El Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program

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El Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program

MARTA A. ORPISZEWSKA†

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I. Introduction

In December 2003, Khaled El Masri, a German citizen of Lebanese descent, was vacationing in Europe. On December 31, Macedonian officials detained him as he was crossing the

† J.D., University of North Carolina School of Law 2014. I would like to thank Anna Rolewicz for her suggestion of this note topic.

Macedonian border.\textsuperscript{2} His only crime was having the same name as a wanted al-Qaida operative.\textsuperscript{3} For twenty-three days, he was held in a Macedonian hotel room, without access to the German embassy or the ability to contact his family.\textsuperscript{4} He was then transferred into CIA custody and flown to Afghanistan, where he was held for nearly five months without access to any sort of legal process.\textsuperscript{5} He was held in a small, dirty cell where he was beaten and otherwise mistreated.\textsuperscript{6} He began a hunger strike after his repeated requests to contact German authorities were ignored.\textsuperscript{7} When the CIA finally realized its mistake in holding El Masri, he was left blindfolded on a road in Albania, many pounds lighter.\textsuperscript{8} El Masri’s detention was part of the U.S. government’s extraordinary rendition program,\textsuperscript{9} whereby individuals suspected of terrorist activities are seized, taken to third-party countries to be interrogated without access to any legal regime, and often tortured.\textsuperscript{10}

On December 13, 2012, the European Court of Human Rights ("European Court") handed down its decision in the case of \textit{El Masri v. Former Yugoslav Republic of Macedonia}.\textsuperscript{11} El Masri accused the Macedonian government of violations of the European Convention on Human Rights\textsuperscript{12} ("ECHR" or "European

\textsuperscript{2} Id.
\textsuperscript{3} Id.
\textsuperscript{7} See Van Natta, Jr. & Mekhennet, \textit{supra} note 1.
\textsuperscript{8} Id.
\textsuperscript{9} Hulish, \textit{supra} note 4.
\textsuperscript{10} \textit{See id.}
\textsuperscript{12} European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 \textit{[hereinafter European Convention].}
Convention") in handing El Masri over to the CIA in the course of an extraordinary rendition. The European Court found that El Masri had established his version of the events "beyond a reasonable doubt," and found the government of Macedonia responsible for several violations of the European Convention. Specifically, the European Court found that the Macedonian government was responsible for abducting El Masri and transferring him to CIA authorities with the knowledge that there was a substantial risk that he would be tortured after his transfer. The Macedonian government was held liable for failing to prevent El Masri's torture at the hands of the CIA. The ruling is significant because it is the first time an international tribunal has held that the CIA's extraordinary rendition program amounts to torture. The European Court's finding that Macedonia was responsible for its participation in the extraordinary rendition and for its failure to prevent El Masri's ill treatment at the hands of the CIA has implications for other countries that assist or have assisted the CIA in such renditions.

This Note will explore the legal and practical implications of the decision by the European Court in the case of El Masri v. Former Yugoslav Republic of Macedonia. The United States has consistently held that international human rights obligations do not apply to the detention of suspected terrorists with ties to al-Qaida because such individuals are not part of a recognized national military and are therefore not protected by international human rights agreements. It has claimed that providing legal counsel to detainees would obstruct interrogations. In recent years, the

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13 Id.
14 See id. at 47.
16 See id.
17 See id.
18 See id.
policies of the Bush and Obama Administrations have changed substantially following the Supreme Court’s decisions in *Hamdi v. Rumsfeld* and *Boumediene v. Bush*. Guantanamo detainees have been granted access to the courts, and even detainees held elsewhere have been afforded some protections.21 Such protections have not, however, been extended to *all* detainees.22 The Obama Administration has stated that it will continue to use extraordinary renditions, albeit with the qualification that the detainees will be treated humanely.23 As controversial as extraordinary renditions may be, they are nevertheless an important tool for the Administration to gather intelligence and prevent terrorist attacks. Two issues are especially significant when the United States resorts to the use of extraordinary rendition. First, the United States has been accused of torture and inhumane treatment of detainees by its own CIA operatives, as well as by the foreign governments to whom detainees are transferred.24 Second, individuals that have been wrongly detained have, until now, had no ability to challenge the actions of the U.S. government.25 This Note will explore these issues in light of the European Court’s decision in *El Masri*. Part II will provide a brief history of extraordinary renditions. Part III will explore the facts of the case and the European Court’s holding. Part IV will examine the international legal regime governing human rights and its relation to the European Court’s decision, as well as the U.S. human rights policy in its fight against terrorism. Finally, Part V will analyze how the European Court’s opinion may affect the future legal status of such detentions, as well as international opinion surrounding the programs.

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22 See Robert Bejesky, *Losing Gitmo Due to the Epiphany Approach to Habeas Corpus During the Military Commission Circus*, 50 WILLAMETTE L. REV. 43, 81-83 (2013) (arguing, among other things, that the “non-U.S. citizens held at Guantanamo Bay were afforded only nominal due process protections”).

23 Mayer, *supra* note 19.


II. A History of U.S. Extraordinary Renditions

The U.S. government has been criticized for some of the methods it has employed in its war against al-Qaida. The CIA’s extraordinary rendition program has been especially controversial and has stirred much debate and investigation by the international community. Extraordinary rendition is the process by which individuals suspected of terrorist activities or affiliation with terrorist organizations are “transfer[ed]—without legal process—... to the custody of a foreign government for purposes of detention and interrogation.” The term has come to include the practice of interrogation of suspects by the United States on foreign soil. The U.S. government has defended the program as integral to its counter-terrorism policy. Opponents of the program object to the indefinite detention of suspects without charge or trial and the treatment of detainees at the hands of the CIA or foreign governments. Especially controversial are the cases of El Masri and Maher Arar, both of whom were mistakenly detained and eventually cleared of any ties to terrorism. El Masri’s detention caused particular worldwide media attention due to the fact that he was mistakenly detained because he shared a name with a suspected al-Qaida terrorist. Despite this mistake, he was denied legal recourse for his detention in the United States and other countries.

26 See, e.g., Anup Shah, War on Terror, GLOBAL ISSUES, http://www.globalissues.org/issue/245/war-on-terror (last updated Oct. 7, 2013) (“In May 2003, Amnesty International charged, “The ‘war on terror,’ far from making the world a safer place, has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny.”).

27 See Mayer, supra note 19.


29 Id.


31 See id. at 17.

32 See GLOBALIZING TORTURE, supra note 28, at 47-48.

33 See id.

34 See id.
The U.S. government engaged in extraordinary renditions long before September 11.35 However, it was not until the War on Terror that this program transformed into what we know today.36 The Reagan Administration upheld these renditions for the purpose of bringing to justice suspects located in jurisdictions that did not have an extradition agreement with the United States.37 The Clinton Administration was the first to begin transferring suspects to third-party countries for detention and trial.38 However, only a small number of these renditions occurred: the suspects were convicted in absentia, and the CIA general counsel approved each operation.39 After September 11, the secret rendition program was expanded and suspects were no longer detained for the purpose of criminal prosecution, but rather were interrogated and increasingly transferred to third countries where the risk of torture was great.40 Detainees were sometimes transferred into the custody of other governments that were known for more severe interrogation techniques.41 Increasingly, the United States began to hold detainees in its own secret prisons in foreign countries, where the protections of the U.S. Constitution do not reach.42 Prior to September 11, it is estimated that the CIA took part in over eighty secret renditions.43 By 2005, 100-150 detainees had been transferred to third-party countries for interrogation.44 Currently fifty-four countries are thought to have assisted the United States in various ways in the extraordinary rendition program.45

One aspect of the extraordinary rendition program that is especially controversial is the subjection of detainees to "enhanced interrogation techniques" at the hands of the CIA. These

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35 See id. at 13.
36 See id.
37 See id. at 14.
38 See GLOBALIZING TORTURE, supra note 28, at 14.
39 See id.
40 See id.
41 See id. at 7.
42 See id. at 6.
43 See id. at 14
44 See GLOBALIZING TORTURE, supra note 28, at 14.
45 See id.
techniques include waterboarding, which has been described by the United States as requiring the following:

"[B]inding the detainee to a bench with his feet elevated above his head,' ‘immobilizing his head,’ and ‘place[ing] a cloth over his mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for twenty to forty seconds and the technique produces the sensation of drowning and suffocation."46

Additional techniques include "forced nudity, sleep deprivation while being vertically shackled, and dietary manipulation."47 Although these "enhanced interrogation techniques" had been specifically authorized by the U.S. Department of Justice, their use to interrogate detainees has sparked substantial criticism.48 Recently, President Obama has explicitly prohibited the use of torture and other degrading treatment of individuals.49 Additionally, international bodies have questioned the legality of such techniques under international norms.50 The legality of enhanced interrogation methods, while beyond the scope of this paper, continues to be litigated and debated.

III. Facts of the Case

Khaled El Masri, a German citizen of Lebanese descent, alleged before the European Court that on December 31, 2003, he boarded a bus from Germany to Skopje, Macedonia, to take a vacation.51 He was stopped at the Serbian/Macedonian border by officials who questioned the validity of his passport.52 At the border crossing, his luggage was searched and Macedonian authorities interrogated him about possible ties to Islamist organizations.53 He was then transported to a hotel where he was

46 See id.
47 See id. at 16.
48 See id. at 14-18.
49 See id. at 7.
50 See GLOBALIZING TORTURE, supra note 28, at 22.
52 Id.
53 Id.
held incommunicado in a hotel room with guards watching him.\textsuperscript{54} He was continuously interrogated and was not permitted to contact the German embassy.\textsuperscript{55} He began a hunger strike on the thirteenth day of his imprisonment and did not eat until his transfer into CIA custody ten days later.\textsuperscript{56} He was held for a total of twenty-three days.\textsuperscript{57} Upon leaving the hotel, he was told that he would be flown back to Germany.\textsuperscript{58} However, on January 23, 2004, instead of being released to Germany, El Masri was transferred from the hotel to the Skopje airport where he was handed over to the CIA.\textsuperscript{59} He was subjected to further mistreatment, including being sodomized with an object during the handover.\textsuperscript{60}

He was then flown to a facility in Afghanistan, later identified as the "Salt Pit," where he was held in a dirty cell and allegedly beaten and mistreated.\textsuperscript{61} He was interrogated three or four times during his confinement.\textsuperscript{62} His requests to contact the German government were denied.\textsuperscript{63} On May 28, 2004, after U.S. officials realized they had mistakenly detained the wrong man, he was transported from Afghanistan to Albania and left blindfolded on a road near the Macedonian and Serbian border.\textsuperscript{64} Albanian officials then transported him back to Germany.\textsuperscript{65} Upon arrival in Germany, El Masri was about eighteen kilograms lighter than when he left for Macedonia.\textsuperscript{66}

The European Court found that El Masri had established his
version of the facts "beyond a reasonable doubt,"\textsuperscript{67} and that the Macedonian government failed to provide evidence to refute those facts.\textsuperscript{68} The European Court relied on news reports, accounts from other detainees describing the extraordinary rendition program, and other evidence to confirm El Masri's account of the events.\textsuperscript{69} Specifically, aviation logs confirmed that a jet registered to the United States had left Skopje airport and flown to Afghanistan on January 23 and from Afghanistan to Albania on May 28.\textsuperscript{70} Hair follicle samples taken from El Masri confirmed that he had been in a South Asian country and had been deprived of food for an extended period of time.\textsuperscript{71} Geological records of earthquakes were consistent with El Masri's account of his experience, and his sketches of the Afghanistan compound were confirmed by other prisoners held at the Salt Pit.\textsuperscript{72} Additionally, the European Court relied on public records that had described the CIA rendition procedures and the treatment conferred on prisoners.\textsuperscript{73}

\textit{A. Article 3 (Prohibition Against Torture)}

The European Court found Macedonia had violated several Articles of the ECHR in its detention and transfer of El Masri into CIA custody.\textsuperscript{74} Article 3 of the ECHR states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."\textsuperscript{75} The European Court found that El Masri's treatment at the Skopje hotel amounted to a violation of Article 3 of the ECHR.\textsuperscript{76} El Masri was denied access to the German embassy and did not know what would happen to him.\textsuperscript{77} His detention caused him to begin a hunger strike.\textsuperscript{78} This mental

\begin{itemize}
\item \textsuperscript{67} See id at 47, 51.
\item \textsuperscript{68} Id. at 51.
\item \textsuperscript{69} See id at 39-40, 49-50.
\item \textsuperscript{70} See id at 49.
\item \textsuperscript{71} See El Masri, App. No. 39630/09, at 49.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} See id. at 50.
\item \textsuperscript{74} See generally El Masri, App. No. 39630/09, at 81 (setting forth Macedonia's violations of the ECHR).
\item \textsuperscript{75} European Convention, supra note 12, art. 3.
\item \textsuperscript{76} See El Masri, App. No. 39630/09, at 61-62.
\item \textsuperscript{77} See id. at 4, 6.
\item \textsuperscript{78} See id. at 61.
\end{itemize}
anguish amounted to inhumane treatment as defined by Article 3 of the ECHR.\textsuperscript{79}

The European Court also found that the treatment El Masri suffered at the Skopje airport when he was handed over to CIA authorities amounted to a violation of Article 3.\textsuperscript{80} El Masri was beaten, sodomized, and forcibly tranquilized when he was handed over to the CIA, while Macedonian officials stood guard.\textsuperscript{81} The European Court found that "[t]he same pattern of conduct applied in similar circumstances has already found to be in breach of Article 7 of [the International Covenant on Civil and Political Rights]."\textsuperscript{82} This treatment, while performed at the hands of the CIA, was imputable to Macedonia, as it was carried out in the presence of Macedonian officials and within Macedonia's jurisdiction.\textsuperscript{83} Significantly, the treatment itself was found to be a violation of Article 3 of the ECHR.\textsuperscript{84} The European Court held that "any recourse to physical force which has not been made strictly necessary by the applicant's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3."\textsuperscript{85} The European Court found that Macedonia must be held responsible because it actively facilitated this treatment and failed to take any measures to prevent its occurrence.\textsuperscript{86}

\textsuperscript{79} See id. at 62.
\textsuperscript{80} See id. at 62-64.
\textsuperscript{81} See id.
\textsuperscript{83} See El Masri, App. No. 39630/09, at 63.
\textsuperscript{84} See id.
\textsuperscript{85} See id.
\textsuperscript{86} See id. at 64.
Finally, the transfer of El Masri from Macedonian custody into the hands of the CIA exposed El Masri to a real and known risk of treatment akin to torture, in contravention of the ECHR. The European Court based this conclusion on four findings. First, there was no evidence that El Masri was handed over to the CIA upon a legitimate request for extradition or pursuant to an arrest warrant. Second, the European Court found that there was evidence that Macedonian authorities knew El Masri would be taken to a secret detention camp in Afghanistan. Third, the European Court found especially significant that reliable sources, public records, and media reports had made well known the ill treatment such prisoners received when transferred to CIA custody. Finally, Macedonia did not seek any reassurances from CIA authorities that El Masri would endure no ill-treatment. By transferring him into CIA hands, Macedonia exposed El Masri to treatment and conditions that were contrary to those espoused by Article 3 of the ECHR.

B. Article 5 (Right to Liberty and Security)

Article 5 of the ECHR requires that one who is detained be promptly informed of the reason for his detention and the charges brought against him, and be brought before a judge. It secures "the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities." The European Court held that even extraordinary threats, such as those posed by terrorism, do not warrant treatment in contravention of Article 5. El Masri’s detention at the Skopje hotel, without access to the judicial system or any proceeding whatsoever, was found to be an infringement of the ECHR’s guarantee of a right to judicial

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87 See id. at 63.
88 See id.
89 El Masri, App. No. 39630/09, at 63.
90 See id.
91 See id. at 66.
92 See id.
93 European Convention, supra note 12, art. 5.
95 See id. at 69-70.
process. Furthermore, the European Court found Macedonia’s failure to provide documentation of El Masri’s arrest and detention to be incompatible with the purpose of Article 5. The European Court noted that El Masri’s detention in the Skopje airport constituted a “particularly grave violation of his right to liberty and security as secured by Article 5.” El Masri was not able to question the lawfulness of his detention, and was “left completely at the mercy of those holding him.” Because Macedonian authorities knew or should have known that the CIA’s extraordinary rendition program had already been found “arbitrary” in similar cases, the authorities should have known that El Masri’s transfer to CIA authorities would be in direct contravention of Article 5. The European Court found that El Masri’s abduction amounted to an “enforced disappearance as defined in international law,” and that Macedonia should be held responsible for “violating [El Masri’s] rights under Article 5 of the Convention during the entire period of his captivity.”

C. Article 8 (Right to Respect for Private and Family Life)

Article 8 of the ECHR recognizes a right to privacy and a right to a family life and prohibits interference therewith by the authorities except as “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” The European Court, having found that Macedonian authorities violated Articles 3 and 5 of the Convention, likewise found that Macedonia acted in contravention of Article 8. This interference with El Masri’s rights under

96 See id. at 70.
97 See id.
98 See id. at 71.
99 Id.
100 El Masri, App. No. 39630/09, at 72.
101 Id.
102 Id.
103 European Convention, supra note 12, art. 8.
Article 8 "was not in accordance with the law."\(^{105}\)

**D. Article 13 (Right to an Effective Remedy)**

Article 13 of the ECHR guarantees a remedy for the breach of the rights set forth in the ECHR by a national authority.\(^{106}\) The European Court found that no effective investigation had been carried out by the Macedonian government.\(^{107}\) Instead, the violations alleged by El Masri were "discounted in favour of a hastily reached explanation that he had never been subjected to any of the actions complained of."\(^{108}\) This failure to carry out a proper investigation, in conjunction with the violations of Articles 3, 5, and 8, led to a violation of Article 13.\(^{109}\)

**E. Remedy**

The European Court found the Macedonian government liable for €60,000 for the above-mentioned violations.\(^{110}\)

**IV. International Human Rights Law**

There are several international agreements governing human rights norms in the international community. Courts have been established to oversee many of these agreements and to prosecute violations.\(^{111}\) The United States is a party to several agreements that explicitly prohibit the torture of detainees.\(^{112}\) In addition to these international obligations, the United States has specific domestic laws dealing with the treatment of prisoners.\(^{113}\) It has

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\(^{105}\) Id.

\(^{106}\) European Convention, *supra* note 12, art. 13.

\(^{107}\) *El Masri*, App. No. 39630/09, at 76.

\(^{108}\) Id.

\(^{109}\) Id. at 77.

\(^{110}\) Id. at 80.


\(^{112}\) See *The Legal Prohibitions Against Torture*, HUMAN RIGHTS WATCH, http://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#laws (last updated June 1, 2004) (stating that the United States has signed the International Covenant on Civil and Political Rights as well as the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, both of which prohibit the use of torture by signatory nations).

\(^{113}\) MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION
been far from clear how far these agreements go in protecting the rights of detainees of the CIA; furthermore, the Obama Administration’s policy on such treatment has evolved over the years.\footnote{114} Recently, the Administration has stated that while extraordinary rendition will continue, detainees are to be treated humanely, and that the interrogation methods of the Bush era are not to be used.\footnote{115} However, no remedy is available for the victims who suffer breaches of these violations.\footnote{116} Despite the international criticism of the treatment of detainees,\footnote{117} there is little recourse for violations of the law, especially because the law does not clearly define these violations.\footnote{118}

\textbf{A. European Convention on Human Rights (ECHR)}

The ECHR is an international treaty that protects human rights in the Council of Europe member states.\footnote{119} The ECHR was signed on November 4, 1950, and entered into force in 1953.\footnote{120} All states are required to ratify the ECHR upon joining the Council of Europe.\footnote{121} The European Court was established in 1959 to rule on violations of the ECHR.\footnote{122} Decisions of The European Court are binding on member states and have led to changes in the laws and


\footnote{117} \textit{Id}.

\footnote{118} \textit{Id}.

\footnote{119} \textit{The European Court of Human Rights, The Court In Brief}, \textit{available at} http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (hereinafter \textit{Court In Brief})

\footnote{120} \textit{Id}.

\footnote{121} \textit{Id}.

\footnote{122} \textit{Id}.
policies of those states. As with many international human rights agreements, the ECHR was based on the Universal Declaration of Human Rights and specifically mentions the Declaration in its preamble. El Masri filed his suit before this court. The ECHR protects the right to life and the right to a fair trial, and specifically prohibits arbitrary detention and torture and inhumane treatment of individuals. The European Court found that Macedonia had violated Articles 3, 5, 8, and 13 of the ECHR in its detention and subsequent handover of El Masri to the CIA. The European Court is one of the most influential courts on human rights and has served as a model for other regional courts such as the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights.

The European Court is a closed court and not open to membership outside the Council of Europe. The judgments of the European Court are therefore not binding on the United States. Nevertheless, the judgment does have the potential to affect the many European countries that are believed to have aided the United States in some way in the detention and removal of detainees as part of the extraordinary rendition program. Cases against Romania and Poland for their participation in the secret detention of detainees on their territory are currently pending before the European Court.

123 Id.
126 El Masri, App. No. 39630/09, at 76.
127 COURT IN BRIEF, supra note 119.
130 Id.
131 See GLOBALIZING TORTURE, supra note 28 at 6. These European countries include Denmark, Germany, Italy, Poland, the United Kingdom, and others. Id.
B. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The CAT was adopted by the General Assembly on December 10, 1984. The United States ratified the agreement on October 21, 1994, but with several reservations. Most importantly, the United States ratified with the stipulation that the agreement’s provisions were not self-executing. That is, ratification was subject to the United States implementing the provisions of the agreement in its domestic laws. Therefore, ratification alone was not enough to make the agreement enforceable against the United States.

Under CAT, torture is defined as:

severe pain or suffering, whether physical or mental, intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person.

States are required to take any “legislative, administrative, judicial or other measures” required to prevent torture. No exceptional circumstances, including war or the threat of war, can justify the use of torture by a state. States are prohibited from extraditing an individual to third countries where “there are substantial grounds for believing that he would be in danger of being subjected to torture.” States are additionally required to enact


133 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].
134 GARCIA, supra note 113, at 5.
135 Id. at 6.
136 Id.
137 Id.
138 Id. art. 2 § 1.
139 Id. art. 2 § 2.
140 Id. art. 3 § 1.
national legislation to criminalize all acts of torture. The United States did not enact additional legislation that would prohibit torture within the United States, as it believed current domestic laws such as those dealing with murder and assault were sufficient to guarantee the rights conferred on individuals by the agreement. The United States did enact legislation that criminalized torture outside of the United States. Title 18 of the U.S. Code, §§ 2340 and 2340A specify that anyone who commits an act of torture outside the United States is subject to a fine or imprisonment of up to twenty years. Where “death results, an individual may be subject to life imprisonment or the death penalty.” Conspiracies to commit torture abroad are subject to similar penalties. According to a Congressional Research Service Report, while these statutes grant broad authority to prosecute acts of torture, no one has been prosecuted for their violation.

Article 16 of CAT provides that nations must prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I.” The United States did not enact any legislation implementing this provision of the agreement. Two interpretations have been offered for the application of this provision without domestic legislation to implement it. The first interpretation holds that because the United States ratified the agreement with the stipulation that its provisions were not self-executing, thereby necessitating the enactment of domestic laws to implement it, the United States is prohibited from taking actions in contravention of Article 16 only to the extent that the U.S. Constitution and other

141 Id. art. 4 § 1.
142 GARCIA, supra note 113, at 7.
143 Id.
144 Id. at 8.
145 Id.
146 Id.
147 Id. at 11.
148 Convention Against Torture, supra note 133, art. 16 § 1.
149 See GARCIA, supra note 113, at 13-14.
150 See id.
laws prohibit it.  Because the U.S. Constitution does not protect non-U.S. citizens outside the territory of the United States, non-citizen detainees taken to third-party countries would therefore not be protected by this provision. The second interpretation holds that Article 16 prohibits the acts outlined therein in any territory under its jurisdiction if such treatment is prohibited within the United States. This view holds that American "reservation to CAT Article 16 was to more clearly define types of treatment that were 'cruel, inhuman, and degrading,' rather than to limit the geographic scope of U.S. obligations under CAT Article 16." In 2006, in part because of this controversy, Congress passed the McCain Amendment to the Detainee Treatment Act, prohibiting such cruel and inhuman treatment of detainees of the U.S. government.

CAT also specifically prohibits countries from extraditing individuals to other countries if there is a reason to believe that they will be subjected to torture there. Additionally, participation in the act of torture for purposes of CAT, as defined by the Committee Against Torture, includes the prohibition of "acts that amount to 'directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture.'" The Council of Europe's advisory body has stated that providing transit facilities for an extraordinary rendition, with the belief that the detainee would be subjected to torture if extradited, is a violation of international law.

The U.S. government maintains that CAT does not apply to situations of armed conflict, and therefore does not cover the

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151 See id.
152 See id.
153 See id.
154 See id.
156 Convention Against Torture, supra note 133, art. 3.
157 The Committee Against Torture is a body of experts that monitors implementation of CAT. Committee Against Torture, OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/cat/ (last visited Feb. 12, 2014).
158 GLOBALIZING TORTURE, supra note 28, at 27.
159 See id.
current conflict in Afghanistan or Iraq.\textsuperscript{160} It argues that the negotiations surrounding CAT indicate that it was meant to apply to domestic obligations and not to armed conflict.\textsuperscript{161} The Committee Against Torture has disagreed with the U.S. position and has urged the U.S. government to recognize that CAT applies at all times, including in situations of armed conflict.\textsuperscript{162} Additionally, the United States has stated that its Constitution gives the President the power to disregard CAT when acting for national defense.\textsuperscript{163}

\textbf{C. International Covenant on Civil and Political Rights (ICCPR)}

The ICCPR was adopted by the United Nations General Assembly on December 16, 1966.\textsuperscript{164} It was signed by the United States in 1977, and formally ratified on June 8, 1992.\textsuperscript{165} Article 7 of the ICCPR protects the right of individuals to be free from "torture, or [other] cruel, inhuman or degrading treatment or punishment."\textsuperscript{166} Article 9 protects the right of individuals to liberty and security of person.\textsuperscript{167} It prohibits the arbitrary arrest and detention of individuals and requires due process of law for detainees.\textsuperscript{168} Specifically, Article 9 requires that detainees "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."\textsuperscript{169}

\textbf{D. Other Agreements}

The International Convention for the Protection of all Persons

\begin{thebibliography}{9}
\bibitem{160} See id. at 17.
\bibitem{161} See id.
\bibitem{162} See id.
\bibitem{165} See id.
\bibitem{166} See id. art. 7.
\bibitem{167} See id. art. 9.
\bibitem{168} Id.
\bibitem{169} Id.
\end{thebibliography}
Against Enforced Disappearance went into force in 2010.\textsuperscript{170} Although the United States is not a party to the Convention, the agreement has ninety-three signatories and forty-one parties.\textsuperscript{171} The Convention is modeled on CAT and is intended to prevent the forced disappearance of individuals.\textsuperscript{172} Article 2 of the Convention defines enforced disappearance as

\begin{quote}
the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.\textsuperscript{173}
\end{quote}

Also, similar to CAT, the Convention does not permit states to violate the rights protected by the agreement even under war, or threat of war.\textsuperscript{174} The Convention requires states to criminalize the acts prohibited by the agreement.\textsuperscript{175} It also requires states to investigate acts of enforced disappearance and compensate the victims.\textsuperscript{176}

The Geneva Convention applies to situations of armed conflict.\textsuperscript{177} The four separate conventions regulate the treatment of persons during situations of war.\textsuperscript{178} It requires that detainees,
whether prisoners of war or civilians, be held in officially registered detention centers. Additionally, Article 49 of the Fourth Geneva Convention prohibits "[i]ndividual or mass transfers, as well as deportation of protected persons from occupied territory of the Occupying Power or to that of any other country, occupied or not ... regardless of their motive." The Bush Administration argued that because suspected al-Qaida members are not part of a state-sponsored military that was a signatory of the Geneva Convention, the rights guaranteed by the agreement are therefore not applicable to its operatives. The Supreme Court rejected this argument, at least in part, in its holding in *Hamdan v. Rumsfeld*. The Supreme Court held that while the Convention generally may apply only to signatories, at least Common Article 3 of the Convention is applicable to the conflict with al-Qaida, and therefore bestows at least some rights on those detained as part of the conflict. Common Article 3 does not provide the full protections of the Convention, but nevertheless does prohibit torture and other "outrages upon personal dignity, in particular humiliating and degrading treatment." The U.S. Congress had made Common Article 3 part of U.S. domestic law and made it illegal to violate its provisions. Following this holding, the Department of Defense issued a directive ordering government branches to come into compliance with Common Article 3. However, because there is no guidance on what treatment constitutes such "outrages upon personal dignity," it is unclear whether U.S. interrogation techniques violate this provision.

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179 See *GLOBALIZING TORTURE*, supra note 28, at 26.
180 See id. (quoting the Geneva Convention).
182 See *Hamdan*, 548 U.S. at 629.
183 The Court did not consider the issue of whether the Convention generally was applicable to the conflict with al-Qaida. See id. at 629.
184 See id.
186 See *RIVKIN*, supra note 178.
187 See id
188 See generally id. (explaining Common Article 3 as it pertains to US Detainee
international community about what the provisions of Common Article 3 actually require of member states, as the terms used have not been defined.\(^{189}\)

The agreements discussed above do not apply under all circumstances. Because of the uncertainty of what constitutes torture or inhumane treatment under international law, and because of the unclear application of these agreements to the treatment of suspected al-Qaida terrorists, especially those in secret detention, the United States has continued in a gray area of the law. The \textit{El Masri} decision sheds some light on this gray area.

\section*{V. Analysis}

The holding by the European Court is the first of its kind.\(^{190}\) It is the "first condemnation, by an international court, of the CIA practice of renditions and secret detentions, which The European Court has likened to enforced disappearance and cruel and inhuman treatment."\(^{191}\) The European Court not only found that the treatment El Masri suffered at the hands of the CIA amounted to torture under the ECHR,\(^{192}\) but also imputed that treatment to Macedonia, the country responsible for detaining El Masri and turning him over to the CIA.\(^{193}\) However, the United States is not a party to the ECHR, and is therefore not subject to the European Court's jurisdiction.\(^{194}\) Current U.S. policy regarding the extraordinary rendition program is in direct conflict with the holding of the European Court in \textit{El Masri}. The judgment will impact the ability of the United States to continue its extraordinary rendition program, at least with the help of European countries.

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Policy generally and arguing that what full compliance with Common Article 3 mandates is still up for discussion).

\(^{189}\) See id.


\(^{191}\) See id.


\(^{193}\) See id.

that are parties to the ECHR. More significantly, the decision may serve as a guide to other cases pending before the European Court and other international tribunals considering the legality of the extraordinary rendition program. Because the provisions of the ECHR, like those of other human rights agreements including the Geneva Convention, derive from international norms based on the Universal Declaration on Human Rights, the decision may serve as a guide on how these international norms apply to the extraordinary rendition program in the future. It may also define the appropriate penalty for those countries that assist the U.S. government in carrying out the program. It may require the United States to reconsider its position on the status and applicability of its commitments under international treaties to those suspects in its custody.

Regional human rights agreements, such as the ECHR, arose from the Universal Declaration on Human Rights. The ECHR specifically references the Universal Declaration. Its counterpart in the Americas is the American Convention on Human Rights. Many African nations have signed onto the African Charter on Human and People’s Rights. While these are all distinct agreements, they form the bases of international human rights norms. The judgment of one tribunal may impact the policies of other human rights tribunals. The ACLU also

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195 As many as fifty-four countries are alleged to have helped the CIA in its extraordinary rendition program in various ways, for example, by tolerating CIA prisons within their borders, interrogating individuals, capturing and transferring individuals into CIA custody, providing intelligence leading to the capture of individuals, and permitting the use of their airspace to remove individuals to secret prison facilities. See GLOBALIZING TORTURE, supra note 28, at 6. Many of these countries are parties to the ECHR over whom the European Court of Human Rights does have jurisdiction. Id.


197 See id.

198 See id.

199 See id.

200 See id.

201 See generally id. (“The Universal Declaration gives an example of the substance of human rights agreements (although it is not itself a treaty, many nations have agreed to abide by its principles, and it serves as an inspiration for treaties on human rights).”)
filed a petition on El Masri’s behalf in the Inter-American Court on Human Rights. The United States is a signatory to the American Convention, but it is bound by The European Court only when it accepts The European Court’s optional jurisdiction. It is uncertain, but unlikely, that the United States will accept jurisdiction, as it has not yet responded to the suit.

While decisions by international tribunals are not binding on U.S. courts, they may nevertheless impact those decisions as well, especially if international law specifically condemns such practices. The European Court held that the treatment El Masri suffered at the hands of the CIA at Skopje airport amounted to torture. This is the first such finding by an international tribunal. In El Masri, the European Court relied on numerous public documents and media reports highlighting suspected human rights violations at CIA-run detention facilities to find that there was a high probability that El Masri would be tortured at the hands of the CIA after being flown to Afghanistan. The European Court also looked to the many newspaper articles detailing suspected torture of detainees at CIA secret prisons to find that the Macedonian government should have been aware that El Masri would be subjected to treatment in violation of human rights norms if he was transferred to CIA officials. Implicit in this holding is that any transfer of a detainee into CIA custody poses

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202 See, e.g., GARCIA, supra note 113, at 19 ("Decisions and opinions issued by foreign courts and international bodies might serve as indicators of an international consensus for the prohibition of certain interrogation techniques.").


206 See id.


208 INTERIGHTS, supra note 15.


210 See id. at 39-41.
the threat that the detainee will be subjected to torture or other treatment contravening human rights laws.\textsuperscript{211} This decision therefore sets a precedent that Council of Europe member states who have assisted CIA officials may be in violation of the ECHR. The European Court also relied on a Council of Europe report by Swiss Senator Dick Marty (the Marty Report), which exposed and detailed the secret detention centers in Council of Europe member states (namely Poland and Romania), and the participation in extraordinary renditions by other member states.\textsuperscript{212} The Marty Report explicitly states that the participation of Council of Europe member states in such renditions is illegal.\textsuperscript{213} The European Parliament has also condemned El Masri's transfer to the CIA.\textsuperscript{214} The holding in the \textit{El Masri} case signals a willingness of international tribunals to recognize the illegality of the program and to hold accountable states that have participated in its execution. This holding, along with the investigations carried out in Europe concerning the extraordinary rendition program, signals a shift in the international community's acceptance and tolerance of the program.

Furthermore, the most difficult obstacle a detainee faces in bringing human rights violations suits against the United States and foreign governments implicated in the extraordinary rendition program is gathering enough evidence to support his or her version of the facts.\textsuperscript{215} It was therefore significant that the European Court found that El Masri had established his version of the facts beyond a reasonable doubt.\textsuperscript{216} In coming to this determination, The European Court relied on media reports, reports by international human rights and law organizations, as well as on investigations conducted by the Council of Europe.\textsuperscript{217} This holding opens the

\textsuperscript{211} See id. at 71.

\textsuperscript{212} See id. at 12; see also Dick Marty, \textit{Alleged Secret Detentions in Council of Europe Member States}, PARLIAMENTARY ASSEMBLY COUNCIL OF EUROPE (Jan. 22, 2006), http://www.assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf.


\textsuperscript{214} See id. at 15-16.


\textsuperscript{216} See id.

door for other detainees who have had difficulty corroborating their account of their detention. The European Court found that while the United States and other state actors had engaged in an attempt to conceal evidence of such secret detentions, El Masri’s account was consistent and supported by significant indirect evidence. Subsequent detainees will be able to refer to this finding to help corroborate their accounts. Cases against Poland and Romania are currently pending in the ECHR. These cases, brought by Abd Al-Rahim al Nashiri, a known senior al-Qaida operative, allege that he was held illegally and tortured at black sites run by the CIA in Poland and Romania. The El Masri decision paves the way for al Nashiri’s extraordinary rendition cases.

The El Masri decision also has the potential to affect how nations, including the United States, apply international treaties in the context of the war on terror. The U.S. government has claimed suspected al-Qaida terrorists are not protected by the Geneva Convention because they are not part of a state sponsored military. The Supreme Court’s holding in Hamdan v. Rumsfeld, however, clarified that al-Qaida detainees are protected by at least some minimal provisions of the Geneva Convention. Nonetheless, it is unclear whether the treatment suffered by the detainees at the hands of the CIA is a violation of the Geneva Convention provisions. Additionally, the UN High Commissioner for Human Rights has explicitly stated that al-

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219 See id.
220 See generally id. ("In a move which may have a bearing on other extraordinary rendition cases, given difficulties faced by applicants and their lawyers in substantiating their claims, the Court accepted Khaled El Masri’s version of events as proven ‘beyond a reasonable doubt.’ The finding is significant as it strongly deters European states not only from engaging directly in torture and enforced disappearances, but also from assisting other states in carrying out these grave violations of human rights.").
221 See Factsheet—Terrorism and the ECHR, supra note 207.
222 See id.
223 Mayer, supra note 19.
225 See RIVKIN, supra note 178.
Qaida detainees held at Guantanamo Bay are protected by both the ICCPR and the Geneva Convention, and any dispute as to their status "must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention." The European Court found that El Masri's rights under the ECHR were violated during his detainment in Macedonia. Therefore, he was entitled to the protection of these rights even at a time he was thought to be a suspected al-Qaida operative. Suspected al-Qaida operatives who are detained in Council of Europe member states are, therefore, protected by the ECHR according to this holding. While the European Court's holding does not extend to the application of the Geneva Convention (or other human rights agreements), it signals the willingness of the Council of Europe to recognize that al-Qaida operatives, despite being unaffiliated with a nationally recognized military, are protected by international human rights laws and establishes a remedy for violations of those laws.

While extraordinary rendition may be an important tool for the United States to gather intelligence and prevent future attacks, the program operates outside of the law and its victims have no remedy in American jurisdictions. Following his release, El Masri filed suit against the former Director of the CIA. The United States District Court for the Eastern District of Virginia dismissed

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227 See id. at 79-80.
228 See id. at 70-71. It was not until after he had been turned over to CIA agents and flown to Afghanistan that U.S. officials discovered they had mistaken El Masri for a suspected al-Qaida agent. See id. at 15. While he was detained in Macedonia, he was believed to be associated with al-Qaida. Id. at 3-8.
229 While this decision marks a "historic moment" against the rendition program, the European Court only found that Macedonia violated the ECHR; the Court did not, however, find that the U.S. extraordinary rendition program itself violates any international agreements. See, e.g., Nicholas Kulish, Court Finds Rights Violation in C.I.A. Rendition Case, NY TIMES, Dec. 13, 2012, http://www.nytimes.com/2012/12/14/world/europe/european-court-backs-cia-rendition-victim-khaled-el-masri.html ("In a unanimous ruling, the 17-judge panel, based in Strasbourg, France, found that Macedonia had violated the European Convention on Human Rights' prohibition on torture and inhuman or degrading treatment and ordered it to pay the man about $78,000 in damages.").
230 See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
the case,231 and the Fourth Circuit upheld the dismissal, based on the states secret doctrine.232 The Fourth Circuit determined that resolution of the claim would require an examination of the methods and procedures the CIA uses in extraordinary renditions—subjects protected by the states secret doctrine.233 El Masri therefore does not have the ability to challenge his wrongful abduction in U.S. courts. Others that have been wrongfully detained under the program have similarly been denied access to U.S. courts. Maher Arar, a dual citizen of Canadian and Syria, was detained at New York’s JFK Airport in 2002 after returning from vacation with his family and then sent to Syria to be interrogated on U.S. claims of suspected terrorism.234 In Syria, he was tortured and eventually confessed to the crimes for which he was accused.235 Arar later turned out to be innocent.236 Arar was eventually released from Syrian custody when the Canadian government began an investigation.237 The Canadian government issued a formal apology and granted him millions of dollars in reparations.238 Significantly, the European Court’s El Masri decision establishes a remedy in a court of law for those victims of the extraordinary rendition program, something that is unavailable to them in the United States.

VI. Conclusion

There has been much debate and uncertainty about the application of international human rights laws to the global war on terror. The European Court settled this debate, at least as it applies to Council of Europe member states, in its decision in El Masri. The European Court’s holding, that Macedonia’s detention of, and subsequent handing over of El Masri to CIA officials, violated several provisions of the ECHR,239 signals a shift in the approach

231 Id. at 300.
232 Id. at 313.
233 Id. at 311.
235 See id.
236 See id.
237 See id.
238 Id.
toward the U.S. extraordinary rendition program. While the extrajudicial transfer and secret detention of those suspected of terrorist activities has stirred international debate and attention, an international tribunal had yet to find that the program violated an international human rights agreement prior to El Masri. The holding makes clear that participation in, or assistance to those who participate in, an extraordinary rendition from the territory of Council of Europe member states violates the ECHR. The European Court’s acceptance of El Masri’s account of his detention and treatment paves the way for detainees to seek a remedy in an international court. As nearly fifty four countries, many of them parties to the ECHR, have been implicated in the CIA’s extraordinary rendition program in some way, this holding may affect how those states manage their participation. It is yet to be seen whether other tribunals will follow the lead of the European Court in condemning the practice of extraordinary renditions.

Moreover, the decision reignites the debate over the extraordinary rendition program itself. The program has undoubtedly been an important tool for the CIA to gather intelligence and prevent attacks, but cases such as El Masri emphasize the potential over-breadth of the program, forcing the
Administration and the international community to examine the dangers of unchecked power used outside of any legal regime.\textsuperscript{245}