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Outside the United States, Extraordinary Rendition on Trial

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Introduction

Three pending cases before the European Court of Human Rights (“ECtHR”) highlight allegedly illegal acts committed by European countries in connection with the U.S. extraordinary rendition program. The first, filed by Khalid El-Masri in September 2009, claims unlawful abduction and

mistreatment by the Macedonian Ministry of the Interior.[1] The second was filed by Abd Al-Rahim al Nashiri for alleged mistreatment during his detention at a secret prison (“black site”) in Poland.[2] While El-Masri was freed in Albania in 2004,[3] al Nashiri remains at the U.S. Naval Facility at Guantanamo Bay, Cuba, where U.S. military commissions prosecutors are preparing the first capital case against a Guantanamo detainee for his alleged role in the 2000 bombing of the *U.S.S. Cole*. The third, most recent case was filed against Lithuania by Zayn al-Abidin Muhammad Husayn (“Abu Zubaydah”) for alleged secret detention and torture by CIA agents committed at a Lithuanian black site.[4] Abu Zubaydah also remains imprisoned at Guantanamo Bay, although there has been no indication that he will face a trial by military commission, and the U.S. government has withdrawn all allegations that he was a member of Al Qaeda or affiliated with the September 11, 2001 terrorist attacks.[5]

This *Insight* provides an overview of the first two cases and assesses their potential to hold accountable the alleged perpetrators of the illegal rendition practices.

Background

The cases are compelling as much for their differences as their similarities. According to his application for relief before the ECtHR, El-Masri, a German citizen of Lebanese descent, was arrested in Macedonia in December 2003 and detained there *incommunicado* for twenty-three days.[6] During that time, he claims to have been continuously questioned about his background and religion.[7] On the last day of his imprisonment in Macedonia, El-Masri claims that he was beaten and sodomized by CIA agents while Macedonian agents

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stood by; he was then allegedly blindfolded and put in a diaper to board a waiting airplane.[8] Flight records show that on January 23, 2004, El-Masri was flown to Afghanistan on a CIA-chartered plane.[9] He was allegedly held there in U.S. custody for four months, without access to counsel or communication, before being flown to Albania and released without explanation in May 2004.[10] When he returned home to Germany, he found that his family had relocated after his disappearance.[11] Subsequent investigations have determined that the U.S. government learned that El-Masri, who had the same name as an Al Qaeda operative, was not the individual wanted in March 2004.[12]

By contrast, al Nashiri, a Saudi national and senior Al Qaeda operative, allegedly organized the bombing of the *U.S.S. Cole* in Yemen in 2000.[13] Al Nashiri was captured in Dubai in October 2002 and almost immediately rendered, in U.S. custody, to CIA-run prisons in Afghanistan and Thailand, where he was waterboarded.[14] In early December 2002, al Nashiri was transferred to the CIA's secret prison in Poland.[15] While in Poland, al Nashiri was allegedly subjected to several abusive interrogation methods, including stress positions, mock executions, and threats of harm to his mother.[16] Then-president George W. Bush also indirectly acknowledged al Nashiri's detention in a 2006 speech.[17] In 2008, after being detained in several other sites, al Nashiri was transferred to Guantanamo Bay, and, in April 2011, military commission prosecutors filed capital charges against him for his involvement in the *U.S.S. Cole* bombing and the 2002 attack on a French oil tanker in the Gulf of Aden.[18]

Charges Under the European Convention on Human Rights

El-Masri's Convention Claims

El-Masri's petition alleges that Macedonia violated Articles 3, 5, and 13 of the European Convention on Human Rights ("Convention"). He alleges that Macedonia violated his Article 3 rights (prohibition of torture or inhuman or degrading treatment or punishment) by failing to intervene during his torture and inhuman treatment by CIA agents in Macedonia; by allowing him to be transported to Afghanistan with the knowledge that he would be tortured and inhumanly treated at the destination; and by failing to investigate his arrest, detention, and transfer to the CIA by Macedonian authorities.[19] Additionally, El-Masri claims that his detention by Macedonian authorities for twenty-three days, along with his transfer to CIA agents, violated his right to liberty and security of person (Article 5), and that the failure by the Macedonian criminal courts to hear his case violated his right to remedy guaranteed by Article 13 of the Convention.

Al Nashiri's Convention Claims

Al Nashiri's petition alleges violations of Articles 2 (right to life), 3 (prohibition of torture or inhuman or degrading treatment or punishment), 5 (liberty and security of person), 8 (right to private and family life), 10 (freedom of expression), and 13 (right to remedy) of the Convention, and Protocol 6 to the Convention (abolition of the death penalty).[20] The Polish government's alleged illegal acts include permitting al Nashiri's *incommunicado* detention, cooperating with CIA agents in his transfer from Poland despite the risks of further ill-treatment and/or the death penalty, and failing to conduct an effective investigation.[21]

The Court

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DOCUMENTS OF NOTE

[El-Masri Application](#)

[al Nashiri Application](#)

[Abu Zubaydah v. Lithuania](#)

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The ECtHR was established by the Convention as a means of enforcing member states' obligations.[22] Forty-seven European states currently submit to the jurisdiction of the ECtHR, which has jurisdiction to adjudicate inter-state applications and applications from individuals against member states; the Court can also issue advisory opinions.[23] Both Poland and Macedonia are member states. For each case, the ECtHR may undertake its own investigations, and member states are expected to fully comply with the Court's requests for evidence.[24]

If the ECtHR accepts El-Masri's and/or al Nashiri's applications, both the applicants and the member states will be invited to present their claims before the ECtHR. Should the Court find that a member state has violated the Convention, the ECtHR may issue a declaratory judgment, order payment of damages and legal costs, or implement other measures of reparation.[25] Chamber judgments may be appealed to the "Grand Chamber," whose judgments are final.[26] Because the United States is not a party to the ECtHR, it is not named in the applications. However, if the United States decides to participate in the proceedings, the Court has the discretion to allow a third party to intervene in the form of written comments.[27]

Distinctions Between the Cases

El-Masri's case is perhaps the most well-known of all former U.S. detainees, in particular because it involved a man who turned out to be "innocent." [28] Subsequent to his detention, El-Masri filed lawsuits in U.S. federal courts, a petition before the Inter-American Commission of Human Rights ("IACHR"), and issued a testimonial before the United Nations Human Rights Committee in an effort to compel accountability.

The U.S. lawsuit,[29] brought against former CIA director George Tenet and the owners of the CIA rendition planes, was dismissed at the district and appellate levels under the legal doctrine of "state secrets privilege." [30] The U.S. Supreme Court also rejected his petition for *writ of certiorari* [31] without comment.[32]

El-Masri's 2008 petition before the IACHR asks for a finding that the U.S. rendition program violates the American Declaration of the Rights and Duties of Man and that El-Masri's rights were violated under the Declaration.[33] However, the United States has not yet responded to this petition.

While El-Masri's 2006 testimonial before members of the UN Human Rights Committee highlighted the rendition program and resulted in the questioning of the U.S. delegation about his then-widely-reported case, the United States refused to comment.[34] Investigations and inquiries continue in Germany and Spain, where prosecutors invoking universal jurisdiction have asked for arrest warrants to be issued for the CIA agents involved in El-Masri's rendition.[35]

El-Masri's case before the ECtHR may be strengthened by the allegation that Macedonian authorities detained him *incommunicado* for twenty-three days before turning him over to the CIA. Arguably, this implies direct mistreatment by Macedonia. In contrast, while Poland allegedly enabled the U.S. agents in al Nashiri's rendition and detention, Polish authorities do not appear to have been directly in contact with al Nashiri.

Al Nashiri's case also differs from El-Masri's in that his petition urgently requests that Poland intervene to prevent the possible imposition of the death penalty.[36] Poland has signed and ratified Protocol 6 to the European Convention, which abolishes the death

penalty.[37] and the ECtHR has previously ordered a member state to “use diplomatic channels” to protect applicants from the death penalty.[38] Thus far, there has been no response from the Polish government to al Nashiri’s request.

It should also be noted that both men have initiated domestic proceedings in Poland and Macedonia respectively, seeking remedy for their renditions; but their petitions have either been dismissed[39] or ignored.[40] Following the dismissal of El-Masri’s claims in the United States, along with numerous other rendition-related cases, on the basis of state secrets, al Nashiri will unlikely obtain a remedy in U.S. courts for any alleged mistreatment.[41] Both El-Masri and al Nashiri’s last opportunity for recourse from national governments for their treatment thus lies with the ECtHR.

Conclusion

Much is made of the fact that al Nashiri is a known Al-Qaeda operative whose interrogation was important for intelligence gathering, and El-Masri is apparently an “innocent” man. However, the importance of the present litigation before the European Court of Human Rights is that it seeks to maintain the legal distinction between crimes committed by al Nashiri (and previously suspected of El-Masri) and the alleged crimes committed against them. In other words, if these cases progress, and if the ECtHR finds Poland and Macedonia in violation of the Convention, both men will share their status as victims of the extraordinary rendition program.

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The views expressed in this ASIL Insight are those of the author and do not necessarily reflect those of the Task Force on Detainee Treatment

Endnotes:

[1] El-Masri v. Macedonia, App. No. 39630/09 (Eur. Ct. H.R. Sept. 18, 2009), *available at* <http://www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf> [hereinafter El-Masri Application].

[2] Al Nashiri v. Poland, App. No. _____ (Eur. Ct. H.R. May 6, 2011), *available at* <http://www.soros.org/initiatives/justice/litigation/nashiri/echr-al-application-20110506.pdf> [hereinafter al Nashiri Application].

[3] American Civil Liberties Union [ACLU], Statement: Khaled El-Masri (Dec. 6, 2005), *available at* http://www.aclu.org/human-rights_national-security/statement-kaled-el-masri.

[4] Abu Zubaydah v. Lithuania, App. No. _____ (Eur. Ct. H.R. Oct 27., 2011), *available at* <http://www.interights.org/document/181/index.html>.

[5] Larry Siems, *Old Claims, New “Understandings,”* in The Torture Report (Apr. 21, 2010), *available at* <http://www.thetorturereport.org/diary/old-claims-new-%E2%80%9Cunderstandings%E2%80%9D>.

[6] El-Masri Application, *supra* note 1, at 5.

[7] *Id.*

[8] Scott Horton, *The El-Masri Cable*, Harper’s Mag., Nov. 29, 2010, *available at* <http://harpers.org/archive/2010/11/hbc-90007831>.

[9] El-Masri Application, *supra* note 1, at 16.

[10] *Id.* at 22-31.

[11] *Id.* at 32.

[12] See 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, Apr. 21, 2005, available at <http://www.msnbc.msn.com/id/7591918/>; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/12/03/AR2005120301476.html>.

[13] Al Nashiri Application, *supra* note 2, at 5.

[14] *Id.* at 9. See also Caitlin Price, *CIA Chief Confirms Use of Waterboarding on Three Terror Detainees*, Jurist, Feb. 5, 2008, available at <http://jurist.law.pitt.edu/paperchase/2008/02/cia-chief-confirms-use-of-waterboarding.php>.

[15] *Id.* at 10.

[16] Such tactics have been confirmed. See, e.g., Central Intelligence Agency [CIA], Special Report on Counterterrorism, Detention, and Interrogation Activities 35-43 (May 7, 2004), available at http://media.luxmedia.com/aclu/IG_Report.pdf.

[17] Off. Press Sec'y, President George W. Bush, Transcript: Speech from the East Room of the White House (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (“[A] small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence Agency This group includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole.”). The U.S. government subsequently claimed that al Nashiri was the U.S.S. *Cole* bombing suspect.

[18] U.S. Dept. Def. [DOD], *DOD Announces Charges Sworn Against Detainee Nashiri* (Apr. 20, 2011), available at <http://www.defense.gov/releases/release.aspx?releaseid=14424>.

[19] El-Masri Application, *supra* note 1, at 6-7.

[20] Al Nashiri Application, *supra* note 2, at 6-7.

[21] *Id.*

[22] European Convention on Human Rights art. 19, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), available at <http://www.hri.org/docs/ECHR50.html>.

[23] *Id.* arts. 33, 34.

[24] European Court of Human Rights, Rules of Procedure arts. A1-A2 (July 2009), available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

[25] European Convention on Human Rights, *supra* note 22, art. 41. See also Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief*, 23 Harvard Hum. Rts. J. 51 (2010), available at <http://harvardhrj.com/wp-content/uploads/2010/10/51-74.pdf>.

[26] *Id.* arts. 35- 36, 73.

[27] European Court of Human Rights, Rules of Procedure, *supra* note 24, art. 44(3)(a).

[28] See Priest, *supra* note 12. See also Marcus Brandt, *Merkel Says that U.S. Admits Error in Detaining German National*, USA Today, Dec. 6, 2005, available at http://www.usatoday.com/news/world/2005-12-06-ricemerkel_x.htm.

[29] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (2006).

[30] Modern use derived from *United States v. Reynolds*, 345 U.S. 1 (1953) (compelling exclusion of evidence that may disclose information endangering national security).

[31] *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007), http://www.aclu.org/pdfs/safefree/elmasri_cert20070530.pdf.

[32] Linda Greenhouse, *Supreme Court Refuses to Hear Torture Appeal*, N.Y. Times, Oct. 10, 2007, available at <http://www.nytimes.com/2007/10/10/washington/10scotus.html>.

[33] Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits (Inter-Am. Comm'n H.R. Apr. 9, 2008), available at http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf. See also ACLU, *El-Masri v. Tenet* (June 1, 2011), available at <http://www.aclu.org/national-security/el-masri-v-tenet>.

[34] Office of the High Commissioner of Human Rights, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), available at <http://www.universalhumanrightsindex.org/hrsearch/displayDocumentVersions.do?lang=en&docId=1095>.

[35] Scott Horton, *Arrest of 13 CIA Agents Sought in Spain*, Harper's Mag., May 12, 2010, available at <http://harpers.org/archive/2010/05/hbc-90007028>.

[36] *Al Nashiri v. Poland*, Request Under Rule 39 (May 6, 2011), available at <http://www.soros.org/initiatives/justice/litigation/nashiri/echr-al-nashiri-rule-39-request-20110506.pdf>.

[37] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=&CL=ENG> (Status of Ratifications).

[38] *Boudellaa et al. v. Bosnia & Herzegovina*, Judgment, ¶ 300 (H.R. Chamber for Bosn. & Herz. Oct. 11, 2002).

[39] *Al Nashiri Application*, *supra* note 2, at 76.

[40] *El-Masri Application*, *supra* note 1, at 35.

[41] See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); Carol Williams, *Five Foreign Men Lose "Extraordinary Rendition" Case*, L.A. Times, May 17, 2011, available at <http://articles.latimes.com/2011/may/17/local/la-me-rendition-20110517>.