Parliament, "Report of the TDIP Committee Delegation to the Former Yugoslav Republic of Macedonia (FYROM)," CM/617396EN.doc, 6 June 2006, pg. 5. Available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/notices/pe374316_en.pdf ("Fava 2006 Macedonia Delegation Report")

[8] Exhibit 5: Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States," Doc. 10957, 12 June 2006, para. 116. Available at: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf ("Marty 2006")

[9] *Ibid.* at para. 121

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11. Mr. El-Masri was driven by the state agents to the Skopski Merak hotel in Skopje. The hotel had four or five floors, and he was taken to a room on the top floor of the hotel. The state agents did not leave. During his detention at the hotel, Mr. El-Masri was watched by a team of nine men, who changed shift every six hours.[10] He was informed that three of them would be with him at all times, even when he was sleeping.[11]

12. Mr. El-Masri was interrogated repeatedly throughout the course of his detention. On the first night, the three men who had initially escorted him to his room carried out a search of his belongings and then interrogated him until 3 a.m. They positioned themselves around the room and asked him several questions at once. Mr. El-Masri was questioned in English even though he spoke and understood very little of the language. For the next three days, there were similar interrogations. He was watched at all times. Even when he used the toilet he was required to leave the door open. He became exhausted from the questioning and demanded a translator and to call the German embassy. His requests were all denied. On one occasion, Mr. El-Masri stated that he intended to leave, and one of his captors pointed a pistol at his head and threatened to shoot him.[12] After five days' detention in the hotel, a man appeared and took his fingerprints and photographs.[13]

13. After a further seven days of confinement, an official who seemed to be about 55 years old appeared. He had a large build and brought an assistant with him. The official made some inquiries about Mr. El-Masri's treatment and then offered him a deal: If Mr. El-Masri stated that he was a member of Al-Qaeda, he would be given a police escort back to Germany.[14] Mr. El-Masri refused to make any such admission. Two or three days later, the assistant returned and read a list of allegations, stating that he was "wanted" in Germany.[15] The list included allegations that he did not have a passport, and that he was wanted by

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[10] Declaration of Khaled El-Masri, see note 1 above, at para. 20
[11] *Ibid.* at para. 18
[12] *Ibid.* at para. 19
[13] *Ibid.* at para. 20
[14] *Ibid.* at para. 21
[15] *Ibid.* at para. 22

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the Egyptian and German governments because he had been seen in Jalalabad, Afghanistan. [16] Mr. El-Masri asked repeatedly to meet with the German ambassador or any other German official, and was told that the German government did not want anything to do with him, and that his detention had been authorized by the President of Macedonia.[17]

14. On the thirteenth day of his confinement, Mr. El-Masri commenced a hunger strike to protest against his continued unlawful detention, and did not eat for ten remaining days of his detention in Macedonia. A week after he commenced his hunger strike he was told that he would soon be transferred by plane back to Germany.[18]

15. During meetings with the delegations from the Marty and Fava Inquiries, the Ministry of the Interior stated that Mr. El-Masri stayed as a guest at the hotel and that hotel management would be able to provide evidence of this stay.[19] In a meeting with Siljan Avramovski, the then Head of the UBK, the delegation was told that Mr. El-Masri signed into the hotel's guest book.[20]

16. When the delegation visited the hotel, only junior staff who had been working there for less than a month were available.[21] Those staff could not provide any documentation regarding Mr. El-Masri's stay. The delegation instead collected information about the hotel's normal operating procedure, ascertaining that the cost of Mr. El-Masri's stay would have been approximately €2,500.[22] The owner of the hotel later stated that all records of Mr. El-Masri's stay had been given to the Ministry of the Interior.[23] The Marty Inquiry rejected the assertion by the Macedonian government that a secret detention could not be concealed during

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[16] *Ibid.* at para. 23
[17] *Ibid.* at para. 23
[18] *Ibid.* at para. 24
[19] Fava 2006 Macedonia Delegation Report, see note 7 above, at pg. 9.
[20] Marty 2006, see note 8 above, at para. 109
[21] Fava 2006 Macedonia Delegation Report, see note 7 above, at pg. 9
[22] *Ibid.* at pg. 9
[23] Marty 2006, see note 8 above, at para. 113

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the holiday season, noting that a detention could go unnoticed in an especially busy hotel.[24]

17. Witnesses who spoke to the Marty Inquiry in confidence confirmed Mr. El-Masri's account of the detention including that "three teams of three agents rotated in the task of guarding and surveillance."[25] The witnesses went on to explain that technicians and analysts helped to compile the record of the operation. An operational commander and deputy marshaled the Macedonian agents and took responsibility for reporting to their liaisons in the CIA.[26]

18. Mr. El-Masri has repeated with remarkable detail and consistency the factual circumstances of his detention in Skopje to numerous professional interviewers over several years. Shortly upon his return to Germany he positively recognized, through photographs available on the Skopski Merak's website, the hotel building, the room where he was held, and one of the waiters who served him food. [27]

19. Mr. El-Masri has also indicated that he was under the constant watch of several armed plainclothes officials at all times after he was held at the border crossing post, who appeared to be acting with official authority. The officials who picked him up at the border crossing were able to pass through a police barricade. The nature of the questions asked by his interrogators at the Skopski Merak, including detailed questions about his private life in Germany, was clearly professional and such that can normally be obtained only through official intelligence channels. At the same time, his captors and interrogators at the Skopski Merak spoke English with a non-native accent.

Transfer to Skopje Airport

20. By 23 January 2004, Mr. El-Masri had been detained for 23 days. At around 8 p.m., he was placed in front of a video camera and instructed to say that he had been treated well, had not been harmed in any way, and would shortly be flown

[24] *Ibid.* at para. 118
[25] *Ibid.* at para. 121
[26] *Ibid.*
[27] Declaration of Khaled El-Masri, see note 1 above, at para. 16-17

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back to Germany. He was then taken out of the hotel.[28] In the street, two men approached him and took hold of his arms, handcuffed him and blindfolded him. They then placed him in a car. [29] Before he was blindfolded, he saw a white minivan, and in front of it, a black jeep. He also saw many people standing around in civilian dress. He was placed in the jeep and it drove off. By the manner in which it was being driven, Mr. El-Masri believed it was following another car.[30]

Handover to CIA Rendition Team at Skopje Airport

21. After a drive of approximately half an hour the car came to a halt and Mr. El-Masri heard the sound of aircraft. The evidence outlined below demonstrates that he was at Skopje airport. He was removed from the vehicle, still handcuffed and blindfolded, and was initially placed in a chair where he sat for one and a half hours. He then heard the voice of the assistant who had come to see him with the high-ranking official, mentioned in paragraph 13 above.[31] Mr. El-Masri was told by the assistant that he would be taken into a room for a medical examination before his transport to Germany.[32]

22. As he was led into the room he felt two people violently grab his arms, bending them backwards, causing him a lot of pain. He was beaten severely from all sides. Someone held his head so that he was unable to move. His clothes were sliced from his body with scissors or a knife, leaving him in his underwear. He was told to remove his underwear. He tried to resist at first, shouting out loudly for them to stop, but they did not. They continued to beat him, and his underwear was forcibly removed. He explains that he was terrified and humiliated. He heard the sound of pictures 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. Mr. El-Masri felt that this was the

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[28] *Ibid.* at para. 25
[29] *Ibid.*
[30] *Ibid.* at para. 26
[31] *Ibid.* at para. 27
[32] *Ibid.*

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most degrading and shameful indignity that had been perpetrated on him by the men.[33]

23. Mr. El-Masri was then pulled from the floor and dragged to a corner of the room where his feet were tied together. His blindfold was removed. A flash went off and temporarily blinded him. Mr. El-Masri explained that he believed that he was photographed.[34] 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. A bag was placed over his head and they put a belt on him that had chains attached to his wrists and ankles. The men put earmuffs and eye pads on him, blindfolded him, and hooded him. They bent him over, forcing his head down, and quickly marched him to a waiting aircraft, with the shackles cutting into his ankles. He had difficulty breathing because of the bag that covered his head. When he tried to slow down he was forced to keep moving, almost dislocating his shoulder.[35]

24. Once inside the aircraft he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft.[36] During the flight he received two injections, and they put something over his nose which he thought was some type of anesthesia. He was mostly unconscious for the duration of the flight.[37]

25. According to eye-witness accounts recorded by the Marty Inquiry, the movements related to the plane, later identified as flight N313P (see paragraph 29 below) were not normal. When the plane landed it taxied to the far end of the runway, a kilometer from the terminal. A detail of armed Macedonian security police formed a lookout nearby, with strict instructions to face away from the plane itself. The manner in which the plane registered with ground staff and paid its "route charge" fees was highly unusual.[38] Macedonian interior minister

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[33] *Ibid.* at para. 28
[34] *Ibid.*
[35] *Ibid.* at para. 29, 30 & 31
[36] *Ibid.* at para. 31
[37] *Ibid.* at para. 32
[38] Marty 2006, see note 8 above, at para. 124

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Ljubomir Mihailovski confirmed to the Inquiry that no one left flight N313P when it landed on Macedonian territory.[39]

26. Flight information obtained from the Macedonian Civil Aviation Authority confirms that only crew were on board flight N313P when it landed, but that it contained one passenger when it departed (see paragraph 30 below).

27. Mr. El-Masri's passport contains a Macedonian exit stamp dated 23 January 2004.[40]

Flight from Skopje to Afghanistan

28. Mr. El-Masri states that he was dimly aware that the aircraft landed and took off again.[41] When the plane landed for the final time, he was taken off the aircraft. It was warmer outside than it had been in Macedonia, and he realized that he had not been returned to Germany.[42] He learned later that he was in Afghanistan,[43] and that he had been flown via Baghdad.[44]

29. Flight records obtained by the Marty Inquiry demonstrate that on 23 January 2004 a Boeing 737 business jet flew Mr. El-Masri from Macedonia to Afghanistan. The jet was owned by a U.S.-based corporation, Premier Executive Transportation Services, Inc., and operated by another U.S.-based corporation, Aero Contractors Limited, registered at the time by the U.S. Federal Aviation Administration with tail number N313P. The records indicate that the plane took off from Palma de Mallorca, Spain on 23 January 2004, and landed at Skopje airport at 20:51 that evening – the same night that Mr. El-Masri was handed over to the CIA. The jet left Skopje more than four hours later, at 01:30 on 24 January 2004, flying to Baghdad and then on to Kabul, the Afghan capital.[45]

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[39] *Ibid.*

[40] Exhibit 1(E): Khaled El-Masri's Passport, pg. 3 (including an entry stamp to Macedonia on 31 December 2003 and an exit stamp on 23 January 2004)

[41] Declaration of Khaled El-Masri at 10, see note 1 above, at para. 33

[42] *Ibid.* at para. 33

[43] *Ibid.* at para. 53

[44] *Ibid.* at para. 34

[45] Exhibit 1(A) & Exhibit 2: Aircraft logs of N313P. See also Exhibit 6: Appendix 1 to Marty 2006, see note 8 above, at para. 103. Available at:

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30. On 15 May 2008, Filip Medarski, Mr. El-Masri's Macedonian lawyer, filed an access to information request with the Macedonian Civil Aviation Authority concerning the arrival and departure of Boeing 737 number N313P on 23 and 24 January 2004 from Skopje Airport. The request asked the number, composition and names of the crew and passengers of the incoming and outgoing flights, together with complete copies of the flight logs and other data.[46] On 18 June 2008, the agency replied. Exhibit 2 provides the flight logs that were furnished by the Civil Aviation Authority, which provided practically identical arrival and departure times for jet number N313P as was uncovered by the Marty Inquiry. The reply also stated that the relevant loadsheets related to the crew, passengers and cargo are kept for three months after departure and thereafter the information is only maintained in an electronic system. Accordingly, the only information that was provided, apart from the flight log of N313P, was that Boeing 737 number N313P did not have any passengers on board when it landed and that it carried one passenger upon departure.[47] The government has never provided an explanation for who that passenger was or why the CIA plane was in Skopje that night.

31. The CIA team remained in Kabul for about 30 hours after the rendition of Mr. El-Masri.[48] On Sunday 25 January 2004, the jet left Kabul and flew to Romania. It landed in Timisoara, Romania, at 23:51 on 25 January 2004 and departed 72 minutes later, at 01:03 on 26 January 2004.[49]

32. The facts of Mr. El-Masri's rendition are corroborated by the strikingly similar rendition of Binyam Mohamed, who was transferred to Afghanistan in January

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http://assembly.coe.int/CommitteeDocs/2006/20060614_Ejdoc162006PartII-APPENDIX.pdf ("Marty 2006 Appendix 1")

[46] Exhibit 73& Exhibit 74: Freedom of Information Request to Macedonian Civil Aviation Authority about Flight N313P, 15 May 2008 (English & Macedonian)

[47] See Exhibit 75& Exhibit 76: Alexander the Great Airport Skopje, "Response to Freedom of Information Request about Flight N313P," Ref. 04/751, 18 June 2008 (Macedonian language and English translation); See also footnote 45 above, which provides evidence that the flight paths uncovered by the Marty Report and the Freedom of Information request were identical.

[48] Marty 2006, see note 8 above, at para. 61

[49] The information about the flight was confirmed by the Romanian Civil Aeronautic Authority, Aircraft logs of N313P. See: Marty 2006, Appendix 1, see note 45 above

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2004 on the same plane, forty-eight hours before Mr. El-Masri.[50] Binyam Mohamed was initially seized in Karachi airport in April 2002 by the CIA and rendered to Morocco. In January 2004 he was rendered again, this time to Afghanistan.[51] The plane used to render both men was a Boeing 737, tail-number N313P, that was operating on a circuit. The plane started from Shannon airport in Ireland, and flew to Larnaca, Cyprus, where the crew stayed for four days. The flight left Larnaca on the evening of 21 January 2005 and arrived in Rabat, Morocco at twelve minutes to midnight where it picked up Mr. Mohamed,[52] using the characteristic "capture shock" process that was also used on Mr. El-Masri and others.[53] Mr. Mohamed's flight arrived in Kabul on 22 January 2004. After Mr. Mohamed was offloaded from the flight, the plane stayed in Kabul for a little over two hours, likely loading up three Algerian detainees who were transferred to Algiers. [54] The crew then flew to Palma de Mallorca.[55]

33. The following day, N313P left Palma de Mallorca for Skopje, Macedonia, arriving in the evening of 23 January 2004. Eight minutes after the plane touched down, Mr. El-Masri was taken from his hotel room and driven to the airport. The flight that transported Mr. El-Masri touched down in Baghdad and continued to Kabul. The plane and its crew had an overnight stay in Kabul and left early in the morning of 25 January 2005, arriving in Timisoara, Romania. The plane stayed in Romania for only one hour before departing again for Palma

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[50] Marty 2006, see note 8 above, at para. 200

[51] *Ibid.* at para. 208

[52] Marty 2006 Appendix 1, see note 45 above

[53] Exhibit 77: Reprieve, "Human Cargo: Binyam Mohamed and the Rendition Frequent Flier Programme," 10 June 2008, 17-18. Available at: http://www.reprieve.org.uk/static/downloads/Microsoft_Word_-_2008_06_10_Mohamed_-_Human_Cargo_Final.pdf

[54] *Ibid.* at 19

[55] *Ibid.*

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de Mallorca,[56] where it stayed for two nights before returning to the United States.[57]

The "Extraordinary Rendition" program of the U.S. Government

34. Mr. El-Masri's detention in Macedonia, hand-over at Skopje airport and transfer to Afghanistan were part of a then-secret programme of "extraordinary rendition" that was developed by the government of the United States following the terrorist attacks on September 11, 2001 from an earlier programme of "legal rendition."[58] Mr. El-Masri's description of his pre-flight treatment at the Skopje Airport, most likely at the hands of a special CIA "rendition team," was remarkably consistent both with the accounts of other rendition victims and with recently disclosed CIA documents[59] describing the protocols for the initial so-called "capture shock" treatment as well as the physical and psychological "breaking techniques" to be used during the detainee's detention in a "black site" (a secret, overseas CIA detention facility).

35. In 1995, the CIA established a rendition programme pursuant to Presidential Decision Directives 39 and 62.[60] Though rendition is not a clearly defined term, the European Commission for Democracy through Law (the "Venice Commission") described rendition in the period prior to September 11, 2001 as a

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[56] Marty 2006, see note 8 above, at para. 56-60

[57] *Ibid.* at para. 59. See also Exhibit 47: Andreu Manresa, "La investigación halla en los vuelos de la CIA decenas de ocupantes con estatus diplomatico," *El Pais*, 15 November 2005, (Spanish). Available at: http://www.elpais.com/articulo/elpepiesp/20051115elpepinac_4/Tes/

[58] Marty 2006, see note 8 above, at para. 34 (describing "legal rendition," which was upheld by the United States Supreme Court in *United States v. Alvarez-Machain*, 504 U/.S/ 655 (1992)).

[59] Exhibit 4: Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's combined use of Interrogation Techniques," 30 December 2004. Available at: http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf ("CIA Memo of 30 December 2004")

[60] Exhibit 68: Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations," Serial No. 110-28, 17 April 2007, pg. 12. Available at: http://foreignaffairs.house.gov/110/34712.pdf; Exhibit 11: The White House, "Presidential Decision Directive 39," 21 June 1995, para. 2. Available at: http://www.fas.org/irp/offdocs/pdd39.htm; Exhibit 12: Fact Sheet concerning the classified Presidential Decision Directive 62, 22 May 1998. Available at: http://www.fas.org/irp/offdocs/pdd-62.htm (reinforcing the mission of the many U.S. agencies charged with roles in defeating terrorism)

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process of "one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State."[61] In a May 2006 interview, Mr. Michael Scheuer, the former chief of the Bin Laden Unit of the CIA Counter-Terrorism Center, stated that, in the pre-September 11 period, the prerequisites for launching a rendition were that there must be an "outstanding legal process" against the subject, a CIA dossier, a country willing to help in his apprehension, and a country to detain and subject the suspect to judicial process.[62]

36. After September 11, the programme changed. The Marty Inquiry noted that "there has clearly been a critical deviation away from notions of justice in the rendition programme" and that ". . . the United States transformed rendition into one of a range of instruments ..." used to pursue the war on terror.[63] This new form of "extraordinary rendition" is now understood as referring to "any occasion on which there is little or no doubt that the obtaining of custody over a person is, for one reason or another, not in accordance with the existing legal procedures applying in the state where the person was situated at the time."[64] Instead of functioning as a tool to bring individuals to justice, rendition as it evolved after September 11 led to detention at CIA "black sites,"[65] often resulting in long-lasting psychological damage to detainees.[66] U.S. Secretary of State Condoleezza Rice and President George Bush acknowledged the existence of the updated post-September 11 rendition programme in 2005 and 2006

[61] Exhibit 55: European Commission for Democracy through Law (Venice Commission) "Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners," no. 363/2005, 17 March 2006, para. 30. Available at: http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf ("Venice Commission Opinion of 2006")

[62] Marty 2006, see note 8 above, at para. 29; See also Exhibit 46: PBS Frontline, "Interview of Michael Scheuer," 18 October 2005. Available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/scheuer.html

[63] Marty 2006, see note 8 above, at para. 35

[64] Exhibit 59: European Union Network of Independent Experts on Fundamental Rights, "Opinion 3: The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe ('extraordinary renditions')," 25 May 2006, pg. 6. Available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_3_en.pdf

[65] Marty 2006, see note 8 above, at para. 38.

[66] Marty 2006, see note 8 above, at para. 78

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respectively.[67] Secretary Rice explained that persons "may only be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful."[68]

37. A memo dated 30 December 2004 from the CIA to the United States Department of Justice describes the highly coordinated rendition process. The name given by the CIA to the initial phase of detention is "capture shock," which contributes to the physical and psychological condition of the detainee prior to the start of interrogation. The goal of interrogation is to create a "state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner."[69] Once detainees arrive at a detention "black site," they are subject to poor detention conditions and a variety of interrogation techniques that are designed to reduce them to a baseline dependant state and to demonstrate that the detainee has no control over his basic human needs.[70] CIA practice included exposing detainees to white noise and constant light during detention and forced nudity, sleep deprivation by vertical shackling, dietary manipulation, and interrogation techniques such as slapping and "walling" – slamming the detainee against a flexible wall – water dousing, and cramped confinement.[71]

38. Evidence of renditions has been pieced together through the examination of flight records. The 2006 interim report of the Fava Inquiry indicated that more than 1,000 CIA flights transited through Europe.[72] Following meetings in

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[67] Exhibit 49: Secretary of State Condoleezza Rice, "Remarks Upon Her Departure for Europe," 5 December 2005. Available at: http://geneva.usmission.gov/Press2005/1205RiceEurope.htm; Exhibit 63: President George W. Bush, "Transcript of President Bush's Remarks, "Speech from the East Room of the White House," 6 September 2006. Available at: http://www.npr.org/templates/story/story.php?storyId=5777480

[68] Secretary of State Condoleezza Rice, *Ibid.*

[69] CIA Memo of 30 December 2004, see note 59 above, at pg. 1

[70] *Ibid.* at pg. 4.

[71] *Ibid.* at pg. 9-18.

[72] Exhibit 10: European Parliament, "Interim Report on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners," 15 June 2006, pg. 15. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0213+0+DOC+PDF+V0//EN&language=EN ("Fava Interim Report 2006")

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Washington D.C., the Inquiry revealed that it had obtained information that between 30 and 50 people had been rendered since 2001.[73] The records of Mr. El-Masri's flights were uncovered by the Marty Inquiry through examination of data from the European Organization for the Safety of Air Navigation ("Eurocontrol"), and also of aviation records in twenty Council of Europe states.[74] Mr. Marty was able to identify circuits of CIA rendition flights and uncovered ten case studies of alleged unlawful inter-state transfers, involving a total of seventeen detainees.[75]

39. Following a meeting with Secretary of State Condoleezza Rice on 6 December 2005, Chancellor Angela Merkel stated that Ms. Rice had admitted that Mr. El-Masri was innocent and that the United States had made a mistake in detaining him, as they had confused him with a person of the same (or similar) name.[76] According to the official 9/11 Commission report on the September 11 attacks, a person with that name had traveled by train in Germany together with members of the "Hamburg cell," a group suspected to have been involved in the attacks.[77] The Marty Report rejected this claim of "mistaken identity" due to the detailed knowledge of Mr. El-Masri's life in Germany that was demonstrated by his interrogators.[78]

Detention and Interrogation in Afghanistan

40. Mr. El-Masri was detained and interrogated in Kabul by, or under the authority of, the CIA until 28 May 2004. After landing in Afghanistan, he was removed

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[73] Exhibit 58: European Parliament Press Release, "MEPs say intelligence sources reveal 30 to 50 extraordinary renditions have taken place," 17 May 2006. Available at: http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20060515IPR08166

[74] Marty 2006, see note 8 above, at para. 42

[75] *Ibid.* at para. 50

[76] Exhibit 51: "Merkel Government Stands by Masri Mistake Comments," *The Washington Post*, 7 December 2005. Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/07/AR2005120700469.html ("Merkel Stands by U.S. Mistake Comments")

[77] National Commission on Terrorist Attacks in the United States, Complete 9/11 Commission Report, 22 July 2004. Available at: http://govinfo.library.unt.edu/911/report/index.htm. At pg. 167.

[78] Marty 2006, see note 8 above, at para. 129

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from the aircraft and forced into the trunk of a waiting vehicle.[79] The car drove for about ten minutes. Mr. El-Masri was then dragged from the vehicle, slammed into the walls of a room, thrown to the floor, and kicked and beaten. His head and neck were specifically targeted and stepped upon. [80] He was left in a small, dirty, dark cell made of concrete. When he adjusted his eyes to the light, he saw that the walls were covered in Arabic, Urdu, and Farsi hand-writing. The cell did not contain a bed. Although it was cold, he had been provided with only one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. Through a window at the top of the cell, he saw a red, setting sun, and realized that he had been traveling for twenty-four hours.[81] It later became clear that he had been transferred to a CIA-run facility which media reports have identified as the "Salt Pit," a brick factory north of the Kabul business district that was used by the CIA for detention and interrogation of some high-level terror suspects.[82]

41. Mr. El-Masri was thirsty. Through the small, barred window of his cell, he saw a man dressed in Afghan clothing. He shouted to the man for water, and the man pointed to a bottle of putrid water in the corner of the cell. Mr. El-Masri asked for fresh water, but the guard indicated that he could drink from the bottle or go thirsty.[83] That night, Mr. El-Masri was removed from his cell and dragged to an interrogation room by four masked men dressed in black uniforms. Three additional men were in the interrogation room: two were dressed in black clothing, and one man was wearing a shirt and jeans.[84] Mr. El-Masri believes that the plain clothed man was a doctor.[85] The doctor had a mask over his face,

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[79] Declaration of Khaled El-Masri, see note 1 above, at para. 35

[80] *Ibid.* at para. 35

[81] *Ibid.* at para. 36

[82] Exhibit 1(B): Lisa Myers & Aram Roston, "CIA Accused of Detaining an Innocent Man: If the Agency Kew He Was the Wrong Man, Why Was He Held?" *MSNBC*, 21 April 2005. Available at: http://www.msnbc.msn.com/id/7591918/ ("Myers & Roston – MSNBC – 21 April 2005"); Exhibit 48: Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake," *The Washington Post*, 4 December 2005 ("Dana Priest – *Washington Post* – 2005*")*. Available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html

[83] Declaration of Khaled El-Masri, see note 1 above, at para. 37

[84] *Ibid.* at para. 38

[85] *Ibid.* at para. 41

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but from his voice and his visible grey hair, Mr. El-Masri estimates that he was around 40 or 50 years old.[86] Mr. El-Masri was asked to completely undress by a man who spoke Arabic with a Palestinian accent. He was photographed while naked and underwent a medical examination that included blood and urine samples.[87] Mr. El-Masri complained to the masked doctor about the unhygienic water and poor conditions in his cell. The man responded that the Afghans were responsible for the conditions of his confinement.[88]

42. On his second night in the Salt Pit, Mr. El-Masri was awakened by masked men and once again dragged to the interrogation room. This time, his four escorts and seven additional black-clad men were in the room. Mr. El-Masri was interrogated by a masked man who spoke Arabic with a South Lebanese accent. The man asked him if he knew why he had been detained; Mr. El-Masri said he did not. The man then stated that Mr. El-Masri was in a country with no laws, and that no one knew where he was, and asked whether Mr. El-Masri understood what that meant.[89]

43. Mr. El-Masri was interrogated about whether he had taken a trip to Jalalabad using a false passport; whether he had attended a terrorist training camp; whether he was acquainted with September 11 conspirators Mohammed Atta and Ramzi Binalshibh; and whether he associated with alleged extremists in Germany.[90] Mr. El-Masri answered these questions truthfully, just as he had in Macedonia. Mr. El-Masri asked why he had been transported to Afghanistan, given that he was a German citizen with no ties to Afghanistan. His interrogator did not answer.[91]

44. In all, Mr. El-Masri was interrogated on three or four occasions, each time by the same man who spoke Arabic with a south Lebanese accent, and each time at night. His interrogations were accompanied by threats, insults, pushing, and shoving. Two men who participated in the interrogations identified themselves

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[86] *Ibid.*

[87] *Ibid.* at para. 39, 40

[88] *Ibid.* at para. 41

[89] *Ibid.* at para. 43

[90] *Ibid.* at para. 44

[91] *Ibid.* at para. 45

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as Americans. Mr. El-Masri repeatedly demanded that he be permitted to meet with a representative of the German government, but these requests were ignored.[92]

45. In March, Mr. El-Masri and several other inmates with whom he communicated through cell walls commenced a hunger strike to protest their continued confinement without charges. On 13 March, Mr. El-Masri was interrogated by three American officials in the presence of a psychologist who doubled as the prison's interpreter and spoke with a Syrian accent. The interrogation was centered on El-Masri's alleged association with Dr. El-Attar, Dr. Yousif and his son Omar, and Mr. Reda Seyam, and his relationship with the multicultural center "MultiKultur Haus" and the Islamic Information Center (IIZ) in Ulm.[93]

46. On 31 March, after twenty-seven days without food, Mr. El-Masri met with two unmasked Americans, one of whom described himself as the prison director and the other a higher official whom other inmates referred to as "the Boss." The Afghan prison director was also present, along with the Arabic translator with the Palestinian accent.[94] When asked to end his hunger strike, Mr. El-Masri insisted that the Americans should release him, bring him before a court, and allow him access to a lawyer or to a German government official; otherwise, they would watch him starve to death. The American prison director replied that he could not release Mr. El-Masri without permission from Washington, but agreed that Mr. El-Masri was innocent.[95] Mr. El-Masri was returned to his cell, where he continued his hunger strike. As a consequence of the conditions of his confinement and his hunger strike, Mr. El-Masri's health deteriorated on a daily basis. He received no medical treatment during this time, despite repeated requests.[96]

47. Media reports quoting unnamed U.S. officials, published after Mr. El-Masri's eventual return to Germany, noted that CIA officials at the "Salt Pit" believed

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[92] *Ibid.* at para. 46
[93] *Ibid.* at para. 49
[94] *Ibid.* at para. 50
[95] *Ibid.* at para. 52
[96] *Ibid.*

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early on that they had detained the wrong person. According to those reports, in March, Mr. El-Masri's passport was examined by CIA officials in Langley, Virginia and determined to be valid. Then Director of U.S. Central Intelligence, George Tenet, was notified in April that the CIA had detained the wrong person. By early May, Condoleezza Rice, then the President's National Security Advisor, had also been informed that the CIA was detaining an innocent German citizen.[97] Nonetheless, Mr. El-Masri was detained in the "Salt Pit" until 28 May.[98]

48. On 8 April, Mr. El-Masri was so weak that he was unable to leave his bed, not even to use the toilet. On 9 April, some Afghans approached Mr. El-Masri and urged him to end his hunger strike because of his obviously deteriorating health. On 10 April, the thirty-seventh day of his hunger strike, hooded men entered Mr. El-Masri's cell, pulled him from his bed, and bound his hands and feet. They dragged him into the interrogation room, sat him on a chair, and tied him to it. A feeding tube was then forced through his nose to his stomach and a liquid was poured through it.[99] After this procedure, Mr. El-Masri was given some canned food as well as some books to read. Mr. El-Masri was weighed. Since the time of his seizure in December of 2003, Mr. El-Masri had lost more than twenty-seven kilos.[100] Following his force-feeding, Mr. El-Masri became extremely ill and suffered very severe pain. A doctor visited his cell in the middle of the night and administered medication, but he remained bedridden for several days.[101] Around that time, Mr. El-Masri felt what he believed to be a minor earthquake. Geological data confirmed that an earthquake occurred in the neighbouring area of Kabul.[102]

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[97] See, e.g., Myers & Roston – MSNBC – 21 April 2005, note 82 above

[98] Declaration of Khaled El-Masri, see note 1 above, at para. 66

[99] *Ibid.* at para. 55

[100] *Ibid.*

[101] *Ibid.* at para. 57

[102] *Ibid.* at para. 56; Exhibit 1C: United States Geological Survey, "Significant Earthquakes of the World," (2004) (indicating that on April 5 an earthquake occurred in the Hindu Kush Region of Afghanistan that was a 6.6 magnitude); See also: USGS EarthQuake Hazards program, "News Release: Magnitude 6.6 Hindu Kush Region of Afghanistan," 5 April 2004 (stating that the earthquake was felt strongly in Kabul, that at least one person died, and that the earthquake occurred on April 6 at 1:54 a.m. local time in Afghanistan – 5:24 p.m. on April

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49. Around the beginning of May 2004, the prison director brought Mr. El-Masri to an interrogation room where he met an American who spoke English and identified himself as a psychologist and was accompanied by a female interpreter with a Syrian accent. The psychologist told Mr. El-Masri that he had traveled from Washington D.C. to check on him and asked him some questions. At the conclusion of the conversation, the man promised that Mr. El-Masri would be released from the facility very soon.[103]

50. On 16 May, Mr. El-Masri was visited by a German speaker who identified himself only as "Sam."[104] "Sam" was about 180 cm tall, thin, and had light brown hair. He was accompanied by the American prison director. Mr. El-Masri asked "Sam" whether he was a representative of the German government, and whether the German government knew that Mr. El-Masri was being held in Afghanistan, but "Sam," after consulting with the Americans, declined to answer.[105] He asked "Sam" whether his wife knew where he was; "Sam" replied that she did not. "Sam" then proceeded to ask Mr. El-Masri many of the same questions he had previously been asked regarding his alleged associations with extremists in Neu Ulm, Germany.[106]

51. "Sam" visited Mr. El-Masri three more times. In late May, Mr. El-Masri received a visit from "Sam," the American prison director, and an American doctor. He was informed that he would be released in eight days. "Sam" warned him that, as a condition of his release, he was never to mention what had happened to him because the Americans were determined to keep the affair a secret. Sam met with Mr. El-Masri three additional times prior to his release. On 21 May, Mr. El-Masri began his second hunger strike and that same evening the American prison director appeared with "Sam" and an American doctor. Sam assured Mr. El-Masri that the security formalities of his transfer to Germany

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5, 2004 on the east coast of the United States). Available at: http://neic.usgs.gov/neis/eq_depot/2004/eq_040405/neic_gxce_nr.html

[103] Declaration of Khaled El-Masri, see note 1 above, at para. 58

[104] *Ibid.* at para. 59

[105] *Ibid.*

[106] *Ibid.* at para. 60

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were being arranged and that he would be on his way home within the next eight days.[107]

Disguised "Reverse-Rendition" to Albania

52. On 27 May 2004, the American doctor and the American prison director visited Mr. El-Masri's cell. The doctor instructed Mr. El-Masri not to eat or drink anything, as the next day he would be transported back to Germany and, during the transit back, he would not be permitted to use the bathroom.[108] The next morning, the doctor and the American prison director arrived in his cell. Mr. El-Masri was blindfolded and hand-cuffed, led out of his cell, and driven for about ten minutes. He was then locked in what seemed to be a shipping container until he heard the sound of an aircraft arriving.[109]

53. Mr. El-Masri was released from the shipping container and was handed the suitcase that had been taken from him in Skopje. He was told to change back into the clothes he had worn in Macedonia, and was given two new t-shirts, one of which he put on. He was then driven to the waiting aircraft, blindfolded and ear-muffed, and led onto the plane, where he was chained to his seat.[110] He noticed that the aircraft was smaller than the one on which he had been flown from Macedonia.[111]

54. "Sam" accompanied Mr. El-Masri on the aircraft.[112] Mr. El-Masri also heard the muffled voices of two or three Americans. Shortly after take-off, Mr. El-Masri asked "Sam" if he could have the earmuffs removed; "Sam" obliged, after consulting with the Americans.[113] Sam informed Mr. El-Masri that Germany had a new President. He said that the plane would land in a European country other than Germany, but that Mr. El-Masri would eventually continue on to

[107] *Ibid.* at para. 63
[108] *Ibid.* at para. 65
[109] *Ibid.* at para. 66
[110] *Ibid.* at para. 67 & 68
[111] *Ibid.* at para. 69
[112] *Ibid*
[113] *Ibid.* at para. 70

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Germany. Mr. El-Masri feared that he would not be returned home, but rather taken to another country and executed.[114]

55. Based on its examination of flight records, the Council of Europe confirmed that on 28 May 2004 at 07:04 Mr. El Masri "was flown out of Kabul […] on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome," arriving there at 11.34 a.m. local time. These records also show that the aircraft was owned and operated by a U.S.-based corporation, Richmor Aviation.[115]

56. When the aircraft landed, Mr. El-Masri, still blindfolded, was taken off the plane and placed in the back seat of a vehicle.[116] He was not told where he was. He was driven in the vehicle up and down mountains, on paved and unpaved roads, for more than three hours. The vehicle came to a halt, and Mr. El-Masri was aware of the men in the car getting out and closing the doors, and then of men climbing into the vehicle. All of the men had Slavic-sounding accents but said very little.[117]

57. The vehicle proceeded to drive for another three hours, again up and down mountains and on paved and unpaved roads. Eventually, the vehicle was brought to a halt. He was taken from the car and his blindfold was removed. His captors gave him his belongings and passport, removed his handcuffs, and directed him to walk down the path without turning back. It was dark, and the road was

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[114] *Ibid.* at para. 71

[115] Exhibit 7: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States," Doc. 11302 rev., 11 June 2007, para. 279-280. Available at: http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11302.pdf ("Marty 2007"); Exhibit 8: Flight log of N982RK related to the secret "homeward rendition" of Khaled El-Masri in May 2004, Appendix No. 3, Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States," Doc. 11302 rev., 11 June 2007. Available at: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_Appendix-3.pdf

[116] Declaration of Khaled El-Masri, see note 1 above, at para. 72

[117] *Ibid* at para. 73

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deserted. Mr. El-Masri said that he believed he would be shot in the back and left to die.[118]

58. He rounded a corner and came across three armed men. They immediately asked for his passport. They saw that his German passport had no visa in it, and asked him why he was in Albania without legal permission. He replied that he had no idea where he was. He was told that he was near the Albanian borders with Macedonia and Serbia. The men led him to a small building with an Albanian flag, and he was presented to a superior officer.[119] The officer observed Mr. El-Masri's long hair and long beard and told him he looked like a terrorist. Mr. El-Masri asked to be taken to the German embassy, but the man told him he would be taken to the airport instead.[120]

59. Mr. El-Masri was driven to the Mother Theresa Airport in Tirana, and arrived at about 06:00.[121] One of the Albanian guards took 320 Euros from Mr. El-Masri's wallet together with his passport and went into the airport building. When he returned, he instructed Mr. El-Masri to go through a door, where Mr. El-Masri was met by a person who guided him through customs and immigration control without inspection. Only after he boarded the aircraft and it was airborne did Mr. El-Masri finally believe he was returning to Germany. [122] Exhibit 1(E) shows the Albanian exit stamp in Mr. El-Masri's passport.[123] Exhibit 79 provides the response of the Republic of Albania, Ministry of Interior to an access to information request, indicating that the only information available regarding immigration control of Mr. El-Masri in Albania concerns his departure through Rinas airport on an Albanian Airlines flight on 29 May 2004 at 05:21 hours – no information was provided by Albania regarding Mr. El-

[118] *Ibid* at para. 74 & 75
[119] *Ibid* at para. 76
[120] *Ibid* at para. 77 & 78
[121] *Ibid* at para. 80
[122] *Ibid.*
[123] Khaled El-Masri's Passport, see note 40 above, pg. 3 (including an exit stamp from Albania on 29 May 2004)

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Masri's arrival in Albania.[124] Mr. El-Masri's passport does not contain a stamp showing entry into Albania.[125]

60. Like Macedonia, the Albanian Government has denied any involvement with Mr. El-Masri's rendition, even though Albanian authorities stamped Mr. El-Masri's passport upon his exiting Albania.[126] The Albanian authorities failed to respond to questions, or provide any explanations, regarding the circumstances of Mr. El-Masri's entry and stay in Albanian territory. Mr. El-Masri provided the Munich prosecutor with his boarding pass for the flight from Tirana to Frankfurt.

61. The circumstances of Mr. El-Masri's "reverse rendition" and release via Albania, once the U.S. authorities recognized their mistake, have been clarified by several sources, particularly by the second Marty report which identified the precise flight that took Mr. El-Masri from Kabul to Albania.[127] This was another cover-up operation, with Albania offering to help send Mr. El-Masri back to Germany after Macedonia apparently refused to do so.[128] The Marty Inquiry reported:

> "We were told by [CIA] sources that originally the CIA had asked "the former Yugoslav Republic of Macedonia" whether it would accept a "reversal" of the January 2004 rendition, but that this approach was instantly rejected: 'You can imagine that was the last thing the Macedonians wanted! They had no reason to take the problem back.'"[129]

Arrival in Germany and Criminal Complaint

62. The plane landed at Frankfurt International Airport at 08:40 a.m. on 29 May 2004. Mr. El-Masri was by then about eighteen kilos lighter than when he had left Germany, his hair was long and unkempt, and he had not shaved since his

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[124] See Exhibit 80 & Exhibit 81: Albanian Ministry of Interior, "Response to Request of Information by El-Masri's Albanian Counsel about transfer and hand-over of El-Masri," 9 October 2008 (Albanian original and English translation)

[125] Khaled El-Masri's Passport, see note 40 above

[126] *Ibid.*

[127] Marty 2007, see note 115 above, at para. 279-281

[128] *Ibid.* at para. 282-283; See Also: Dana Priest – *Washington Post – 2005*, see note 82 above

[129] Marty 2007, see note 115 above, at para. 282.

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arrival in Macedonia.[130] From Frankfurt he traveled to Ulm, and from there to his home outside the city. His house was empty and clearly had been so for some time. He proceeded to the Cultural Center in Neu Ulm and asked after his wife and children. He was told that his family had relocated to Lebanon when he failed to return from his holiday in Macedonia.[131]

63. Immediately upon arrival in Germany, Mr. El-Masri made an appointment to see a lawyer. He met with Manfred Gnjidic, of Gnjidic and Aehle in Ulm, on 3 June 2004.[132] Mr. Gnjidic took a full statement from him and then wrote to the German Chancellor and the Minister for Foreign Affairs. [133] Shortly thereafter he was contacted by Mr. Bernhardt of the public prosecution office in Memmingen, Germany, who explained that his office had opened an investigation into the allegations and wished to speak to him[134] (see paragraph 121 below).

64. At the time of his release, Mr. El-Masri was able to identify three other detainees with whom he had been held at the Afghan "black site:" an Algerian named Laid Saidi and two Pakistani brothers from Saudi Arabia called Rabbani. They had also been able to exchange phone numbers, which they memorized while in detention. Upon his release and return to Algeria in August 2004, Mr. Saidi telephoned Mr. El-Masri at the number he had memorized at the Salt Pit. In July 2006, Mr. Saidi was reached and interviewed by the *New York Times*.[135] Mr. Saidi confirmed to the *New York Times* reporters that he had been held with Mr. El-Masri and others, in early 2004, at an Afghan facility run by what appeared to be U.S. officials. He also provided other details about their detention that are consistent with Mr. El-Masri's account; e.g., Mr. Saidi

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[130] Declaration of Khaled El-Masri, see note 1 above, at para. 82

[131] *Ibid.* at para. 83

[132] Exhibit 3: Declaration of Manfred Gnjidic in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative for Summary Judgment, at para.2., Khaled El-Masri v. George Tenet, No. 1:05cv1417-TSE-TRJ (E.D.V.A. 6 April 2006) ("Declaration of Manfred Gnjidic")

[133] *Ibid.* at para. 5

[134] *Ibid.* at para. 6

[135] Exhibit 62: Craig S. Smith, "Algerian Tells of Dark Term in U.S. Hands," *New York Times*, 7 July 2006. Available at: http://www.nytimes.com/2006/07/07/world/africa/07algeria.html

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provided a sketch of the prison layout that "closely matched" one drawn by Mr. El-Masri.[136]

65. Using a phone number memorized by Mr. El-Masri, the *New York Times* reporters were also able to contact relatives of the Rabbani brothers in Saudi Arabia, who said that they had been notified by the Red Cross in 2004 that the brothers were being held in Afghanistan. According to the *New York Times*, Pentagon documents showed that two men with those same names were still being detained at that time at the Guantanamo Bay prison.[137]

Internal Investigation in Macedonia

66. In 2005 there was an internal inquiry undertaken by the "Department for Control and Professional Standards" of the UBK within the Ministry of Internal Affairs into Mr. El-Masri's claims.[138] Mr. El-Masri was not spoken to by this investigation.

67. On 27 December 2005, the results of this investigation were transmitted to the Ambassador of the European Commission, Erwan Fouere.[139] A further account of the government explanation of events was provided in April 2006 in response to a question from a Council of Europe inquiry pursuant to Article 52 of the Convention (see paragraph 103 below) to which the Macedonian government had initially failed to adequately respond.[140] The Ministry of the Interior maintained that the register at the Blace border crossing with Kosovo confirmed that Mr. El-Masri exited Macedonia and entered Kosovo on 23 January 2004.[141] However, no documents were produced to support this version of events. The President of the Republic of Macedonia, Branco Crvenkovski, took a firm stand at a meeting in April 2006 with the Fava Inquiry delegation to Macedonia, stating that "[u]p to this moment … I have no additional comments or facts,

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[136] *Ibid.*

[137] *Ibid.*

[138] Marty 2006, see note 8 above, at para.109; Second Macedonian Response under Article 52, see note 6 above, at pg. 3

[139] Marty 2006, see note 8 above, at para. 106

[140] Second Macedonian Response under Article 52, see note 6 above, at pg. 3

[141] Second Macedonian Response under Article 52, *ibid*, at pg. 3; Fava 2006 Macedonia Delegation Report, see note 7 above, at pg. 5

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from any side, to convince me that what has been established in the official report of our Ministry is not the truth."[142]

68. In March 2006, the Macedonian Ministry of Interior responded to the German government's request for assistance regarding Mr. El-Masri's case. Information about the content of this response was not made public.[143]

69. There are at least five institutions in Macedonia that have the authority to undertake an investigation of this nature.[144]

Criminal Process in Macedonia

70. On 6 October 2008, Mr. 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. [145] A copy of the original Macedonian language version of the complaint which received a reception stamp on its final page is evidence of the proper filing of this request.[146] The request alleged that unnamed personnel of the Macedonian Ministry of the Interior and/or other law enforcement agencies were responsible for numerous violations of Mr. El Masri's rights, including deprivation of liberty, which is punishable under Article 140, paragraphs 1 and 3 of the Macedonian Penal Code. The request also alleged the crime of torture or other cruel, inhuman, or degrading treatment or punishment, which is punishable under Article 142, paragraph 1 of the Penal Code.

71. To date, the Skopje Prosecutor has taken no discernable action on the complaint, and has not notified Mr. El-Masri of any investigative action taken. The five-year statute of limitations expired on 23 January 2009, as explained below in paragraphs 278-285 on "exhaustion of domestic remedies."

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[142] Marty 2006, see note 8 above, at para. 108

[143] Fava 2006 Macedonia Delegation Report, see note 7 above, at pg. 5

[144] *Ibid.* at pg. 8 (listing five institutions that have the power to investigate Mr. El-Masri's case: the ombudsman, the public prosecutor, the Standing Inquiry Committee of the Parliament of Macedonia for Protection of Civil Freedoms and the Rights, the Committee of the Macedonian Parliament for Supervising the Work of the Security and Counter-Intelligence Directorate and the Intelligence Agency, and the Ministry of the Interior)

[145] Exhibit 81: "Criminal Complaint to the Public Prosecutor Office in Skopje," 6 October 2008 (Macedonian original and English translation)

[146] *Ibid.*

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Civil Process in Macedonia

72. On 24 January 2009, Mr. El-Masri filed a claim for damages against the Macedonian Ministry of Interior in relation to his unlawful abduction and ill-treatment by Ministry of Interior personnel. The claim is based on Article 141 of the Law on Contract Relations of the Republic of Macedonia which provides that anyone who causes damage to another person is obliged to provide indemnification unless the person cannot be blamed for the damage. Article 142 of the same law provides that the damage is defined as a reduction in value of an individual's property or the prevention of its increase (lost benefit) as well as the causing of any other physical or mental pain or fear. Article 189 states that the claimant has the right to financial compensation for the pain, mental suffering, and fear that he endured. Article 157 provides that an individual may recover from the Ministry of the Interior based on a theory of *respondeat superior*. The claim stated that Mr. El-Masri was subject to physical pain and intense mental pain and fear that he would be killed during his detention. As a result, he now suffers from permanent damage to his mental health.[147] As of September 2009, the civil case is still pending at the Basic Court Skopje II.

Knowledge of Rendition in January 2004

73. A number of sources published widely in or before January 2004 demonstrate that the Macedonian authorities knew or ought to have known at that time that substantial grounds existed to believe that there was a real risk that Mr. El-Masri would be subjected to acts in violation of the Convention if he were transferred to the CIA. Newspaper reports of unlawful secret detention and ill-treatment in Guantanamo Bay and in Afghanistan had been widely reported in Macedonia, Europe and the United States. Legal cases challenging the system of "extraordinary rendition" in courts in Bosnia and Herzegovina, Germany, the UK and the U.S. had received significant publicity. Well-known human rights organizations had made clear their concerns in highly publicized reports. United Nations bodies – including those of which Macedonia was a member – had raised the issues. As a matter of law, it can be presumed that diplomatic

[147] Exhibit 83: "Request for Relief of compensatory damage," filed at the Basic Court Skopje II, 24 January 2009 (Macedonian)

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representatives of Macedonia posted abroad and at the UN were reporting back to Skopje on relevant matters such that the government must have known of the situation.

Newspaper reports

74. The Macedonian press contained many reports in 2002 and 2003 highlighting concerns as to human rights violations occurring in Guantanamo Bay and Afghanistan. Reports in the international media were frequently repeated in the Macedonian press, such as the following articles:[148]

- Daily newspaper *Dnevnik.* "CIA tortures captured Islamists in Afghanistan," 27 December 2002 (describing the detention conditions at the Bagram base in Afghanistan including: preventing sleep with light shocks, placing prisoners in painful positions to prevent sleep, and transfer from Afghanistan to "dungeons" of neighboring countries where no U.S. surveillance is provided over methods of domestic secret service). "USA forgets about the human rights in the course of the anti-terrorist campaign," 16 January 2003 (providing summary of allegations of Human Rights Watch reports concerning disrespect for basic human rights in Guantanamo bay in Cuba). "Oblivion for 140 prisoners of Guantanamo," 2 December 2003 (reporting that there are at least 660 individuals retained at Guantanamo bay).

- Daily newspaper *Utrinski vesnik*. "Hunger strike of the Taliban in Guantanamo," 4 March 2002 (reporting that 75 Guantanamo prisoners went on hunger strike to protest the conditions and terms of their detention and that at one point 300 prisoners were on hunger strike). "The suspects from Macedonia handed to the U.S.," 8 March 2003 (reporting that two Jordanians and two Bosnians were arrested in the proximity of the residence of the U.S. Ambassador in Skopje and were transferred to Guantanamo bay, and also reporting that the U.S. embassy expressed support for a Macedonian intervention against Pakistanis near the area of Rashtanski lozja and indicated that the U.S. cooperates with Macedonia in the war against terror). "Holmes: Boskoski was lying for the Mujahidin," 16 March 2002

[148] See Exhibit 13 for translations of some of these articles.

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(reporting that the Minister of the Interior Ljube Boshkoski stated that allegedly Mujahidin terrorists were arrested, handed to the U.S. Government, and transferred to Guantanamo and that the U.S. envoy to the Balkans criticized and denied the report). "The first Pakistani back from Guantanamo," 29 October 2002. "The war against terror makes the world more dangerous place," 29 May 2003. "Secret agreement with serious shortcomings," 5 June 2003 (criticizing a proposed extradition treaty between the E.U. and the U.S.A. due to the existence of the death penalty in the U.S.). "The Guantanamo trial became political case between Washington and London," 15 July 2003. "The case suspended on Tony Blair's request," 24 July 2003. "The retaliation for the Guantanamo prisoners is coming," 4 August 2003. "Espionage affair in the Guantanamo prison," 25 September 2003. "Six hundred Guantanamo prisoners are in a two- year detention," 11 October 2003. "'Humans in cage' waiting for a legal formula," 15 October 2003. "Four Frenchmen in Guantanamo under torture," 16 October 2003. "In Guantanamo there is a torture performance," 27 November 2003 (reporting that Australia obtained the agreement of U.S. officials that two of their citizens in Guantanamo will not face the death penalty and advocating that British officials should do the same for their citizens under detention). "One hundred Prisoners will be released from Guantanamo," 3 December 2003. "Prisoners without charges and rights," 12 January 2004 (quoting a Human Rights Watch report that stated that, after two years of imprisonment, those in Guantanamo are kept with not accusation and no rights).

- Daily newspaper *Vest*. "The Bosnian Government transferred six Algerians to the American Government," 19 January 2002 (reporting on the transfer of six individuals from Bosnia to the American authorities despite their release from prison by Bosnian authorities).

75. Major U.S. newspapers available on the internet reported on "stress and duress" tactics in 2002 such as hooding, sleep deprivation, and stress positions that were employed by the United States for interrogating persons in the wake of September 11. As many of these reports noted, these techniques were employed in Afghanistan, as well as other secret detention facilities outside of U.S.

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territory. Articles also recount official descriptions of the rendition of many captives to third countries, outside of formal legal processes.

- Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *Washington Post*, 26 December 2002: " 'If you don't violate someone's human rights some of the time, you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists…Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said."[149]

76. U.S. newspapers also reported on the rendition to U.S. custody of specific individuals suspected of terrorist-related activities prior to January 2004. These suspects were then transferred to third countries, where they were known to be held incommunicado and/or tortured.

- *Albanian five.* The Albanian secret police cooperated with CIA agents to capture five suspected militants living in Albania. They were interrogated by the U.S., and then handed over to Egypt, where all the suspects were held incommunicado for periods ranging from two to fifteen months. According to the Egyptian Organization for Human Rights, all of the Albanian returnees were tortured before appearing in court. See Andrew Higgins, "A

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[149] Exhibit 22: Don van Natta, Jr., "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, 9 March 2003. Available at: http://www.nytimes.com/2003/03/09/international/09DETA.html?pagewanted=all (citing that "[i]nterrogations of important Al-Qaeda operatives like Mr. [Faruq] Mohammed occur at isolated locations outside the jurisdiction of American law. Some places have been kept secret, but American officials acknowledged that the C.I.A. has interrogation centers at the United States air base at Bagram in Afghanistan and at a base on Diego Garcia in the Indian Ocean . . . [i]ntelligence officials also acknowledged that some suspects had been turned over to security services in countries known to employ torture"); see Exhibit 21: Mark Kaufman, "Army Probing Deaths of 2 Afghan Prisoners," *The Washington Post*, 5 March 2003. Available at: http://www.washingtonpost.com/ac2/wp-dyn/A42373-2003Mar4 (stating that "[t]he inquiries by the Army's Criminal Investigation Command are proceeding as human rights groups and the International Committee of the Red Cross voice concerns about treatment of prisoners at Bagram. Some U.S. officials familiar with the Bagram detention operation have said that uncooperative prisoners are made to stand for long periods of time, are often hooded, and are deprived of sleep with the use of flashing lights or loud noises.")

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CIA-Backed Team Used Brutal Means to Crack Terror Cell," *Wall Street Journal*, 20 November 2001.[150]

- *Iqbal Madni.* An alleged al-Qaeda operative living in Indonesia, the CIA provided information about Madni's whereabouts and urged Indonesia to apprehend him. A few days later, Egypt formally requested Madni's extradition, as he was a joint Egyptian/Pakistani national. Madni was apprehended by Indonesian intelligence, and "two days later -- without a court hearing or a lawyer -- he was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt…" See Rajiv Chandrasekaran and Peter Finn, U.S. Behind Secret Transfer of Terror Suspects," *Washington Post*, 11 March 2002.[151]

- *Mohammed Haydar Zammar.* In a widely publicized case a Syrian national was rendered from Morocco to Syria, with the assistance of the CIA. See John Crewdson, "Suspect offers insight on Al Qaeda finances; Charged in Spain with 9/11 link, man is free in Germany," *Chicago Tribune*, 5 October 2003.[152]

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[150] "A CIA-Backed Team Used Brutal Means to Crack Terror Cell", *Wall Street Journal*, 20 November 2001, available at http://online.wsj.com/article/SB1006205820963585440.html; Egyptian Organization for Human Rights Annual Report, "The Human Rights Situation in Egypt; Violation of Human Rights 2000-2001," 2002. Available at http://www.eohr.org/annual/2000/p2.htm

[151] Exhibit 15: Rajiv Chandrasekaran and Peter Finn, U.S. Behind Secret Transfer of Terror Suspects," *The Washington Post*, 11 March 2002. Available at: http://www.infowars.com/saved%20pages/Police_state/torture_wapost.htm (reporting that "[s]ince Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics -- including torture and threats to families -- that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said. 'After September 11, these sorts of movements have been occurring all the time,' a U.S. diplomat said. 'It allows us to get information from terrorists in a way we can't do on U.S. soil.'")

[152] Germany was irate at Zammar's rendition to Syria, because he is also a German citizen. The article continued that "[e]xtraditing Zammar back to Germany appears to be impossible, a senior official said, because the Syrian government refuses to formally acknowledge that it is holding him." This case also received international press. See also Exhibit 26: Paul Vallely, "The Invisible: The Human Cost of the Twenty-First Century's First War is Already Enormous," *Independent*, 26 June 2003 ("Paul Valley – Independent – 2003"); See also

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- *Mahar Arar.* He was seized on 26 September 2002 and handed over to Syria where he spent 10 months in prison, "where he said he was beaten with an electric cable, forced to sign confessions that he had been to Afghanistan and kept in a cell he called a grave." [153] Arar was later released and flown back to Canada in October of 2003. In a news conference before the Canadian Parliament, Arar "described his torture and maintained his innocence of any involvement in terrorist activity." Prime Minister Chretien publicly protested against Arar's rendition as being "completely unacceptable and deplorable."[154]

- *Ahmed Agiza.* Deported from Sweden to Egypt in 2001 on secret evidence of alleged terrorist-activity, where he remained for at least two years without charge.[155]

- *Adil al-Jazeeri.* He was "handed over to U.S. agents by Pakistan authorities on 13 July 2003 and may have been taken to the U.S. Air Base in Bagram, Afghanistan, for further interrogation. In recent months, there have been disturbing allegations of ill-treatment of detainees held incommunicado in Bagram."[156]

- *Khalid Sheikh Mohammed.* Seized by the Pakistani Inter-Services Intelligence Services and the CIA in March of 2003, he was driven to

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Exhibit 32: Ian Mather, "U.S. and Syria in Head-On Clash," *Scotland on Sunday*, 12 October 2003

[153] Exhibit 35: Keith Jones, "The Maher Arar case: Washington's practice of torture by proxy," *Al-Jazeera*, 18 November 2003. Available at: http://www.aljazeerah.info/Opinion%20editorials/2003%20Opinion%20Editorials/November/22%20o/The%20Maher%20Arar%20case%20Washington's%20practice%20of%20torture%20by%20proxy%20By%20Keith%20Jones.htm

[154] Exhibit 33: DeNeen L. Brown & Dana Priest, "Chretien Protests Deportation of Canadian: Prime Minister Calls U.S. Treatment of Terror Suspect 'Completely Unacceptable,'" *The Washington Post*, 6 November 2003

[155] *Ibid*. See also Exhibit 37: Amnesty International, 2003 Annual Report for Sweden: Refugees. Available at http://www.amnestyusa.org/annualreport.php?id=5079A0D60716A74B80256D2400379426&c=SWE (expressing concern over the forcible return of Ahmed Agiza and Muhammad El-Zari to Egypt).

[156] Exhibit 28: Amnesty International, "Incommunicado Detention/ Fear of Ill-treatment—Adil Al-Jazeeri," AMR 51/103/2003, 16 July 2003. Available at: http://www.amnesty.org/en/library/asset/AMR51/103/2003/en/2718f010-fad0-11dd-b531-99d31a1e99e4/amr511032003en.pdf

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Chaklala Air Force base in Rawalpindi and turned over to U.S. forces. "From there he was flown to the CIA interrogation centre in Bagram, Afghanistan, and from there, some days later, to an 'undisclosed location' (a place the CIA calls 'Hotel California') - presumably a facility in another co-operative nation, or perhaps a specially designed prison aboard an aircraft carrier." See Mark Bowden, "The Persuaders," *The Observer*, 19 October 2003.

77. Newspapers published outside of the United States and with large global readerships reported extensively in 2002-2003 on the extraordinary rendition of particular suspects by the U.S. to third countries; numerous articles also described the locations overseas in which terrorism suspects were being detained incommunicado and/or tortured.[157] See, for example, Vallely reporting in the UK's *Independent*, on Zammer's rendition to Syria, as well as locations around the world where at a minimum detainees were being held incommunicado, and at worst were being tortured (for instance, Jordan was known to use sleep deprivation, beatings on the soles of feet and prolonged suspension from ropes).[158] The article also noted that "[t]here are a number of secret U.S. detention centres overseas where due process does not apply. The CIA undertakes a "false flag operation" using fake decor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands."[159]

UN Human Rights Commission

78. In February 2003, the Human Rights Commission received reports from non-governmental organizations (NGOs) concerning ill-treatment of U.S. detainees.

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[157] See, Exhibit 34: Shawn McCarthy, "U.S. probe of Arar case urged: Lawyers also seek criminal inquiry of Canadian's deportation," *Globe and Mail (Canada),* 12 November 2003

[158] Exhibit 26: Paul Valley – Independent – 2003, see note 152 above

[159] *Ibid.* See also, Exhibit 27: "Missing presumed guilty: where terror suspects are being held," *The Independent*, 26 June 2003. Available at http://license.icopyright.net/user/viewFreeUse.act?fuid=NDgyMTI3Mw%3D%3D (listing 19 different countries or territories where terrorism suspects are being held in prolonged detention without charge, and are likely (if not certainly) subjected to torture. The list includes the United Kingdom, the United States, Cuba, Spain, Morocco, Egypt, Jordan, Saudi Arabia, Iraq, the U.S. Diego Garcia base in the Indian Ocean, Indonesia, India, China, Afghanistan, Uzbekistan, Chechnya, Georgia, Syria, and Israel)

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The International Rehabilitation Council for Torture submitted a statement in which it expresses its concern over the United States' reported use of 'stress and duress' methods of interrogation, among them sleep deprivation and hooding, as well as the contraventions of *refoulement* provisions in Article 3 of the Convention Against Torture. The report criticized the failure of governments to speak out clearly to condemn torture, and emphasized the importance of redress for victims.[160] Macedonia was represented at the Human Rights Committee by an observer.[161] The Human Rights Commission communicated this to the General Assembly on 8 August 2003.[162]

79. On 23 April 2003, the Human Rights Commission passed Resolution 2003/32 which stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture."[163] It was reported to the General Assembly in resolution 58/164 of 22 December 2003.[164]

80. In 2002 and 2003, the Working Group on Arbitrary Detention received many communications alleging the arbitrary character of detention measures applied by the U.S. Government as part of its investigations into the terrorist acts of 11

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[160] Exhibit 20: UN Commission on Human Rights, "Civil and Political Rights, Including the Questions of Torture and Detention: Written Statement Submitted by the International Rehabilitation Council for Torture Victims," 59th Session, 28 February 2003, E/CN.4/2003/NGO/51, para. 1-5. Available at: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.NGO.51.En?Opendocument

[161] Commission on Human Rights, "Report on the 59th Session," (17 March-24 April 2003), UN Doc E/CN.4/2003/135, pg. 476. Available at: http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/6395D27097AF5ED0C1256E1600569325/$File/G0316227.pdf?OpenElement

[162] United Nations General Assembly, "Report of the Secretary General on Protection of human rights and fundamental freedoms while countering terrorism," UN Doc A/58/266, 8 August 2003, para. 16-21 (referring in paragraph 30 to a 2002 Amnesty International report on the negative impact of counter-terrorism measures). Available at: http://daccessdds.un.org/doc/UNDOC/GEN/N03/464/15/PDF/N0346415.pdf?OpenElement

[163] Exhibit 24: UN Commission on Human Rights, "Commission on Human Rights Resolution 2003/32: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," E/CN.4/RES/2003/32, 23 April 2003, para. 14. Available at: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-32.doc

[164] United Nations General Assembly, "Resolution on Torture and other cruel, inhuman or degrading treatment or punishment," 58th session, No. 58/164, 22 December 2003. Available at: http://daccessdds.un.org/doc/UNDOC/GEN/N03/504/42/PDF/N0350442.pdf?OpenElement

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September 2001.[165] It concluded that so long as a competent tribunal in the U.S. had not issued a ruling on the contested issue of whether the detainees at Guantanamo were entitled to prisoner-of-war status and protection under the Geneva Conventions, the detainees enjoyed the protection of their rights to humane treatment, to a fair trial, and to a determination on the lawfulness of their detention. The report noted that the Inter-American Commission of Human Rights had requested that the U.S. to take urgent measures to have the legal status of detainees at Guantanamo Bay determined by a competent tribunal.[166] The General Assembly took note of the Working Group's Report in its Resolution 58/157 of December 22, 2003.[167]

UN Special Rapporteurs

81. The Special Rapporteur on Torture issued a Report in July of 2002, pursuant to the General Assembly's resolution 56/143 of 19 December 2001. In his report, the Rapporteur warned that "[States must] ensure that persons they intend to extradite under terrorist or other charges . . . will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment . . . ."[168]

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[165] See, e.g., *Benchellali et al. v. United States of America*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 33, para. 13 & (2003); *Ayub Ali Khan and Azmath Jaweed v. United States of America*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2004/3/Add.1, pg. 20, para. 15-18 (2002)

[166] Exhibit 17: UN Commission on Human Rights, Report of Working Group on Arbitrary Detention, "Civil and Political Rights, Including the Question of Torture and Detention," 59th Session, 16 December 2002, E/CN.4/2003/8, para. 61-64. Available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/c58095e9f8267e6cc1256cc60034de72/$FILE/G0216028.pdf

[167] Exhibit 36: United Nations General Assembly, "Protection of human rights and fundamental freedoms while countering terrorism," A/RES/58/187, 22 December 2003, 58th session. Available at: http://www.icclr.law.ubc.ca/Site%20Map/compendium/Compendium/Instruments/UN%20resolutions%20(Terrorism)/A%20RES%2058%20187.pdf

[168] Exhibit 16: General Assembly, "Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment," 57th Session, 2 July 2002, A/47/173, para. 35. Available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2107741d197b2865c1256c390032be06/$FILE/N0247560.pdf

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82. On 16 November 2001, the UN Special Rapporteur on the Independence of the Judiciary, Param Cumaraswamy, made a public statement outlining his concerns the legal developments in the U.S. during the "war on terror." [169]

Office of the High Commissioner for Human Rights

83. The High Commissioner for Human Rights, Mrs. Mary Robinson, made a statement on 16 January 2002 concerning the detention of Taliban and Al-Qaeda Prisoners at the U.S. Base in Guantanamo Bay, indicating that "[a]ll persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees . . . must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention."[170]

ICRC

84. The International Committee of the Red Cross had also begun to publicly express its concerns as to the legal system being operated by the United States during 2003.

- International Committee of the Red Cross, "ICRC President Meets with U.S. Officials in Washington DC," 28 May 2003. [171] "In relation to Guantanamo,

[169] See UN Wire, "UN Expert on independence of judiciary concerned by military order signed by US president," 16 November 2001. Available at http://www.unwire.org/unwire/20011119/21864_story.asp

[170] Exhibit 14: United Nations High Commissioner for Human Rights, "Statement on detention of Taliban and Al Qaida prisoners at US base in Guantanamo Bay, Cuba," 16 January 2002. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument

[171] Exhibit 25: International Committee of the Red Cross, "ICRC President meets with US officials in Washington DC,' News release 03/36, 28 May 2003. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5mybcu?opendocument

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the ICRC President asked the U.S. authorities to institute due legal process and to make significant changes for the more than 600 internees held there."

- Associated Press Report, "Red Cross Finds deteriorating mental health at Guantanamo," *USA Today*, 10 October 2003: "Wrapping up a two-month visit to the Cuban base, the [ICRC]— the only independent group with access to the approximately 650 detainees — said it found 'a worrying deterioration' in mental health among many prisoners. It blamed their being held indefinitely without charges or legal counsel. 'They have no idea about their fate and they have no means of recourse at their disposal through any legal mechanism,' said Florian Westphal, spokesman for the [ICRC]."[172]

- International Committee of the Red Cross, "United States: ICRC President Urges Progress on Detention-Related Issues," News Release, 16 January 2004.[173] "The President of the ICRC had talks this week with Secretary of State Colin Powell, National Security Advisor Dr Condoleezza Rice and Deputy Secretary of Defense Paul Wolfowitz . . . as a follow-up to a meeting in May 2003 when the ICRC president had appealed for detainees in Guantanamo Bay to benefit from due legal process and for significant changes to be made at the camp itself . . . Mr. Kellenberger . . . lamented the fact that two years after the first detainees arrived at Guantanamo, and despite repeated pleas, they are still facing seemingly indefinite detention beyond the reach of the law. He also noted that the ICRC's concerns regarding certain aspects of the conditions and treatment in Guantanamo have not yet been adequately addressed . . . Beyond Guantanamo, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. Mr. Kellenberger echoed previous official requests from the ICRC

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[172] Exhibit 31: Associated Press, "Red Cross finds deteriorating mental health at Guantanamo," 10 October 2003. Available at: http://www.usatoday.com/news/world/2003-10-10-icrc-detainees_x.htm

[173] Exhibit 40: International Committee of the Red Cross, "United States: ICRC president urges progress on detention-related issues," News release 04/03, 16 January 2004. Available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5V9TE8?OpenDocument&style=custo_print

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for information on these detainees and for eventual access to them, as an important humanitarian priority and as a logical continuation of the organization's current detention work in Guantanamo and Afghanistan."

Amnesty International

85. *2003 Annual Report for the United States of America*.[174] This report provided information on events in 2002 including transfers of detainees to Guantanamo in the wake of 9/11, conditions of transfer (abductions), and conditions in detention (without charge, or access to lawyers/courts). It also reported on detainees being held by the U.S. in undisclosed locations: "[a]n unknown number of detainees originally in U.S. custody were allegedly transferred to third countries, a situation which raised concern that the suspects might face torture during interrogation." The report also noted that two U.S. nationals continued to be held in incommunicado detention without charge or trial in U.S. military custody.

86. Amnesty International, "Notice of 20 August 2003 on Incommunicado Detention/Fear of Ill-treatment."[175] "On 11 August, Riduan Isamuddin aka Hambali, [a man with] suspected links to *al-Qa'ida*, was arrested in the city of Ayutthaya in Thailand. According to media reports, he is being held in U.S. custody at an undisclosed location for interrogation . . . . Amnesty International is concerned that the detention of suspects in undisclosed locations without access to legal representation or to family members and the 'rendering' of suspects between countries without any formal human rights protections is in violation of the right to a fair trial, places them at risk of ill-treatment and undermines the rule of law."

87. Amnesty International, "United States of America—The Threat of a Bad Example: Undermining International Standards as 'War on Terror' Detentions

[174] Exhibit 38: Amnesty International, "2003 Annual Report for the United States of America." Available at: http://www.amnestyusa.org/annualreport.php?id=8926040453C27E8A80256D240037944A&c=USA

[175] Exhibit 30: Amnesty International, "Incommunicado Detention/Fear of Ill-treatment—Riduan Isamuddin aka Hambali," 20 August 2003. AMR 51/119/2003. Available at: http://www.amnesty.org/en/library/asset/AMR51/119/2003/en/b49d72ee-facd-11dd-b531-99d31a1e99e4/amr511192003en.pdf

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Continue."[176] This detailed report describes the detention of suspects in the war on terror, and the threat that this poses to international human rights standards. It particularly notes the non-U.S. nationals held outside the U.S., and that some persons have been held at Guantanamo in conditions amounting to cruel and unusual treatment, and without charge, for upwards of one year. The article further notes that the U.S. has "instigated or involved itself in "irregular renditions," U.S. parlance for informal transfers of detainees between the USA and other countries which bypass extradition or other human rights protections."

Human Rights Watch

88. "United States: Reports of Torture of Al-Qaeda Suspects," 26 December 2002 (referring to the *Washington Post Article* of the same date, "U.S. Decries Abuse"), summarizing that "thousands of persons have been arrested and detained with U.S. assistance in countries known for the brutal treatment of prisoners. The Convention Against Torture, which the United States has ratified, specifically prohibits torture and mistreatment, as well as sending detainees to countries where such practices are likely to occur. That would include, according to the U.S. State Department's own annual human rights report, Uzbekistan, Pakistan, Jordan, and Morocco, where detainees have reportedly been sent."[177]

89. "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," August 2002. The report states that, since 11 September 2001, there has been an "erosion of basic rights against abusive governmental power" guaranteed under both U.S. and international human rights law. The report notes that most of the detainees of "special interest" to the September 11th investigations have been non-citizens, typically Muslim men. These men were subjected to arbitrary detention, legal proceedings that violated of due process

[176] Exhibit 29: Amnesty International, "United States of America—The Threat of a Bad Example: Undermining International Standards as 'War on Terror' Detentions Continue," 18 August 2003, at pg. 2 & 3. Available at http://www.amnesty.org/en/library/asset/AMR51/114/2003/en/48a8fe0c-d6a7-11dd-ab95-a13b602c0642/amr511142003en.pdf

[177] Exhibit 18: Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects," 26 December 2002. Available at: http://www.hrw.org/en/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects?print

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and the presumption of innocence, and were secretly incarcerated in deplorable conditions of confinement and physical abuse.[178]

International Helsinki Federation for Human Rights

90. An April 2003 report details incommunicado and prolonged detention of terrorism suspects by the United States. The report includes newspaper reports of an Egyptian and Indian national, both held in solitary confinement without charge for months, each of whom alleged torture or physical abuse.[179]

91. Macedonia's Helsinki Committee for Human Rights has repeatedly reported human rights violations by its police and intelligence services, in particular, acting outside of the law. The Helsinki Committee's Annual Report for 2002 mentions that a number of human rights violations were perpetrated by officers of the special units at the Ministry of the Interior, and reports on the suspected summary execution of six foreign nationals in the Ranstanski Lozja case as an example.[180]

92. The Helsinki Committee's Report for 2003 details systematic violations by the police of numerous civil and political rights, including arbitrary arrests and abuse in detention.[181] The report also notes the lack of appropriate internal and external control over the actions of the police, and loose or non-existent sanctions of violations of the law by police officials, or abuse of their duties.

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[178] Human Rights Watch, "United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Vol. 14, No. 4 (G) – August 2002, p. 3. Available at: http://www.hrw.org/legacy/reports/2002/us911/USA0802.pdf (see, in particular, summary recommendations on page 3)

[179] Exhibit 23: International Helsinki Federation for Human Rights, "Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11," pgs. 91-100, April 2003. Available at: http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=6426

[180] Exhibit 19: Available at: http://www.mhc.org.mk/default-en.asp?ItemID=547981651CA10C49B78D0B0215AF36F1 (stating "[t]he Helsinki Committee for Human Rights joins the concerns and recommendations contained in the reports of the Committee for Prevention of Torture and underlines the seriousness of the maltreatment and illegal detention at police stations, the non-processing of perpetrators of various overstepping of police authorities, the 'solidarity' on the part of the prosecution and courts, even in cases of evident violations which are substantially documented or clearly pointed out by victims, national or foreign governmental or non-governmental organizations")

[181] Exhibit 39:Available at: http://www.mhc.org.mk/default-en.asp?ItemID=6F2DCCEDDB037641A0D0D2357EE1A2F1

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Actions of other European governments and Courts

93. *The Abassi Case*.[182] In 2002, the Court of Appeal in London described Mr. Abassi's detention in Guantanamo as "legally objectionable" and commented that "Mr. Abassi is at present arbitrarily detained in a legal black hole." The court lacked jurisdiction to compel the British Foreign Secretary to intervene in Abassi's case, but noted its concern regarding the status of Guantanamo detainees, stating that "[t]here have been widespread expressions of concern, both within and outside the United States, in respect of the stand taken by the United States government [i.e. the policy of denying Geneva Convention protections to Guantanamo detainees]"[183]

94. *The Al-Moayad Case*.[184] The German Constitutional Court decided in 2003 that it was not unlawful to extradite a detained person to be tried by a U.S. court where the government had obtained diplomatic assurances from the United States that he would not be tried pursuant to the Presidential Military Order of 13 November 2001 or detained in Guantanamo Bay or in any other internment camp.

95. *Six Bosnian Detainees.*[185] The Human Rights Chamber for Bosnia and Herzegovina (BiH) found in October 2002 that BiH and the Federation of BiH had arbitrarily expelled the six Bosnian suspects, and acted in contravention of its human rights obligations in transferring them to illegal detention in BiH by the U.S. However, the suspects were transferred to U.S. authorities despite the Human Rights Chamber for Bosnia and Herzegovina's interim order to prevent the suspects' extradition or expulsion.[186]

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[182] *Abbasi v. Secretary of State for Foreign and Commonweath Affairs*, [2002] EWCA Civ. 1598, 6 November 2002
[183] *Ibid*. at para. 10 & 18.
[184] *Decision as to the Admissibility of Al-Moayad v. Germany*, 44 EHRR SE 22, no.35865/03, para. 65-66, 20 February 2007
[185] *Boudella et al. v. Bosnia and Herzegovina*, Human Rights Chamber for Bosnia and Herzegovina, Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 & CH/02/8691, 11 October 2002
[186] *Boudella et al. v. Bosnia and Herzegovina*, Order for Provisional Measures and on the Organization of the Proceedings, Human Rights Chamber for Bosnia and Herzegovina, Case nos. CH/02/8679, CH/02/8690, CH/O2/8691, 17 January 2001

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Diplomatic Missions of Macedonia

96. There is a presumption in international law that diplomatic missions abroad report to their capitals on events in the country of their posting. In the *Yerodia* case, the International Court of Justice reasoned that a Minister of Foreign Affairs acts on behalf of the State in matters of foreign relations in part because communication between the embassies and consulates (over which he has authority) and the Government is presumed.[187] In reaching its conclusion that a Minister of Foreign Affairs has full power to act on behalf of the State, and thus retained diplomatic immunity under the Vienna Convention, the ICJ stated that "[h]e or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States."[188]

97. In addition, the Vienna Convention on Consular Relations indicates that, in considering transfer of individuals in the context of extradition and deportation, consular officers have a duty to report to their respective governments on conditions in receiving States, and to protect the interests of their nationals. For instance, the Convention provides that consular functions shall include "ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested," and "protecting in the receiving State the interests of the sending State and of its nationals," within the limits of international law.[189]

98. Accordingly, there is a presumption that the Government of Macedonia had at its disposal information about the CIA's extraordinary rendition programme. The duty to be informed about the CIA's treatment of terrorism suspects would include reading the numerous diplomatic, NGO, and press reports of ill-treatment in Guantanamo and Afghanistan outlined above and reporting back to Skopje.

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[187] *Democratic Republic of the Congo v. Belgium* [The Yerodia Case], ICJ, Gen. List No. 121, 14 February 2002, para. 53

[188] *Ibid*.

[189] See: Vienna Convention on Consular Relations, 24 April 1963, Article 5, para. (a) & (c)

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99. By January 2004, it was public knowledge within international organizations, the diplomatic community, and the general public that credible concerns existed regarding the use by the United States of secret renditions to third countries under circumstances which were outside the law and the use of interrogation techniques that were likely to constitute torture or inhuman or degrading treatment or punishment.

International Inquiries

100. There have been a number of international inquiries into the process of "extraordinary renditions" in Europe and the involvement of European governments in facilitating the secret activities of the CIA. These reports include the case of Khaled El-Masri.

Council of Europe: Article 52 Procedure

101. On 21 November 2005, the Secretary-General of the Council of Europe invoked the procedure under Article 52 of the European Convention on Human Rights with regard to reports of European collusion in secret rendition flights. Member states were required to provide a report on the controls provided in their internal law over acts by foreign agents in their jurisdiction, on legal safeguards to prevent unacknowledged deprivation of liberty, on legal and investigative responses that are taken to address alleged infringements of ECHR rights, and on whether public officials who were allegedly involved in acts or omissions leading to such deprivation of liberty of detainees had been or were being investigated.[190]

102. On 17 February 2006, the Ambassador of the Republic of Macedonia to the Council of Europe sent a general reply that broadly addressed the constitutional guarantees concerning deprivation of liberty, torture, and the specificity of

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[190] Exhibit 54: Council of Europe, "Report by the Secretary General under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts," (SG/Inf. (2006) 5), 28 February 2006, para. 3. Available at: https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=339988&SecMode=1&DocId=954442&Usage=2

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criminal offences.[191] This reply failed to address relevant legal safeguards against human rights abuses by foreign agents on Macedonian soil and provided no response to questions concerning whether any public officials had colluded with foreign agents to perpetrate unlawful deprivations of liberty and whether any investigations had been undertaken concerning any such allegations of collusion.[192] The Secretary General requested a full response from Macedonia on 7 March 2006.

103. In a letter dated 3 April 2006, the Macedonian Ministry of Foreign Affairs replied to the Article 52 Committee and provided further information about the national level oversight over the work of the Directorate of Security and Counter-Intelligence and the Police. In contrast to the response to the freedom of information request (see paragraph 30 above) the response indicated that the Civil Aviation Authority does not maintain records regarding the passengers of planes that enter Macedonian territory.[193] The Ministry of Foreign Affairs handles requests from states for foreign aircraft landings and generally receives information regarding flight plans and cargo of the planes.[194] The Macedonian response also provided the official Macedonian account of Mr. El-Masri's stay in Macedonian, reporting that the Minister of the Interior conducted an investigation in 2005.[195] This account has been discredited by multiple international inquiries.[196]

Council of Europe: Venice Commission

[191] Exhibit 53: Macedonian Ambassador to the Council of Europe, "Reply to the Letter of Secretary General of the Council of Europe Terry Davis of 21 November 2005," No. 35-01-035/2, 17 February 2006. Available at: http://www.coe.int/T/E/Com/Files/Events/2006-cia/Yougoslav-Republic-of-Macedonia.pdf

[192] *Ibid.*

[193] Second Macedonian Response under Article 52, see note 6 above, at pg. 1 & 2

[194] *Ibid.* at pg. 2

[195] *Ibid.* at pg. 3

[196] Marty 2007, see note 115 above, at para. 314; Exhibit 9: European Parliament, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners," Rapporteur Giovanni Fava, A6-0020/2007, 30 January 2007. Available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf ("Fava Final Report 2007"); Exhibit 84 & Exhibit 85: Bundestag Committee of Inquiry, Findings of the First Investigative Committee of the Sixteenth Legislative Period, Majority Opinion, at pg. 26-27 of English Translation & pg. 369-370 of German translation, 18 June 2009 ("Bundestag Committee of Inquiry Majority Findings")

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104. At the same time, the Committee on Legal Affairs and Human Rights requested the Venice Commission to prepare an opinion on the international legal obligations of the Council of Europe member states.[197] The Venice Commission concluded that there are only four legal ways of transferring a prisoner to foreign authorities: deportation, extradition, transit and transfers of sentenced persons for the purpose of their serving the sentence in their country of origin.[198] Additionally, there are clear limitations to the prerogative of Council of Europe members to cooperate with foreign states: member states may violate Articles 2, 3, 5, and 6 of the ECHR when the transfer creates a real risk of violation of these rights by the receiving state.[199] The Venice Commission also asserted that "the assessment of the reality of the risk must be carried out very rigorously."[200]

Parliamentary Assembly of the Council of Europe – "the Marty Inquiry"

105. On 13 December 2005, the President of the Parliamentary Assembly of the Council of Europe ("PACE") asked the Committee on Legal Affairs and Human Rights to investigate media reports of "extraordinary renditions" in Europe and Senator Dick Marty of Switzerland, was appointed as a special rapporteur. Senator Marty did not possess investigative powers, and in particular was not entitled to use coercive methods or to require the release of specific documents.[201] His analysis consisted primarily of interviews and analysis.[202]

106. The Marty Inquiry compiled a database of aircraft movements that were attributable to CIA planes in European airspace. Information containing details regarding the types of aircraft, the registered owner and operator, and the N-numbers of planes were obtained from investigative journalists and NGOs. [203] The records of these flights were then requested from Eurocontrol and from national air traffic control bodies. The inquiry focused on rendition circuits that

[197] Marty 2006, see note 8 above, at para. 9
[198] Venice Commission Opinion of 2006, see note 61 above, at para. 137
[199] *Ibid.* at para. 68 & 138
[200] *Ibid.* at para.139-140
[201] Marty 2006, see note 8 above, at para. 14
[202] *Ibid.*
[203] *Ibid.* at para. 44-48

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were used to facilitate ten cases of unlawful inter-state transfer of seventeen detainees.[204]

107. The Marty Inquiry also conducted investigative visits and interviews to countries that were suspected of facilitating renditions and interviewed victims.[205] Investigative visits were conducted in Macedonia from 27 to 29 April 2006, together with the Fava Inquiry, described below.[206]

108. The Marty Inquiry issued a first report in June 2006 and a final report in June 2007. The first report of 12 June 2006 published detailed evidence regarding the existence of CIA rendition circuits in Europe and corroborating evidence regarding the circuit that was used to render Mr. El-Masri.[207] The report concluded that some countries were used for re-fuelling airplanes, such as Ireland. Other states, like Spain, were staging areas from which flights were launched. Still others, like Macedonia, were one-off pick-up points. Finally, states such as Afghanistan, Poland, and Romania were drop-off points where detainees were left for interrogation.[208]

109. The report found evidence that corroborated Mr. El-Masri's account[209] including the following:

- Mr. El-Masri's passport contains entry and exit stamps from Macedonia and an exit stamp but not an entry stamp from Albania.[210]
- Scientific testing from the German criminal investigation illustrates that Mr. El-Masri was in a South Asian country and deprived of food over a long period of time.[211]
- German prosecutors possess physical evidence that Mr. El-Masri carried with him during his detention, that was returned to him afterward, or that he

[204] *Ibid* at para. 50
[205] *Ibid.* at para. 88
[206] *Ibid.* at para. 105; See para. 114-120 for description of the Fava investigation
[207] *Ibid*. at para. 50-51 & para. 125
[208] *Ibid.* at para. 52
[209] *Ibid.* at para. 102
[210] Marty 2006, see note 8 above, at para. 103; Khaled El-Masri's Passport, see note 40 above
[211] Marty 2006, *Ibid.* at para. 103; See: Exhibit 3 (B): Exhibit B of the Declaration of Manfred Gnjidic, Isotopic Appraisal of El-Masri's hair

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acquired during his ordeal. This evidence includes the two T-shirts that were given to him by the CIA, his boarding pass from Tirana to Frankfurt, and keys that Mr. El-Masri had with him.[212]

- Accounts from witnesses on the bus confirm Mr. El-Masri's detention at the border of Germany and Macedonia.[213]
- Mr. El-Masri can identify the photograph of the hotel in which he was detained and a photograph of the waiter who served him food during his stay there.[214]
- Geological records indicate that the earthquake the Mr. El-Masri describes feeling at the Salt Pit indeed occurred during his detention.[215]
- Mr. El-Masri can provide sketches that he drew of the layout of the Afghan prison that were immediately recognizable to another rendition victim.[216]
- Photographs were taken of Mr. El-Masri upon his return to Germany and these are consistent with his account of weight loss and unkempt grooming during his stay in Afghanistan.[217]

110. In addition, the report found that Mr. El-Masri's account was corroborated by the strikingly similar account of Binyam Mohammed, particularly considering that the two men had never spoken to each other. The report concluded that "[t]he information at our disposal indicates that the renditions of Binyam Mohamed and Khaled El-Masri were carried out by the same CIA-operated aircraft, N313P, within 48 hours of each other, in the course of the same 12-day tour in January 2004."[218] The report concluded that "because neither man knew each other, their respective stories lend credence to one another."[219]

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[212] Marty 2006, *Ibid.*
[213] *Ibid.*
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid*. at para. 52
[219] *Ibid.*

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111. The Marty report stated that the CIA and the UBK had a strong working relationship, and that the UBK had an excellent reputation in carrying out joint operations. Witnesses to the Inquiry described a previous collaborative operation between the CIA and the UBK that was aimed at apprehending a suspected Islamic fundamentalist. In the El-Masri case, the Marty Inquiry understood that the cooperation was "particularly efficient and the Macedonian services fulfilled the expectations of the CIA."[220] Though Macedonia claims that a routine background check was conducted on Mr. El-Masri by Interpol, the Marty Report indicates that the UBK instead liaised with the CIA bureau chief in Macedonia.[221] Furthermore, during the Macedonian interrogation of Mr. El-Masri, the Americans kept a very low profile, simply providing questions for the UBK to ask without ever taking part in any interrogation.[222] On the occasion of his nomination to serve as Macedonia's Minister of the Interior, Siljian Avramovski, the former director of the UBK was personally praised by CIA Director George Tenet in a statement to the United States press as "one of the top ten analysts of world terrorism."[223]

112. The Marty Report of 7 June 2007 reviewed evidence regarding the NATO and bi-lateral legal arrangements that allowed European states to cooperate with CIA renditions and also provided more evidence than was available at the time of publication of the first report regarding the existence of detention centers in Poland and Romania.[224] In addition, secret detention facilities were identified in Europe that were run exclusively by the CIA.[225]

113. The report examined further evidence regarding the disguised reverse rendition through Albania and set out the legal vacuum facing Mr. El-Masri in the United

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[220] *Ibid.* at para. 117
[221] *Ibid.*
[222] *Ibid.* at para. 119
[223] Exhibit 65: Excerpts from press articles published in 2005 and 2006 in the Macedonian daily *Vreme*, (unofficial translation). Available at: http://www.statewatch.org/cia/documents/excerpts-from-VREME-macedonia.pdf. See also: Exhibit 45: Aleksandar Bozinovski, "CIA is helping us and controlling us," *Vreme* (Skopje), *Global Research*, 22 March 2005. Available at: http://www.globalresearch.ca/index.php?context=va&aid=462
[224] Marty 2007, see note 115 above, at para. 100-105, para. 127 & para. 130
[225] *Ibid.* at para. 8

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States and Germany that compounds the fact that the Skopje prosecutor failed to take action before the expiration of the domestic statute of limitations for criminal action in Macedonia.[226] The report called Macedonia's account of Mr. El-Masri's ordeal "utterly untenable" and urged all authorities involved to tell the truth.[227]

The European Parliament

114. In 2006, the European Parliament established the Temporary Committee on Extraordinary Rendition and appointed Claudio Fava as rapporteur ("the Fava Inquiry") with a mandate to investigate the alleged existence of CIA prisons in Europe.[228]

115. The Fava Inquiry held 130 meetings and sent delegations to Macedonia, the United States, Germany, the United Kingdom, Romania, Poland and Portugal.[229] The Inquiry examined confidential documents that were forwarded by Eurocontrol and the German Government.[230] They identified at least 1,245 flights operated by the CIA in European airspace between the end of 2001 and 2005.[231] The rapporteur noted the lack of cooperation from European member states.[232]

116. During their visit to Macedonia, the Inquiry was presented with the government explanation of events.[233] The delegation met with a number of officials, including Branko Crvenkovski, President of the Republic; Siljan Avramovski, Deputy Director of the Security and Counter-Intelligence Directorate; Ljubomir Mihailovski, Minister of Interior since December 2004; Ljupco Jordanosvki, the

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[226] *Ibid.* at para. 279-284, para. 299-305; see para. 70 & 71 above and corresponding notes 145 & 146 above concerning Mr. El-Masri's properly filed request with the Skopje prosecutor's office to initiate a criminal investigation.

[227] *Ibid.* at para. 314

[228] Exhibit 52: European Parliament, "Resolution to set up a Temporary Committee on extraordinary rendition," P6_TA(2006)0012, 18 January 2006. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0012+0+DOC+WORD+V0//EN

[229] Fava Final Report 2007, see note 196 above, at pg. 3

[230] *Ibid*.

[231] *Ibid.* para. 42

[232] *Ibid.* para. 13

[233] Fava 2006 Macedonia Delegation Report, see note 7 above, at pg. 4-5

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President of the Parliament; Stojan Andov, the President of the Human Rights Parliamentary Committee; Teuta Arifi, the President of the Foreign Affairs Committee; Esad Rahic, the President of the Parliamentary Committee for Defense and Security; Karolina Ristova-Asterud, the President of the Parliament's EU Affairs Committee; and Zvonimir Jankulovski, former Ambassador to the Council of Europe from March 2002 to March 2005.[234]

117. On 24 April 2006, the Inquiry presented its draft interim report, which indicated that more than 1,000 CIA flights transited through Europe.[235]

118. A resolution of the European Parliament adopted on 6 July 2006, mid-way through the work of the Inquiry, foreshadowed its conclusions, regretting that the NATO Council Decision of 4 October 2001 was not made available to the temporary committee.[236] In reference to Mr. El-Masri's case, the resolution indicated that the Macedonian investigations were inadequate.[237]

119. On 30 January 2007, the final report of the Fava Inquiry was published. Noting the lack of thorough investigation in Macedonia, the report condemned the extraordinary rendition of "the German citizen Mr. Khaled El-Masri, abducted at the border-crossing Tabanovce in the Former Yugoslav Republic of Macedonia on 31 December 2003, illegally held in Skopje from 31 December 2003 to 23 January 2004 and the transported to Afghanistan on 23-24 January 2004, where he was held until May 2004 . . . ."[238] The report fully endorsed the preliminary findings of the Munich Public Prosecutor (see below), stating "that there is no evidence on the basis of which to refute Mr. Khaled El-Masri's

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[234] *Ibid.* at pg. 2; Fava Final Report 2007, see note 196 above, at pg. 53

[235] Fava Interim Report 2006, see note 72 above, at pg. 15

[236] Exhibit 61: European Parliament, "Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee," (2006/2027(INI)), 6 July 2006, at pg. 6, para. 4. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0316+0+DOC+PDF+V0//EN ("European Parliament Resolution of 6 July 2006 adopted during the work of the Fava Inquiry"); Fava Final Report 2007, see note 196 above, at para. 34

[237] European Parliament Resolution of 6 July 2006 adopted during the work of the Fava Inquiry, *Ibid.* at para.19

[238] Fava Final Report 2007, see note 196 above, para. 136

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version of events."[239] They also emphasized that "the concept of 'secret detention facility' includes not only prisons, but also places where somebody is held *incommunicado*, such as private apartments, police stations or hotel rooms, as in the case of Khaled El-Masri in Skopje."[240]

120. On 14 February 2007, the European Parliament adopted a resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners that was informed by the final conclusions of the Fava Inquiry.[241] The resolution highlighted the inadequacy of safeguards and lack of effective controls regarding the activity of security services of member states and the rules of co-operation with foreign secret services.[242]

The German Prosecutor's Investigation

121. In June 2004, the Office of the Prosecuting Magistrate in Munich contacted Mr. El-Masri's German lawyer to inform him that an investigation was open into the allegations that Mr. El-Masri had been unlawfully abducted, detained, physically and psychologically abused, and interrogated in Macedonia and Afghanistan.[243] The authorities undertook a number of investigative actions, corroborating Mr. El-Masri's account. The German authorities verified from eye-witnesses that Mr. El-Masri traveled to Macedonia by bus at the end of 2003, and that he had been detained shortly after entering that country.[244] To evaluate Mr. El-Masri's account of his detention in Macedonia, they conducted scientific tests, including radioactive isotope analysis of Mr. El-Masri's hair.

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[239] *Ibid*. at para. 138

[240] *Ibid*. at para. 150

[241] Exhibit 67: European Parliament, "Resolution on the Alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)," P6_PA-PROV(2007)0032, 14 February 2007. Available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/ta/p6_ta-prov(2007)0032_/p6_ta-prov(2007)0032_en.pdf ("European Parliament Resolution of 14 February 2007 adopting the conclusions of the Fava Inquiry")

[242] *Ibid.* at para. 43-49, 154-158 & 202-206.

[243] Declaration of Manfred Gnjidic, see note 132 above, at para. 6

[244] *Ibid.* at para. 11

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Those tests proved that he had spent time in a South Asian country and had been deprived of food for an extended period.[245]

122. On 27 August 2004, the then Ambassador of Germany to Macedonia, Dr. Hinrichsen, relayed to the Macedonian authorities a request for information on the El-Masri case.[246] On 5 April 2005, then Foreign Minister of Germany Joschka Fischer, "brought up the El-Masri matter" with his Macedonian counterpart during an official meeting held in Durres, Albania.[247]

123. On 17 August 2005, the German authorities submitted a formal letter rogatory to Macedonia in relation to the ongoing criminal investigation in Germany. In June and again in December 2006, a German Foreign Affairs Undersecretary raised the issue with the Macedonian Ambassador in Berlin, reiterating "Germany's interest in a full investigation."[248] In January 2007, the Munich prosecutor, acting on the basis of a well-documented "strong suspicion of criminal conduct" related to the El-Masri case, issued international arrest warrants against thirteen suspected CIA agents and/or personnel.[249]

124. As described in paragraph 64 above, in a report published in the *New York Times*, Laid Saidi confirmed that he had been detained with Mr. El-Masri in Afghanistan by the Americans in early 2004. Mr. El-Masri's German lawyer contacted the prosecutor and told him of this potential witness. For the next several months, the prosecutor discussed bringing the witness to Germany. Unfortunately, concrete steps were not taken to facilitate that process and the witness has not been heard from since 2004.[250]

125. On 31 January 2007, the German Prosecutor issued arrest warrants for thirteen CIA agents for their alleged involvement in Mr. El-Masri's rendition. The

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[245] *Ibid.* at para. 12-13; See also: Bundestag Committee of Inquiry Majority Findings, see note 192 above, at pg. 7 English & pg. 112 German

[246] Bundestag Committee of Inquiry Majority Findings, *Ibid.* at pg. 20 English & 121 German, 18 June 2009

[247] *Ibid.* at pg. 20 of English translation & 122 German

[248] *Ibid* at pg. 21 English translation & 122 German

[249] *Ibid.* at pg. 27 English translation & 371 German

[250] Declaration of Manfred Gnjidic, see note 132 above, at para. 9

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prosecutor's office refused to make public the names of the people sought.[251] The identities of the CIA agents were given to the German Prosecutor by Spanish authorities who had uncovered them in the course of their investigation into the use of Spanish airports by the CIA.[252]

German Parliamentary Inquiry

126. On 7 April 2006, the Bundestag appointed the "First Investigative Committee of the Sixteenth Legislative Period of the Federal Parliament" (the "BND Investigative Committee") to review the activities of the secret services.[253] Over a period of investigation of three years, the Committee held a total of 124 sessions, seven areas of investigations were addressed, and a total of 141 witnesses were heard, including Mr. El-Masri. [254] The findings were made public on 18 June 2009.

127. The Committee also directed interrogatories at the German government authorities concerning their knowledge of Mr. El-Masri's detention in Macedonia and the investigatory steps that were taken, although the government frequently invoked state secrecy and only submitted redacted documents to the Committee.[255]

128. The Committee concluded that Mr. El-Masri's account of his transfer to Afghanistan was consistent with subsequent reports of the excesses of the "war on terror" by the United States.[256] The committee also identified a "credible core" of Mr. El-Masri's account.[257] The final report indicated that the police

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[251] Mary Report 2007, see note 115 above, at para. 286; See also Exhibit 66: Matthias Gebauer, "Germany issues Arrest Warrants for 13 CIA Agents in El-Masri Case," Spiegel Online, 31 January 2007. Available at: http://www.spiegel.de/international/0,1518,463385,00.html

[252] Declaration of Manfred Gnjidic, see note 132 above, para. 14

[253] Exhibit 84 & Exhibit 85: Bundestag Committee of Inquiry, Findings of the First Investigative Committee of the Sixteenth Legislative Period, Separate Opinion of the FDP Parliamentary Group, at pg. 41 of English & 443 German, 18 June 2009.

[254] Bundestag Committee of Inquiry Majority Findings, see note 196 above, at pg. 2 English & pg. 109 German

[255] Mary Report 2007, see note 115 above, at para. 310.

[256] Bundestag Committee of Inquiry Majority Findings, see note 196 above, at pg. 26 English & pg. 370 German

[257] *Ibid*.

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investigations conducted by Swabian law enforcement and supported by the BKA (Bundeskriminalamt – German Federal Criminal Police) affirm Mr. El-Masri's account of his transfer from Macedonia to Afghanistan by United States forces. In addition, the recorded movement of an American Boeing 737 from Mallorca to Skopje on 23 January 2004, which then continued on to Kabul matched "the temporal information that Mr. El-Masri provided …" concerning the duration of his detention in Macedonia.[258]

129. In reference to the Macedonian government's account of Mr. El-Masri's passage through their country (see paragraphs 67 and 103 above), the German report stated, "the official account of the Macedonian government is clearly incorrect . . . it must be found that there is convincing evidence of his arrest and transfer outside the country."[259] The Inquiry rejected allegations of German government collusion.

The Spanish Investigation

130. In 2005, a Spanish prosecutor commenced an investigation into the alleged use of the airport at Palma de Mallorca by aircraft involved in CIA renditions. The investigation was opened after an investigative journalist – Mattias Valles – obtained copies of registers from two luxury hotels in Palma de Mallorca showing the entries for the crew on the flight that left Mallorca on 23 January 2004 for Skopje (where they picked up Mr. El-Masri).[260] Mr. Valles gave evidence to the Fava Inquiry.[261] These names were subsequently given by the Spanish Prosecutor to the German Prosecutor who then charged them and sought their extradition.[262]

Press Investigations

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[258] *Ibid.* at pg. 26-27 English & pg. 369-370 German
[259] *Ibid.*
[260] Marty Report 2006, see note 8 above, pg.50, para. 244
[261] Exhibit 57: European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, **"**Verbatim Report: Testimony of Mr. Mattias Valles," 20 April 2006. Available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/reports/20060420_en.pdf ("Report of Mattias Valles – European Parliament – 20 April 2006")
[262] Bundestag Committee of Inquiry Majority Findings, see note 196 above, at pg. 27 English Translation & pg. 371 German

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131. The 9 January 2005 story in the *New York Times* included quotations from Mr. Hofmann, the Munich prosecutor in charge of the case, who endorsed the truthfulness of Mr. El-Masri's allegations and indicated that certain elements of his account had already been positively verified, including the fact that Mr. El-Masri had been forced off the bus by the Macedonian border police at the Tabanovce border crossing.[263] In addition, the article indicated that the reporters had reached for comment a spokesman for the Macedonian Ministry of Interior, Golan Pavlovski, who had told them "he had no information" about the case. This was re-iterated by a story in the London-based daily *The Guardian* on 14 January 2005.[264] The Macedonian national television channel, 'A1,' ran a feature story on the El-Masri case as early as 23 January 2005,[265] which referred to the then-recent investigations by the *Guardian* and the *New York Times,* as well as an article by two Skopje-based reporters for the Institute for War and Peace Reporting (IWPR) that would appear the following day.[266] The 'A1' story summarized Mr. El-Masri's allegations and referred to IWPR sources within the Macedonian police and intelligence community who had confirmed Mr. El-Masri's claims, noting that the operation had been carried out by the Macedonian intelligence agencies at the request of U.S. intelligence. The IWPR story itself was run as part of a series, the *Balkan Crisis Report,* which, at the time, was widely read in the region. This IWPR report published additional details, including information obtained from Skopje Airport sources that a U.S.-registered Boeing 737 aircraft had left Skopje for Kabul, with one passenger, on 23 January 2004. An unnamed Interior Ministry official reportedly told IWPR emphatically that, "while in Macedonia, [El-Masri] was not beaten or tortured. Our people acted in a strictly professional manner." Another intelligence source

[263] Exhibit 41: Don Van Natta Jr. & Souad Mekhennet, "German's Claim of Kidnapping Brings Investigation of U.S. Link," *The New York Times*, 9 January 2005. Available at: http://www.nytimes.com/2005/01/09/international/europe/09kidnap.html

[264] Exhibit 42: James Meek, "They beat me from all sides," *The Guardian*, 14 January 2005. Available at: http://www.guardian.co.uk/world/2005/jan/14/usa.germany

[265] Exhibit 43: Miomir Serafinovic, "Macedonia Involved in Kidnapping," *A1 Television*, 23 January 2005. Available at: http://www.a1.com.mk/vesti/default.aspx?VestID=42046

[266] Exhibit 44: Ana Petruseva and Miomir Serafinovic, "Macedonia Implicated in 'Abduction' Case," Institute for War and Peace Reporting, *Balkan Crisis Report* (BCR) No. 538, 21 January 2005. Available at: http://www.iwpr.net/?=bcr&s=f&o=242469&apc_state=henibcr2005

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was quoted by IWPR as saying that in cases of such CIA requests for collaboration "the rules do not apply." A former Macedonian Minister of the Interior and a former head of the intelligence service commented to IWPR that, whatever the nature of such an operation, it would have been clearly illegal under Macedonian law.[267]

132. A December 2005 article in *The Washington Post*, based to a great extent on interviews with "current and former intelligence and diplomatic officials," shed new light on the internal processes within the U.S. intelligence apparatus that led to Mr. El-Masri's rendition—an operation that, according to the reporters, the CIA had recognized as a "mistake" and for which the U.S. authorities had privately apologized to German officials.[268] The article included an account of the standard CIA procedures for handling rendition victims, which was consistent with Mr. El-Masri's description of his treatment at the Skopje airport, prior to his transfer to Kabul. In addition, the *Post* article provided new details on the findings of the German investigation at the time, including the results of the forensic hair analysis, and the discovery of flight logs, which showed that a CIA-operated aircraft departed Skopje for Kabul on the same day Mr. El-Masri claimed to have been taken to Afghanistan.

UN Committees

133. The UN Human Rights Committee conducted a periodic review of Macedonia's compliance with its ICCPR obligations during its March-April 2008 session. In the course of this review, the Committee considered, on its own motion, Macedonia's response to Mr. El-Masri's allegations. It noted Macedonia's denial of any involvement in Mr. El-Masri's rendition, "notwithstanding the highly detailed allegations as well as the concerns" raised by the Marty and Fava Enquiries, among others.[269] The Committee made the following recommendation:

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[267] *Ibid.*

[268] Dana Priest – *Washington Post* – 2005, see note 82 above

[269] Exhibit 72: U.N. Human Rights Committee, Concluding Observations on the Former Yugoslav Republic of Macedonia, 3 April 2008, U.N. Doc. CCPR/C/MKD/CO/2. Available at: http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.MKD.CO.2.doc

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"The State party should consider undertaking a new and comprehensive investigation of the allegations made by Mr. Khaled al-Masri. The investigation should take account of all available evidence and seek the cooperation of Mr. al-Masri himself."[270]

134. In addition, the UN Committee Against Torture expressed concern at the lack of a thorough and independent investigation into Mr. El-Masri's case and recommended that a new and thorough investigation be initiated. The Committee for the Elimination of all forms of Racial Discrimination also indicated regret for the rendition of Mr. El-Masri in its consideration of the fourth to seventh periodic reports of Macedonia.[271] During the recent Universal Periodic Review of Macedonia both the International Commission of Jurists[272] and the Commissioner for Human Rights of the Council of Europe[273] raised the need for an effective investigation.

135. The Commissioner for Human Rights of the Council of Europe, Mr. Thomas Hammarberg, visited Macedonia in February 2008 upon an invitation by the Macedonian Minister of Foreign Affairs, Mr. Antonio Milososki, as part of the commissioner's continuous process of official country visits to all Council of Europe member states.[274] During his visit, Mr. Hammarberg discussed Mr. El-Masri's case with the Department of Justice and was told that the Ministry of the Interior's Sector for Internal Control and Professional Standards (SICPS)

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[270] *Ibid.*

[271] Exhibit 71: International Convention on the Elimination of All Forms of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention—The Former Yugoslav Republic of Macedonia, CERD/C/MKD/CO/7, 13 June 2007, para. 12. Available at: www2.ohchr.org/English/bodies/cerd/docs/CERD.C.MKD.CO.7.doc

[272] Exhibit 82: United Nations Human Rights Council, 5th Session of the Working Group on Universal Periodic Review, 4-15 May 2009, "ICJ Submission to the Universal Periodic Review of The Former Yugoslav Republic of Macedonia," November 2008, pg. 5. Available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MK/ICJ_MKD_UPR_S5_2009_InternationalCommissionofJurists.pdf

[273] Exhibit 78: Council of Europe Commissioner for Human Rights, Thomas Hammarberg, "Report on visit to the former Yugoslav Republic of Macedonia – 25-29 February 2008," 11 September 2008, para. 76. Available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MK/COE_MKD_UPR_S5_2009_Follow-upReportonMacedonia_2003-2005_CommDH_2008_21.pdf

[274] *Ibid.* at para. 1 & 2

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undertook an internal investigation and was related the same official version of events that has been provided to other international inquiries.[275] Noting that the United Nations Human Rights Committee concluded that Macedonian denial of involvement despite numerous credible allegations mandated a new comprehensive investigation, Mr. Hammarberg also strongly recommended a full and independent investigation and urged full cooperation with the Munich public prosecutor's investigation.[276]

Legal Action by El-Masri in the United States

136. On 6 December 2005, the American Civil Liberties Union (ACLU) filed a claim on behalf of Mr. El-Masri in the United States District Court for the Eastern District of Virginia against a number of defendants including former CIA director George Tenet and certain unknown CIA agents.[277] The claim alleged that Mr. El-Masri had been deprived of liberty in absence of legal process, and included a claim under the Alien Tort Statute (ATS)[278] for violations of international legal norms prohibiting prolonged arbitrary detention and cruel, inhuman, or degrading treatment.[279]

137. In May 2006, the District Court dismissed Mr. El-Masri's case, finding that the U.S. Government had validly asserted the state secrets privilege.[280] The District Court stated that it is well settled that "where the very question on which a case

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[275] *Ibid.* at para. 75

[276] *Ibid.* at para. 76 & 76

[277] *El-Masri v. George Tenet et al.*, 437 F. Supp. 2d 530, 534 (E.D.V.A. 2006).

[278] The ATS is codified at *28 U.S.C. § 1350* and provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In *Sosa v. Alvarez-Machain,* 542 U.S. 692, 124 S. Ct 2739, 159 L. Ed. 2d 718 (2004), the Supreme Court interpreted the statute as providing jurisdiction of district courts over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law, which were not fully enumerated by the Supreme Court.

[279] *El-Masri v. George Tenet et al.*, see note 277 above, at 535; See also: Complaint of Plaintiff, El Masri v. United States, pg. 4-5, para. 15 (E.D.V.A.)(alleging that the acts complained of violated the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civil Prisons in Time of War)

[280] El-Masri v. George Tenet et al., 437 F. Supp. 2d 530, 536-537 (E.D.V.A. 2006)

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turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy."[281] The District Court held that the state's interest in preserving state secrets outweighed Mr. El-Masri's individual interest in justice.[282]

138. The ACLU challenged the dismissal in November 2006 before the United States Court of Appeals for the Fourth Circuit.[283] The ACLU argued that the complaint should not have been dismissed under the state secrets doctrine given that a great deal of information about the CIA's extraordinary rendition programme was publicly known and that President Bush had himself confirmed the programme's existence on 6 September 2006.[284] The Court of Appeals noted that Mr. El-Masri acknowledged that "at least some information important to his claim, is likely to be privileged, and thus beyond his reach."[285] The Court's decision turned on the fact that the publicly available knowledge did not prove Mr. El-Masri's case, and that his case could not be set forth without revealing state secrets.[286] In October 2007, the Supreme Court refused to review the case and Mr. El-Masri exhausted domestic remedies in the United States.[287] The ACLU filed a petition with the Inter-American Commission of Human Rights on Mr. El Masri's behalf on 9 April 2008. On 23 August 2009, the Commission transmitted the petition to the U.S. Government for its comments, due within two months.

Submissions

139. Extraordinary rendition operations are conducted under the highest level of secrecy and classification by U.S. government agencies and their allies. As such, they are carried out in ways that leave behind as little evidence as possible, and

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[281] *Ibid.* at 538-539
[282] *Ibid.* at 539
[283] *El-Masri v. United States et al.,* 479 F.3d 296, 301-302 (2006)
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.* at 309-311
[287] *El Masri v. United States*, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007)

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indeed are often characterized by deliberate cover-up attempts, such as the filing of dummy flight plans for CIA rendition flights.[288]

140. The fact of Mr. El-Masri's unlawful abduction and secret and incommunicado detention in Macedonian territory between 31 December 2003 and the early morning of 24 January 2004 by Macedonian agents and/or U.S. agents operating with the official authorization and/or acquiescence of Macedonian authorities has been confirmed beyond a reasonable doubt. Mr. El-Masri has repeatedly provided a detailed and consistent account of both his transfer from Macedonia to Afghanistan and his further incommunicado detention in Afghanistan. His account has been corroborated in every significant component by the German criminal investigation and the Marty and Fava Inquiries – which relied on Eurocontrol data among other sources – as well as by the Mallorca prosecutor's investigation in relation to the N313P flight used by the CIA to render Mr. El-Masri from Skopje to Kabul. The consistent statements of Mr. El-Masri have been corroborated by the evidence outlined above in all significant details, such as to make the official Macedonian version of the events appear, in the words of Senator Marty, "utterly untenable."[289]

141. Having granted permission for the landing and onward itinerary of the N313P flight to Kabul, the Macedonian authorities must have known that, whatever their or the U.S.'s suspicions about Mr. El-Masri at the time, he was not being transferred to U.S. custody to face justice under conditions consistent with the ECHR. The deliberate Macedonian decision to allow and facilitate the continued unacknowledged detention of Mr. El-Masri by the U.S. is even more astounding considering that he is a citizen of Germany, a friendly and democratic country and member of the Council of Europe, with which Macedonia has good intelligence relations.

142. It is not entirely clear whether the Macedonian authorities notified any German officials, at any level and any time before Mr. El-Masri's release, regarding his apprehension. The majority and minority reports of the Bundestag inquiry seem to disagree as to whether a definitive conclusion could be reached on this matter

[288] Marty 2007, see note 115 above, at para. 78
[289] *Ibid.* at para. 314

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on the basis of the evidence available to them. There is no question, however, that, on 23 January 2004, neither Macedonia, nor the U.S. had any intention whatsoever of handing Mr. El-Masri over to the German authorities.

143. Mr. El-Masri's detailed and precise accounts of his treatment at the Skopje airport and the Afghan "Salt Pit" site became public long before the CIA released the relevant documents in the summer of 2009 in response to a U.S. Freedom of Information Act request. Mr. El-Masri was also one of the very first rendition victims to give a full account of his ordeal.

144. The investigations and forensic tests conducted by the Munich prosecutor, including sophisticated radioactive isotope analyses of Mr. El-Masri's hair, established certain key facts that corroborate his account, including that he had spent time in a South Asian country and had been deprived of food for an extended period. The overall corroboration of Mr. El-Masri's allegations was so compelling that the Munich prosecutor proceeded, on their basis, to issue arrest warrants for 13 CIA agents suspected of involvement in his rendition. The conclusions of the Munich prosecutor were further confirmed by the German parliamentary enquiry.

145. It is virtually impossible to imagine that such an operation could have been carried out for such an extended period of time on Macedonian territory without the full and active collaboration of the Macedonian authorities. For almost the entire duration of his detention in Macedonia, Mr. El-Masri was in the effective custody of Macedonian agents, most likely of the Security and Counter-Intelligence Service (known as UBK by its Macedonian acronym).[290]

146. The German investigative committee concluded, following an exhaustive investigation of the El-Masri case, that

> "Khaled El-Masri's report on his imprisonment in Macedonia and in Afghanistan is credible as to the core facts of his detention in Macedonia and his transfer to Afghanistan, as well as his confinement there by the United States forces. … [The] official account of the events by Macedonia is clearly incorrect. Rather, it must be found that convincing evidence exists for El-

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[290] *Ibid.* at para. 275

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Masri's account of the course of his arrest and transfer outside the country. The Macedonian government's insistence on an obviously contrived version of the events is unacceptable."[291]

147. The U.S. Government has never publicly acknowledged or apologized for the rendition and detention of Mr. El-Masri. It has now been confirmed, however – including by German Chancellor Merkel in a live response to a journalistic question as well as by the explicit findings of the German parliamentary investigation – that U.S. officials have privately admitted to German officials, on several occasions, that U.S. agencies were responsible for Mr. El-Masri's rendition and detention, which they characterized as "a mistake."[292] Several reports in reputable international media have also quoted unnamed Macedonian officials as admitting Macedonia's deliberate involvement in Mr. El-Masri's detention and rendition, as "a favour" to the U.S.[293]

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[291] Bundestag Committee of Inquiry Majority Findings, see note 196 above, at pg. 26-27 English & pg. 370 German

[292] Merkel Stands by Masri Mistake Comments, see note 76 above; Bundestag Committee of Inquiry Majority Findings, *Ibid.* at pg. 29-30 English & pg. 372 German

[293] Exhibit 1(D): Don Van Natta, Jr., "Germany Weights if it Played Role in Seizure by U.S.," *New York Times*, 21 February 2006. Available at: http://www.nytimes.com/2006/02/21/international/europe/21germany.html?pagewanted=print (stating that "[w]e consider the Americans as our partners. . . " and "[w]e cannot refuse them" by a senior Macedonian official said.)

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III. STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND RELEVANT ARGUMENTS

INTRODUCTION

148. The ill-treatment and detention of Khaled El-Masri in the Skopski Merak hotel and the failure to prevent him being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje airport violate Article 3, Article 5 and Article 8 of the Convention.

149. The treatment inflicted upon him during his detention in the Salt Pit in Afghanistan should be assessed as ill-treatment that constitutes a violation of Article 3, Article 5 and Article 8, which the Macedonian government is responsible for facilitating by knowingly transferring him into the custody of U.S. agents directly responsible for such ill-treatment even though there were substantial grounds for believing that there was a real risk of such ill-treatment. In addition, in respect of the Article 5 and Article 8 violations, it is also argued that Macedonia should be considered directly responsible for the entire period of captivity from his initial detention on 31 December 2009 to his return to Albania on 28 May 2004 due to the fact that Macedonia did not merely facilitate the risk of a future violation by a third state but directly participated in commencing and perpetuating an actual and ongoing violation.

150. The failure to conduct a prompt and effective investigation into the events also violates Article 3 of the Convention, and the continuing lack of an effective remedy breaches Article 13. Mr. El-Masri and the public as a whole have a right to the truth as to the secret rendition programme.

151. The entire operation was outside the law, in secret, and for the purpose of getting Mr. El-Masri to speak by terrifying and intimidating him. It followed pre-arranged plans set out in CIA memos approved at the highest level that were designed to inflict physical pain and extreme psychological discomfort in order to break his spirit.

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ARTICLE 3

152. Mr. El-Masri was subjected to torture and/or inhuman and degrading treatment for an uninterrupted period of 149 days as a result of a coordinated operation of the Macedonian and U.S. intelligence agencies. He submits that Macedonian authorities violated his Article 3 rights during and/or in relation to the following incidents, taken separately and in the context of the entire rendition operation:

- The illegal detention and interrogation by Macedonian agents at the Skopski Merak hotel (Direct Responsibility)
- The transfer to the CIA at Skopje Airport (Direct Responsibility)
- The Salt Pit, Afghanistan (*Soering* Responsibility)

In addition, Mr. El-Masri contends that the Macedonian authorities further violated his Article 3 rights in respect of each of the above incidents by failing to carry out an effective and thorough investigation capable of leading to the identification and punishment of the perpetrators.

A. The Skopksi Merak Hotel: Article 3

153. The unlawful incommunicado detention and interrogation of Mr. El-Masri for 23 days in the Skopski Merak hotel, combined with repeated threats and prolonged uncertainty as to his fate violates Article 3. He was detained in a hotel room under guard for 23 days, interrogated until late at night in a language he did not understand, threatened with a gun, pressured to admit to serious criminal offences, and consistently refused access to anyone other than his interrogators. Even absent direct physical assaults, the situation led to the acute psychological effects of anguish and stress which were used for the express purpose of breaking the psychological integrity of Mr. El-Masri in order to interrogate him, and was sufficient to drive him to protest by way of a hunger strike for 10 days.

<u>Relevant Legal Standards: Scope of Article 3</u>

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154. Torture occurs where there is “deliberate inhuman treatment causing very serious and cruel suffering.”[294] The suffering must have been intentionally inflicted, for a purpose such as obtaining evidence or intimidating the victim.[295]

155. Inhuman treatment must “cause either actual bodily harm or intense physical or mental suffering.”[296] Unlike torture, the ill-treatment does not have to be intended to cause suffering,[297] and there is no need for it to have been inflicted for a purpose.[298]

156. Degrading treatment occurs where the ill-treatment is “such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them,”[299] or if it “humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.”[300] Such treatment often has an intention to humiliate or debase them.[301]

157. *Minimum level of severity.* There is a minimum level of severity that must be attained for treatment to be in violation of Art.3. The Court has held that the threshold for “severe” is relative: “It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, it duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”[302] In the case of Mr. El-Masri he was particularly vulnerable due to the fact that the entire operation was secret and unlawful, without any legal protections and it took place, for the most part, in a foreign language (English) and in foreign countries.

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[294] *Ireland v United Kingdom*, ECHR, Judgment of 18 January 1978, at para. 167
[295] *Ilhan v Turkey*, ECHR, Judgment of 27 June 2000, at para. 85
[296] *Kudla v Poland,* ECHR, Judgment of 26 October 2000, at para. 92
[297] *Ireland v United Kingdom,* see note 294 above, at para. 167
[298] *Denizci v Cyprus*, ECHR, Judgment of 23 August 2001, at para. 384
[299] *Kudla v Poland,* see note 296 above, at para.92
[300] *Pretty v United Kingdom,* ECHR, Judgment of 29 July 2002, para. 52
[301] *Ireland v United Kingdom,* see note 294 above, at para. 167
[302] *Kudla v Poland,* see note 296 above, at para. 91

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158. *Psychological interrogation.* A generation ago the Court found that psychological interrogation techniques used against suspected terrorists may violate Art.3. In *Ireland v UK*, the Court found that the techniques used during the interrogation of individuals placed in preventive detention on suspicion of being involved in acts of terrorism were inhuman and degrading.[303] Given the evolving standards of decency that assist with the interpretation of the Convention, it is submitted that such acts deliberately repeated in the 21st Century amount to torture, as " ... the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[304]

159. *Terrorism.* The protection of Art.3 is absolute. "The requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals… It should also be borne in mind that the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct and – where detainees are concerned – the nature of the alleged offence."[305] In *Saadi v Italy*, the Court rejected arguments made by the UK that the risk of ill-treatment should be balanced against the danger of terrorism, or that stronger evidence should be presented of the risk of ill-treatment in such cases, while acknowledging that "states face immense difficulties in modern times in protecting their communities from terrorist violence."[306]

160. *Evidence.* Allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt." However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar

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[303] *Ireland v United Kingdom*, ECHR, see note 294 above, at para. 167

[304] *Selmouni v France,* ECHR, Judgment of 28 July 1999, at para. 101

[305] *Dikme v Turkey*, ECHR, Judgment of 11 July 2000, at para. 90

[306] *Saadi v United Kingdom*, ECHR (GC), Judgment of 28 February 2008, at para. 137

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un-rebutted presumptions of fact.[307] The evidence of Mr. El-Masri as to his treatment is clear and consistent. Initially rejected by some as a fantasist, his depiction of events has been corroborated by flight records, scientific tests, investigative journalists, international inquiries, and senior government officials speaking anonymously. Despite attempts to obtain documentary evidence of his detention in the civil courts of Macedonia, the criminal courts of Germany and the Supreme Court of the United States, the governments involved in the case have maintained their silence, depriving Mr. El-Masri of some of the vital documents needed to further support his case.

161. *Reverse Burden of Proof.* Where an individual suffers harm while in the custody of the State, the burden shifts to the government to provide a satisfactory and plausible explanation supported by evidence. In *Selmouni v France* the Court held that "Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."[308]

162. *Inferences.* The Court is prepared to draw an inference where the government fails to provide evidence in support of their explanation of events. In *Tas v Turkey* the Court drew "very strong inferences from the lack of any documentary evidence relating to where Muhsin Tas was detained and from the inability of the government to provide a satisfactory and plausible explanation as to what happened to him."[309] Such cases are not limited to instances where the individual is in the custody of the State, and the Court will draw inferences where the State fails to produce evidence when it is in a unique position to do so: "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, <u>such as</u> in cases where persons are under their control in custody, strong presumptions of fact will arise in respect if injuries and death occurring during that detention. Indeed, the burden of proof may be

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[307] *Salman v Turkey*, ECHR (GC), Judgment of 27 June 2000, at para. 100.
[308] *Selmouni v France*, see note 304 above, at para. 87.
[309] *Tas v Turkey,* ECHR, Judgment of 14 November 2000, at para. 66.

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regarded as resting on the authorities to provide a satisfactory and convincing explanation."[310] (emphasis added).

Violation of Article 3: Skopski Merak Hotel

163. During his detention Mr. El-Masri had no idea if he would ever be released. His situation was aggravated by the fact that the solitary confinement was conducted extra-judicially, illegally, and for the explicit purpose of breaking his spirit in order to interrogate him more effectively. The risks of unjustified detention were increased dramatically by the secret nature of the operation, a risk that was shown to be well-founded by his subsequent detention for four months in Afghanistan. When taken together, the following aspects of Mr. El-Masri's ill-treatment demonstrate that his detention was not just degrading and inhuman, but the cumulative effect was of such severity as to amount to torture.

164. *Anguish and Stress.* The 23 days detention in the hotel caused Mr. El-Masri substantial anguish and stress sufficient to cause him to go on a hunger strike. Such treatment amounts to "non-physical torture" as "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."[311]

165. *Threats*. In addition, the Macedonian officials threatened to shoot Mr. El-Masri when he attempted to leave the room, which was a real and immediate threat sufficient to generate mental suffering that amounted to a violation of Article 3.[312]

166. *Uncertainty as to his fate.* For the entire period of his detention Mr. El-Masri had no idea what was going to happen to him, and such "uncertainty about his fate" can contribute to an Article 3 violation in the context of interrogation.[313]

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[310] *Khadzhialiyev and others v Russia*, ECHR, Judgment of 6 November 2008, at para. 79, 83, 86, 89, 91-93; *Takhayeva and Others v. Russia,* ECHR, Judgment of 18 September 2008, at para. 68, 77, 80.

[311] 12 YB (the *Greek* case) 1 at 461 (1969) Com Rep; CM Res DH (70) 1. The acts complained of included death threats, humiliating acts, and threats against family members.

[312] The *Greek* case, *ibid.; Campbell and Cosens v United Kingdom,* ECHR, Judgment of 25 February 1982, at para. 26

[313] *Dikme v Turkey*, ECHR, 11 July 2000, at para. 95

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167. *Incommunicado Detention.* Despite repeated requests to speak to the German embassy, Mr. El-Masri was denied this right and kept incommunicado, which contributed to the violation of Article 3 because throughout that time he was ". . . left entirely vulnerable, not only to interferences with his right to liberty . . . but also to the reprehensible conduct of his custodians and the police officers responsible for questioning him . . . "[314] See further the arguments on Article 5 for this period at paragraphs 215-229 below.

168. *Solitary confinement*. Although he was guarded at all times by three armed men, Mr. El-Masri was to all intents and purposes detained in solitary confinement during this period, subjected to social isolation, as he unable to communicate with anyone save his captors, and subjected to sensory isolation by being kept in a room with the curtains closed. There was no justification for this treatment. The Court has considered that "prolonged solitary confinement is undesirable, especially where the person is detained on remand."[315] However, "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or for any other reason."[316]

169. *Length of time.* The detention for 23 days is more than enough to engage Article 3. In *Fedotov v Russia* a period of 22 hours in appalling conditions was sufficient to violate Art.3.[317] A period of a few days was a violation for a severely disabled woman.[318]

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[314] *Ibid.* at para. 82 (stating that the applicant was held incommunicado for 16 days)

[315] *Ramirez Sanchez v France,* ECHR (GC), Judgment of 4 July 2006, para. 120 (citing *Ensslin, Baader and Raspe v. Germany, nos.*7572/76, 7586/76 and 7587/76, Commission Decision, DR 14, pg. 64). See also: General Comment 20 of the Human Rights Committee, 44th session, 10 March 1992 (stating at paragraph 6 that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7). Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument

[316] *Ilascu et al v Moldova and* Russia, ECHR, Judgment of 8 July 2004, at para. 432 (stating that the applicant was detained for eight years with no contact with the outside world or other prisoners, in an unheated cell with no natural light or ventilation, and he was deprived of food as a punishment, causing his health to deteriorate)

[317] *Fedotov v Russia*, ECHR, Judgment of 25 October 2005, at para. 66-70.

[318] *Price v United Kingdom*, ECHR, Judgment of 10 July 2001, at para. 25 & 30 (stating that the applicant was a four-limb deficient thalidomide victim detained overnight in a

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170. *Interrogation*. Throughout his detention Mr. El-Masri was subjected to constant interrogation, which was informed by information coming from Germany. His interrogators put him under great pressure to admit to things that were not true and made him promises of better treatment if he did. This purposive element for the ill-treatment by way of detention is relevant for finding a violation of Article 3, as an attempt to break his will. In *Ireland v UK*, the five techniques used to break the spirit of the detainees were described "as degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[319]

171. *Accumulation of Acts.* The combination of acts against Mr. El-Masri during his detention, together with the illegal and incommunicado nature of the captivity are sufficient to raise inhuman or degrading treatment to the level of torture.[320]

172. In conclusion, the evidence demonstrates that Mr. El-Masri crossed the border into Macedonia on 31 December 2003 and was taken into the custody of the border guards, as demonstrated by his own testimony, the stamps in his passport and the admissions made by the government to bodies such as the Marty Inquiry. He then disappeared for four months, and re-appeared in Albania. The burden therefore shifts to Macedonia to demonstrate what happened to him. The only explanation that the government has provided is that he stayed as a paying guest at the Skopski Merak hotel and that he left towards Kosovo on 23 January 2004, but they have failed to provide any evidence to support that explanation.

173. Precisely because this Case involves action by Macedonia's secret services, the CIA and the "extraordinary renditions" program, the truth lies wholly within the exclusive knowledge of the authorities, who have consistently refused to make it

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"dangerously cold" police cell, and then detained for 2 days in a prison which did not have adequate facilities to look after her)

[319] *Ireland v United Kingdom,* see note 294 above (emphasizing that the Court concurs with the Commission on this point)

[320] *Aydin v. Turkey*, ECHR, Judgment of 15 September 1997, at para. 86 (stating that a 17 year-old girl was subjected to humiliating experiences of physical and mental violence during 3 days detention including being blind-folded, paraded naked, spun in a tyre, and an act of rape, and concluding that the "accumulation of acts of physical and mental violence inflicted on the applicant" other than rape gave rise to suffering amounting to torture)

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any of it public. Inferences and presumptions of fact should be made against that failure.

B. Skopje Airport Transfer and "Capture Shock": Article 3

174. The evidence indicates that the security services of Macedonia took him from the hotel, blindfolded him, handcuffed him, drove him to the airport and handed him to eight men dressed from the CIA in black with ski-masks. He was immediately beaten, stripped and forced to the floor while an object was forced into his anus. He was photographed, chained and shackled, subjected to complete sensory isolation and then forced onto a waiting airplane. Macedonian security forces formed a cordon around the plane as he was loaded on, injected and chained to the floor of the plane. The events are consistent with numerous other transfers conducted by CIA rendition teams. Under the applicable jurisprudence of this Court and other international human rights mechanisms, by engaging in these acts, the Macedonian government breached its obligation to prevent Mr. El-Masri from ill-treatment which it knew or ought to have known would occur.

Relevant Legal Standards: the obligation to prevent ill-treatment

175. The Court has established that there is a positive obligation upon States to protect individuals from ill-treatment contrary to Art.3:

> "…The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals… These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[321]

[321] *Z and Others v United Kingdom,* ECHR, Judgment of 10 May 2001, at para. 73.

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176. The Court has found violations of Article 3 in situations where the State knew that an individual was at risk of being targeted by non-state actors and had not taken specific measures to protect him,[322] and in a situation where the police stood by and failed to step in to prevent ill-treatment when there was a physical attack on Jehovah's Witnesses by members of a different church.[323]

177. The United Nations Human Rights Committee found a violation of the obligation to prevent ill-treatment in the case of a CIA rendition team taking custody of an individual in a violent manner at a European airport. In the case of *Alzery v Sweden*, the Swedish government decided to expel the complainant to Egypt, having rejected his asylum claim. On 18 December 2001, he was transferred to the police station at Bromma airport near Stockholm "…where he was handed over to some ten foreign agents in civilian clothes and hoods. Later investigations by the Swedish Parliamentary Ombudsman disclosed that the hooded individuals were United States' and Egyptian security agents."[324] He was then subjected to the violent seizure described in paragraph 180 below.

178. The Human Rights Committee considered that "…the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged."[325] The Committee considered that this amounted to "acquiescence" and a violation of the prohibition against torture.[326]

Violation of Article 3

179. The violence used to transfer Mr. El-Masri to the CIA plane was out of all proportion to any threat that he posed, and was conducted for the purpose of debasing him or breaking his spirit, and amounts to torture. Even lawful

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[322] *Kaya v Turkey,* ECHR, 28 March 2000, at para. 115 & 116

[323] *97 Members of the Gladani Congregation of Jehovah's Witnesses v Georgia,* ECHR, Judgment of 3 May 2007, at para. 124 & 125

[324] Exhibit 64: *Alzery v Sweden,* UNHRC, "Views adopted on 25 October 2006," U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006, at para. 3.10. Available at: http://www.bayefsky.com/pdf/sweden_t5_iccpr_1416_2005.pdf

[325] *Ibid.* at para. 11.6

[326] See also: *Agiza v Sweden,* UNHRC, Views of 25 May 2005, at para.13.4. Available at: http://www.unhcr.org/refworld/country,,CAT,,EGY,456d621e2,42ce734a2,0.html

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extraditions may not be carried out in a way that causes "extreme anxiety" as "such a total lack of humanity" can amount to inhuman treatment.[327] Here, the entire process was illegal and was carefully designed to induce "capture shock" and make it easier to interrogate Mr. El-Masri:

> "…the rendition and reception process generally creates significant apprehension in the HVD [High Value Detainee] because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of U.S. custody."[328]

180. As noted above, the Human Rights Committee of the United Nations considered the same fact pattern conducted by a CIA rendition team in another European airport and found a violation of Article 7 of the ICCPR. In the case of *Alzery v Sweden*, the author was transferred to a U.S. airplane at Bromma airport on 19 December 2001 under the following circumstances:

> "The author states that the hooded agents forced him into a small locker room where they exposed him to what was termed a "security search", although Swedish police had already carried out a less intrusive search. The hooded agents slit the author's clothes with a pair of scissors and examined each piece of cloth before placing it in a plastic bag. Another agent checked his hair, mouths and lips, while a third agent took photographs, according to Swedish officers who witnessed the searches. When his clothes were cut off his body, he was handcuffed and chained to his feet. He was then drugged *per rectum* with some form of tranquilliser and placed in diapers. He was then dressed in overalls and escorted to the plane blindfolded, hooded and barefooted. Two representatives from the Embassy of the United States of America were also present during the apprehension and treatment of the applicant. In an aircraft registered abroad, he was placed on the floor in an awkward and painful position, with chains restricting further movement. The blindfold and hood

[327] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, ECHR, Judgment of 12 October 2006, at para. 69 (stating that the applicant was an unaccompanied five year old girl being returned to Kinshasa, where there was no-one to meet her on arrival)
[328] CIA Memo of 30 December 2004, see note 59 above

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stayed on throughout the transfer including when he was handed over to Egyptian military security at Cairo airport some five hours later."[329]

181. The Human Rights Committee concluded "it is evident that the use of force was excessive and amounted to a breach of article 7 of the Covenant."[330]

182. Each of the individual elements employed in the course of Mr. El-Masri's transfer process has also been considered as a violation of Article 3 by this Court.

183. *Physical Force.* Significant physical force was used on Mr. El-Masri. He was beaten repeatedly such that he cried out for his abusers to stop. He was held to the floor by force. He had a hard object inserted into his anus. He was forcibly marched to the plane, causing him immense pain. "[A]ny recourse to physical force which has not been made strictly necessary by [the subject's] own conduct diminishes human dignity and is in principle an infringement" of Article 3, being both inhuman in the way that it generates suffering and degrading in the way that it humiliates.[331]

184. *Use of force during arrest.* It is for the government of Macedonia to demonstrate that the pain and injuries caused during this unlawful arrest were necessary, as "the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive,"[332] or was "indispensable."[333] This Court has found a violation in circumstances where the State had failed to provide "convincing and credible arguments which would provide a basis to explain or justify the degree of force used."[334]

185. *Forced removal of clothes and photographs*. The way in which Mr. El-Masri had his clothes literally ripped off him and photographs taken of him while naked was humiliating, and intended to be so. Such a search is degrading

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[329] *Alzery v. Sweden*, see note 324 above
[330] *Ibid.* at para. 3.11
[331] *Ribitsch v Austria,* ECHR, Judgment of 21 November 1995, at para. 38
[332] *Rehbock v Sweden,* ECHR (GC), Judgment of 28 November 2000, at para. 72
[333] *Ivan Vasilev v Bulgaria,* ECHR, Judgment of 12 April 2007, at para. 63
[334] *Rehbock v Sweden,* ECHR (GC), see note 332 above, at para. 76 (finding that the explanation for facial injuries was not credible, there was plenty of time to plan the arrest, and that the applicant had not resisted arrest)

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treatment where there is no compelling reason for it and it "showed a lack of respect for the applicant's human dignity" and "humiliated and debased the applicant."[335]

186. *Shackles.* As part of the process, Mr. El-Masri's feet were tied together. He was then shackled with his hands and feet connected with chains to a belt around his waist, such that he could not move. The shackles on his ankles caused him great pain as he was forced to the airplane. In the plane he was restrained on the floor in a painful position. The physical restraint of prisoners is not a violation of Art. 3 where it is reasonably necessary in the circumstances.[336] The relevant considerations include the danger of escape or violence, the degree of force used to effect the restraint and the extent of any exposure to the public.[337] Here, there was no such risk, as Mr. El-Masri had been in detention for 23 days and had been on a hunger strike for the last ten.

187. *Hooding*. The rendition team blinded Mr. El-Masri with a blindfold and a hood over his head. The use of hooding to deliberately disorientate and confuse the detainee was condemned as contributing to a violation of Art.3 by the Court in *Ireland v UK*, which found a breach of the Convention for the practice of putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation.[338] In the case of *Dikme v Turkey*, the Court considered the fact that the applicant was blindfolded and in total isolation to be an exacerbating feature "that was likely to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will."[339]

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[335] *Iwańczuk v Poland*, ECHR, Judgment of 15 November 2001, at para. 58 (finding that a prisoner was made to strip to his underclothes in front of guards who then ridiculed him, and prevented him from voting when he refused to do so). See also: *Wieser v Austria,* ECHR, Judgment of 22 May 2007, at para. 40 (stating that the police themselves undressed the victim while he was in a particularly vulnerable handcuffed position in order to search for arms and drugs that could have been found through a simple body search)

[336] *Ocalan v Turkey,* ECHR (GC), Judgment of 12 May 2005, at para. 184; See also: *Khudoyorov v Russia*, at para. 117-118 (stating that confinement in a small space during transportation was a violation "irrespective of the duration")

[337] *Ibid.* at para. 182

[338] *Ireland v United Kingdom,* see note 294 above, at para. 96 & 167

[339] *Dikme v Turkey*, see note 313 above, at para. 91

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188. *Forced treatment*. The forcible administration of a suppository while Mr. El-Masri was held to the ground by men in ski-masks without any explanation, had no lawful basis and no medical necessity. As an unlawful act of penetration, the act amounts in many jurisdictions within the Council of Europe to rape, a further breach of Article 3 of the Convention. Medical treatment can be given by force where it is necessary from the point of view of established principles of medicine and in the interests of the person's physical or mental health, and will not be in breach of Art.3.[340] The medical necessity must be "convincingly shown", with appropriate procedural guarantees. In addition, the treatment must be administered in a way which does not exceed the minimum level of humiliation and suffering that is necessary.[341] Such restraint was entirely lacking here.

189. *Stress positions.* Mr. El-Masri was chained to the floor of the plane in a painful position for several hours while it remained on the tarmac at Skopje airport, and remained restrained in that way for the entire flight to Baghdad and Afghanistan. The use of stress positions was found to contribute to a violation of Art.3 in *Ireland v UK*.[342]

190. *Cumulative effect.* In *Ireland v UK*, the Court re-iterated that the fact that the methods "were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."[343]

191. In conclusion, in the instant case, Mr. El-Masri's dramatic and violent strip search had no legitimate purpose after 23 days in custody. Tranquillisers were forcibly and violently administered against his will. He was subjected to total sensory deprivation. The restraints were particularly intense and painful, doubling him over to walk to the plane and then chaining him to the floor.

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[340] *Jalloh v* Germany, ECHR, Judgment of 11 July 2006, at para. 69
[341] *Ibid*
[342] *Ireland v United Kingdom,* see note 294 above, at para. 96 & 167
[343] *Ibid.* at para. 167

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192. A recently released CIA memo indicates that the method in which CIA rendition teams bring a detainee into custody is meant give rise to a state of "capture shock" with the goal of inducing a state of "learned helplessness and dependence" that will be conducive to effective interrogation upon arrival at the black site.[344] The memo specifically authorizes many of the methods that were used against Mr. El-Masri: "During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods" in order to "contribute to the overall psychological condition of the HVD prior to the start of interrogation" through "capture shock."[345]

193. The memo makes clear that the strategic aim of all interrogation and transport methods was to use both "physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence detainees' behavior and to overcome their resistance posture,"[346] that is, breaking their physical and moral resistance. In view of the clear illegality of the entire operation and the pre-meditation of its design, the cumulative effect of the treatment inflicted upon Mr. El-Masri at Skopje airport amounted to torture.

194. Moreover, as the Human Rights Committee found with respect to the rendition at Bromma airport, it is not acceptable to stand around and do nothing.[347] The violent assault on Mr. El-Masri began from the moment that he was passed by the Macedonians to the CIA rendition team. He shouted out for them to stop. He was dragged to the plane across the tarmac having been shackled and hooded in a way that was clearly and visibly unlawful. The Macedonian authorities had a positive obligation to prevent the clear ill-treatment that was occurring in front of them, and are responsible for the torture that occurred at Skopje airport as a result.

C. The Salt Pit, Afghanistan: Article 3

195. As outlined in paragraphs 73-99 above, the unlawful nature of the U.S. detention regime in both Afghanistan and Guantanamo Bay was a matter of public record

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[344] CIA Memo of 30 December 2004, see note 59 above, at pg. 1
[345] *Ibid.*
[346] *Ibid.*
[347] *Alzery v. Sweden*, see note 324 above, at para. 11.6.

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by January 2004. The government of Macedonia was on notice that it should not transfer Mr. El-Masri to the CIA without a proper assessment, and then only if there were sufficient assurances and monitoring for them to be sure that a violation would not occur.

Relevant Legal Standards: Transfer in Breach of the Convention (the *Soering* principle)

196. It is a breach of the Convention for a State Party to transfer (by deportation or extradition, legal or otherwise) an individual to another state "where substantial grounds have been shown for believing that the individual concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."[348] This prohibition applies to both extradition and deportation.[349] The personal circumstances of the individual are relevant to the consideration of the risk.[350] In such cases the State Party is liable due to the fact that they have "taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[351] This is on the basis that the returning state is "not being held directly responsible for the acts of another state but for the facilitation, through the process of extradition, of a denial of the applicant's rights by that other state".[352]

197. The prohibition against transfers applies to not only to risks of treatment contrary to Art.3, but also the risk of a "flagrant denial" of a fair trial protected by Art.6.[353] In the case of Mr. El-Masri there is no issue under Article 6, as there

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[348] *Soering v United Kingdom,* ECHR, Judgment of 7 July 1989, at para. 91

[349] *Cruz Varas and Others v Sweden,* ECHR, Judgment of 20 March 1991, at para. 53

[350] In *Soering,* see note 348 above, the applicant was 18 years old at the time of the killings that lead to his deportation, was not mentally responsible for his acts, and Germany was prepared to prosecute him without the death penalty.

[351] *Soering v. United Kingdom*, *Ibid.* at para. 91

[352] Michael O'Boyle, "Extradition and Expulsion under the European Convention on Human Rights: Reflection on the Soering Case," in James O'Reilly, ed., *Human Rights and Constitutional Law, Essays in Honour of Brian Walsh,* Dublin: The Round Hall Press, 1992, at pg. 97

[353] *Mamatkulov and Askarov v Turkey*, ECHR (GC), Judgment of 4 February 2005, at para. 91. In *Ocalan v Turkey*, the Court reiterated that, in the case of *fugitives*, States are permitted to co-operate "within the framework of extradition treaties or in matters of deportation, for the

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was never any intention of trying him: his detention was for intelligence purposes only. He was flown to Afghanistan, rather than Guantanamo Bay where there might have been the possibility of a trial. Nonetheless, the facts which have led the Court in prior cases to consider that there would be a "flagrant denial" of any subsequent trial (see, e.g., *Al-Moayad v Germany)* are relevant to the question of whether there was a similar violation of his various rights under Article 5. As is discussed more fully below, see paragraphs 237-241 in the article 5 section, it is submitted that there is no reason why the *Soering* principle should not also apply to a "flagrant denial" of Article 5.

198. This Court is entitled to look at a wide range of evidence in order to reach a decision on the application of the *Soering* principle. "In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*." [354] "This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears."[355]

199. A number of factors are relevant to the consideration of the case of Mr. El-Masri under the *Soering* principle.

a) *Unlawful process.* No arrest warrant was ever shown to Mr. El-Masri and none has ever been produced, either from the Macedonian authorities or from the American authorities. He was never brought before a judge, and no legal process was followed to effect his transfer or to allow it to be challenged. In *Ocalan v Turkey,* the Court considered relevant both the fact that the arrest had taken place in accordance with Turkish law even though there was no formal extradition treaty between Kenya and Turkey, and the

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purpose of bringing fugitive offenders to justice, provided that it does not interfere with *any specific rights* recognised in the Convention. ECHR (GC), see note 336 above, at para. 86

[354] *Cruz Varas and Others v Sweden*, see note 349 above, at para. 75

[355] *Ibid.*

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fact that there was a legal basis for the arrest in the form of "an arrest warrant issued by the authorities" in the requesting country.[356]

b) *Proper assessment of the risk.* There is no evidence that the Macedonian authorities undertook any assessment of the evident risk of transferring Mr. El-Masri to the CIA. Where there is an indication of a risk of ill-treatment then there is a duty on the State Party to undertake a proper assessment of that risk and to take any steps that are necessary to avoid any violation of the Convention. The "examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe."[357] That examination, if it is to satisfy the requirements of Article 13 (see paragraphs 247-256 below) "must be carried out without regard to … any perceived threat to national security"[358] and must amount to "independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3"[359] which may need to be conducted by a judicial authority to be effective.[360]

c) *Assurances.* In July 2002, the UN Special Rapporteur on Torture issued a report in which he urged States "to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put in place with a view to ensuring that they are treated with full respect for their human dignity."[361] Even if assurances are made, the Court will assess the nature of those assurances, rejecting

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[356] *Ocalan v Turkey,* see note 336 above, at para. 91
[357] *Vilvarajah v United Kingdom,* ECHR, Judgment of 30 October 1991, at para. 108
[358] *Chahal v United Kingdom,* ECHR, Judgment of 15 November 1996, at para. 151
[359] *Ibid.*
[360] *Ibid.* at para. 152.
[361] Exhibit 16: see note 167 above, at para. 35

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general assurances of protection,[362] and will look to objective evidence in order to make that assessment.[363] Here, the evidence of subsequent torture is relevant, as the likelihood of ill-treatment in such circumstances had been widely reported such as to become public knowledge. There is no indication that the Macedonian authorities ever sought, let alone were provided, any assurances regarding the treatment of Mr. E-Masri in U.S. custody.

d) *Monitoring.* There is no evidence that the Macedonian authorities considered finding out what had happened to Mr. El-Masri after they handed him over; to the contrary, to this day they have maintained their complete denial that he was transferred to the CIA. A state which extradites despite a real risk of ill-treatment has a positive and continuing obligation under Article 1 of the ECHR to protect the individual by taking steps that neutralize that risk prior to extradition, which may be realized by seeking effective diplomatic assurances.[364] This may include negotiating adequate monitoring measures. In *Garabayev v Russia*, the ECHR found relevant the fact that "no medical reports or visits by independent observers were requested or obtained."[365] In *Alzery v Sweden*, the Human Rights Committee examined associated enforcement mechanisms with diplomatic assurances,[366] and concluded that the assurances were inadequate and did not include an effective monitoring mechanism.[367]

e) *The duty to reverse the wrong.* Even if the Macedonian government was to claim that it did not know what was going to happen to Mr. El-Masri once transferred to U.S. custody, it would then still have a duty to attempt to remedy the wrong once it was discovered. Where a human rights violation is

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[362] *Chahal v United Kingdom,* see note 358 above, at para. 97 & 105-107; *Saadi v Italy,* see note 306 above, at para. 128, 142 & 148-149

[363] *Ismoilov v Russia*, ECHR, Judgment of 24 April 2008, at para. 120 & 121 (referencing reports by the UN Special Rapporteur on Torture)

[364] *Shamayev v Georgia and Russia,* ECHR, Judgment of 12 October 2005, at para. 344-353; *Al-Moyayad v Germany*, ECHR, Decision on Admissibility of 20 February 2007, at para. 69-72

[365]*Garabayev v Russia*, ECHR, Judgment of 7 June 2007, at para. 79

[366] *Alzery v. Sweden*, see note 324 above, at para. 11.5.

[367] *Ibid*. at para. 11.5. See also: *Agiza v Sweden*, UNHRC, View of 24 May 2005, at para.13.4

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caused by the actions of an extraditing state, then there is a duty of diplomatic intervention or representation on behalf of the victim due to the fact that "the expulsion or extradition itself is an act of 'jurisdiction' on the part of the Contracting state."[368] The Bosnian Human Rights Chamber held that Bosnia and Herzegovina was under a continuing obligation to use diplomatic interventions to protect the rights of the applicants, including subsidizing the cost of the individuals' legal defence and using all diplomatic channels to prevent the application of the death penalty.[369] The South African Constitutional Court went even further when the South African authorities worked with the United States to unlawfully render to United States custody a Tanzanian seeking asylum in South Africa, enunciating a diplomatic duty to "to do whatever may be in their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best consequential prejudice caused to him."[370] The European Commission accepted a friendly settlement where Sweden accepted that a man should not have been expelled, and agreed to re-admit him, pay the costs of his return, grant him permanent leave to remain in Sweden, and use its good offices to encourage the Jordanian authorities to investigate the circumstances of his treatment in Amman.[371]

Violation of Article 3: The Salt Pit, Afghanistan

200. This Court is required to assess the human rights violation in the non-State Party, but not to adjudicate upon it. In *Soering,* the Court considered that the establishment of responsibility of the State Party for the foreseeable consequences of the transfer "inevitably involves an element of assessment of conditions in the requesting country against the standards of Article 3 of the

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[368] *Bertrand Russel Peace Foundation Ltd v United Kingdom*, European Commission of Human Rights Decision of 2 May 1978, at pg. 124

[369] *Boudella et al. v. Bosnia and Herzegovina*, see note 185 above, at para. 330

[370] *Khalfan Khamis Mohamed and Abdurahman Dalvie v President of the Republic of South Africa and Six Others*, Judgment of the Constitutional Court of South Africa of 28 May 2001, CCT 17/01, at para. 33. Available at: http://www.capdefnet.org/pdf_library/Mohamed_Judgment.pdf

[371] *Mansi v. Sweden*, Report of the European Commission on Human Rights, 8 March 1990, at para. 1-19

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Convention. Nonetheless, there is no question of adjudication on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[372]

201. This assessment will be undertaken prior to the transfer, as in the case of *Soering,* or after the event. Where the transfer has already taken place, "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion. The Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion."[373] The Court has conducted such an assessment in a number of cases in which there was in fact no post-transfer ill-treatment. In *Shamayev v Georgia and Russia* the applicants had been extradited from Georgia to Russia and tried for terrorist offences on the basis of assurances of their good treatment, but there was no evidence of ill-treatment presented to the Court.[374] In *Mamatkulov and Askarov v Turkey* the applicants were extradited to Uzbekistan with assurances that they would not be tortured or subjected to the death penalty, and in finding no violation the Court held the lack of evidence of any post-extradition torture to be important.[375]

202. The Court has previously considered the detention regime operated by the United States in Bagram, Afghanistan:

> "The Court would state at the outset that it is gravely concerned by the worrying reports that have been received about the interrogation methods used by the U.S. authorities on persons suspected of involvement in international terrorism. It notes, however, that these reports concern prisoners detained by

[372] *Soering v United Kingdom*, see note 348 above, at para. 91
[373] *Cruz Varas v Sweden*, see note 349 above, at para. 76
[374] *Shamayev and Others v Georgia and Russia*, see note 364 above, at para. 338-339
[375] *Mamatkulov and Askarov v Turkey*, ECHR (GC), see note 353 above, at para. 73

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the U.S. authorities outside the national territory, notably in Guantánamo Bay (Cuba), Bagram (Afghanistan) and some other third countries."[376]

203. The Court of Appeal of England and Wales considered the similar legal regime operating for detainees in Guantanamo Bay to amount to a "legal black hole."[377]

204. The conditions under which Mr. El-Masri was detained in the Salt Pit should be assessed as being treatment contrary to Article 3.

a) *Conditions of detention.* The prison conditions were unacceptable. He was detained in a filthy, bare cell, without running water, bedding, or heat, and without adequate light. See, e.g., *Kalashnikov v Russia* (violation of Art.3 for detention in a "filthy, dilapidated cell");[378] *Modarca v Moldova* (violation of Art. 3 for detention for nine months "in extremely overcrowded conditions with little access to daylight, limited availability of running water, especially during the night and in the presence of heavy smells from the toilet, while being given insufficient quantity and quality of food or bed linen").[379]

b) *Physical assault.* He was kicked, beaten and slammed against the wall (see cases in paragraph 183 above).

c) *Inadequate food and water.* He was deprived of necessary food and water. See, e.g., *Ireland v UK* (deprivation of food and drink was one of the five techniques contributing to a violation of Art.3);[380] *Moisejevs v Latvia* (inadequate food provided to a remand prisoner during his trial amounted to a violation of Art.3).[381]

d) *Sleep deprivation.* He was deprived of sleep and subjected to constant interrogation. See, e.g., *Ireland v UK* (deliberate deprivation of sleep

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[376] *Al-Moayad v Germany*, ECHR, see note 273 above, at para. 66.
[377] *Abbasi v. Secretary of State for Foreign and Commonweath Affairs*, see note 182 above
[378] *Kalashnikov v. Russia*, ECHR, Judgment of 15 July 2002, at para. 98-99 & 101-103 (stating that the cell was shared with multiple inmates, infested with pests, had only one toilet with no screen for privacy, inadequate ventilation, and that the applicant contracted skin diseases and fungal infections)
[379] *Modarca v Moldova*, ECHR, Judgment of 10 May 2007, at para. 68
[380] *Ireland v United Kingdom,* see note 294 above, at para. 96 & 167
[381] *Moisejevs v Latvia*, ECHR, Judgment of 15 June 2006, at para. 78-81

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pending interrogations was a factor contributing to the finding of a violation of Art.3).[382]

e) *Lack of medical treatment.* He was deprived of the adequate medical assistance which is required by Article 3. See e.g., *McGlinchey v UK* (failure to take effective steps to treat a patient such as admitting them to hospital amounts a violation of Article 3);[383] *Sarban v Moldova* (degrading treatment caused by the stress and anxiety suffered by the lack of medical assistance);[384] *Hummatov v Azerbaijan* (lack of medical assistance causes "considerable mental suffering diminishing his human dignity").[385]

f) *Forced Feeding.* He was forcibly and humiliatingly given food, against his will. See, e.g., *Herczegfalvy v Austria* (only permitted for patients "who are entirely incapable of deciding for themselves");[386] *Nevmerzhitsky v Ukraine* (finding of torture where no necessity to save life shown and procedural safeguards not complied with, in circumstances of restraint with handcuffs and forcible insertion of rubber tube into throat);[387] *Ciorap v Moldova* (physical injuries caused by forced feeding without sedation which was "not prompted by valid medical reasons but rather with the aim of forcing the applicant to stop his protest, and performed in a manner which unnecessarily exposed him to great physical pain and humiliation, can only be considered as torture."[388]

g) *Unlawful.* The detention was incommunicado, unlawful, and secret (see cases in paragraph 167 above).

h) *Uncertainty as to his fate.* He was denied any information concerning the basis and duration of his detention, and was consequently left with complete uncertainty as to his fate (see cases in paragraph 166 above).

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[382] *Ireland v United Kingdom,* see note 294 above, at para. 96 & 167
[383] *McGlinchey v United Kingdom,* ECHR, Judgment of 29 April 2003, at para. 57-58
[384] *Sarban v Moldova,* ECHR, Judgment of 4 October 2005, at para. 83 & 89-91
[385] *Hummatov v Azerbaijan,* ECHR, Judgment of *29 November* 2007, at para. 121
[386] *Herczegfalvy v Austria*, ECHR, Judgment of 24 September 1992, at para. 82
[387] *Nevmerzhitsky v Ukraine*, ECHR, Judgment of 5 April 2005, at para. 95-99
[388] *Ciorap v Moldova,* ECHR, Judgment of 17 June 2007, at para. 89

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205. As a result of these conditions, Mr. El-Masri was driven to enter a hunger strike which was forcibly ended after 36 days when the authorities forced a feeding tube down his throat. Violence was used to effect the feeding upon Mr. El-Masri and it was done in a way that caused him extreme pain for several days without sufficient medical intervention to ease the pain and suffering. The fact that the feeding treatment was forced upon Mr. El-Masri without any legal process further aggravates the ill-treatment. The cumulative effect of all of the above is such that the treatment amounted to torture.

206. As a member of the Council of Europe and of the United Nations, Macedonia was fully aware of the legal obligation to conduct a proper assessment of the risk of ill-treatment were Mr. El-Masri to be handed to the CIA. The fact that the entire handover process was carried out in secret is evidence that Macedonia knew that what was occurring was wrong, and unlawful. The continuing situation whereby Macedonian government officials publicly deny the events while admitting them in private also demonstrates their knowledge that the transfer was improper.

207. The fact that the United States is a democracy makes no difference: human rights violations occur in democracies, as the decisions of this Court make clear, and states have a duty to carefully consider the factual situation before handing over a vulnerable suspect even to a mature democracy. Where the process occurred outside the law, as in this case, it demonstrates that Macedonia was knowingly colluding in the human rights violation rather than fulfilling its positive obligation to prevent violations through the rule of law.

D. Prompt and Effective Investigation

208. There is a separate and distinct violation of Article 3 where the State fails to investigate promptly, impartially and effectively an arguable claim of a violation of Article 3 which is capable of leading to the identification and punishment of the perpetrators. Despite calls from a plethora of international bodies and complaints from Mr. El-Masri himself, Macedonia has essentially ignored what happened on 23 January 2004. The cursory investigation that was undertaken by the Ministry of the Interior in 2004 (see paragraphs 66-69 "Internal Investigation

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in Macedonia" above) was neither prompt, impartial nor effective and was incapable of leading to the identification or punishment of the perpetrators.

Relevant Legal Standards

209. In *Assenov and Others v Bulgaria*,[389] the Court first held that there was an investigative element to Article 3:

> ". … where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible.[390] If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see paragraphs 154-162 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

210. The Court has explained (in the context of an Article 2 investigation) that the purpose of this duty is to "secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents of bodies, to ensure their accountability for deaths occurring under their responsibility."[391] Violations of both the substantive and investigative elements of Article 3 have been found by the Court in *Satik and Others v Turkey,*[392] *Toteva v Bulgaria,*[393] and *Boicenco v Moldova.*[394]

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[389] *Assenov and Others v Bulgaria*, ECHR, Judgment of 28 October 1998, at para. 102

[390] See, in relation to Article 2 of the Convention, *McCann and Others v. the United Kingdom*, ECHR, Judgment of 27 September 1995, at para. 161; *Kaya v. Turkey*, see note 322 above, at para. 86; *Yaşa v Turkey*, ECHR, Judgment of 2 September 1998, at para. 98

[391] *Kelly and Others v the United Kingdom,* see note 391 above, at para. 94

[392] *Satik and Others v Turkey*, ECHR, Judgment of 10 October 2000, at para. 62

[393] *Toteva v Bulgaria*, ECHR, Judgment of 19 May 2004, at para. 52, 56 & 57

[394] *Boicenco v Moldova*, ECHR, Judgment of 11 July 2006, at para. 111

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211. The investigative duty will also apply where there is an arguable claim that an individual has been subjected to treatment in severe violation of Article 5 of the Convention such as the prolonged, unacknowledged detention of the person.[395] What constitutes an "arguable claim" will depend on the circumstances of each specific case. However, it is generally considered, including for the purposes of Article 13 (right to remedy) of the Convention, that an applicant has made an arguable claim if he or she has laid "the basis of a prima facie case" of mistreatment by state agents.[396]

212. In considering the point in time at which the State is put on notice that there has been a violation of the Convention that should be investigated, the Court has held in an Article 2 case that it is not "decisive"

> ". … whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority…. The mere knowledge of the killing on the part of the authorities gave rise to an *ipso facto* obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances of the death."[397]

<u>No effective investigation</u>

213. The only investigation undertaken within Macedonia was that undertaken by the "Department for Control and Professional Standards" of the UBK, under the auspices of the Ministry of the Interior, is described at paragraph 66-67 above. This investigation is insufficient for the purposes of Article 3 of the Convention for the following reasons:

a) *The investigation was not prompt or expeditious.* After an initial failed investigation, no attempts have been made to follow up on the plethora of issues raised by the Marty and Fava Inquiries, the request for a criminal prosecution or indeed the civil case. An investigation must be undertaken with "promptness and reasonable expedition,"[398] which means that it must

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[395] *Kurt v Turkey*, ECHR, Judgment of 25 May 1998, para. 124

[396] *Cacan v. Turkey*, ECHR, Judgment of 26 October 2004, para. 80

[397] *Ergi v Turkey,* ECHR (GC), Judgment of 28 July 1998, at para. 82

[398] *Kelly and Others v United Kingdom,* see note 384 above, at para. 97

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be both commenced immediately and pursued with diligence. There will be a violation where "the inertia displayed by the authorities in response to … allegations [of ill-treatment] was inconsistent with the procedural obligation which devolves upon them under Article 3 of the Convention."[399]

b) *The investigation was not independent*. The Court has previously held that an investigation by the special internal departments of the Macedonian Ministry of the Interior is not hierarchically independent,[400] as both the Director of the Police and the Director of the Security Service report directly to the Minister of the Interior.

c) *The investigation was neither thorough nor effective*. Those who carried out the internal investigation did not speak to Mr. El-Masri, the main witness in the case.[401] No evidence has been preserved or produced, such as the hotel records.[402] The investigation accepted the official government position without investigating the alternative theory adequately or at all.[403] No

[399] *Sevtap Veznedaroglu v Turkey,* ECHR, Judgment of 11 April 2000, at para. 35. See also: *Yaşa v Turkey* ECHR, see note 390 above, at para. 107 (stating that the investigation into two murders had been commenced immediately but concluded after a week on the basis that it was not possible to identify the perpetrators and finding a violation of Art.2: "… up till now, more than five years after the events, no concrete and credible progress has been made, the investigations cannot be considered to have been effective.")

[400] *Jasar v Macedonia*, ECHR, decision of 11 October 2006, at page 10 (finding that "special internal departments such as the Sector for Internal Control [of the Ministry of Interior Affairs] or institutions hierarchically linked to the alleged perpetrators lack the necessary independence.") See also: *Dzeladinov and Others v. FYROM*, ECHR, Decision of 6 March 2007 (Admissibility), at pg. 15.

[401] *Assenov and Others v Bulgaria*, ECHR, Judgment of 28 October 1998, at para. 103. See also: *Gulec v Turkey,* ECHR, Judgment of 27 July 1998, at para. 82 (failure to interview witness standing next to deceased when he was shot and driver of police vehicle); *Velikova v Bulgaria,* ECHR, Judgment of 18 May 2000, at para. 79 (failure to interview officer who arrested deceased and a cell mate); *Akkoc v Turkey*, ECHR, Judgment of 10 October 2000, at para. 98 (only interviewing one person from a 'crowd' at the scene of a killing)

[402] *Kelly and Others v United Kingdom,* see note 391 above, at para. 96 (indicating that States must ensure that they have taken "the reasonable steps available to them to secure the evidence concerning the incident")

[403] *M.C. v Bulgaria*, ECHR, Judgment of 4 December 2003, at para. 157-166 (finding a violation of Article 3 where the domestic authorities had chosen only to investigate a rape case on the basis of the lack of evidence of physical resistance rather than on evidence that indicated lack of consent)

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scientific evidence was obtained, such as medical evidence[404] or evidence of flights.

d) *Publicity and family involvement.* Mr. El-Masri was not involved at all in the Macedonian investigation.[405] Although a copy of the investigation report was sent to the Ambassador of the European Commission, it has not been made public.[406] Nor has there been any information to "reassure a concerned public that the rule of law [has] been respected."[407]

e) *Decision and appeal.* As there has been no public decision, it has been impossible to challenge it.[408] The cursory and grossly inadequate investigation conducted in this case falls far short of what the Convention requires.

214. Only an effective criminal investigation, capable of identifying and punishing those responsible at all levels of government, can be considered to provide an effective remedy for the Article 3 and Article 5 violations (see paragraphs 256 below) suffered by Mr. El-Masri. The cursory and grossly inadequate investigation conducted in this case falls far short of what the Convention requires.

ARTICLE 5

215. Mr. El-Masri was effectively abducted and forcefully disappeared for an uninterrupted period of 149 days as a result of a coordinated operation of the

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[404] *Poltoratskiy v Ukraine*, ECHR, Judgment of 29 April 2003, at para. 126-127,)medical examination unduly delayed. (Art.3 case)); *Boicenco v Moldova*, see note 394 above, at para.126.

[405] *Kelly and Others v United Kingdom,* see note 391 above, at para. 98 (stating that "[i]n all cases … the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.")

[406] *Ibid.* (stating that "… there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.")

[407] *Ibid.* at para. 118

[408] *Macovei and Others v Romania,* ECHR, Judgment of 21 June 2007, at 49, 53 & 55-57 (where the lack of the right of an appeal against his decision meant that the victims were prohibited from having their case heard before a tribunal that could attribute criminal responsibility for the acts)

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Macedonian and U.S. intelligence agencies. He submits that Macedonian authorities violated his Article 5 rights during and/or in relation to the following incidents, taken separately and in the context of the entire rendition operation:

- The illegal detention and interrogation by Macedonian agents at the Skopski Merak hotel (Direct Responsibility)
- The transfer to the CIA at Skopje Airport (Direct Responsibility)
- The Salt Pit, Afghanistan (Direct or, in the alternative, *Soering* Responsibility)

In addition, Macedonia has further violated Article 5 by failing to conduct an effective investigation into the credible allegations that Mr. El-Masri was disappeared for an extended period by Macedonian and U.S. agents (see paragraph 211 above).

Relevant Principles

216. The purpose of Article 5 is to ensure that no one should be dispossessed of his liberty in an "arbitrary fashion."[409] Detention must be "in accordance with the law," and will be arbitrary if there has been "an element of bad faith or deception on the part of the authorities."[410] In addition, "where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[411]

217. Article 5 creates a positive obligation on the State to prevent any unlawful deprivation of liberty by non-state agents. The state is also "obliged to take

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[409] *Winterwerp v The Netherlands,* ECHR, Judgment of 24 October 1979, at para. 37
[410] *Saadi v United Kingdom*, ECHR GC, see note 306 above, at para. 69
[411] *Jecius v Lithuania,* ECHR, Judgment of 31 July 2000, at para. 56

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measures providing effective protection of vulnerable persons, including reasonable steps to prevent deprivation of liberty of which the authorities have or ought to have knowledge."[412]

218. *Legality.* Where it is claimed that the transfer is a form of extradition, it must be done lawfully. In *Bozano v France,* after the Courts had refused to order extradition to Italy, the executive issued a deportation order, and he was driven by police across France to the Swiss border where he was arrested by Swiss police. The domestic courts subsequently found the deportation order was invalid. In finding a violation, this Court concluded that the deprivation of liberty "was neither 'lawful', within the meaning of Article 5(1)(f), nor compatible with the "right to security of person." Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent" the domestic judicial decisions.[413] The fact that the domestic courts had concluded that the operation was unlawful *ab initio* was considered by the Court to be of the "utmost importance."[414]

219. *Terrorist suspects.* No government has ever found that Mr. El-Masri has any connection whatsoever to terrorist groups or activities. It must be recalled, nevertheless, that this Court has repeatedly held that suspicions about an individual's possible involvement in acts of terrorism do not justify doing away with their Article 5 rights. Thus, in *Dikme v Turkey*, the Court noted that

> "[it] has accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems. … That does not mean, however, that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence . . . ."[415]

<u>Disappearance</u>

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[412] *Storck v Germany,* ECHR, Judgment of 16 June 2005, at para. 102
[413] *Bozano v France,* ECHR, Judgment of 18 December 1986, at para. 60
[414] *Ibid.*
[415] *Dikme v. Turkey*, see note 305 above, at para. 64 (references omitted)

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220. Forcible disappearance is one of the most egregious violations of Article 5. In a number of cases involving Turkey and Russia, among other countries, this Court has held that a person's unacknowledged detention and/or disappearance is "a most grave violation" of Article 5.[416] It is also "a complete negation" of the additional Convention safeguards for the preservation of the right to life and freedom from torture of detained persons, which the procedural guarantees of Article 5 are meant to serve (among other goals).[417] A forced disappearance ultimately does away with some of the most basic rule-of-law protections from abuse of state power.[418]

221. Prolonged unacknowledged detention tends to trample upon all the different provisions of Article 5. However, the initial failure to record the fact and details of detention (date, time and location), and the ongoing failure to account for the detainee's further whereabouts constitute "a most serious failing" since they facilitate the official cover-up of future violations, such as the detainee's extra-judicial execution.[419]

222. It appears that this Court has yet to decide a case of temporary disappearance, i.e. involving a person who was released and accounted for after a period of forced disappearance. The above principles, however, are equally applicable to cases of temporary disappearance or prolonged (but not ongoing) unacknowledged detention, as other international human rights mechanisms have found. In *Celiberti de Casariego v Uruguay*, the U.N. Human Rights Committee reviewed the case of a joint Uruguayan and Italian citizen who was abducted and held for a week by Uruguayan agents in Brazil before being taken secretly to Uruguay, where she was held incommunicado for another four

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[416] *Kurt v Turkey,* see note 395 above, at para. 124. See on disappearances generally: *Cakici v. Turkey*, ECHR, Judgment of 8 July 1999, para. 104; *Cicek v. Turkey*, ECHR, Judgment of 27 February 2001, at para. 164; *Imakayeva v. Russia*, ECHR, Judgment of 9 November 2006, at para. 171; and *Luluyev v. Russia*, ECHR, Judgment of 9 November 2006, at para. 122 (finding a "a very grave violation of Article 5")

[417] *Ibid.* at para. 123-124

[418] *Ibid.* at para. 122

[419] *Kurt v Turkey*, *Ibid.* at para. 125

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months before the authorities announced that they were holding her.[420] The Committee found a violation of Article 9(1) (arbitrary arrest or detention) of the Covenant in relation to Celiberti's abduction into Uruguayan territory, as well as a violation of Article 10(1) (humane treatment of detainees) of the Covenant due to her prolonged incommunicado detention.[421]

223. The duration of unacknowledged or incommunicado detention is not decisive in finding a serious violation of personal liberty. Thus, in *Suarez Rosero v Ecuador*, the Inter-American Court of Human Rights found that 36 days of incommunicado detention amounted not only to a flagrant violation of the right not to be arbitrarily detained, but also to cruel, inhuman and degrading treatment by virtue of the suffering it had caused to the detainee.[422] In *Urrutia v Guatemala*, the Inter-American Court made similar findings in relation to the victim's unacknowledged detention for eight days.[423]

224. Like all forced disappearances, Mr. El-Masri's unacknowledged detention for a continuous period of 149 days, including 23 days under Macedonian jurisdiction, is "incompatible with the very purpose of Article 5 of the Convention."[424]

<u>Consular Access</u>

225. Despite his several requests to contact the German embassy, Mr. El-Masri was unable to exercise his right to consular access. The Vienna Convention on Consular Relations provides that foreign nationals must be informed, without delay, of their right to communicate with their consulate when they are detained. It also requires the detaining authorities to notify the appropriate consulate if the foreign national requests such notification.[425] In *Avena and*

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[420] *Casariego v Uruguay*, Human Rights Committee, Communication No. 56/1979, Decision of 29 July 1981; See also: *El-Megreisi v. Libyan Arab Jamahiriya*, Comm. No. 440/1990, Decision of 23 March 1994

[421] *Casariego v Uruguay*, *Ibid.* at para. 11

[422] *Suarez Rosero v. Ecuador*, Inter-American Court of Human Rights, Judgment of 12 November 1997, at para. 91

[423] *Urrutia v. Guatemala*, Inter-American Court of Human Rights, Judgment of 27 November 2003,at para. 51(a), 87

[424] *Kurt v. Turkey,* see note 395 above, at para. 125.

[425] Vienna Convention on Consular Relations, see note 189 above, at article 36 (1)(b)

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Others v the United States, the International Court of Justice found that an individual must be informed of their right to communicate and access consular offices "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national,"[426] and that a delay of forty hours was a violation of the Vienna Convention.[427]

226. The rights of Germany are also violated where that state's authorities are not informed that a national is in custody. In *Paraguay v. The United States,* the International Court of Justice concluded that the protections implicated under Article 36 (1) are interrelated, such that when a state fails to inform a detainee of the consular right, a detaining authority may also deny the detainee's country of nationality the right to access the detainee.[428] In *LaGrand* case, the Court found that "when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay . . . the sending State has been prevented for al1 practical purposes from exercising its rights under Article 36, paragraph 1."[429]

A. Skopski Merak Hotel and Skopje Airport Transfer: Article 5

227. Macedonia is responsible for the violation of Mr. El-Masri's rights, by its own agents and/or foreign agents operating in its territory and under its jurisdiction, under the following subsections of Article 5:

- Article 5.1 and Article 5.1(c) insofar as Mr. El-Masri's detention was not carried out "in accordance with a procedure prescribed by law" and was not "lawful" in the sense of Article 5.1(c). There is no basis in Macedonian or Convention law for a person's forced disappearance by state agents. Such conduct is, indeed, criminalised by Macedonian law (see under Admissibility above).

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[426]*Avena and Others v. The United States*, International Court of Justice, Judgment of 31 March 2004, at para. 88

[427] *Ibid.* at para. 89

[428] *Ibid.* at para. 99

[429] *Germany v. United States*, International Court of Justice, Judgment of 17 June 2001, at para. 74

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- Article 5.2 insofar as Mr. El-Masri was not properly informed by either the Macedonian or U.S. agents of the reasons for the deprivation of his liberty or any legal charges against him. Indeed, the Macedonian agents guarding him at the Skopski Merak suggested that he was not under arrest ("Do you see any handcuffs?") but then threatened to shoot him when he tried to leave the hotel room.
- Article 5.3 insofar as, throughout his incommunicado detention, Mr. El-Masri was never brought before a judge or other judicial officer of any country, or sent to trial. His detention was entirely extra-judicial.
- Article 5.4 insofar as Mr. El-Masri was denied any practical possibility of challenging the lawfulness of his detention. Throughout his detention, and despite his repeated requests, he was never allowed to contact his family, a lawyer, or a German consular official. He was held in a legal "black hole" that denied him any habeas corpus protections.
- Article 5.5 insofar as Mr. El-Masri has never been compensated for his detention, despite numerous attempts in courts around the world to do so.

228. Mr. El-Masri was held by Macedonian agents at the Skopski Merak hotel for 23 days, in flagrant violation of all Article 5 guarantees. On January 23, 2004, he was then handed by Macedonian agents directly to CIA agents at Skopje airport, where he was immediately subjected to the most intense form of deprivation of liberty. He was closely restrained with shackles to his hands and feet which were attached to a belt, having been hooded and subjected to total sensory deprivation. He was then forcibly marched while restrained in such a way, with his head forced down, across the tarmac of Skopje Airport to a plane that was at the far end of the runway, surrounded by Macedonian security forces. He was then chained to the floor of the airplane, prior to a long flight.

229. This treatment, which occurred in Macedonian territory and with the authorization or acquiescense of Macedonian authorities, was clearly a violation of Article 5(1)-(5) for the same reasons as mentioned above. The treatment engaged the positive obligation of Macedonia to prevent a violation of Article 5 by non-state agents, as outlined in paragraphs 175-178 above.

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C. The Salt Pit, Afghanistan: Article 5

230. Macedonia is also directly responsible for Mr. El-Masri's continued disappearance in Afghanistan for another four months on the basis that the decision to transfer Mr. El-Masri to Afghanistan was a joint U.S./Macedonian operation conducted – and indeed only possible – with full awareness, authorization, and active collaboration of Macedonian intelligence agencies, as we as their superiors at the highest levels of government. Macedonia thus contributed directly to Mr. El-Masri's continued disappearance outside its territory. As such, its responsibility in that respect is significantly more serious than a *Soering*-type violation.

231. International human rights bodies have, on occasion, reviewed cases of serious violations of the right to liberty and personal security as a result of coordinated, covert operations involving more than one country. Thus, in the landmark case of *Goiburu and Others v. Paraguay*, the Inter-American Court of Human Rights addressed the question of state responsibility for the extra-territorial abduction (in relation to one of the applicants), incommunicado detention, torture, and ultimate disappearance of four Paraguayan citizens by the Stroessner regime.[430] One of the victims had been abducted in Argentina; the two others while entering Paraguay from Argentina. The Court established that the initial abduction and/or detentions of the applicants were carried out "in close collaboration with Argentine authorities," as part of the infamous "Operation Condor."[431] The latter operation was put in place in the 1970s by the military governments of six South American countries in a coordinated effort to follow, detain, and neutralize political dissidents and other perceived national security threats residing within their respective territories, or indeed anywhere in the world.[432]

232. The Inter-American Court found Paraguay responsible for the flagrant violation of the applicants' rights to life, humane treatment in detention, and personal

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[430] *Goiburú and Others v. Paraguay*, Inter-American Court of Human Rights, Judgment of 22 September 2006 (Merits, Reparations and Costs), para. 2

[431] *Ibid.* at para. 87

[432] *Ibid.* at para. 61

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liberty, among others. While it had to limit its review to the international responsibility of Paraguay, the sole respondent in the case, the Court noted that "it cannot neglect to indicate that the torture and forced disappearance of the alleged victims . . . was perpetrated with the collaboration of authorities of other States of the continent. "[433]

233. In a separate concurring opinion, Judge Cançado Trindade specifically noted the similarities between the *Goiburu* case and the practices described in the European Parliament's July 2006 resolution on the alleged use of European countries for the transportation and secret detention of CIA detainees, including the practice of extraordinary rendition.[434] Macedonia's role in the El-Masri case is comparable to – and in fact even more direct than – Argentina's in the *Goiburu* affair.

234. The Court is therefore similarly required to review Macedonia's contributing role in and its resulting Article 5 responsibility for Mr. El-Masri's continued forced disappearance in U.S. custody. This is so, it is submitted, because Macedonia's responsibility in that respect is both more serious than and distinct from its Article 3/*Soering* responsibility. Unlike in a typical *Soering* scenario, the Macedonian authorities did not transfer Mr. El-Masri to the U.S. pursuant to a (even purportedly) legitimate request for extradition or another lawful form of transfer recognized by international law.[435]

235. Instead, Mr. El-Masri is the victim of a secret, joint U.S.-Macedonian plan to disappear him with the primary goal of subjecting him to harsh CIA interrogations in a secret location, outside any criminal justice process or judicial supervision. The purpose and effect of the operation, in which the Macedonian agencies effectively acted as accessories to the CIA, was to place him in a "legal black hole," with no semblance of legality. The record shows that his forced disappearance was a single, continuous, and coordinated operation by the Macedonian and U.S. intelligence agencies that started at Macedonia's Tabanovce border crossing and ended at the Rinas airport in

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[433] *Ibid.* at para. 93
[434] Separate Opinion of Judge Cançado Trindade, *Ibid.* at para. 57-58
[435] Venice Commission Opinion of 2006, see note 61 above, at para. 159

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Tirana, Albania. The rendition simply would not have happened had Macedonia chosen to refuse the U.S.'s illegal request. As such, Macedonia's actions are not different from – and indeed even more active than – Argentina's role in facilitating the abduction of Dr. Goiburu by Paraguayan agents on Argentine soil.[436]

236. The facts and evidence submitted include sufficiently strong and concordant inferences that the Macedonian authorities must have been aware of the fate that awaited Mr. El-Masri in U.S. custody, including as to the terms of his continued detention in Afghanistan (see paragraphs 73-99 above on "knowledge"). Consequently, they further violated Article 5 by knowingly enabling the continued disappearance of Mr. El-Masri beyond Macedonia's borders. Even if Macedonian officials could show that they were deliberately misled by the U.S. in relation to Mr. El-Masri's future fate, this would not relieve Macedonia of such responsibility, since they chose to transfer the applicant with no regard whatsoever for his due process rights, under both domestic and Strasbourg law.[437] Having transferred Mr. El-Masri in violation of the Convention and general international law, and without granting him any opportunity to challenge the transfer,[438] the Respondent State cannot rely on a good faith defence.

237. *Soering Responsibility.* In the alternative, Mr. El-Masri submits that Macedonia is, at the very least, responsible for transferring him to unacknowledged U.S. custody while a real risk existed that he would be subjected to continued treatment in severe violation of Article 5. As outlined in paragraphs 196-199 above, when a State Party is about to transfer an individual to the custody of another State, there is a duty on the State to assess whether there is real risk of treatment contrary to the Convention. This includes detention contrary to Article 5.[439]

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[436] See paragraph 231-233 above: *Goiburú and Others v. Paraguay*, see note 430 above

[437] *Chahal v. United Kingdom*, see note 358 above, at para. 74

[438] See Article 3 submissions, para. 152-214

[439] *M.A.R. v United Kingdom*, Decision of the European Commission on Human Rights (Admissibility), 16 January 1997 (holding that applicant's claim that his deportation to Iran would violate Article 5 was not manifestly ill-founded; the case ended in friendly settlement)

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238. The Court has found there to be such a “flagrant denial” of Article 6 in circumstances where an individual is detained for a lengthy period before trial without being brought before a judge. It is submitted that these principles can be applied *mutatis mutandis* to a flagrant denial of Article 5 where Mr. El-Masri was detained without any intention to bring him to trial and for “intelligence” purposes only.

> “A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release”.[440]

239. Similarly, the lack of access to legal assistance is also a “flagrant denial” of the Convention:

> “Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial within the meaning of Article 6(1) and (3)(c).”[441]

> “The extradition of the applicant to the United States would therefore raise an issue under Article 6 of the Convention if there were substantial grounds for believing that following his extradition he would be held incommunicado without having access to a lawyer and without having access to and being tried in the ordinary U.S. criminal courts.”[442]

240. While the Court may not determine whether the detention by a non-state party was an actual violation of Article 5, it is required to assess the general situation and any relevant events transpiring in the receiving State (see paragraphs 234-236 above).

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[440] *Al-Moayad v Germany,* ECHR, Decision as to admissibility, 20 February 2007, at para. 101 (considering trial by military commission in Guantanamo Bay).
[441] *Ibid.*
[442] *Ibid.* at para. 102

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241. Mr. El-Masri was detained for a further 126 days in the Salt Pit, Afghanistan. There was no legal basis for his detention. He was never told the reasons for his detention. He was never brought before a judge. He was never able to challenge his detention, and he was never compensated for it. The detention should be assessed as contrary to Article 5, were it to be within the jurisdiction of the Convention.

ARTICLE 8

242. The obligation not to engage in arbitrary action is the essential object of Article 8.[443] The secret and extra-judicial abduction of Mr. El-Masri was entirely arbitrary, and a severe violation of his right to respect for private and family life. For over four months he was detained in solitary confinement, only seeing his guards and interrogators, separated from his family who had no idea where he was, and beaten. This had a severe effect on his physical and psychological integrity. The entire process was conducted without any legal basis and was wholly unlawful. Any attempt to justify the treatment of Mr. El-Masri on the basis of national security would have to fail, as it can never be necessary in a democratic society to collude in the secret abduction of an individual.

Scope of Article 8

243. The abduction and detention of Mr. El-Masri interfered with "the development, without outside interference, of [his] personality … in his relations with other human beings."[444] More basically, by being kept in a hotel room with three guards at all times he was deprived of his right to privacy. The mistreatment to which Mr. El-Masri was subjected throughout the entire period, from his initial seizure at the border on 31 December 2003, until his return to Germany in May 2004, interfered with his right to private life.

244. Article 8 protects the physical and psychological integrity of the individual.[445] This includes the notion of personal autonomy, [446] that a person could not not to

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[443] *Kroon and Others v Netherlands*, ECHR, Judgment of 27 October 1994, at para.31

[444] *Niemietz v Germany,* ECHR, Judgment of 16 December 1992, at para.29.

[445] *Raninen v Finland,* ECHR, Judgment of 16 October 1997, at para. 63.

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be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom."[447] The essential ingredient of family life is the right to live together so that family relationships may develop normally[448] and that members of the family may enjoy each other's company.[449] At the time of his abduction, Mr. El-Masri was living with his wife and four children in Ulm, Germany. When detained by Macedonian agents, he was not allowed to communicate with consular officials who could have contacted his wife.[450] His wife had no idea where he was, and on his return to Germany she had left for Lebanon.[451]

In Accordance with the Law

245. Any interference with Article 8 must be "in accordance with the law" or it will be a violation of the Convention. Mr. El-Masri was never shown an arrest warrant. He was never brought before a judge. He was denied any right to counsel or to communicate with his family or with consular representatives. He was never charged with any offence. He was never told the reason for his detention. No legal basis has ever been put forward for his detention. It appears that the decision to unlawfully detain him was taken by the CIA and senior members of the government of Macedonia (see paragraphs 8 & 111 above).

Submissions

246. The entire purpose of the detention, "capture shock" and rendition of Mr. El-Masri was in order to break him for the purposes of interrogation. This was a drastic interference with his physical and psychological integrity. In Macedonia he was detained without any legal process or rights, kept with three male guards in a hotel room at all times, repeatedly interrogated in a foreign language and threatened with a gun, all in circumstances that were clearly without any legal protections, disturbing his psychological integrity sufficiently to cause him to go

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[446] *Pretty v United Kingdom*, see note 300 above, at para. 61
[447] *Ibid.* at para. 65
[448] *Marckx v Belgium*, ECHR, Judgment of 13 June 1979, at para. 31
[449] *Olsson v Sweden*, ECHR, Judgment of 24 March 1988, at para. 59
[450] Declaration of Khaled El-Masri, see note 1 above, at para. 19
[451] *Ibid.* at para. 32

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on a hunger strike. In Macedonia he was also hooded, driven to the airport and then physically assaulted during his preparation for transfer in a way that must have been terrifying. In Afghanistan he was denied all aspects of private life.

ARTICLE 13

247. The effects of the events to which Mr. El-Masri was subjected have had a serious effect on his health and well-being. As a result of the events, he was subjected to a "defamatory campaign" from local media[452] and to articles that questioned what happened to him and his background. He was unable to find employment for three years after his return to Germany.[453]

248. Although Mr. El-Masri asked for treatment shortly after his return to Germany in 2004, he was only able to begin his therapy in 2006, at a treatment centre for torture victims in Neu-Ulm, after he secured the required health insurance.[454] However, his therapist at the treatment center considered his therapy inadequate, as he attended only 70 hours between February 2006 and May 2007.[455] In an interview with Spiegel Online, the therapist, describing Mr. El-Masri's ordeal, said that the conflict between his post-traumatic care and the pressure arising from the various ongoing investigations compounds and continues his mental trauma.[456]

249. Mr. El-Masri's mental state has been "directly and adversely affected by the lack of any official action against those who harmed him or even an official statement about the crimes committed against him."[457] Mr. El-Masri noted that

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[452] Marty 2006, see note 8 above, at para. 131

[453] *Ibid.* at para. 296

[454] *Ibid.* See also: Exhibit 70: Sebastian Fischer, "Drama un CIA Opfer, Wie Khaled El-Masri zum Brandstifter wurde," *Speigel Online*, 18 May 2007. Available at: http://www.spiegel.de/politik/deutschland/0,1518,483488,00.html (Sebastian Fischer – Spiegel Online –18 May 2007)

[455] Marty 2006, *Ibid.* at para. 296; Sebastian Fischer – Spiegel Online – 18 May 2007, *Ibid.*; See also: para. 8 above

[456] Marty 2007, see note 115 above, at para. 296; Sebastian Fischer – Spiegel Online – 18 May 2007, *Ibid.*

[457] Redress, "*Amicus Curiae* Brief to the Inter-American Commission on Human rights in the case of *Khaled El-Masri v. United States*," 30 March 2009, para. 17. Available at:

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such official recognition of his ordeal would help him be again part of his community, and noted that "all I [Mr. El-Masri] want is to know the truth about what happened to me . . ." as a foundation for an apology for the U.S. government.[458]

250. Mr. El-Masri's lack of adequate treatment of his trauma culminated in several events. In 2007, he was convicted of having set fire into a wholesale market in Neu-Ulm and sent for psychiatric assessment.[459]

251. Mr. El-Masri suffered violations of the right to a remedy provided for in Article 13 due to the failure of Macedonia:

- To allow a challenge to the legality of the detention in Macedonia, auxiliary to his rights under Article 5(4).
- To allow a challenge to the administrative decision to transfer him to the CIA.
- To conduct an effective investigation capable of establishing the facts of his detention and treatment, auxiliary to the investigative element of Article 3.

252. The Court has defined the right to an effective remedy as follows:

> "Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happy to be secure in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief… the remedy required by Article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state."[460]

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http://redress.org/casework/REDRESS%20Amicus%20Brief_Khaled%20El%20Masri%20v%20United%20States_30%20March%202009.pdf.

[458] Marty 2006, see note 8 above, at para. 91

[459] Exhibit 69: "El-Masri detained on arson suspicion," *Spiegel Online*, 17 May 2007. Available at: http://www.spiegel.de/international/germany/0,1518,483426,00.html

[460] *Aksoy v Turkey*, ECHR, Judgment of 26 November 1996, at para. 95

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253. Article 13 applies wherever there is an arguable claim to a violation of another right.[461] The competent national authority providing the remedy must be sufficiently independent of the national body that is being challenged.[462] It must have sufficient power to provide adequate redress for any violation that has already occurred.[463] It must have powers that are not merely advisory but able to grant relief.[464] It must be able to consider the Convention rights of the individual.[465] For the remedy to be considered effective "in practice as well as in law," the exercise of the effective remedy "must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state."[466]

National Security

254. In cases involving national security, the remedy must be "'as effective as can be' in circumstances where national security consderations did not permit the divulging of certain sensitive information."[467] However, this test "is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial"[468] due to the "irreversible nature of the harm that might occur if the risk of ill treatment materialized and the importance the Court attaches to Article 3."[469] In *Al-Nashif v Bulgaria*, all appeals against the decision to deport were prohibited because the reason for the deportation was national security, meaning that there was no effective way to challenge the order by a process which would have "the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic form offering adequate guarantees of independence and

[461] *Silver v United Kingdom*, ECHR, Judgment of 25 March 1983, at para.113
[462] *Ibid.* at para.116
[463] *Kudla v Poland,* see note 296 above, at para. 157-8
[464] *Chahal v United Kingdom*, see note 358 above, at para. 145
[465] *Soering v United Kingdom*, see note 348 above, at para. 120
[466] *Aksoy v Turkey*, ECHR, see note 460 above, at para. 95
[467] *Klass and Others v Federal Republic of Germany*, ECHR, Judgment of 6 September 1978, at 69
[468] *Chahal v United Kingdom,* ECHR, see note 358 above, at para. 150
[469] *Ibid.* at para. 151

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impartiality."[470] The Court commented that while they might grant some margin of appreciation to states for matters of national security, there was no justification for "doing away with remedies altogether."[471]

255. For Mr. El-Masri, there were no remedies at all, as the entire process occurred outside the law, and all his attempts to seek justice have failed (see paragraphs 70-79 of the Facts).

Relationship with Article 3

256. The Court is invited to consider the lack of an investigation under Article 3. However, in view of the fact that, due to the inertia of the government of Macedonia, the statutory time limit has expired for the effective prosecution of those responsible for the treatment of Mr. El-Masri, in this case the Court must also consider a further violation of Article 13. While there are currently civil proceedings ongoing in Macedonia, such proceedings are not able to attribute criminal responsibility for his ill-treatment. In those circumstances, the case is one of those where "the criminal investigation . . . was ineffective and the effectiveness of any other remedy that may have existed, including . . . civil remedies . . . was consequently undermined"[472] such that the State has additionally failed in its obligation under Article 13.

THE RIGHT TO THE TRUTH

257. By its steadfast refusal to acknowledge, let alone apologise for, the ill-treatment to which its agents subjected Mr. El-Masri, the Macedonian government has denied him the right to an accurate accounting of the suffering he endured. He has been denied the right to the truth. This has caused further, documented harm to Mr. El-Masri's psychological wellbeing and has undermined his ability to resume a normal life following his release (see paragraph 248-250 above).

258. As a direct victim of enforced disappearance, Mr. El-Masri has a right under the Convention and international human rights law to the full truth about the

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[470] *Al-Nashif v Bulgaria*, ECHR, Judgment of 20 June 2002, at para. 133
[471] *Ibid.* at para. 137
[472] *Musayev v Russia,* ECHR, Judgment of 26 July 2007, at para. 175

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circumstances of his abduction and extraordinary rendition. In fulfilment of that right, the Macedonian government should provide, through appropriate and credible means, a full account of the facts of his enforced disappearance and rendition to the U.S.; the reasons and processes that led to such state actions, including as a function of Macedonia's assumed role in the U.S.-led "war on terror"; the reasons for the related failures of any preventive mechanisms; the responsibilities of officials and agencies at all levels of government; and, where appropriate, the identification of those responsible for the multiple Convention violations.

259. The jurisprudence of the Court on States' obligation to investigate allegations of serious violations of Articles 2, 3 and 5 of the Convention includes a requirement that not only justice be done, but also be seen to be done. In *Kelly and Others v the United Kingdom*, an Article 2 case involving the use of lethal force by police agents against suspected terrorists and bystanders, the Court considered the effects of the government's decision not to release the prosecutorial report finding that no criminal prosecutions were warranted. The Court found that this was a situation that "crie[d] out for explanation . . . . There was no reasoned decision available to reassure a concerned public that the rule of law had been respected."[473] In the similar context of *Ramsahai v Netherlands*, the Grand Chamber of the Court found that "[w]hat is at stake here is nothing less than public confidence in the state's monopoly on the use of force."[474]

260. Under the exceptional circumstances of the current case, which involves flagrant violations of the Convention and its core values, Mr. El Masri and the public – in Macedonia and in Europe as a whole – are entitled to know the full truth about the Macedonian government's role in his ordeal. It is submitted that they have a right to the truth, under Articles 3, 5, 10 and 13 of the Convention, which goes beyond the right to a criminal investigation into the facts.

261. While a victim's right to the truth about gross human rights violations has not been explicitly recognized by this Court, multiple other international tribunals and human rights mechanisms have defined and confirmed the central contours

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[473] See note 391 above, at para. 118.

[474] ECHR (GC), Judgment of 15 May 2007, at para. 325.

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of such a right, either as an autonomous entitlement or one emerging from a combination of other rights. In a recent resolution, the U.N. Human Rights Council recognized "the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and respect human rights."[475]

Missing persons and forced disappearances

262. The right to the truth about gross human rights violations has been established most firmly in relation to missing persons and forced disappearances. Its origins have been traced to Additional Protocol I to the Geneva Conventions, which recognizes the right of families to know the fate of their relatives and requires states parties to an armed conflict to search for persons reported missing.[476] The International Committee of the Red Cross considers these state obligations to be norms of customary international law.[477]

263. Similarly, in the last several decades, the Inter-American Commission[478] and the Inter-American Court of Human Rights,[479] the U.N. Human Rights Committee,[480] the U.N. Working Group on Enforced or Involuntary Disappearances,[481] the Parliamentary Assembly of the Council of Europe,[482] and

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[475] Human Rights Council, "Resolution 9/11. Right to Truth," pg, 3, para. 1. Available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf ("Human Rights Council Resolution 9/11")

[476] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 32-33

[477] ICRC, *Customary International Humanitatian Law,* Volume I, Rules (Cambridge University Press, 2005), Rule 117, pg. 421

[478] See, e.g., Annual Reports 1985-86, p. 205; *Manuel Bolanos v. Ecuador*, IACommHR, Report of 12 September 1995; and *Bamaca Velasquez v. Guatemala*, IACommHR, Report of 7 March 1996

[479] See, e.g., *Velasquez Rodriguez v Honduras,* IACtHR, Judgment of 29 July 1988, para.181; *Castillo Paez v Peru,* IACtHR, Judgment of 24 January 1998; and *Bamaca Velasquez v. Guatemala*, IACtHR, Judgment of November 25, 2000

[480] *Almeida de Quinteros v. Uruguay*, UNHRC, Comm. 107/1981, views of 21 July 1983

[481] First Report of the U.N. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1435, at para. 187

[482] Resolutions 1056(1987); 1414(2004), para. 3; and 1463(2005), para. 10(2).

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the Human Rights Chamber for Bosnia and Herzegovina[483] (relying on the ECHR), among others, have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons.

264. In the *Almeida de Quinteros* case, the Human Rights Committee addressed the plight of the mother of a victim of enforced disappearance, noting that

> "…[it] understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular, of article 7."[484]

265. In particular, the Committee views the right to the truth as essential to ending or preventing the mental suffering of the relatives of victims of enforced disappearances or secret executions.[485]

266. The Inter-American Court was, at first, not prepared to endorse the Inter-American Commission's finding of a separate right to the truth under the American Convention. In the early cases, the Court limited itself to holding that the right to the truth was simply "subsumed" within the rights guaranteed by Article 8 (right to a fair trial) and Article 25 (right to judicial protection) of the treaty.[486] More recently, however, the Court has construed the right in more extensive terms. Thus, in the case of *Moiwana Community v. Suriname*, which involved a massacre by army forces, the Court held that

> "… all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized,

[483] *Palic v. Republika Srpska*, Judgment of 11 January 2001; and the *Srebrenica Cases*, Judgment of 7 March 2003, at para. 220(4)
[484] *Almeida de Quinteros v. Uruguay*, Comm. 107/1981, Views of 21 July 1983, at para. 14 (emphasis added)
[485] *Sarma v. Sri Lanka*, UNHRC, 16 July 2003, at para. 9.5; *Lyashkevich v. Belarus*, UNHRC, 3 April 2003, at para. 9.2
[486] *Bamaca Velasquez v. Guatemala*, IACtHR, Judgment of November 25, 2000; and the *Barrios Altos* Case (v. Peru), IACtHR, Judgment of 14 March 2001

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constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims."[487]

267. The Inter-American Commission has gone even further, by emphasizing the particular importance of state compliance with the right to the truth in those cases in which legal or historical developments, such as extensive amnesties, have made difficult or impossible the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses.[488] By the same token, the case for exposing the truth is particularly compelling in Mr. El-Masri's case in view of Macedonia's self-inflicted inability to prosecute those responsible for his treatment as a result of the total prosecutorial inaction for more than five years. In such cases, truth and official apologies may well be the only significant forms of reparation available.

268. As a matter of state practice and acceptance, perhaps the most explicit recognition of the right to truth of victims of disappearance appears in the recent *International Convention for the Protection of All Persons from Enforced Disappearances*, adopted by the U.N. Commission on Human Rights in September 2005.[489] Article 24(2) of the Convention specifically provides that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person." Macedonia is one of the first signatories to the Convention as of 6 February 2007.

Other serious or gross human rights violations

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[487] *Moiwana Community v. Suriname,* IACtHR, Judgment of 15 June 2005, para. 204 (emphasis added)

[488] See, among others, *Parada Cea and Others v. El Salvador*, IACommHR, Report of 27 January 1999; *Ignacio Ellacuria v. El Salvador*, IACommHR, Report of 22 December 1999

[489] As of September 2009, 81 countries have signed and 13 countries have ratified the Convention. Twenty ratifications are required for its entry into force (Art.39). See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

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269. Multiple specialized bodies and authorities – including the U.N. Human Rights Committee,[490] the Inter-American Court,[491] the U.N. Human Rights Council,[492] and the Office of the U.N. High Commissioner for Human Rights (OHCHR)[493] – have further extended the scope of the right to truth to include a state obligation to shed light on all serious or gross human rights violations, such as torture or extrajudicial executions, to the point that the principle is now widely accepted. The OHCHR's 2006 study concluded, after an extensive review of the state of the right in international law and practice, that

> "[t]he right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels."[494]

270. The right applies not only to cases of massive or repeated violations, but also to singular cases of sufficient gravity. Many of the judgments and opinions cited above involve cases of individual abuse, albeit often in a context of a general breakdown of the rule of law and respect for human rights.[495]

Public Component

271. Finally, many authorities have construed the right to the truth to include a public component, above and beyond the right to know of the direct victims and their families. Thus, the 2005 Updated Principles on Impunity adopted by the U.N. Commission on Human Rights declare that

> "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances

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[490] *Concluding Observations on Guatemala*, 3 April 1996, CCPR/C/79/add.63, at para. 25

[491] See *Moiwana Community v. Suriname,* IACtHR, Judgment of 15 June 2005

[492] Human Rights Council, Resolution 9/11, see note 475 above

[493] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006

[494] *Ibid*. at para. 55

[495] See in particular para. 259, 264 & 266

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that led, through massive or systematic violations, to the perpetration of those crimes."[496]

272. The rights of victims and their families to the truth apply "irrespective of any legal proceedings."[497]

273. Similarly, the U.N.'s 2005 Basic Principles on Reparations provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth."[498] The Inter-American Court has held that "society as a whole must be informed of everything that has happened in connection" with severe violations, such as extrajudicial executions.[499] The Bosnian Human Rights Chamber in the Srebrenica cases, as well as the highest courts of Argentina, Colombia and Peru, have reached similar conclusions in respect of the public's right to the truth.[500]

274. The precise content and constitutive elements of the right to the truth – especially in its collective dimension – differ somewhat from one jurisdiction to the other and are, in some respects, in progressive evolution. The OHCHR study cited above concluded, however, that the core content of the right has crystallized sufficiently to imply "knowing the full and complete truth about events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."[501] In cases of enforced disappearances and related abuses, the right to the truth has also the special dimension of knowing the fate and whereabouts of the direct victim.[502]

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[496] Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Commission Resolution 2005/81, principle 2

[497] *Ibid*. principle 4

[498] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by U.N. General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b). Available at: http://www2.ohchr.org/english/law/remedy.htm

[499] *Mack Chang v. Guatemala*, IACtHR, Judgment of 25 November 2003, para. 274

[500] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, para. 36. Available at: http://www.unhcr.org/refworld/docid/46822b6c2.html

[501] *Ibid*. at para. 59.

[502] *Ibid*.

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IV. STATEMENT RELATIVE TO ARTICLE 35(1) OF THE CONVENTION

Introduction

275. Mr. El-Masri has attempted to exhaust domestic remedies, but has been prevented from doing so by the inertia of the government of Macedonia. He sought to initiate a criminal investigation but the authorities did not respond, and any prosecution is now statutorily time-barred. This was after numerous national and international inquiries had put the government on notice that a full investigation was necessary. While Mr. El-Masri is still pursuing non-criminal remedies in Macedonia, these are not capable of leading to attribution of criminal responsibility and need not be exhausted. Consequently, all available domestic remedies have now been exhausted.

276. This application is being submitted in compliance with the 6-month rule (Article 35.1). The same matter has not been submitted to any other international procedure (Article 35.2(b)).

Victim Status

277. Mr. El-Masri is the direct victim of the multiple violations of his Convention rights, as submitted in this application.

Exhaustion of Domestic Remedies

278. The Government of Macedonia was put on notice on numerous occasions that a criminal investigation into his allegations was required and warranted starting almost immediately after Mr. El-Masri's release. This included the German investigation (see paragraphs 121-129 above), the Marty and Fava Inquiries (paragraphs 105-120 above) and press reports that quoted Macedonian officials (paragraph 131 above). However, the Macedonian Government failed to undertake any proper investigation that was capable of leading to the identification and prosecution of those responsible for his treatment.

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279. In 2005, the "Department for Control and Professional Standards" of the UBK within the Ministry of Internal Affairs (MoI) reportedly undertook an investigation into the role of MoI personnel in the El-Masri affair. As noted immediately above, that the official Macedonian version has been thoroughly discredited by the internal inconsistencies therein highlighted, and the evidence to the contrary presented by the two European Inquiries, among other sources. As described above at paragraphs 213-214 and 256 this investigation was not sufficiently effective or independent to satisfy either the investigative element of Article 3 or the right to a remedy in Article 13, and so does not exhaust domestic remedies for the purposes of admissibility.

280. As outlined in paragraph 70 above, Mr. El-Masri filed a formal request for a criminal investigation with the Office of the Skopje Public Prosecutor, which included extensive evidence that corroborates Mr. El-Masri's submissions, including from the findings of the German criminal investigation, the Marty and Fava Inquiries, and flight logs of known CIA rendition aircraft officially obtained from a Macedonian state agency.[503] The complaint specifically referred to the jurisprudence of this Court on the States' obligation to investigate credible allegations that state agents engaged in conduct contrary to Articles 3 and 5 of the Convention.

281. To this date, the Skopje Prosecutor has not notified Mr. El-Masri of any investigative actions or measures in relation to the October 2008 criminal complaint and does not otherwise appear to have taken any such actions. There is no appeal or other effective remedy against prosecutorial inaction at this stage of the proceedings in the Macedonian legal system. At the same time, the Skopje Prosecutor has not notified Mr. El-Masri of any formal decision to dismiss the complaint. Under Macedonian criminal procedure, the victim is not allowed to initiate a <u>private</u> prosecution where the identity of the perpetrator(s) is unknown.[504] The inactivity of the public prosecutor has therefore prevented Mr.

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[503] *Ibid.*

[504] Criminal Procedure Act Article 48: "For crimes that are prosecuted by the filing of a private criminal complaint or a request for prosecution, the criminal complaint or the request must be filed within three months from the date that the victim knew of the crime and of the identity of the perpetrator" (unofficial translation).

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El-Masri from taking over the investigation as a subsidiary complainant (private prosecutor) and denied him access to subsequent challenges in the context of the criminal proceedings.[505]

Future Prosecutions Barred by Statute of Limitations

282. Statutory limitations of prosecutions are governed by Articles 107 and 108 of the Macedonian Penal Code. Article 107 (Limitation (obsolescence) of criminal prosecution) provides as follows in the relevant parts:

> "[C]riminal prosecution may not be undertaken when the following expires: … (4) five years from the commission of a crime for which imprisonment of more than three years [but no more than five years] may be pronounced, according to the law."

283. The maximum punishment under both Article 140.3 (unlawful arrest by an official person), and Article 142.1 (torture or other proscribed treatment committed by a person performing his duty) of the Macedonian Penal Code is five years. The period of limitation is counted from the date of commission of the crime.[506] The running of the limitation period may be interrupted "by any procedural action undertaken in order to prosecute the offender" for the relevant crime.[507] However, no relevant procedural action has been undertaken by the public prosecutor in the current case.

284. Therefore, prosecutions for the offences committed against Mr. El-Masri were statutorily barred in Macedonia as of 23 January 2009 – five years from the date of Mr. El-Masri's transfer to U.S. custody – as a result of the Respondent State's failure to undertake a prompt and effective criminal investigation, in spite of the strong arguable claims presented by the applicant and multiple European inquiries.

285. In any event, even if prosecutions were theoretically possible for some reason unknown to the applicant, it is Mr. El-Masri's submission that an independent

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[505] On the same issue, see the findings of this Court: *Jasar v. FYROM*, ECHR, Judgment of 15 February 2007, at para. 53; *Dzeladinov and Others v. FYROM*, ECHR, Judgment of 10 April 2008, para. 73

[506] Penal Code, Art. 108, para. 1

[507] Penal Code, Art. 108, para. 3

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and effective investigation of his case would be practically impossible in Macedonia following years of denial of any involvement from the highest levels of the Macedonian Government and other documented efforts to cover the truth.

No Need to Exhaust Additional Remedies

286. Under this Court's established jurisprudence, Mr. El-Masri is not required to pursue any additional remedies domestically, and no other effective remedies are available in the Macedonian legal system. As a general rule, Strasbourg applicants are required to first use the remedies that are normally available and sufficient in the domestic legal system. There is, conversely, no obligation to have recourse to remedies that are inadequate or ineffective.[508]

287. With particular respect to alleged violations of Article 3 by state agents, the Court has held that an applicant who has exhausted the possibilities of redress within the criminal justice system is not required to pursue other, non-criminal remedies.[509] Invoking the Commission's finding in *Assenov and Others v Bulgaria* that "civil compensation could not be deemed fully to rectify a breach of Article 3," the Court rejected the Bulgarian Government's claims that the applicant should have pursued alternative civil or administrative remedies.[510]

288. In *Dzeladinov*, an Article 3 case against Macedonia, the applicants had filed a criminal complaint against ill-treatment by unknown police officers, which (complaint) had been met by inaction by the public prosecutor. Dismissing the Government's claims of non-exhaustion, the Court held that, having sought unsuccessfully to initiate a criminal prosecution, the applicants "were not required to embark on another attempt to obtain redress by bringing a civil action for damages."[511] Mr. El-Masri is essentially in the same position as the applicants in *Dzeladinov*.

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[508] *Aksoy v. Turkey*, see note 466 above, at para. 51-52.
[509] *Assenov and Others v. Bulgaria*, see note 401 above,at para. 86
[510] *Ibid.* at para. 84-86
[511] *Dzeladinov and Others v. FYROM*, ECHR, Decision of 6 March 2007 (Admissibility), at pg. 16. (rejecting the Government's arguments that the applicants should have pursued disciplinary or internal inquiries with the Ministry of Interior and/or a petition to the Ombudsperson)

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289. The same principles apply to arguable claims that state agents are responsible for severe violations of Article 5 of the Convention, such as prolonged incommunicado detention. This Court has recognized that the Article 5 right to personal liberty and security are among the "most basic guarantees of individual freedom," and that the procedural guarantees spelled out in Article 5 are also aimed at preventing violations of the fundamental rights to life and freedom from torture protected by Articles 2 and 3 of the Convention, respectively.[512] For these reasons, "the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5." States have an obligation to both take effective measures for the prevention of disappearances, and conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.[513]

290. The above notwithstanding and without prejudice to his right to a criminal investigation, on 24 January 2009, Mr. 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.[514] The civil case before the Basic Court Skopje II is still in its early stages. These civil proceedings are, in any event, not capable of providing sufficiently effective remedies for the violation of Mr. El-Masri's Convention rights and therefore do not need to be exhausted prior to the filing of this application.

Six-Month Rule

291. As of 23 January 2009, prosecutions for the offences committed against Mr. El-Masri were statutorily barred in Macedonia, due to prosecutorial inaction, rendering any effective remedies unavailable. On 20 July 2009, within the six-month period, Mr. El-Masri filed with the Court's Registry an introductory letter of complaint. In response, the Court set a 22 September deadline for the

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[512] *Kurt v. Turkey*, ECHR, see note 395 above, at para. 122-123.

[513] *Ibid.* at para. 124.

[514] Exhibit 83: "Request for Relief of compensatory damage," filed at the Basic Court Skopje II, 24 January 2009, (Macedonian)

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submission of the full application. This application is being submitted within that deadline.

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V. STATEMENT OF THE OBJECT OF THE APPLICATION

292. Mr. El-Masri seeks a declaration from the Court that his rights have been violated under Article 2, Article 3, Article 5, Article 10 and Article 13 of the Convention and a finding that there must be a full investigation into his abduction. He will also seek just satisfaction under Article 41 (pecuniary and non-pecuniary damages together with legal costs and expenses) as well as general measures to ensure that such a violation cannot be covered up in the future. The applicant will submit detailed claims in connection with the claim for just compensation at a later date.

VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

293. On 9 April 2008, Mr. El-Masri, through his U.S.-based attorneys at the American Civil Liberties Union, filed a complaint against the United States of America with the Inter-American Commission on Human Rights, under a non-binding procedure provided for by the American Declaration of Human Rights. In late August 2009, the Inter-American Commission communicated the petition to the United States Government, giving it a two-month period to respond.

294. The current application against Macedonia is not "substantially the same matter", in the meaning of Article 35.2(b) of the Convention, that has been submitted by Mr. El-Masri to the Inter-American Commission. Under this Court's case law, a complaint is considered to be substantially the same as a matter submitted to another international procedure "when the facts, the parties and the claims are identical."[515]

[515] *Peraldi v France*, Decision of 7 April 2009 (Admissibility), pg. 10 (in French original: "*une requête est considérée comme étant « essentiellement la même » quand les faits, les parties et les griefs sont identiques*"); see also *Celniku v Greece*, ECHR, Judgment of 5 July 2007, para. 40 & 41

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295. This complaint filed by Mr. El-Masri with the Inter-American Commission is against a third country, which is not subject to the jurisdiction of this Court, and before an international procedure that has no jurisdiction over Macedonia. The nature of the claims filed and remedies requested in relation to the U.S. in the Inter-American system are also distinct from the claims made in this case against the Respondent State. As such, it cannot be considered that "substantially the same" matter has been subjected to another procedure of international investigation or settlement. Nor has the same matter been submitted by Mr. El-Masri to any other international procedure.

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VII. LIST OF DOCUMENTS

Key documents

Exhibit 1 Tenet,	Declaration of Khaled El-Masri, Khaled El-Masri v. George No. 1:05cv1417-TSE-TRJ (E.D.V.A. Dec. 6, 2005)
Exhibit 1 (A) Record,	Exhibit A of Khaled El-Masri Declaration, N 313P Flight Skopje Alexander the Great Airport
Exhibit 1 (B)	Exhibit B of Khaled El-Masri Declaration, Lisa Myers & Aram Roston, "CIA Accused of Detaining an Innocent Man: If the agency knew he was the wrong man, why was he held?," *MSNBC*, 21 April 2005; David Johnston, "Rice Ordered Release of German Sent to Afghan Prison in Error," *New York Times*, 23 April 2005
Exhibit 1 (C)	Exhibit C of Khaled El-Masri Declaration, United States Geological Survey, "Significant Earthquakes of the World," (2004), 6 October 2005
Exhibit 1 (D)	Don Van Natta, Jr., "Germany Weights if it Played Role in Seizure by U.S., *New York Times*, 21 February 2006
Exhibit 1 (E)	Exhibit E of Khaled El-Masri Declaration, Khaled El-Masri's Passport
Exhibit 1 (F)	Exhibit F of Khaled El-Masri Declaration, Khalid El-Masri's statement with English translation; Sketch Plan of Hotel in Skopje; Sketch Plan of Prison in Afghanistan
Exhibit 1 (G)	Transcript, Department of Homeland Security, Denial of Entry [Khaled El-Masri]
Exhibit 1 (H)	Correspondence between A.C.L.U. and U.S. Department of State; Correspondence between A.C.L.U. and U.S. Department of Homeland Security
Exhibit 2	Alexander the Great Airport Skopje, "Response to Freedom of Information Request: Closed Flights Records Flight N313P 23-24 January 2004" 18 June 2008
Exhibit 3	Declaration of Manfred Gnjidic in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative for Summary Judgment, Khaled El-Masri v. George Tenet, No. 1:05cv1417-TSE-TRJ (E.D.V.A. 6 April 2006)
Exhibit 3 (A)	Exhibit A of Declaration of Manfred Gnjidic, Photographs of Khaled El-Masri, June 2004
Exhibit 3 (B)	Exhibit B of Declaration of Manfred Gnjidic, Isotopic Appraisal of El-Masri's hair

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Exhibit 3 (C)	Exhibit C of Declaration of Manfred Gnjidic, Mandate of the German Parliamentary Inquiry, with English translation
Exhibit 4	Central Intelligence Agency, “Memo to DOJ Command Center – Background Paper on CIA’s combined use of Interrogation Techniques,” 30 December 2004
Exhibit 5	Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,” Doc. 10957, 12 June 2006
Exhibit 6	Aircraft logs of N313P related to the rendition of Khaled El-Masri - Appendix No. 1, Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states,” 12 June 2006
Exhibit 7	Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, “Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States,” Doc. 11302 rev., 11 June 2007
Exhibit 8	Flight log of N982RK related to the secret "homeward rendition" of Khaled El-Masri in May 2004, Appendix No. 3, Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, “Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States,” Doc. 11302 rev., 11 June 2007
Exhibit 9	European Parliament, “Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” Rapporteur Giovanni Fava, A6-0020/2007, 30 January 2007
Exhibit 10	European Parliament, “Interim Report on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners,” 15 June 2006
1995 & 1998	
Exhibit 11	The White House, “Presidential Decision Directive 39,” 21 June 1995
Exhibit 12	Fact Sheet concerning the classified Presidential Decision Directive 62, 22 May 1998
2002 and 2003	
Exhibit 13	A compilation of Macedonian press reports and brief and unofficial English translations thereof. The articles were published in the daily newspapers *Dnevnik, Utrinski vesnik,* and *Vest* in 2002 and 2003 and highlight concerns as to human

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	rights violations occurring in Guantanamo Bay and Afghanistan.
Exhibit 14	United Nations High Commissioner for Human Rights, "Statement on detention of Taliban and Al Qaida prisoners at U.S. base in Guantanamo Bay, Cuba," 16 January 2002
Exhibit 15	Rajiv Chandrasekaran and Peter Finn, U.S. Behind Secret Transfer of Terror Suspects," *The Washington Post*, 11 March 2002
Exhibit 16	General Assembly, "Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment," 57th Session, 2 July 2002, A/47/173, para. 35
Exhibit 17	UN Commission on Human Rights, Report of Working Group on Arbitrary Detention, "Civil and Political Rights, Including the Question of Torture and Detention," 59th Session, 16 December 2002, E/CN.4/2003/8
Exhibit 18	Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects," 26 December 2002
Exhibit 19	Helsinki Committee for Human Rights, "Annual Report for Year 2002"
Exhibit 20	UN Commission on Human Rights, "Civil and Political Rights, Including the Questions of Torture and Detention: Written Statement Submitted by the International Rehabilitation Council for Torture Victims," 59th Session, 28 February 2003, E/CN.4/2003/NGO/51
Exhibit 21	Mark Kaufman, "Army Probing Deaths of 2 Afghan Prisoners," *The Washington Post*, 5 March 2003
Exhibit 22	Don van Natta, Jr., "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, 9 March 2003
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Exhibit 25	International Committee of the Red Cross, "ICRC President meets with U.S. officials in Washington DC,' News release 03/36, 28 May 2003
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Exhibit 27	"Missing presumed guilty: where terror suspects are being held," *The Independent*, 26 June 2003
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Exhibit 29	Amnesty International, "United States of America—The Threat of a Bad Example: Undermining International Standards as 'War on Terror' Detentions Continue," 18 August 2003
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Exhibit 42	James Meek, "They beat me from all sides," *The Guardian*, 14 January 2005
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Exhibit 45	Aleksandar Bozinovski, "CIA is helping us and controlling us," Vreme (Skopje), *Global Research*, 22 March 2005
Exhibit 46	PBS Frontline, "Interview of Michael Scheuer," 18 October 2005
Exhibit 47	Andreu Manresa, "La investigación halla en los vuelos de la CIA decenas de ocupantes con estatus diplomatico," *El Pais*, 15 November 2005, (Spanish)
Exhibit 48	Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake," *The Washington Post*, 4 December 2005
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Exhibit 50	"German man sues CIA on claims of torture," *NBC News*, 6 December 2005
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Exhibit 54	Council of Europe, "Report by the Secretary General under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts," (SG/Inf. (2006) 5), 28 February 2006
Exhibit 55	European Commission for Democracy through Law (Venice Commission) "Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners," no. 363/2005, 17 March 2006
Exhibit 56	Macedonian Ministry of Foreign Affairs, "Additional Answers to the Questions Contained in the Letter of Mr. Terry Davis dated 7 March 2006," 3 April 2006

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Exhibit 57	European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, "Verbatim Report: Testimony of Mr. Mattias Valles," 20 April 2006
Exhibit 58	European Parliament Press Release, "MEPs say intelligence sources reveal 30 to 50 extraordinary renditions have taken place," 17 May 2006
Exhibit 59	European Union Network of Independent Experts on Fundamental Rights, "Opinion 3: The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe ('extraordinary renditions')," 25 May 2006
Exhibit 60	European Parliament, "Report of the TDIP Committee Delegation to the Former Yugoslav Republic of Macedonia (FYROM)," CM/617396EN.doc, 6 June 2006
Exhibit 61	European Parliament, "Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee," (2006/2027(INI)), 6 July 2006
Exhibit 62	Craig S. Smith, "Algerian Tells of Dark Term in U.S. Hands," *New York Times*, 7 July 2006
Exhibit 63	President George W. Bush, "Transcript of President Bush's Remarks, "Speech from the East Room of the White House," 6 September 2006
Exhibit 64	*Alzery v Sweden,* UNHRC, "Views adopted on 25 October 2006", UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006
Exhibit 65	Excerpts from press articles published in 2005 and 2006 in the Macedonian daily *Vreme*, Aleksandar Bozinovski (unofficial translation)

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Exhibit 66	Matthias Gebauer, "Germany issues Arrest Warrants for 13 CIA Agents in El-Masri Case," Spiegel Online, 31 January 2007
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Exhibit 69	“El-Masri detained on arson suspicion,” *Spiegel Online*, 17 May 2007
Exhibit 70	Sebastian Fischer, “Drama un CIA Opfer, Wie Khaled El-Masri zum Brandstifter wurde,” *Speigel Online*, 18 May 2007
Exhibit 71	International Convention on the Elimination of All Forms of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention—The Former Yugoslav Republic of Macedonia, CERD/C/MKD/CO/7, 13 June 2007
Exhibit 72	U.N. Human Rights Committee, Concluding Observations on the Former Yugoslav Republic of Macedonia, 3 April 2008, U.N. Doc. CCPR/C/MKD/CO/2
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Exhibit 74	Freedom of Information Request to Macedonian Civil Aviation Authority about Flight N313P, 15 May 2008 (English Translation)
Exhibit 75	Alexander the Great Airport Skopje, “Response to Freedom of Information Request about Flight N313P,” Ref. 04/751, 18 June 2008 (Macedonian)
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Exhibit 81	Criminal Complaint to the Public Prosecutor Office in Skopje, 6 October 2008 (Macedonian)
Exhibit 82	United Nations Human Rights Council, 5th Session of the Working Group on Universal Periodic Review, 4-15 May 2009, “ICJ Submission to the Universal Periodic Review of The Former Yugoslav Republic of Macedonia,” November 2008
Exhibit 83	Request for Relief of compensatory damage, filed at the Basic Court Skopje II, 24 January 2009 (Macedonian)

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Exhibit 84	Bundestag Committee of Inquiry, Findings of the First Investigative Committee of the Sixteenth Legislative Period, 18 June 2009 (Extracts in English Language Translation)
Exhibit 85	Bundestag Committee of Inquiry, Findings of the First Investigative Committee of the Sixteenth Legislative Period, 18 June 2009 (Extracts in German Language)

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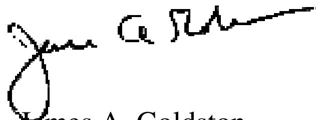
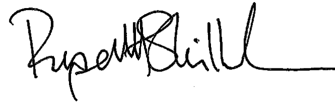
VIII. DECLARATION AND SIGNATURE

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Place: New York, N.Y.

Date: 18 September 2009





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