

Case of El-Masri v. The Former Yugoslav Republic of Macedonia (application no. 39630/09)

November 22, 2019

Background

1. This submission concerns the implementation of *El-Masri v. The Former Yugoslav Republic of Macedonia* (application no. 39630/09)¹ delivered by the European Court of Human Rights on 13 December 2012. The Open Society Justice Initiative (“the Justice Initiative”) represented Mr. Khaled El-Masri as co-counsel before the European Court of Human Rights (“the Court”). The Justice Initiative made a Rule 9 submission in this case in May 2018, which it would like to incorporate by reference in this briefing.² Copies of that Rule 9 submission are available today.
2. This case concerns grave violations of the European Convention, including torture, incommunicado detention and enforced disappearance, as well as the Macedonian government’s failure to conduct an effective investigation into these and other violations. The violations occurred in the context of North Macedonia’s participation in the CIA’s “extraordinary rendition” programme, which the European Court has recognized is “anathema to the rule of law and the values protected by the Convention.”³
3. On 31 December 2003, Macedonian agents captured Mr. El-Masri, a German national, at the Serbian-Macedonian border and held him incommunicado, and abused him for 23 days in a hotel room in Skopje. Macedonian agents then took him, handcuffed and blindfolded, to Skopje airport, where he was severely beaten, forcibly undressed, and sodomized by US personnel. He was subjected to total sensory deprivation, and placed on an aircraft surrounded by armed Macedonian security guards, before he was flown to Afghanistan, where he was secretly detained for four months before being released, without explanation or apology, in Albania. The European Court of Human Rights found that Macedonia had violated articles 3, 5, 8 and 13 of the Convention.

¹ At the time of the judgement, the state’s name was the Former Yugoslav Republic of Macedonia. Its name is now North Macedonia.

² See also Communications submitted under Rule 9.2 of the Rules of the Committee of Ministers by the Open Society Justice Initiative: [1273 meeting \(6-8 December 2016\) \(DH\)](#) - Communication from a NGO (Open Society Justice Initiative) (13/09/2016) in the case of El-Masri against “the former Yugoslav Republic of Macedonia” (Application No. 39630/09); [1230 meeting \(June 2015\) \(DH\)](#) - Communication from a NGO (Open Society Justice) (26/05/2015) in the case of El-Masri against “the former Yugoslav Republic of Macedonia” (Application No. 39630/09).

³ *Babar Ahmad and Others v. United Kingdom*, ECtHR, 8 July 2010, para. 114.



Key Points

4. In this context, the Justice Initiative would like to make three key points:
5. **First**, as stated in our May 2018 Rule 9 submission, the government has failed to fully implement the Court’s judgement because it has not yet conducted an effective investigation “capable of leading to the identification and punishment of those responsible”.⁴ Neither the Macedonian government’s apology nor an adjudication of his civil claims is capable of leading to the identification and punishment of those responsible for his torture and abuse. **This case should therefore remain under enhanced supervision and the Committee of Ministers should reject the Action Report’s suggestion that this case is fully implemented.**
6. The government’s Action Report notes that the Justice Initiative’s executive director, James Goldston, welcomed the government’s apology in saying: “We welcome the “FYROM” government’s apology to El-Masri, and its recognition that its security personnel violated the European Convention on Human Rights”. This is indeed the case. The government’s apology was a welcome step forward.
7. However, the government neglects to mention that Mr. Goldston also said (in the same statement): “*However, the conduct at issue was illegal, not merely ‘improper,’ and thus requires a thorough investigation. The FYROM has yet to open a formal criminal inquiry into what happened, or to hold anyone to account*” (emphasis added). The Macedonian government also neglects to mention that the Justice Initiative has also stressed before the Committee of Ministers “a public apology does not absolve the authorities of their obligation to conduct an effective investigation”.⁵
8. **Second**, it is concerning that the Committee of Ministers’ June 2018 decision apparently accepts the Macedonian government’s position that a criminal investigation cannot be conducted because it has become time-barred. This is contrary to the Court’s judgement, which requires an effective criminal investigation to be conducted in this case, and indeed, found a violation of Article 3 on account of FYROM’s failure to conduct such an investigation.⁶

⁴ *El-Masri vs. Macedonia*, para. 182.

⁵ Communication from a NGO (Open Society Justice Initiative and Foundation Open Society Macedonia) (01/06/2018) in the case of El-Masri v. “the former Yugoslav Republic of Macedonia” (Application No. 39630/09), [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:%22DH-DD\(2018\)625E%22}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:%22DH-DD(2018)625E%22})

⁶ See *El-Masri vs. Macedonia*, paras. 182, 193-94.

9. Moreover, it is the North Macedonian government's inaction that has caused the investigation to become time-barred. Indeed, the Court specifically noted that the applicant in this case filed a criminal complaint in October 2008 before it became time-barred,⁷ but that Macedonian authorities rejected the complaint as unsubstantiated, thereby failing to comply with Article 3 of the Convention.⁸ **Mr. El-Masri should not be penalized—and the North Macedonian government should not be rewarded—for its failure to conduct an effective investigation in a timely manner.**
10. Were the Committee of Ministers to conclude that North Macedonia is not obligated to conduct an effective criminal investigation (i.e., one capable of identifying and punishing those responsible for Mr. El-Masri's violations) on account of a statute of limitations, it would also be contrary to international law (including the European Court's own jurisprudence), which prohibits such limitations on torture claims.⁹ This conclusion would be especially unwarranted in light of the North Macedonian authorities' previous Action Plans, which committed to undertake a fresh investigation into the case in order to establish facts and the responsibility of individuals.
11. Since 2015, the Justice Initiative has called for the North Macedonian authorities to set up a Commission of Inquiry (COI), "tasked with investigating the role of the former Yugoslav Republic of Macedonia in this case, capable of leading to the identification and punishment of the officials who participated in or were otherwise complicit in Mr. El-Masri's extraordinary rendition. The Commission must have the power to compel witnesses to give evidence, be authorized to review any evidence considered classified, and *must be capable of recommending criminal investigations and of bringing about the prosecution* of those persons deemed responsible for unlawful acts against Mr. El-Masri, no matter their standing or position within the government"¹⁰ (emphasis added).
12. The Committee of Ministers has also continually made clear that the implementation of this case requires an investigation. In March 2015, the Committee urged the authorities to carry out a fresh investigation with a view to bringing the responsible individuals to justice. It

⁷ *El Masri v. Macedonia*, para. 143.

⁸ *El Masri v. Macedonia*, paras. 186-193.

⁹ See Committee Against Torture (CAT), General Comment N°3, op. cit. 11, § 38; see also CAT, Report of the Committee against Torture, 51st and 52nd sessions (2013-2014), UN Doc. A/69/44, pp. 27, 39, 46, 102, 114, 121 and 130; *Cestaro v. Italy*, ECtHR, 7 April 2015, para. 208.

¹⁰ See Communication from a NGO (Open Society Justice Initiative) (26/5/2015) in the case of *El-Masri v. "the former Yugoslav Republic of Macedonia"* (Application No. 39630/09), <https://rm.coe.int/16804b137f>.

repeated the importance of this in June 2015, and in 2016 urged Macedonian authorities to accelerate the setting up of an ad-hoc commission to establish facts and responsibility of individuals. There is no reason why this case should now be considered fully implemented in the absence of such an investigation, particularly when the government has failed to comply with the Committee's prior decisions.

13. **Third**, North Macedonia should remove the statute of limitations for claims of grave violations of the Convention, including torture and ill-treatment. As previously noted in the Justice Initiative's September 2016 Rule 9 submission, the report of the Commission of Inquiry "should lead to the identification and punishment of those responsible for the violations committed against Mr. El-Masri. This mandate will be compromised if the law bars subsequent criminal investigation and punishment of those identified as perpetrators by the Commission."¹¹ More generally, North Macedonia has a non-derogable duty under international law and the European Convention to investigate such serious violations, and to punish those responsible. As noted above, statutes of limitations that bar prosecution of such violations conflict with this obligation.¹²
14. The September 2016 Rule 9 submission also notes that "[n]ational law already provides that a limitation period can be sidestepped where offences are committed contrary to international conventions, such as offences of torture and ill-treatment."¹³ Article 112 of Macedonia's 1996 Penal Code makes clear that there can be "[n]o obsolescence for crimes of genocide and war crimes," and that "the criminal prosecution and the execution of punishment do not become obsolete for crimes foreseen in Article 403 to 408, as well as for crimes for which no obsolescence is foreseen with ratified international conventions"(emphasis added).¹⁴ North Macedonia is subject to obligations under the European Convention on Human Rights and party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), as well as several leading international human rights treaties, including the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. These international instruments

¹¹ See Communication from a NGO (Open Society Justice Initiative) (13/9/2016) in the case of *El-Masri v. "the former Yugoslav Republic of Macedonia"* (Application No. 39630/09), [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2016\)1082E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2016)1082E%22%5D%7D)

¹² See Committee Against Torture (CAT), General Comment N°3, op. cit. 11, § 38; see also CAT, Report of the Committee against Torture, 51st and 52nd sessions (2013-2014), UN Doc. A/69/44, pp. 27, 39, 46, 102, 114, 121 and 130; *Cestaro v. Italy*, ECtHR, 7 April 2015, para. 208.

¹³ *Ibid.*

¹⁴ Criminal Code of Macedonia.

provide a more than adequate basis for setting aside the limitation period and undertaking proper, effective investigations into the serious abuses suffered by Mr. El-Masri.

15. While the Action Report highlights the government's calls for "zero tolerance" of ill-treatment and torture, it is regrettable that this has not translated into removing the statute of limitations applicable to these crimes. **The North Macedonian authorities should remove the relevant statute of limitations provisions in order to ensure that individuals responsible for Mr El-Masri's violations can be identified and punished.**

Recommendations

16. In light of the above, the Justice Initiative respectfully requests that the CoM continue to keep this case under enhanced supervision and call upon the North Macedonian authorities to conduct an effective investigation capable of leading to the identification and punishment of individuals responsible for violating Mr. El-Masri's rights.
17. Towards this end, the North Macedonian government should:
 - Create an effective National Commission of Inquiry that can recommend criminal investigations and bring about the prosecution of those responsible for the violation of Mr. El Masri's rights under the Convention.¹⁵
 - Ensure that this Commission complies with international and regional best practices and possesses appropriate powers, a comprehensive mandate, independent members, and an adequate budget.¹⁶
 - Remove the statute of limitations with respect to claims of grave violations of the Convention including torture and ill-treatment.

¹⁵ *Ibid.*

¹⁶ *Ibid.*