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The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism

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Abstract

On 13 December 2012, the European Court of Human Rights (ECtHR) delivered a milestone decision in the quest to ensure accountability of gross human rights violations committed in the fight against terrorism. The case, *El-Masri v The Former Yugoslav Republic of Macedonia*, concerned the extraordinary rendition to torture of an individual wrongly suspected of being involved in terrorism activities. The ECtHR found that by seizing, detaining and secretly transferring Mr El-Masri to the custody of United States (US) intelligence agents, Macedonia had violated the prohibition of torture and inhuman and degrading treatment, the prohibition of arbitrary detention, the right to private and family life and the right to access to court as protected under the European Convention on Human Rights, and ordered the respondent government

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to pay damages in compensation. The decision of the ECtHR broke the wall of secrecy and impunity with which the case of Mr El-Masri had been treated at the domestic level and fully vindicated his human rights' claims. At the same time, the ECtHR cautiously endorsed a new paradigm of the 'right to the truth'—that is: a right for the victim and the public at large to know about the abuses committed by governments in the field of national security—increasing the chances of accountability in future cases of gross human rights violations. Nevertheless, the decision also left some issues open, as the ECtHR did not, and could not, address the culpability of US agents who effectively tortured Mr El-Masri in Macedonia, secretly transferred him to Afghanistan and detained him there in inhumane conditions. From this point of view, therefore, the article argues that the decision of the ECtHR should be seen as an opportunity for further action in the US to ensure the full vindication of the values on which our liberty, and our security, ultimately rest.

Keywords: extraordinary renditions – torture – inhuman and degrading treatment – right to the truth – *El-Masri v United States* – Articles 3, 5, 8 and 13 European Convention on Human Rights – *El-Masri v Former Yugoslav Republic of Macedonia*

1. Introduction

On 13 December 2012, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a milestone decision in the quest to ensure accountability for the gravest human rights violations committed in the fight against terrorism. The case of *El-Masri v Former Yugoslav Republic of Macedonia*[1] concerned one of the most contentious counter-terrorism policies utilised by the United States (US) Administration after 9/11, known as 'extraordinary rendition'.[2] Mr El-Masri had been seized by Macedonian authorities as a terrorist suspect and handed over to Central Intelligence Agency (CIA) operatives who secretly transferred him to a black site in Afghanistan for the purpose of interrogation. There he was detained until the US intelligence concluded that he was not involved in any terrorist activity and decided to rendition him back to Albania. After this ordeal, Mr El-Masri had brought proceedings to seek damages in the US federal courts. At the request of the US government, however, lower federal courts had dismissed his complaint holding that the State secrets privilege barred the suit from continuing and the US Supreme Court (USSCt) had refused to grant certiorari, effectively depriving Mr El-Masri of a domestic judicial forum to obtain redress. Mr El-Masri sought therefore another tribunal willing

1 Application No 39360/09, Merits and Just Satisfaction, 13 December 2012.

2 See Fisher, 'Extraordinary Rendition: the Price of Secrecy' (2008) 57 *American University Law Review* 1405 at 1418. For a description and a criticism of the practice of extraordinary rendition, see also Weissbrodt and Bergquist, 'Extraordinary Renditions: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123.

to hear his claim. Given the role Macedonia played in arresting Mr El-Masri and transferring him to US custody, Mr El-Masri asked Macedonian prosecutors to open a criminal investigation in his case. When the domestic inquiry was discontinued, he brought proceedings before the ECtHR.

In its decision, the ECtHR ruled unanimously that Macedonia had violated Articles 3, 5, 8 and 13 of the European Convention on Human Rights (ECHR).[3] The ECtHR found that the detention and ill-treatment of Mr El-Masri by Macedonian authorities amounted to inhuman and degrading treatment and torture within the meaning of Article 3 of the ECHR. Moreover, the ECtHR held that the responsibility of Macedonia was engaged with regard to the applicant's transfer into the custody of the USA despite the existence of a real risk that he would be subjected to further treatment contrary to Article 3 of the ECHR. At the same time, the ECtHR found that by failing to carry out an effective investigation into the events, Macedonia had violated Article 3 of the ECHR in its procedural aspect and deprived the victim also of his right to access to court under Article 13 of the ECHR. Finally, the ECtHR ruled that Macedonia was in breach of Articles 5 and 8 of the ECHR for to the arbitrary detention of Mr El-Masri, as well as for his subsequent captivity in Afghanistan.

The purpose of this article is to analyse the decision of the ECtHR in the context of the quest for accountability of gross human rights abuses committed in the struggle against terrorism since 9/11. As the article argues, the ECtHR was able to reconstruct in a credible manner the severe human rights violations suffered by Mr El-Masri and hold a state government accountable for them. By drawing extensively on the independent inquiries carried out by supranational institutions, such as the Parliamentary Assembly of the Council of Europe and the European Parliament, as well as on the reports of human rights non-governmental organisations (NGOs), the ECtHR brought to light the extraordinary rendition of Mr El-Masri and broke the impunity with which his case had been treated in state jurisdictions. At the same time, the ECtHR, albeit cautiously, endorsed the existence of a 'right to the truth'—that is: a right for the victim and the public at large to know about the abuses committed by governments in the field of national security—with potentially broad implications for other future comparable cases. In this regard, the decision of the ECtHR stands in contrast to that of the USA and other domestic courts, which, by embracing an expansive conception of the State secrets privilege, had deprived victims of egregious abuses of a remedy and failed to exercise any check on the action of national governments, even when cases of extraordinary renditions were at stake.

Nevertheless, the decision of the ECtHR still leaves some issues open. While the ECtHR exercised full review over the action of Macedonian authorities, and heavily sanctioned them for their multiple violations of the ECHR, the

3 1950, ETS 5.

ECtHR took pains to clarify that its ruling did not, and could not, hold accountable the US government. Yet, from the very same factual account offered by the ECtHR in its decision, it was US intelligence agents who tortured Mr El-Masri in Macedonia, secretly transferred him to Afghanistan and detained him there in inhuman conditions upon the wrongful suspicion that he was a terrorist. From this point of view, therefore, although the *El-Masri* ruling represents due recognition of the human rights violations carried out in the extraordinary rendition of Mr El-Masri, it also reflects the limits of jurisdiction of the ECtHR and suggests that further action would be needed in the US to ensure full accountability. The article, therefore, discusses the proposals that have been made in favour of the establishment of an independent commission charged to inquire into the responsibility of CIA agents involved in cases of extraordinary rendition and to award victims adequate compensation and considers how the example of the Arar Commission established in Canada to inquire into another case of extraordinary rendition could be a model to follow in the US.

In conclusion, the article argues that the decision of the ECtHR should be praised for casting light over the unlawful practice of extraordinary renditions, which had so far been covered by the State secrets privilege. The ECtHR, taking advantage of its peculiar institutional position and of its flexible rules of procedure, removed the wall of impunity that had protected the unlawful arrest, secret detention and forced disappearance of Mr El-Masri and offered a forum in which his human rights claims could be heard and vindicated. At the same time, by reaffirming an obligation for national governments to secure effective investigations of gross human rights violations, the ECtHR outlined a right for victims and society at large to know the truth about the wrongs committed by governments in the fight against terrorism, potentially increasing the chances of accountability of future analogous cases. Yet, the reach of the ECHR stops at the edge of the Atlantic. On the other side of the same ocean, another Great Charter of Rights—the Constitution of the United States of America—is in force and should be used to secure the accountability of those responsible for cases of extraordinary renditions. The decision of the ECtHR in *El-Masri* therefore can offer an opportunity for further action in the USA to ensure the full vindication of the values on which our liberty, and our security, ultimately rest.

The article is structured as follows. Section 2 summarises the facts of the case and the vain attempts by Mr El-Masri to obtain redress in domestic courts. Section 3 analyses in detail the decision of the ECtHR. Section 4 assesses from a comparative perspective the achievements of the ECtHR in adjudicating Mr El-Masri's human rights claim and explains what institutional and substantive conditions favoured the ECtHR *vis-à-vis* other courts in reaching this result. Section 5 discusses the (partial) recognition by the ECtHR of a right to the truth in cases of human rights abuses committed in the fight

against terrorism and considers the potential implications of this holding. Finally, Section 6 cautions about the limits of the ECtHR's ruling, emphasising the lack of adequate accountability for the US officers who have effectively tortured, renditioned and detained Mr El-Masri. In this regard, the article discusses the proposals that have been made in favour of an independent commission of inquiry. A brief conclusion follows.

2. The 'Extraordinary Rendition' of Mr El-Masri and Vain Attempts to Obtain Judicial Redress

Mr Khaled El-Masri, a German citizen of Lebanese descent, was arrested by Macedonian police on 31 December 2003 upon suspicion of being a terrorist. Macedonian authorities detained Mr El-Masri incommunicado for 23 days and repeatedly interrogated him. On 23 January 2004, they drove him to Skopje Airport and handed him over to CIA agents. There, CIA agents severely beat him, stripped him and sodomised him with an object. Shackled and hooded, and subjected to total sensory deprivation, Mr El-Masri was then placed on to a CIA aircraft and secretly transferred to Afghanistan where he was detained in a CIA-run facility and repeatedly subjected to 'enhanced' interrogations. In May 2004, however, the CIA apparently came to the conclusion that there had been a mistake of identity and that it was detaining an innocent man. Mr El-Masri was therefore flown back to Europe and abandoned on the side of an Albanian road.

On 6 December 2005, Mr El-Masri filed a civil case in the US Federal District Court for the Eastern District of Virginia, suing the former director of the CIA, certain unknown agents of the CIA and the corporations who owned the private jets with which the CIA had operated his extraordinary rendition to and from Afghanistan as well as their personnel. In March 2006, while the case was still at the pleading stage, however, the US Administration (then headed by President Bush) filed a statement of interest in the case and moved to intervene in the suit, requesting that the District Court dismiss the case on the basis of the State secrets privilege, as recognised by the USSCt in *US v Reynolds*.[4] On 12 May 2006, the judge of the District Court, after hearing arguments by the parties, held that the government's claim to the State secrets privilege was valid and ordered the case dismissed before it could even move to discovery.[5]

4 345 U.S. 1 (1953) (recognising an executive privilege to resist disclosure of information in litigation if there is a reasonable danger that this will expose matters that in the interest of national security should not be divulged).

5 *El-Masri v Tenet* 437 F. Supp. 2d 530 (E.D. Va. 2006).

Mr El-Masri appealed the decision of the District Court to the US Court of Appeals for the Fourth Circuit.[6] On 2 March 2007, however, a unanimous three-judge panel of the Circuit Court affirmed the decision of the lower court.[7] The Court held that the case threatened the disclosure of relevant State secrets. Although Mr El-Masri had contended that most of the evidence sealed by the government as State secrets had already been made public, the court held that 'advancing a case in the court of public opinion, against the US at large, is an undertaking quite different from prevailing against specific defendants in a court of law'.[8] The Court stated that its function had to be 'modest'[9] and that it would exceed its power if it could 'disregard settled legal principles in order to reach the merit of an executive action . . . on the ground that the President's foreign policy has gotten out of line'.[10] The Court 'recognize[d] the gravity of [the] conclusion that Mr El-Masri must be denied a judicial forum for his complaint',[11] but concluded that in the present circumstances the fundamental principle of access to court had to bow to reasons of national security.[12] Mr El-Masri appealed the decision of the Circuit Court to the USSCt. On 9 October 2007, however, the USSCt denied certiorari,[13] effectively terminating Mr El-Masri's suit.[14]

Having unsuccessfully pursued the US domestic avenues of recourse, on 9 April 2008 Mr El-Masri brought proceedings against the US before the Inter-American Commission on Human Rights (IACommHR).[15] The US, in fact, is subject to the 1948 American Declaration of the Rights and Duties of Men (ADRDM) and is a member of the Organisation of the American States, whose Charter institutes the IACommHR.[16] As such, after the exhaustion of national remedies, private parties may file a complaint to the IACommHR alleging a violation of the ADRDM.[17] Nevertheless, the powers of the IACommHR *vis-à-vis* states like the US, which are not parties to the American Human

6 See Huyck, 'Fade to Black: *El-Masri v United States* Validates the Use of the State Secret Privilege to Dismiss "Extraordinary Renditions" Claims' (2005) 17 *Minnesota Journal of International Law* 435.
7 *El-Masri v United States* 479 F.3d 296 (4th Cir 2007).
8 Ibid. at 308–9.
9 Ibid. at 312.
10 Ibid. at 312-13.
11 Ibid.
12 See Fisher, supra n 2 at 1447; and Huyck, supra n 6 at 454.
13 *El-Masri v United States* 552 U.S. 947 (2007).
14 See Huq, 'Supreme Court *El-Masri* Rejection Undermines Accountability for Renditions', *Jurist*, 12 October 2007.
15 See *El-Masri v United States* Petition No 419-08, 9 April 2008, available at: www.aclu.org/files/pdfs/safefree/elmasri.iachr.20080409.pdf [last accessed 23 September 2013].
16 119 UNTS 3. On the IACommHR generally, see Davidson, *The Inter-American Human Rights System* (Aldershot: Ashgate, 1997).
17 Cfr. Article 24 IACommHR Statute together with Article 51 IACommHR Regulation (procedure for petitioning the IACommHR claiming a human rights violation by a State which is not a party to the American Human Rights Convention).

Rights Convention and thus not subject to the Inter-American Human Rights Court (IACtHR), are extremely limited.[18] No judicial decision with binding effect on the respondent State can be adopted by the IACommHR, even when it finds a violation of the fundamental rights enshrined in the ADRDM.[19] Because of the limited powers of the IACommHR *vis-à-vis* the US, Mr El-Masri could only request the IACommHR to investigate the facts, declare that the US is responsible for the violation of the ADRDM, and ask it to recommend adequate and effective remedies for addressing the violation, including a public acknowledgment of the facts and public apology. On 27 August 2009 the IACommHR accepted the petition.[20] Since then, however, the proceedings have not moved forward because the US has refused to cooperate.[21]

With the impossibility of obtaining redress in the US courts, and given the limited prospects of success before the IACommHR, on 6 October 2008 Mr El-Masri lodged a criminal complaint with the Office of the Public Prosecutor in Skopje, Macedonia. Without conducting any independent investigation, however, on 18 December 2008 the Public Prosecutor rejected Mr El-Masri's complaint as unsubstantiated. Mr El-Masri then also sought to begin civil proceedings for damages before the civil court, but the suit was significantly hampered by the halt of the criminal investigation. At that point, on 21 September 2009, he lodged an application before the ECtHR.

3. The Decision of the European Court of Human Rights

In his complaint to the ECtHR, Mr El-Masri claimed multiple violations of the ECHR and argued that Macedonia had failed to offer him an effective forum in which to make his case. On 14 June 2010, the ECtHR declared El-Masri's application admissible and in January 2011 entrusted the Grand Chamber to deal with the case. On 13 December 2012, after oral hearings, the ECtHR eventually delivered its much awaited judgment. As a preliminary matter, the ECtHR rejected the respondent government's objection that Mr El-Masri's complaint was incompatible with Article 35 of the ECHR, holding that

18 This is not the case for States which are parties to the American Human Rights Convention and thus subject to the IACtHR. See Buergenthal, 'The Inter-American Court of Human Rights' (1982) 76 *American Journal of International Law* 231.

19 See Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856 at 883.

20 See American Civil Liberties Union, 'International Tribunal Takes Up Case of Innocent Victim of CIA Extraordinary Rendition Program' Press Release, 27 August 2009, available at: www.aclu.org/human-rights-.national-security/international-tribunal-takes-case-innocent-victim-cia-extraordinary-r [last accessed 23 September 2013].

21 See *El-Masri v United States* Petition No 419-08, Petitioner's Additional information, 27 July 2010, available at: www.aclu.org/files/assets/P-419-08.Petitioners-Additional.Information.pdf [last accessed 23 September 2013].

Mr El-Masri had started a criminal complaint in Macedonia and that this had been used, hence satisfying the requirement of the prior exhaustion of domestic remedies.[22]

The ECtHR then moved to assess the facts, where it was faced with a peculiar situation. Whereas generally the ECtHR can rely on the reconstruction of the facts offered by domestic courts, in the present case no court assessment of the evidence and establishment of the facts had occurred, because judicial proceedings had been terminated before reaching the merits stage both in Macedonia and the US. This forced the ECtHR to directly take care of establishing the factual truth. After summarising the allegations of the applicant and the response of the Macedonian government, the ECtHR offered an overview of the relevant international inquires relating to the applicant's case—notably the two reports by Dick Marty, commissioned by the Parliamentary Assembly of the Council of Europe,[23] and the report by Claudio Fava commissioned by the European Parliament[24]—and other information submitted to the ECtHR as additional evidence. Furthermore, the ECtHR indicated a number of other sources it would consider: these included both official reports by the United Nations (UN) Special Rapporteur for the Protection of Fundamental Rights in the Fight Against Terrorism, the Venice Commission, the UN General Assembly and the UN Human Rights Council, as well as 'public sources highlighting concerns as to human rights violations allegedly occurring in US-run detention facilities in the aftermath of 11 September 2001' by human rights NGOs.[25]

As the ECtHR stated, '[i]n cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court.'[26] Nevertheless, the ECtHR clarified that its role was not 'to rule on criminal guilt or civil liability but on Contracting States' responsibility under the ECHR', and this conditioned its approach to the issues of evidence and proof.[27] To begin with, the ECtHR indicated that '[i]n the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment'.[28] Moreover, it explained that it would not require a 'strict application of the principle *affirmanti incumbit probatio*'[29] and, taking into

22 *El-Masri v Macedonia*, supra n 1 at paras 143–144.
23 Ibid. at paras 42–46. See *Alleged Secret Detentions in Council of Europe Member States* AS/Jur (2006) 03, 22 January 2006 ('Marty Report 1') and *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States* AS/Jur (2007) 36, 7 June 2007 ('Marty Report 2').
24 Ibid. at paras 47–51. See Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detentions of Prisoners 2006/2027(INI), P6.TA (2006)0316.
25 Ibid. at paras 111–124.
26 Ibid. at para 151.
27 Ibid.
28 Ibid.
29 Ibid. at para 152.

account the special position of the government as the authority with exclusive knowledge of the facts, shifted the burden of proof to the respondent government. Finally, while emphasising its sensitivity 'to the subsidiary nature of its role',[30] the ECtHR indicated that it was prepared to apply a 'particularly thorough scrutiny' given the seriousness of the allegations made by Mr El-Masri.[31] In light of this, the ECtHR evaluated the evidence before it and concluded that it could 'draw inferences from the available material and the authorities' conduct . . . and [find] . . . the applicant's allegations sufficiently convincing and established beyond reasonable doubt'.[32] The ECtHR then proceeded to assess Mr El-Masri's complaint on the merits.

Given the central importance of Article 3 of the ECHR in the complaint, the ECtHR began its review from this provision, focusing first on its procedural aspects. As the ECtHR clarified, 'where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police . . . that provision . . . requires by implication that there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice'.[33] In the present case, however, Macedonia had failed to conduct an in-depth investigation of Mr El-Masri's abduction and rendition. As the ECtHR remarked, 'the investigating authorities remained passive'[34] and surprisingly failed to take notice of the already available international information on the events. This conduct, according to the ECtHR, 'f[e]ll short of what could be expected from an independent authority'[35] and had a negative 'impact on the right to the truth regarding the relevant circumstances of the case'.[36]

In a key paragraph the ECtHR clarified, in fact, that the present case was of great importance 'not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the States concerned were not interested in seeing the truth come out'.[37] As the ECtHR emphasised, because the 'concept of "State secrets" has often been

30 Ibid. at para 155.
31 Ibid.
32 Ibid. at para 167.
33 Ibid. at para 182.
34 Ibid. at para 188.
35 Ibid. at para 189.
36 Ibid. at para 191.
37 Ibid.

invoked to obstruct the search for the truth',[38] including in proceedings 'before the US courts',[39] the prosecuting authorities of the respondent State, after having been alerted to the applicant's allegations, 'should have endeavored to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts'.[40] Investigation of serious human rights violations, as in the present case, was 'essential in maintaining public confidence in [public authorities'] adherence to the rule of law'.[41] By failing to undertake an adequate investigation of Mr El-Masri's complaint, therefore, Macedonia had 'deprived the applicant of [the right to] being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal'.[42] As such, Macedonia had violated Article 3 of the ECHR in its procedural limb.[43]

The ECtHR then moved to examine the substantive aspects of Article 3, assessing separately the ill-treatment of Mr El-Masri in Skopje, at the Skopje Airport, and in Afghanistan. The ECtHR unequivocally affirmed that Article 3 of the ECHR 'enshrines one of the most fundamental values of democratic societies',[44] which cannot be subject to exceptions or derogations even in the event of a public emergency threatening the life of a nation, including in the fight against terrorism.[45] In light of this, the ECtHR concluded that the ill-treatment of Mr El-Masri by Macedonian security forces during the twenty-three days he was detained in Skopje amounted to inhuman and degrading treatment in breach of Article 3.[46] Mr El-Masri had been held incommunicado, under constant guard, threatened with a gun and consistently refused access to anyone other than his interrogators.[47] As the ECtHR underlined, he 'undeniably lived in a permanent state of anxiety'.[48] At the same time, 'the applicant's suffering was further increased by the secret nature of the operation'.[49] The ECtHR, however, found that the treatment suffered by Mr El-Masri at the Skopje Airport was even more obnoxious and amounted to torture.[50] CIA agents stripped and sodomised Mr El-Masri, beat him severely and subjected him to total sensory deprivation. He was shackled and hooded and forced to march on to a CIA aircraft, where he was thrown to the floor, chained and

38 Ibid.
39 Ibid.
40 Ibid. at para 192.
41 Ibid.
42 Ibid.
43 Ibid. at para 194.
44 Ibid. at para 195.
45 See *Chahal v United Kingdom* 1996-V; 23 EHRR 413 at para 79.
46 *El-Masri v Macedonia*, supra n 1 at para 204.
47 Ibid. at para 200.
48 Ibid. at para 202.
49 Ibid. at para 203.
50 Ibid. at para 211.

forcibly tranquilised.[51] All the measures 'were used in combination and with premeditation, the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant'.[52] At the same time, the acts complained of 'at the hands of the special CIA rendition team' were carried out 'in the presence of officials of the respondent State and within its jurisdiction'.[53] Consequently, for the ECtHR, Macedonia ought to be regarded as responsible for committing torture under Article 3 of the ECHR, since 'its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring'.[54]

In addition, the ECtHR found Macedonia was liable under Article 3 of the ECHR for removing the applicant to US custody.[55] The ECtHR clarified that the principle of *non-refoulment*[56] prohibited Contracting Parties to the ECHR from transferring a detainee to another state 'where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to [torture or inhuman and degrading treatment]'.[57] In the present case, having regard to the manner in which the applicant was transferred into the custody of the US authorities, the ECtHR ruled that 'he was subjected to "extraordinary rendition", that is, an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment'.[58] According to the ECtHR, 'Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the ECHR'.[59] So, the ECtHR concluded that Macedonia was 'to be held responsible for the inhuman and degrading treatment to which the applicant was subjected while in [Skopje], for his torture at Skopje airport and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the ECHR'.[60]

The ECtHR then moved to consider Mr El-Masri's claim under Article 5 of the ECHR. Here, the ECtHR remarked upon the fundamental importance of

51 Ibid. at para 205.
52 Ibid. at para 211.
53 Ibid. at para 206.
54 Ibid. at para 211.
55 Ibid. at para 222.
56 On this principle in the case law of the ECtHR, see Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulment under Article 3 ECHR Reassessed' (2009) 22 *Leiden Journal of International Law* 583.
57 *El-Masri v Macedonia*, supra n 1 at para 212.
58 Ibid. at para 221 (citations omitted).
59 Ibid. at para 218.
60 Ibid. at para 223.

Article 5 'for securing the right of individuals in a democracy'[61] and stated that '[a]lthough the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean 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'.[62] In the present case, the ECtHR noted that Mr El-Masri was arrested by Macedonian authorities on 31 December 2003 and 'subsequently disappeared' until 29 May 2004.[63] The ECtHR, therefore, examined whether 'the applicant's detention in Macedonia was in conformity with the requirements set out in Article 5 of the ECHR and whether the applicant's subsequent detention in Kabul [wa]s [also] imputable to the respondent State'.[64] On the former, the ECtHR found 'wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework'[65] and thus ruled that 'during that period the applicant was held in unacknowledged detention in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation of his right to liberty and security'.[66]

At the same time, the ECtHR found that Macedonia was also responsible for Mr El-Masri subsequent detention in Afghanistan. The ECtHR reiterated its precedents, holding that the removal of a detainee to a state where he would be at risk of a flagrant breach of Article 5, amounted to a violation of Article 5.[67] The ECtHR otherwise repeated that in the present case 'the applicant was subjected to "extraordinary rendition" . . . which entails detention . . . outside the normal legal system and which, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention'.[68] In such circumstances, according to the ECtHR, 'it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5'.[69] According to the ECtHR, 'Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the ECHR, but they actively facilitated his subsequent detention

61 Ibid. at para 230.
62 Ibid. at para 232.
63 Ibid. at para 234.
64 Ibid. at para 235.
65 Ibid. at para 236.
66 Ibid. at para 237.
67 See *Othman (Abu Qatada) v United Kingdom* 55 EHRR 1 at para 233.
68 *El-Masri v Macedonia*, supra n 1 at para 239 (citations omitted).
69 Ibid.

in Afghanistan by handing him over to the CIA'.[70] As such, the ECtHR concluded that Macedonia was responsible for 'the entire period of [Mr El-Masri] captivity'[71] and that his abduction and detention in violation of Article 5 of the ECHR also 'amounted to 'enforced disappearance' as defined in international law'.[72]

In light of its conclusions with regard to Articles 3 and 5 of the ECHR, the ECtHR also found a violation of Articles 8 and 13 of the ECHR. Further, it ordered that the respondent State pay Mr El-Masri €60,000 for non-pecuniary damages caused by the violations.

4. Succeeding Where the Others Failed: The ECtHR in Comparative Perspective

The decision of the ECtHR in *El-Masri* represents a major success for the rule of law and the protection of fundamental rights. The ECtHR, through a careful analysis of the existing evidence, was able to reconstruct the abuses suffered by Mr El-Masri from his detention in Skopje, his hand-over to CIA agents at Skopje Airport and his rendition to Afghanistan. By holding that Macedonia had subjected Mr El-Masri to torture and inhuman and degrading treatment, arbitrarily detained him and violated his right to private and family life as well as his right of access to court, the ECtHR broke the impunity with which this case of extraordinary rendition had been treated so far.[73] Whereas a number of international reports, which the ECtHR largely utilised in support of its conclusion, had acknowledged the accuracy of Mr El-Masri's claims and revealed the widespread practice of extraordinary renditions of suspected terrorist by the CIA with the support of European countries, the judgment of the ECtHR is the first judicial decision which officially recognises the events, and the first verdict that effectively holds a government accountable for them.

On this account, the decision of the ECtHR sharply contrasts with the positions of the other courts that had so far dealt with the case.[74] While no Macedonian court effectively heard a case, because criminal proceedings were terminated by the prosecutors at the stage of investigation, US courts deliberately discarded Mr El-Masri's claim. By applying a broad conception of the State secret privilege, both the District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit renounced any meaningful role in scrutinising the action of the executive branch, thus leaving the

70 Ibid.
71 Ibid. at para 240.
72 Ibid.
73 See Huyck, supra n 6 at 472.
74 See supra Section 2.

human rights abuses committed in this case of extraordinary rendition unchallenged.[75] Otherwise, the unwillingness by US courts to rein in the assertion of the State secrets privilege by the executive branch even when cases of extraordinary renditions are at play, is not limited to the *El-Masri* case.[76] A recent example confirming this stand is the ruling of the Court of Appeals for the Ninth Circuit in *Mohamed v Jeppesen Dataplan*[77]—another civil suit brought by an individual allegedly subjected to extraordinary rendition against an airline corporation accused of arranging secret flights for the CIA. In that case, the Court granted a motion to dismiss the case at the pre-trial phase, as requested by the Obama Administration, holding that the State secrets privilege was validly asserted and barred the suit from continuing.[78]

The 'security-sensitive' approach of the US courts, nevertheless, is not unique. As several authors have explained, secrecy arguments have trumped litigation concerning abuses committed in the fight against terrorism in multiple jurisdictions worldwide.[79] From this point of view, although formalism in the interpretation of the State secrets privilege may be at its height in the US, most other state courts have given up their obligation to ensure respect for human rights whenever governments invoked reasons of secrecy and national security.[80] Focusing specifically on cases where allegations of extraordinary renditions were at stake, it suffices here to mention the case of Italy.[81] In *Abu Omar*[82]—a case regarding the criminal trial of CIA and Italian intelligence agents indicted for the abduction and extraordinary rendition of a suspect terrorist—the Italian Constitutional Court ruled that it had no authority to review whether the decision of the Italian Prime Minister to invoke a State secrets privilege was justified. By embracing a 'kind of political question doctrine',[83] the Constitutional Court refused to oversee the government assertion

75 Huyck, supra n 6 at 472; and Fisher, supra n 2 at 1418.

76 See, for example, Donohue, 'The Shadow of the State Secret' (2010) 159 *University of Pennsylvania Law Review* 77.

77 *Mohamed v Jeppesen Dataplan Inc.*, 2010 U.S. App. LEXIS 18746 (9th Cir. 2010); *cert. denied Mohamed v Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575.

78 See the critical Editorial, 'Torture is a Crime, Not a Secret', *New York Times*, 9 September 2010 at A30 NY edn.

79 See Setty, 'Litigating Secrets: Comparative Perspective on the State Secret Privilege' (2009) 75 *Brooklyn Law Review* 201; and Cole, Fabbrini and Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham: Elgar, 2013).

80 Setty, 'Formalism and State Secrets', in Cole, Fabbrini and Vedaschi, ibid. at 57.

81 See Fabbrini, 'Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared' (2011) 2 *Italian Journal of Public Law* 255; but see also on the United Kingdom: *Mohamed v Secretary of State* [2008] EWHC 2048 (Admin.); *aff'd by Mohamed v Secretary of State* [2009] EWHC 152 (Admin.).

82 C.Cost., sent. 106/2009, 11 March 2009.

83 Giupponi, 'Servizi di informazione e segreto di Stato nella legge n. 124/2007' (2009) *Forum Quaderni Costituzionali* 1 at 47.

of the State secrets privilege.[84] While the Italian Supreme Criminal Court later sought to interpret this holding restrictively, and found room to keep the case open,[85] the decision of the Constitutional Court has severely hampered the possibility to provide accountability for the human rights abuses committed in this case of extraordinary rendition.[86]

Seen in this wider comparative context, the position of the ECtHR appears particularly remarkable. The ECtHR clearly affirmed that the fight against terrorism did not give governments a '*carte blanche*'[87] to disregard human rights and noted with disapproval that 'the concept of "State secrets" ha[d] often been invoked to obstruct the search for the truth'.[88] The ECtHR, instead, engaged in a thorough scrutiny of the *action* by Macedonia (as well as its *inaction*: notably, the failure to prevent the harsh treatment of Mr El-Masri by CIA agents, his extrajudicial transfer and subsequent detention in Afghanistan), concluding that this amounted to a violation of the ECHR. From this point of view, the ECtHR's ruling confirms that the existence of sources and institutions for the protection of human rights beyond the state can make individuals adversely affected by human rights violations better off.[89] Indeed, as I had argued elsewhere,

> a multilevel architecture for the protection of fundamental rights such as that existing in Europe today can have several advantages. A supranational court such as the ECtHR can play a role in ensuring effective protection of fundamental rights, even where for reasons of national security – as invoked by national governments through the State secret privilege – municipal courts have been forced to step back from litigation involving cases of extraordinary rendition, leaving gaps at the domestic level.[90]

What factors explain the success of the ECtHR? Several institutional and procedural reasons influence the greater ability of the ECtHR *vis-à-vis* other courts to function as an adequate forum to hear claims of human rights violations such as those of Mr El-Masri. To begin with, unlike domestic courts,

84 Messineo, '"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023 at 1043.

85 See Cass. Pen. Sez. V n. 46340, 19 September 2012, on which see Stasio, 'Abu Omar, nuovo processo per gli ex vertici del SISMI' *Il Sole 24 Ore*, 20 September 2012 at 20.

86 The Italian Constitutional Court had recently re-affirmed its hands-off jurisprudence in the field of State secrecy; see C.Cost. sent. 40/2012, 21 November 2011, on which see critically, Vedaschi, '*Arcana Imperii* and *Salus Rei Publicae*: States Secret Privilege and the Italian Legal Framework', in Cole, Fabbrini and Vedaschi, supra n 79 at 95.

87 *El-Masri v Macedonia*, supra n 1 at para 232.

88 Ibid. at para 191.

89 See Garlicki, 'Concluding Remarks', in Cole, Fabbrini and Vedaschi, supra n 79 at 322 (emphasising the contribution of the ECtHR in raising the standard of protection in cases of national security).

90 Fabbrini, supra n 81 at 302 (citations omitted).

which are embedded in the national context, the ECtHR as a supranational court enjoys a detachment from state governments, which allows it to take decisions without the pressure of political events.[91] Certainly, under the established case law of the ECtHR, contracting parties enjoy a margin of appreciation in the application of the ECHR, which increases in cases of public emergencies threatening the life of the nation.[92] Yet even the decision to invoke Article 15 of the ECHR, which allows a contracting party to derogate from the ECHR (save for the respect of the right to life, the prohibition of torture and slavery), is subject to review by the ECtHR,[93] and this confirms the existence of a strong supranational supervision on the activities of the contracting parties in the field of national security.[94] At the same time, one should not underestimate the temporal factor. Courts tend to be more willing to defer to the assessment of the executive branch in cases of national security in the aftermath of a public emergency, such as a terrorist attack.[95] Because the ECtHR usually is involved only after the exhaustion of domestic remedies, and thus often several years after the events, its decisions tend to be less influenced by the emergency under which domestic courts adjudicated.[96]

From a procedural point of view, the ECtHR enjoys several advantages. This is made plain by the *El-Masri* case.[97] The ECtHR is a human rights court whose task, under Article 19 of the ECHR, is to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention. A national government could in the abstract invoke a secrecy privilege before the ECtHR, but this would not prevent the ECtHR from delivering a decision. In fact, the ECtHR could shift the burden of proof on to the respondent government to demonstrate that the allegations

91 This does not mean that State courts do not decide independently in national security cases or that security concerns do not affect decision-making in the ECtHR. It simply points out that the pressures surrounding adjudication may be different. Cf. also Kavanagh, 'Constitutionalism, Counter-Terrorism and the Courts: Changes in the British Constitutional Landscape' (2011) 9 *International Journal of Constitutional Law* 172 (emphasising how the ECtHR has changed the approach of British courts in national security cases, reducing deference *vis-à-vis* the executive).

92 See Brems, 'The Margin of Appreciation in the Case-Law of the European Court of Human Rights' (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240.

93 See *Aksoy v Turkey* 1996-VI; 23 EHRR 553 (holding that the measures adopted under Article 15 ECHR exceeded what was strictly required by the exigencies of the situation).

94 See Gross and Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625.

95 Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28 *Yearbook of European Law* 664 (arguing that both the USSCt and the European Court of Justice have changed their standard of review, from an early phase, closer to the emergency, in which they granted wide discretion to the executive, through an intermediate phase, to a last phase in which they exercised a more demanding scrutiny and thus secured greater protection of fundamental rights).

96 See also Ackerman, *Before the Next Attack* (Cambridge: Harvard University Press, 2006).

97 See supra text accompanying nn 27–32.

made by the individual applicant are false.[98] Ultimately, the ECtHR can rule against the respondent government and award damages to the applicant, even where the respondent states shields its action under State secrecy. At the same time—witness again *El-Masri*—the ECtHR is not restricted by procedural barriers on the admissibility of evidence. It can rely on sources of information collected by other human rights bodies. And it can accord third parties, such as the International Commission of Jurists and the UN High Commissioner for Human Rights, motion to intervene. These procedural flexibilities make the supervision of the ECtHR comprehensive and pervasive, ensuring that formalism cannot stand in the way of protecting core fundamental rights.[99]

Last but not least, however, the ECtHR enjoys success also because it is a *court of law*.[100] Under the ECHR, since the entry into force of Protocol 11, the jurisdiction of the ECtHR is compulsory. Individual applicants who have exhausted domestic avenues of recourse can bring proceedings before the ECtHR without the consent of the government concerned. In fact, respondent governments can refuse to participate in the proceedings before the ECtHR, but this does not prevent the ECtHR from ruling, and making a definitive assessment on the violation of the ECHR. This state of affairs contrasts significantly with the jurisdiction of other transnational bodies such as the IACommHR.[101] As previously mentioned, the IACommHR lacks substantive capacity to adjudicate individual applications and is dependent upon the goodwill of the respondent government to operate. As such, its role is merely that of providing an international forum in which the action of the States can be subject to public scrutiny.[102] The different destiny of the applications lodged by Mr El-Masri before the IACommHR and the ECtHR make these differences evident. More than five years after Mr El-Masri lodged his application before the IACommHR, proceedings have not moved forward as the USA has refused to cooperate.[103] Three years after he raised his case in Strasbourg, the ECtHR found Macedonia responsible for violating core provisions of the ECHR and condemned it to pay monetary damages.

98 See *Imakayeva v Russia* Application No 7615/02, Merits and Just Satisfaction, 9 November 2006 (suggesting a presumption that the applicant's version of the facts is correct in case of a refusal by the respondent State to deliver the documents and information requested by the ECtHR).

99 See Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 *Ritsumeikan Law Review* 83 (arguing that 'the principal and overriding aim of the system set up by the ECHR is to bring about a situation in which in every Contracting State the rights and freedoms are effectively protected').

100 On the question whether the ECtHR can be considered as a Constitutional Court, see Greer and Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.

101 See generally Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2000).

102 See Steiner, Alston and Goodman, *International Human Rights in Context: Law Politics Morals* (Oxford: Oxford University Press, 2007) at 1033.

103 See supra text accompanying nn 20–21.

5. A Right to the Truth Against Abuses Committed in the Fight Against Terrorism?

The decision of the ECtHR, besides vindicating the human rights claim of Mr El-Masri, also advances a principle that could be of significant importance in future cases in which gross abuses of human rights committed in the fight against terrorism are claimed. In its assessment of the obligation of the Macedonian authorities to undertake, under the procedural limb of Article 3 of the ECHR, an effective investigation on the crimes of torture and inhuman and degrading treatment, the ECtHR 'underline[d] the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.[104] In particular, addressing a specific observation that had been made by the UN High Commissioner for Human Rights, the ECtHR took the opportunity to express its opinion on 'another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case'.[105] The ECtHR remarked how '[t]he issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations'[106] and emphasised how authorities had 'hid[den] the truth'[107] by resorting to the State secrets privilege. However, the ECtHR hinted that this state of affairs was inconsistent with both the right of the victim *and* the public at large to know about the human rights violations that had been committed in cases of extraordinary rendition.

On the dimension of the right of the *victim* to know the truth, on the one hand, the ECtHR stated that Macedonia had 'deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal'.[108] On the *societal* component of the right to the truth, on the other hand, the ECtHR affirmed that 'while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[109] The ECtHR recalled its precedents on the obligation of state parties to investigate cases of human rights abuses in order to provide 'sufficient element

104 *El-Masri v Macedonia*, supra n 1 at para 191.
105 Ibid.
106 Ibid.
107 Ibid. (quoting Marty Report 2 at para 5).
108 Ibid. at para 192.
109 Ibid.

of public scrutiny [and] . . . secure accountability in practice as well as in theory'.[110] It also cited the March 2011 Guidelines of the Council of Europe on the eradication of impunity for serious human rights violations stating that 'impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system'.[111]

The considerations of the ECtHR on the right to the truth join a trend in international human rights jurisprudence in favour of the increasing recognition of this legal paradigm in cases of gross human rights abuses.[112] While the contour of a right to the truth first emerged in the context of enforced disappearances, and is in fact codified in Article 24(2) of the 2006 International Convention for the Protection of All Persons against Enforced Disappearance, a number of human rights bodies have recently affirmed the validity of the principle more broadly.[113] In fact, the UN Human Rights Council in two resolutions has recognised 'the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the acts that gave rise to such violations'.[114] The right to the truth has been expressly acknowledged in the jurisprudence of the IACtHR,[115] features in documents of the Council of Europe[116] and has even been referred to in legislation of the European Union.[117] Otherwise, 'parallel to this quiet evolution of the right to the truth as a remedy in international tribunals, the world as seen an almost explosive movement toward the establishment of truth commissions'.[118] From this point of view, therefore, the decision of the ECtHR confronts the emerging international human rights jurisprudence and seems to suggest that in cases of state atrocities public disclosure can be an important element of rehabilitation, satisfaction and guarantee of non-repetition of the events.[119]

Nevertheless, the embrace of a new paradigm of a right to the truth by the ECtHR in *El-Masri* has been partial at best. In fact, the ECtHR was heavily divided on this question. This is made clear by two separate opinions attached

110 Ibid.
111 Ibid.
112 See Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 *International Review of the Red Cross* 245.
113 See Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 *Michigan Journal of International Law* 977.
114 UNHRC Resolution 9/11, 24 September 2008 and UNHRC Resolution 12/1, 12 October 2009.
115 See *Velasquez Rodriguez v Honduras* IACtHR Series C 4 (1988); and *Contreras et al. v El Salvador* IACtHR Series C 232 (2011).
116 Council of Europe, Guidelines of the Committee of Ministers on Eradicating Impunity for Serious Human Rights Violations H/Inf (2011) 7.
117 Council Framework Decision on the Standing of Victims in Criminal Proceedings 2001/220/JHA; [2001] OJ L 82/1.
118 Antkowiak, supra n 113 at 996.
119 See Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2001).

to the ruling. In a jointly written concurrence, Judges Tulkens, Spielmann, Sicilianos and Keller pushed in favour of fully outlining a right to the truth under the scope of Article 13 of the ECHR. The four judges appreciated that the Grand Chamber had addressed the matter in its assessment of Article 3 and affirmed that '[i]t could therefore be argued that the Court is implicitly acknowledging that the right to the truth has a place in the context of Article 3'.[120] Nevertheless, the judges argued that 'the right to the truth would be more appropriately situated in the context of Article 13 ECHR'.[121] Moreover, as they plainly stated, a right to the truth under Article 13 of the ECHR ought to encompass both an individual dimension and a societal one.[122] According to the four Judges, at the same time, the right to the truth was a logical development of the case law of the ECtHR on Articles 2 and 3 of the ECHR, which guarantees a right to an investigation involving the applicant and subject to public scrutiny.[123] As a consequence, the four judges criticised the ECtHR for failing to offer '[a] more explicit acknowledgment of the right to the truth in the context of Article 13 ECHR, [since] far from being either innovative or superfluous, [this] would [have] in a sense cast renewed light on a well-established reality'.[124]

Yet the position of the ECtHR on the right to the truth drew criticism from two other judges. In a joint concurrence, Judges Casadevall and López Guerra expressed their view that 'as regards the violation of the procedural aspect of Article 3 of the ECHR on account of the failure of the respondent State to carry out an effective investigation into the applicant's allegations of ill-treatment, no separate analysis as performed by the Grand Chamber . . . was necessary with respect to the existence of a "right to the truth" as something different from, or additional to, the requisites already established in such matters by the previous case-law of the Court'.[125] According to the two judges, the case law of the ECtHR made clear that contracting parties had an obligation under Articles 2 and 3 of the ECHR to carry out investigations with the aim to establish the facts of the case and the identity of the persons responsible for the injuries. This activity, 'amount[ed] to finding out the truth of the matter'.[126] Nevertheless, 'the right to a serious investigation, equivalent to the right to the truth'[127] had as its only beneficiary the victim of the crime, and

120 *El-Masri v Macedonia*, supra n 1 at Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para 3.
121 Ibid. at para 4.
122 Ibid. at para 6.
123 See Mowbray, 'Duties of Investigation Under the European Convention on Human Rights' (2002) 52 *International & Comparative Law Quarterly* 437.
124 *El-Masri v Macedonia*, supra n 1 at Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para 7.
125 *El-Masri v Macedonia*, supra n 1 at Joint Concurring Opinion of Judges Casadevall and López Guerra.
126 Ibid.
127 Ibid.

not the public at large. In the judges' view, in fact, the obligation to investigate human rights abuses 'applies equally in cases which have attracted wide public coverage and in other cases which have not been subject to the same degree of public attention',[128] which confirmed that 'as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 ECHR'.[129]

Taken together, the positions articulated in the two concurring opinions reveal how the Grand Chamber of the ECtHR has adopted in *El-Masri* an intermediate stand, failing to embrace fully a new paradigm of the right to the truth under Article 13 of the ECHR, but opening the possibility that the duty to investigate gross human rights abuses under Article 3 of the ECHR may be designed to remedy both individual *and* societal harms. In this light, the decision of the ECtHR cautiously expands the function of the state duty to undertake a credible investigation and possibly sets a novel standard to secure accountability of human rights violations committed in other national security cases and beyond. Member states are under an obligation *vis-à-vis* the victim and the public at large to investigate gross human rights abuses committed in the fight against terrorism and to provide domestic means that redress the harm and prevent its re-occurrence.

6. What the European Court of Human Rights Could Not Do: Accountability of US Intelligence Agents Involved in Cases of Extraordinary Rendition

The decision of the ECtHR in *El-Masri* vindicated the human rights of Mr El-Masri in a way that had proved impossible before other courts. Simultaneously, the ECtHR set a standard for the protection of the right to the truth that, if confirmed, could ensure greater accountability in future cases of gross human rights abuses committed in the fight against terrorism. Nevertheless, for all its successes, the decision of the ECtHR also presents several limits. Although the ECtHR strongly scrutinised the action of Macedonia and found that the respondent State had committed multiple violations of the ECHR, the ECtHR did not, and could not, address the action of those US agents who effectively were also responsible for a large share of the abuses committed against Mr El-Masri. As the ECtHR explicitly clarified in assessing the responsibility of Macedonia under Article 3 of the ECHR for removing the applicant to US custody, in fact, 'there [wa]s no question of adjudicating on or

128 Ibid.
129 Ibid.

establishing the responsibility of the receiving country, whether under general international law, under the ECHR or otherwise. In so far as any liability under the ECHR is or may be incurred, it is liability incurred by the sending Contracting State'.[130]

Because the ECtHR only held accountable the actions of Macedonian authorities, however, the decision leaves several other demands for accountability unanswered. For it is the ECtHR itself which systematically reconstructed how it was CIA agents who tortured Mr El-Masri, secretly transferred him to a 'black site' in Afghanistan and detained, interrogated and ill-treated him there for almost four months. While the responsibility of Macedonia cannot be questioned, and is correctly condemned by the ECtHR, it seems clear that there is more to ensure accountability than what a decision against the Former Yuglosav Republic of Macedonia can accomplish.[131] In fact, as an international lawyer has argued, the ECtHR has even pushed to the limits ordinary principles of international responsibility to hold Macedonia not only liable for the rendition of Mr El-Masri to Afghanistan but also for his detention and ill-treatment there.[132] While this reasoning should be praised as the attempt to ensure full accountability under the ECHR for the extraordinary rendition of Mr El-Masri, it also reflects the difficulty of reviewing the human rights abuses committed by CIA agents under colour of US law. For this reason, in the aftermath of the ruling of the ECtHR a renewed call has been made for the US government to 'seize the opportunity [of this decision] to reinvigorate a national security policy longed plagued by the absence of legal accountability'.[133]

Since the Obama Administration took office on 22 January 2009, the US has abandoned the programme of extraordinary renditions to torture.[134] One of the first decisions adopted by the President was to order an evaluation of 'the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the [US] and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of

130 *El-Masri v Macedonia*, supra n 1 at para 212.

131 For a call for accountability of CIA agents involved in the policies of extraordinary renditions, see also the Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedom while Countering Terrorism, 4 February 2009, A/HRC/10/3, at para 60; and the Concluding Observations of the Human Rights Committee established under the ICCPR, Report on the USA, 18 December 2006, CCPR/C/USA/CO/3/Rev.1.

132 Nollkaemper, 'The ECtHR finds Macedonia Responsible in Connection with Torture by the CIA, But on What Basis?' *EJIL-Talk* (2012), available at: www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/#more-7292 [last accessed 23 September 2013].

133 Goldston, 'Rendition Condemned', Op-Ed, *New York Times*, 13 December 2012.

134 See generally Fisher, 'The American Constitution at the End of the Bush Presidency', in Peele, Bailey, Cain and Peters (eds), *Developments in American Politics* (New York: Palgrave Macmillan, 2010) 238.

undermining or circumventing the commitments or obligations of the [US] to ensure the humane treatment of individuals in its custody or control'.[135] At the same time, the Administration has adopted a new policy and refined procedures for the assertion of the State secrets privilege in court in order to reduce the cases that will be dismissed for reasons of national security and thus ensure greater accountability of government action.[136] Nevertheless, it is well known that on 30 August 2012 Attorney General Eric Holder announced that no one would be prosecuted for the deaths of prisoners in US custody in Iraq and Afghanistan, foreclosing the possibility that any criminal charge will be brought as a result of harsh interrogations carried out by the CIA.[137]

The decision to immunise US intelligence agents from criminal prosecutions—coupled with the unsuccessful exhaustion of the remedies available in civil action for damages—eliminates the prospects of judicial accountability for those human rights violations that the ECtHR acknowledged were committed in the extraordinary rendition of Mr El-Masri. In this context, some US scholars and activists have argued that a necessary step for the US government would be to establish an independent commission charged to investigate and report on the practice of renditions and on the use of torture and other forms of cruel and inhuman techniques against suspects in the 'war on terror'.[138] As Cole has urged, in particular:

> A commission could make findings that what was done was wrong, legally and morally, and counterproductive, without rewarding 'the enemy' in doing so. We now know much about the brutal mistreatment of prisoners in secret prisons, inflicted according to specific legal guidance from . . . the Justice Department . . . But what we still lack is any form of accountability. [US] courts have proved unwilling not only to impose such accountability, but even to let suits seeking accountability go forward at all. We have exhausted that avenue of redress. But we have not yet said we are sorry. A commission is more urgent than ever.[139]

135 Section 5 (e)(ii) Executive Order No 13,491, 74 Fed Reg 4893, 22 January 2009 ('Ensuring Lawful Interrogations').

136 See Department of Justice Press Release 23 September 2009, available at: www.justice.gov/opa/pr/2009/September/09-ag-1013.html [last accessed 23 September 2013]. These new policies however have been criticised for being insufficient: see Editorial, 'Shady Secrets', *International Herald Tribune*, 1 October 2010, at 6.

137 See Shane, 'No Charges Filed on Harsh Tactics Used by the CIA', *New York Times*, 30 August 2012.

138 See Cole, 'Getting Away With Torture', *New York Review of Books*, 14 January 2010 at 39; see also Miller (ed.), *US National Security, Intelligence and Democracy: From the Church Committee to the War on Terror* (London: Routledge, 2008); Langley, 'The Loss of American Values in the Case of Erroneous Irregular Renditions' (2010) 98 *Georgetown Law Journal* 1441; and Human Rights Watch, 'Getting through the Truth through a Nonpartisan Commission of Inquiry' Testimony Before the Senate Judiciary Committee, Hearing, 4 March 2009.

139 Cole, 'No Accountability for Torture', *New York Review of Books Blog* (2012), available at: www.nybooks.com/blogs/nyrblog/2012/may/07/john-yoo-jose-padilla-torture-lawsuit/ [last accessed 23 September 2013].

In this regard, a model that the US could follow is that of the Arar Commission, the independent Commission established by the Canadian government to inquire into the involvement of the Canadian security forces in the extraordinary rendition of Mr Maher Arar—a Canadian national born in Syria who was rendered by the US to Syria under suspicion of being a terrorist suspect and subjected to torture and other inhuman and degrading treatments.[140] The Commission investigated the facts of the case, conducted a number of public hearings, and, despite the refusal by the US government to participate in the inquiry, delivered a comprehensive report where it categorically exonerated Mr Arar from any involvement in terrorist activities, confirmed that he had been tortured after his extraordinary rendition to Syria and found the Canadian government liable for what had occurred.[141] On the basis of this report, Canadian Prime Minister Stephen Harper issued a formal apology to Mr Arar and awarded him $10,000 CAN in damages. As it has been explained, the Arar Commission is an example of action by the political branches that 'produced policy changes, acknowledgements of wrongdoing and compensation, [contrary to] the judicial process [which] admittedly, in the United States – yielded nothing'.[142]

A commission modelled on the Arar Commission could inquire into the role of US intelligence agents in the extraordinary renditions of suspected terrorists and provide adequate compensation to those individuals, like Mr El-Masri, who have been victims of such policies.[143] This commission could benefit from the work done, among others, by the ECtHR and complete the quest for the accountability of gross human rights violations committed in the fight against terrorism that the ECtHR has initiated.[144] In this regard, it could function as a sort of 'truth commission', offering to the victims and the public at large a comprehensive account of what had occurred and thus also contributing to the recognition, already under way in international human rights law,

140 For an account of the facts involving Mr Arar, see Craddock, 'Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" The Due Process Deficiencies in the US Removal Proceedings?' (2008) 93 *Cornell Law Review* 621.

141 Cf. Roach, 'Review and Oversight of National Security Activities and Some Reflection on Canada's Arar Inquiry' (2007) 29 *Cardozo Law Review* 53 at 82 (noting that 'the Canadian inquiry might have been even more effective had the US and Syrian governments not declined the inquiry's invitation to participate').

142 Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation' (2008) *International Journal of Law in Context* 275 at 285.

143 On the importance of accountability of intelligence agencies, see Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedom while Countering Terrorism, 5 May 2010, A/HRC/14/46; see also O'Connell, 'The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World' (2006) 94 *California Law Review* 1655.

144 On the importance that a similar undertaking would have to restore US human rights reputation, see Koh, 'Restoring America's Human Rights Reputation' (2007) 40 *Cornell International Law Journal* 635; and Garcia, 'Renditions: Constraints Imposed by the Laws on Torture' *Congressional Research Service*, RL32890, 8 September 2009.

of the right to the truth as a central antidote against grave governmental human rights violations. Needless to say, however, proposals for calling a commission meet with a number of difficulties. As the case of the 9/11 Commission indicates, Congressional legislation and Presidential signature would be needed to set up this body,[145] and neither the President nor Congress seem today eager to move in this direction,[146] especially after the recent tragic recurrence of terrorist attacks in the US. As the US legal debate suggests, therefore, the prospects of the establishment of a similar commission any time soon look dim.

7. Conclusion

On 13 December 2012, the ECtHR took a fundamental step in ensuring accountability for gross human rights violations committed in the fight against terrorism. The case, *El-Masri v Former Yugoslav Republic of Macedonia*, concerned the extraordinary rendition of an individual wrongly suspected of being a terrorist. The ECtHR found that the extraordinary rendition of Mr El-Masri amounted to torture and inhuman and degrading treatment, arbitrary detention and violation of the right to private and family life and the right of access to court and condemned Macedonia to award damages to the applicant. Whereas previous attempts by Mr El-Masri to seek redress in US and Macedonian courts had hit a wall of secrecy and impunity, the ECtHR fully exercised its duty to protect human rights, offering a forum in which Mr El-Masri's claim could be heard and vindicated. At the same time, the ECtHR, albeit cautiously, endorsed the recognition of a 'right to the truth'—that is a right for victims and the public at large to know about the gross human rights violations committed by governments in the field of national security—thus opening the way for greater accountability in future cases of abuses. Yet, despite these major accomplishments, the decision of the ECtHR also left some issues open, as it could not address the culpability of CIA agents who effectively tortured Mr El-Masri in Macedonia, secretly transferred him to Afghanistan and detained him there in inhuman conditions. For all the goodwill of the ECtHR, the ECHR stops at the waters' edge. On the other side of the Atlantic, however, another Great Charter of Rights is in force, and should be used to prevent anyone getting away with torture. Given the impossibility to

145 Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No 107-306, § 602, 116 Stat. 2383, 2408 (2002).

146 See Shane, 'U.S. Practiced Torture After 9/11, Nonpartisan Review Concludes', *New York Times*, 16 April 2013 (discussing political responses to an independent review report written by the Constitution Project, a legal research and advocacy group, on US interrogation and detention policies after 9/11); cf. also Setty, 'National Security Interest Convergence' (2012) 4 *Harvard National Security Journal* 185 (discussing legislators tendency to give primacy to national security concerns over civil liberties).

seek judicial accountability in the US, some scholars and activists have urged the establishment of an independent commission to inquire into the wrongs committed to Mr El-Masri (and others) and award compensation. Political considerations may make the prospect of establishing such a commission wishful thinking. Nevertheless, the decision of the ECtHR arguably offers an opportunity that should not be wasted.