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Light in the Shadows? The promise of the 'Right to Truth' for victims of extraordinary  
renditions in the European Court of Human Rights

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## ABSTRACT

The analysis discusses the case of *El-Masri*, where the European Court of Human Rights for the first time delivers a judgment concerning a victim of the ‘Global Rendition Programme’. It focus on a particular element of the judgment: the right to truth. It analyses the claims made by a number of international actors towards the recognition of this right, partially supported by a minority opinion in the court. It then assess whether it is feasible to expect such recognition to take place in the European Court of Human Rights, as well as the impact it would have on the concrete case, and other victims of the extraordinary renditions in Europe. It suggests that the right to truth is an especially compelling norm to face the challenge posed by the War on Terrorism, in the way it became recognised by other human rights bodies and it is advocated by these actors. However, it contends that the European system of human rights possesses its own features, which will shape the way, and the extent, in which the right to truth might achieve recognition by the European Court of Human Rights.

## Table of Acronyms

American Convention on Human Rights.....	(ACHR)
Amnesty International.....	(AI)
Council of Europe.....	(CoE)
Committee of Ministers.....	(CoM)
Draft Articles on State Responsibility.....	(DASR)
European Convention on Human Rights.....	(ECHR)
European Court on Human Rights.....	(ECtHR)
European Union.....	(EU)
Global Rendition Programme.....	(GRP)
Human Rights Committee.....	(HRC)
Human Rights Chamber for Bosnia and Herzegovina.....	(HRCBiH)
Human Rights Council.....	(HRC)
International Covenant on Civil and Political Rights.....	(ICCPR)
International Commission of Jurists.....	(ICJ)
International Law Commission.....	(ILC)
International Non-Governmental Organisations.....	(INGOs)
International Customary Law.....	(ICL)
International Organisations.....	(IOs)
Inter-American Commission on Human Rights.....	(IACmHR)
Inter-American Court on Human Rights.....	(IACtHR)
Office of the High Commissioner for Human Rights.....	(OHCHR)
Organisations of American States.....	(OAS)
United Nations.....	(UN)
United States.....	(US)

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## INTRODUCTION

In February 2014, the Italian Constitutional Court overruled the 2013 judgment of the Court of Cassation, concerning the involvement of Italian agents in the CIA's "extraordinary rendition" programme.<sup>1</sup> The latter ordered the prosecution of Italian officials who collaborated in the unlawful rendition, enforced disappearance and torture of an Egyptian refugee abducted in Milan and rendered to Egypt in 2003.<sup>2</sup> It involved the only judicial decision seeking accountability for the actions committed within the US Global Rendition Programme ("GRP" hereinafter).<sup>3</sup> The legal reason given by the Constitutional Court to deny accountability referred to the privilege of state secrets.<sup>4</sup>

With that decision, the last –and so far unique– hope for the more than 136 victims<sup>5</sup> of these practices, to combat the system of impunity and obtain redress before a national authority worldwide, vanished. Despite the clear repudiation of the unlawful actions carried out by the Bush-era CIA,<sup>6</sup> no public official has so far been brought to justice in the United States ("US"). The new administration has kept many of the facts classified,<sup>7</sup> eliminating the slightest possibility that any criminal charges will be brought as a result of the brutal interrogations carried out by the CIA.<sup>8</sup> In Europe no more than substantial compensation paid to victims of secret detention has been ordered, failing to attain any acknowledgment of legal liability or an establishment of the facts.<sup>9</sup> The alleged argument to prevent accountability and truth-telling has consistently concerned the privilege of state secrets.<sup>10</sup>

In such framework of widespread impunity, based on a policy of secrecy and national security, the finding of facts and truth-discovery has been considered essential,

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<sup>1</sup> Corte Costituzionale, Italy, 2014

<sup>2</sup> The Guardian, "Italy's ex-intelligence chief given 10-year sentence for role in CIA kidnapping" consulted on 09/07/2014 at <http://www.theguardian.com/commentisfree/2013/feb/13/italy-cia-rendition-abu-omar>

<sup>3</sup> ICJ "Italy : Constitutional Court's rendition ruling undermines the fight against impunity" 09/07/2014 at <http://www.icj.org/italy-constitutional-courts-rendition-ruling-undermines-the-fight-against-impunity/>

<sup>4</sup> Id.

<sup>5</sup> Open Society Foundations, Globalizing torture: CIA secret detention and extraordinary rendition, consulted on 10/07/2014 at <http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>

<sup>6</sup> Satterthwaite, 2010, p. 3

<sup>7</sup> Cfr. supra footnote 5, p. 357

<sup>8</sup> The New York Times 30 August 2013 "No Charges Filed on Harsh Tactics Used by the C.I.A." 09/07/2014 at [http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?\\_r=2&pagewanted=1&](http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?_r=2&pagewanted=1&)

<sup>9</sup> Cfr. supra footnote 5, p. 7

<sup>10</sup> A/HRC/22/52, 1 March 2013, para 37

as a first step towards the establishment of responsibilities. The process of seeking the truth has gathered momentum, and independent investigations have reliably established the complicity, to a greater or lesser degree, of the public officials of a large number of European States in the CIA rendition programme.<sup>11</sup> It is thus easy to see that, in such context, the right to the truth has become an especially compelling norm.

The concept of the right to the truth has evolved in the context of the advancement in the rights to a remedy and reparation for victims of gross human rights violations, through the establishment of international standards and jurisprudence.<sup>12</sup> Some commentators have identified this right as the newest human rights construction, denoting a paradigmatic shift from conventional criminal justice models toward victim-oriented remedies for both survivors and the society at large.<sup>13</sup> Anyhow, due to a still ambiguous and heterogeneous recognition, it has been characterized to be one emerging principle in international law.<sup>14</sup>

Either way, to properly face the challenge posed to human rights by the “extraordinary renditions” practice, it has been stated that what remains crucial, and to a large extent still to be achieved, is the full realization of the “right to truth”.<sup>15</sup> In this vein, many victims have already pushed, domestically and internationally, for such recognition, supported by those actors who, at the international level, advocate for the advancement of the right to truth.

Concerning the development of this right, at international level it is possible to find a global movement advocating for the recognition of an enforceable right to truth and reparation under international law for victims of gross human rights violations. Despite being a still evolving concept, the right to truth has been incorporated in several instruments at international level, and recognised to certain extent by different regional and international judicial or quasi-judicial human rights bodies. Its recognition has mainly taken place by deriving it from both the right to an effective domestic remedy, on the one hand, and the exercise of specific powers of international bodies to afford reparations, on the other hand.<sup>16</sup> Regarding the latter, it is not clear whether a right to

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<sup>11</sup> *Idem.* para. 19

<sup>12</sup> E/CN.4/2002/71, 8 January 2002, para. 79

<sup>13</sup> Teitel, 1997, p. 315

<sup>14</sup> Karstedt, 2009, p. 39

<sup>15</sup> Borelli, 2014, p. 15

<sup>16</sup> Cfr. *supra* footnote 12, para. 79



receive reparations is an existing right under international law or, in the case it exists, whether victims themselves have the access to it or, on the contrary, it is up to States to offer it.

Under the universal system for human rights protection, established under the framework of the United Nations (“UN”), the situation of a right to reparation is very precarious. Individual complaints procedures able to provide it are usually optional, apply only to a very limited number of human rights treaties and can only be decided in a legally non-binding manner. Regionally, the situation seems more encouraging, since there are a number of human rights courts which decisions count with a binding nature. Such is the case of the European Court of Human Rights (“ECtHR”) and the Inter-American Court of Human Rights (“IACtHR”), where many victims of the extraordinary renditions have turned to seek redress for their suffering, before the lack of remedy at the national levels.

The subject of this study concerns the case of *El-Masri*, a German citizen victim of an illegal rendition in the Former Yugoslav Republic of Macedonia (“FYRM”). His unsuccessful search for redress, both domestically and internationally, led him to initiate a complainant procedure before the ECtHR, emphasizing the recognition of the right to truth by this court as a means to obtain redress and end impunity. In December 2012, the ECtHR delivered the first international judgment concerning extraordinary renditions.<sup>17</sup> Amnesty International (“AI”) labelled it as an “*historic ruling*”,<sup>18</sup> and the International Commission of Jurists (“ICJ”) stated that it entails a milestone on the recognition the right to know the truth.<sup>19</sup>

These attempts to attain redress for victims of extraordinary renditions through the advancement the right to truth must be allocated within the mentioned broader context of advocates of a right to truth and reparation under international law. Such movement is characterized as an advocacy network composed by International Non-Governmental Organisations (“INGOs”), International Organisations (“IOs”) and legal practitioners working towards a common goal. In *El-Masri*, this is situated at the European level, in the ECtHR. In this case, it may be observed some attempts by these

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<sup>17</sup> *El-Masri v. FYRM*, (ECtHR, 2012)

<sup>18</sup> Julia Hall, Amnesty International’s expert on counter-terrorism and human rights, consulted on 25/05/2014 at <http://www.amnesty.org/en/news/historic-ruling-europe-s-role-cia-renditions-2012-12-13>

<sup>19</sup> Wilder Tayler, Secretary General of the ICJ, consulted on 25/05/2014 at <http://www.icj.org/historic-ruling-on-europes-role-in-cia-renditions-say-icj-and-amnesty/>

different international actors towards the institutionalisation of the right to truth in the European system of human rights protection. AI, the ICJ, REDRESS and the Office of the High Commissioner for Human Rights (“OHCHR” hereinafter) are the main actors present in *El-Masri* as analysed here. They mainly supported their claims by drawing on the past case-law of the European Court of Human Rights (“ECtHR”), the development of the right to truth at international level and the recognition of this case by similar human rights bodies, like its American counterpart –the IACtHR- or the Human Rights Committee (“HRC”).

However, their claims are far from straightforward. As previously outlined, the right to truth has mainly drawn on the right to effective remedies and the power of some human rights bodies to order reparations. Thus, the recognition of this right seems to be dependent on the specific powers of international bodies to order reparations. Not all human rights bodies possess a binding power to order reparations. Consequently, even if the right to truth was recognised under the right to an effective domestic remedy, only those human rights bodies counting with the power to afford reparations could directly provide victims with it. The controversy revolves here around whether the right to an effective domestic remedy can play a role in the inception of a right to truth and reparations for victims of gross human rights in the absent of the second element, this is, the power to order reparations.

In this regard, the European system presents certain features that are determinant for the likelihood of an eventual recognition of the right to truth by the ECtHR. The actors in *El-Masri*, mainly pushed for the recognition of this right under the effective domestic remedy provision. No attention whatsoever was paid to the power of the ECtHR to order reparations in this regard. Consequently, this paper attempts to assess whether the recognition of the right to truth under Art. 13 might, first, involve a substantive development (the appropriateness of their claims) and to what extent this has been achieved in *El-Masri*, in the same line to the claims requested by the main actors present. The aim is to analyse whether the strategy followed by these actors is something attainable in the ECtHR (the feasibility of their claims), and whether such claims are feasible to achieve the redress of Khaled El-Masri and similar victims in Europe, in the absence of a direct order to afford reparations (the feasibility of relying exclusively on Art. 13).

To achieve this goal, three groups of sources shall be analysed. The first group is composed of primary sources such as international legal instruments and judgments. The second group of sources is formed by INGOs and UN reports and “amicus curiae” submissions regarding the right to truth or in relation with the extraordinary renditions. A third group concerns the analysis of legal and political scholarship on reparations.

This paper observes the widespread lack of redress for victims of extraordinary renditions, and whether the right to truth may involve a suitable norm to remedy it (Part I Chapter 1). Afterwards, it observes the comparative approach to the right to truth in the main international human rights bodies (Part I Chapter 2). It will continue with the assessment of the claims made in *El-Masri* case, concerning the recognition of the right to truth under the effective domestic remedy provision, to analyse whether they involve something feasible and to which extent it was attained (Part II Chapter 1). Lastly, it observes whether those claims are capable of providing real redress in practice to El-Masri and alike victims, in the absent of an order to make reparations. This is, relying exclusively in the right to an effective domestic remedy (Part II Chapter 2).

## PART I. THE RIGHT TO TRUTH AND REPARATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW

The contentious debate over whether victims of gross human rights violations possess an enforceable right to reparation recognised at the international level is currently far from straightforward. The right to truth, an innovative legal construction which has undertaken its path through international law, and is linked to the right to reparation, consequently shares its same fate.

Victims of serious human rights violations have two possibilities under international law to find redress. The first one is to claim an independent and enforceable right to reparation, based directly on international law. This option would involve the existence of an individuals’ right to obtain, and a corresponding State’s duty to provide, reparations, based on some general principle of international law, or in a norm of Customary International Law (“ICL”). The second option is to have this right recognised by some of the varied instruments existing under international law, such as international human rights treaties or regional conventions. Since ICL is based on the practice of international actors, some of whom can be acting within the framework of

these international and regional instruments, both channels might be, at least to certain extent, interrelated.

The aim of this paper is to assess the feasibility and the eventual impact of the claims of some “right to truth” entrepreneurs before a very specific human rights convention-based framework: the one established by the Council of Europe (“CoE”). To properly understand the significance of their claims, this part analyses the position of truth and reparations at international level, in the context of extraordinary renditions (Chapter 1), and the treatment given to these rights by other regional and international human rights bodies (Chapter 2).

## 1. THE GLOBAL RENDITION PROGRAMME AND THE OPPORTUNITY FOR THE RIGHT TO TRUTH AT INTERNATIONAL LAW.

*“If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.”*<sup>20</sup> With these words Bob Baer, ex-undercover agent working for the CIA in the Middle East, illustrated the acts of the CIA during the presidency of George W. Bush. After the attacks of September 2001, the Bush Administration implemented a programme of torture, rendition and secret detention of terrorist suspects,<sup>21</sup> normally for coercive interrogation and extrajudicial detention,<sup>22</sup> in collaboration with public officials in other States. The programme consisted of abductions, detentions, and transfers of presumed terrorists, without involving any legal process,<sup>23</sup> to secret prisons, known as “black sites,” outside the United States.<sup>24</sup> This practice was given the name “extraordinary rendition”.<sup>25</sup>

The concept of “extraordinary rendition” is not a legal term. Likewise, there is no publicly available official U.S. government definition of it.<sup>26</sup> It typically consists of a complex series of events: after captured in a certain country, the rendered person, an alleged terrorist, is transferred to a detention facility in another country where he is interrogated, and in many cases tortured or subjected to other forms of inhuman

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<sup>20</sup> Galella et al., 2012, p. 7

<sup>21</sup> Cfr. supra footnote 10, para. 1

<sup>22</sup> Cfr. supra footnote 15, p. 2

<sup>23</sup> Cfr. Supra footnote 5, p. 13

<sup>24</sup> Idem. p. 5

<sup>25</sup> Cfr. supra footnote 20, p. 7

<sup>26</sup> Cfr. supra footnote 6, p. 71

treatment. The rendered person does not face any criminal charge or a trial by an independent judicial body.<sup>27</sup> In fact, they are precisely calculated to place human beings beyond the reach of the legal protection that international human rights law is aimed to guarantee.<sup>28</sup>

Under international human rights law, though, these individuals are victims of enforced disappearance.<sup>29</sup> It is an international crime which occurs when there is an:

*“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.”*<sup>30</sup>

However, on the scale and through the modes by which it occurred after 9/11, this practice has undoubtedly posed unprecedented challenges to human rights.<sup>31</sup> Since the extraordinary rendition program was highly classified,<sup>32</sup> the attempts of victims of these actions to find truth and redress have been severely hampered by state secrecy and national security privileges. It is within this context where the right to truth becomes all the more a need. This section will show the challenges that the practice of extraordinary rendition has posed worldwide, regarding the lack of remedy and reparations for victims (Section A) and how international human rights, in particular the right to know the truth, can currently respond to this threat by providing redress to victims of these actions (Section B).

#### A) REAL POSSIBILITY TO REMEDY THE VICTIMS OF THE WAR ON TERROR?

In January 2009, shortly after the change in the US Administration, President Obama formally renounced the practice of torture and other harsh interrogation methods, and covert overseas detention facilities were closed.<sup>33</sup> However, there has

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<sup>27</sup> Messineo, 2009, p. 3

<sup>28</sup> Cfr. supra footnote 10, p. 1

<sup>29</sup> Amnesty International 'Off the record' secret CIA detention, consulted on 14/07/2014 at <http://www.amnesty.org/en/news-and-updates/feature-stories/off-the-record-secret-cia-detention-20070607>, p. 5

<sup>30</sup> UNGA, 20 December 2006, Art. 2(1)

<sup>31</sup> Cfr. supra footnote 15, 2

<sup>32</sup> Cfr. supra footnote 5, p. 5

<sup>33</sup> Executive Order 13491, US Government, 22 January 2009

been no outlawing of rendition as such.<sup>34</sup> In August 2009, US Attorney General Eric Holder stated that the people working in the intelligence service acted within legal guidance, and therefore none of them will be ever prosecuted.<sup>35</sup>

Despite the scale of torture associated with extraordinary rendition operations, most of the governments involved have failed to conduct effective investigations into these operations.<sup>36</sup> Italy being the only case where a criminal conviction on national public officials for their involvement in the programme had taken place,<sup>37</sup> before the Constitutional Court overruled the decision convicting the Italian officers.<sup>38</sup> Apart from that, only Sweden and the UK in Europe have issued compensation to extraordinary rendition victims, but no other kind of measures have been taken.<sup>39</sup>

International organisations have played a more active role, which has been crucial for the termination of the programme. It has raised public awareness and thereby made it politically impossible for European states to continue to support the US.<sup>40</sup> Cases have also been brought before international human rights bodies, at international and regional level, where several victims of the extraordinary renditions have sought redress. It follows the idea that there is a basic principle of international law that every violation of an international obligation entails a duty to make full reparation, as well as to provide an effective remedy to victims of rights violations.<sup>41</sup> This section aims to observe the attempts made by victims of the global rendition programme and, in particular, by Khaled El-Masri, to find redress at the international level (Section 1), while at the same time assessing the existence of a right of victims to remedy and reparations under general international law (Section 2).

1. The search for redress at international level: victims' last hope? El-Masri experience.

Due to the extreme secrecy surrounding the programme, the exact number of victims remains unknown. According to the Civil Society Initiative report "Globalizing

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<sup>34</sup> Satterthwaite, 2010, p. 3

<sup>35</sup> Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, Monday, August 24, 2009, <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>

<sup>36</sup> Cfr. supra footnote 5, p. 7

<sup>37</sup> Corte d'Appello di Milano, 1 February 2013

<sup>38</sup> Cfr. supra footnote 1

<sup>39</sup> Cfr. supra footnote 5, p. 7

<sup>40</sup> Cfr. supra footnote 15 p. 13

<sup>41</sup> Idem. p. 7

Terror”, 136 individuals have reportedly been subjected to these operations.<sup>42</sup> These victims have unsuccessfully sought redress for their suffering following the usual legal channels at domestic level. Subsequently they jumped to the international arena. An excellent example of their search for remedy is the case of Khaled El-Masri, which constitutes the centrepiece of this study. All the principles characterizing extraordinary rendition found specific application in this case,<sup>43</sup> and it is specially compelling since the victim went to different national and international fora before its case were heard by the ECtHR.

On 31 December 2003 Khaled El-Masri, a German citizen traveling to Macedonia, was mistakenly identified as a member of Al Qaida<sup>44</sup> and abducted by the Macedonian secret service, who kept him secretly held for 23 days in a hotel in Skopje. A CIA rendition team then arrived to take him to Afghanistan, torturing him at Skopje airport to break him through “capture shock”. He was subsequently detained for four months in the Salt Pit near Kabul, even though senior officials in the US government knew he was an innocent man.<sup>45</sup>

El-Masri saw denied his right to truth and reparations by local authorities at both Germany and FYRM. To avoid a political conflict with the U.S., the German government declined to file an extradition request in September 2007. The proceedings carried out by the FYRM could not be considered of any effectiveness as to provide redress.<sup>46</sup> He equally filed complaints before US tribunals, where he was denied justice on grounds of the protection of state secrets.<sup>47</sup> Several leaks have shown that authorities in Madrid,<sup>48</sup> Berlin and Skopje<sup>49</sup> were subject to international pressure from the US to

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<sup>42</sup> Cfr. supra footnote 5, p. 6

<sup>43</sup> Cfr. supra footnote 15, p. 6

<sup>44</sup> European Center for Constitutional and Human Rights, The El Masri case, consulted on 14/07/14, at [http://www.ecchr.de/index.php/el\\_masri\\_case.html](http://www.ecchr.de/index.php/el_masri_case.html)

<sup>45</sup> Open Society Foundations El-Masri v. Macedonia: judgment of 13 December, 2012 2 page Fact sheet summary consulted on 14/07/2014 at [http://www.opensocietyfoundations.org/sites/default/files/El-Masri-Fact%20Sheet%20Summary%20of%20Judgment-RS-1.20.13\\_1.pdf](http://www.opensocietyfoundations.org/sites/default/files/El-Masri-Fact%20Sheet%20Summary%20of%20Judgment-RS-1.20.13_1.pdf)

<sup>46</sup> Cfr, supra footnote 17, paras. 186-194

<sup>47</sup> El-Masri v. Tener, 437 F. Supp 2d 530, 541 (ED Va 2006) at n.37; affirmed 479 F ed 296 (4<sup>th</sup> Cir 2007); cert denied 552 US 947 (2007);

<sup>48</sup> El Pais, “Cable en el que la embajada alerta sobre el peligro de la idependencia judicial en España” consulted on 14/07/14 at [http://elpais.com/elpais/2010/12/02/actualidad/1291281428\\_850215.html](http://elpais.com/elpais/2010/12/02/actualidad/1291281428_850215.html)

<sup>49</sup> America’s “Coercive Diplomacy”. Washington Threatens Allies Over CIA Kidnapping and Torture Programs, consulted on 14/07/2014 at <http://www.globalresearch.ca/america-s-coercive-diplomacy-washington-threatens-allies-over-cia-kidnapping-and-torture-programs/22382?print=1>

“keep (...) head down and guard up regarding allegations”<sup>50</sup> on El-Masri US involvement.

At international level, the concern for El-Masri took on a different nature, becoming the one of the best documented extraordinary rendition cases.<sup>51</sup> Several studies were carried out mentioning it: both the Parliamentary Assembly of the CoE (in the so-called Marty report)<sup>52</sup> and the European Parliament (the Fava Inquiry)<sup>53</sup> undertook inquiries into the collaboration of European governments with the CIA operations. They corroborated the details of El-Masri’s rendition in its entirety, including his secret detention and interrogation in Macedonia and Afghanistan.

As with many other extraordinary rendition victims, given that any expectation of redress was denied at the domestic level, El-Masri therefore sought redress at the international one. Several international and regional human rights bodies have received applications from these victims, such as the HRC<sup>54</sup> or the IACHR, against USA. Concerning the former, El-Masri also tried his luck there, asking the IACHR to declare that the extraordinary rendition program violated the American Declaration of the Rights and Duties of Man,<sup>55</sup> but the case could not effectively succeed, due to the lack of collaboration of the US. In any case, the US has consistently maintained that international human rights law does not apply to the war against terrorism.<sup>56</sup> All of this led El-Masri to file an application before the ECtHR, which issued its judgment last 13 December 2012.<sup>57</sup> It found the FYRM responsible for violating the rights of liberty and security, effective remedy, family life and be freedom from torture,<sup>58</sup> and ordered the payment of 60.000 euros as just compensation.<sup>59</sup>

The international fora, although severely needed by these victims, has proven itself unable to effectively respond to this challenge. Ben Emmerson, Special Rapporteur

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<sup>50</sup> Id.

<sup>51</sup> European Center for Constitutional and Human Rights, The El Masri case, at [http://www.ecchr.de/index.php/el\\_masri\\_case.html](http://www.ecchr.de/index.php/el_masri_case.html)

<sup>52</sup> Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, Report, 12 June 2006, Doc. 10957

<sup>53</sup> 2006/2200(INI), Fava Report, para. 135-140

<sup>54</sup> Alzery v. Sweden (HRC 2006) para 11.5 and 11.6

<sup>55</sup> ACLU, El-Masri v. Tener, consulte don 05/07/2014 at <https://www.aclu.org/national-security/el-masri-v-tenet>

<sup>56</sup> Cfr. supra footnote 15, p. 14

<sup>57</sup> Ctr, supra footnote 17

<sup>58</sup> Idem. Operative Part 3-11

<sup>59</sup> Idem. Operative part 12



on the promotion and protection of human rights and fundamental freedoms while countering terrorism, highlighted the failure of the international community to secure full accountability for the acts of US during “the Bush-era CIA”.<sup>60</sup> Victims of these violations have seen their hopes vanish through both domestic available procedures and existing remedies in international law. The question is now evident: Can we affirm that victims of gross human rights violations really possess *de iure* a right to obtain reparations under international law? It seems clear that *de facto* they hardly get this right satisfied. I will analyse what the existing legal framework says in this regard.

## 2. Individuals’ right to reparations under general international law

To answer this question it first becomes necessary to analyse the extent to which victims of gross human rights violations have recognised a right to reparations under international law, outside a concrete legal framework providing it. It will help better understand the position in which they stand, and the nature and significance of their claims.

### *a. The emergence of reparations in international law: an inter-State responsibility.*

Before human rights law burst into the international arena, a principle existed under international general law, concerning that when a State commits an international wrong, it becomes liable to cease the wrongful conduct and afford adequate reparation.<sup>61</sup> This principle was stated by the Permanent Court of International Justice (“PCIJ”) in the landmark case of *Factory at Chorzow*, and confirmed by its successor, the International Court of Justice (“ICJ”), in *LaGrand* case.<sup>62</sup> The duty to make reparations, is thus understood, is an automatic consequence derived from the breach of the obligation, and does not need to be explicitly recognised in the treaty in question.

In this line, the most comprehensive study on the consequences following an internationally wrongful act is comprised by the Draft Articles on State Responsibility (“DASR”) elaborated by the International Law Commission (“ILC”).<sup>63</sup> According to

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<sup>60</sup> Cfr. supra footnote 10, para. 1.

<sup>61</sup> *Chorzów Factory* (PCIJ 1928) para. 29

<sup>62</sup> *LaGrand* (ICJ 2001) para. 48.

<sup>63</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts

these articles, an internationally wrong act presupposes that an obligation under international law, this is, a primary norm, has been breached.<sup>64</sup>

The consequences are: the obligation to make full reparation,<sup>65</sup> the duty to cease in the violation, and the obligation to offer guarantees of non-repetition.<sup>66</sup> The differences between these measures must be clear, since only the first involves an authentic measure of reparation, this is, a secondary norm. The duty to cease is, on the contrary, linked to the primary norm. The measures composing reparation are restitution, compensation and satisfaction.<sup>67</sup>

This is relevant to assess whether victims of the GRP possess the right to obtain redress relying exclusively on general international law, disregarding human rights treaties or domestic implementation of international rules. However, that would imply the existence under general international law of a victims' right to reparations, in the same fashion as the observed at inter-State context. This idea is not free from controversy.

- b. The application to individuals: an independent victims' right to reparations?

The PCIJ stated that those principles entail a general conception of law itself.<sup>68</sup> Therefore, in the inter-State context, the duty to provide reparations does not need to be explicitly established: it is a natural consequence of the breach.<sup>69</sup> However, in the context of human rights and individual-State relations, some authors contend that primary rights do not imply corresponding secondary rights: they must be explicitly established by treaty or customary law.<sup>70</sup> This is, that the principles regulating inter-State relations do not automatically apply to human rights.

At the international level, there is no universal treaty comprising the right of victims of human rights violations to obtain reparations though. If these principles do not apply automatically, we must then find evidence of the existence of a norm of ICL on victims' right to reparations. Therefore, the aim is here to assess whether victims of

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<sup>64</sup> *Idem.* Art. 2 (b)

<sup>65</sup> *Idem.* Art. 31

<sup>66</sup> *Idem.* Art. 30

<sup>67</sup> *Idem.* Art. 35, 36 and 37

<sup>68</sup> Cfr. footnote supra 61, para. 29

<sup>69</sup> *Idem.*

<sup>70</sup> Echeverría, 2012, p. 705

serious human rights violations have a right to reparations relying exclusively in general international law, in the same fashion as the rules of State responsibility:<sup>71</sup> this is, without the need of established mechanisms.

*i. Application of the inter-State regime to human rights law.*

Several scholars contend that the law of state responsibility is also applicable to individual-state relations. They affirm that after World War II, the international public law suffered a change in its approach, from a State-centred perspective to natural persons one.<sup>72</sup> Gabriela Echeverría argues that there would be a clear gap in human rights protection if primary rights under ICL would not count with corollary secondary rights for victims to obtain reparations once those were violated.<sup>73</sup>

On a radically different line, Christian Tomuschat contends that neither the PCIJ nor its successor has ever said that States are under an obligation to compensate their own citizens in cases where they have suffered harm at the hands of public authorities.<sup>74</sup> Therefore, there is no reason as to think that this regime is applicable to human rights controversies. Furthermore, in the DASR the ILC did not touch upon individual reparation claims in that draft.<sup>75</sup> The conclusion must be that an automatic application of the same regime to individual-State relations lack legal basis, and is therefore impracticable. In order to find these legal basis, its characterization as a norm of ICL must be considered.

*ii. Existence of a norm of ICL providing a victims' right to reparations?*

Article 38 of the Statute of the ICJ establishes that an international customary norm must be based on two elements: a widespread and consistent practice, and the existence of *opinio iuris*.<sup>76</sup> The controversy revolves around what must be considered as a relevant practice to observe an international customary individual's right to reparations.

By observing the different treaty legal systems, it is easily noticeable that there are several human rights instruments at international level conferring power to order

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<sup>71</sup> *Idem.* p. 699

<sup>72</sup> *Idem.* p. 700

<sup>73</sup> *Idem.* p. 709

<sup>74</sup> Tomuschat, 2002, p. 166

<sup>75</sup> *Idem.* 160

<sup>76</sup> Statute of the International Court of Justice, Art. 38

measures of reparations,<sup>77</sup> and most of them include the right to an effective domestic remedy within their texts.<sup>78</sup> The most extended argument to confirm the existence of a general duty to provide reparation for human rights violations has been found in the “*seminal norm requiring States to establish effective domestic remedies*”.<sup>79</sup> This is not explicitly a provision on reparations, but it has normally been regarded as a hybrid one, including both a procedural and substantive dimension.<sup>80</sup>

Tomuschat maintains that this is based on a misunderstanding.<sup>81</sup> Under his view, by observing the Spanish and French versions of the texts including this right,<sup>82</sup> it must be extracted that the right to an effective domestic remedy merely obliges the State to establish, at the national level, mechanisms able to settle the dispute concerned. He contends that the right to an effective domestic remedy is something completely different from an individuals' right to reparation at international law, and must be considered merely in that procedural dimension.<sup>83</sup> These provisions must therefore not be taken into account to establish a right to reparations under ICL. What must be observed is whether it exists a right to reparation, not to effective domestic remedies, under international law. In this line, this can only be analysed by attending to the practice of the existing established mechanisms concerning the award of reparations.

Consequently, Tomuschat argues that a norm of ICL on a victim's right to reparations depends upon whether there are established international procedures – international human rights bodies normally- able to provide reparations for victims.<sup>84</sup> Mechanisms must comply with certain requirements, though. First, victims must possess direct access.<sup>85</sup> This means that individuals must have the possibility to independently bring a case to the institutions in question, normally human rights bodies at international level. Secondly, reparations must be a legal duty for the institution in

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<sup>77</sup> Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Art. 63; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Art. 41

<sup>78</sup> Art. 8 and 25 ACHR, Art. 13 ECHR, Art. 8 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)UDHR, Art. 2(3) UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>79</sup> Nowak, 2006, p. 360

<sup>80</sup> *Idem.*, p. 361

<sup>81</sup> Cfr. *supra* footnote 74, p. 168

<sup>82</sup> *Idem*

<sup>83</sup> *Idem.* pp. 167-168.

<sup>84</sup> Tomuschat, 1999, pp. 10-11

<sup>85</sup> Cfr. *supra* footnote 74, p. 174

question, instead of some sort of discretionary power.<sup>86</sup> Finally, decisions conferring reparations must be binding on states.<sup>87</sup>

There exists, at the international level, no remedy meeting all the requirements Tomuschat considers necessary for the existence of a right to reparation under ICL. The existing international human rights bodies counting with legally binding powers are only found at the regional level. Therefore, they do not accurately reflect international practice, which would be required as the factual basis for a rule of customary law.<sup>88</sup> In sum, the lack of a universal human rights court providing reparations for victims precludes the right to reparations as an ICL norm.

On the other hand, other authors argue that such right exists, regardless remedial mechanisms like human rights judicial bodies.<sup>89</sup> They prefer to dissociate the existence of the right itself from the existence at international level of mechanisms available to victims to enforce it.<sup>90</sup> Gabriella Echevarría argues that the lack of mechanisms established at the international level does not involve the absent of the right itself.<sup>91</sup>

They contend that there is evidence proving that individuals may possess rights under customary law irrespective of the existence of established remedies. As examples of practice in this line, in *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ found, basing on ICL,<sup>92</sup> the need to provide reparations for victims of fundamental human rights violations.<sup>93</sup> This has been regarded as implying an obligation under international law to make reparation to individuals for violations of human rights and international humanitarian law.<sup>94</sup>

Moreover, to assess relevant practice on reparations themselves, there are several international bodies and human rights courts providing reparations to victims of human rights violations. Contrary to Tomuschat's idea, some commentators argue that the discretion enjoyed by some international bodies to assess the appropriate form of reparation does not lead to conclude the absence of the right. International jurisprudence

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<sup>86</sup> *Idem.*, pp. 162 and 165

<sup>87</sup> *Idem.*, p. 168

<sup>88</sup> *Idem.*, p. 170

<sup>89</sup> Cfr. *supra* footnote 70, p. 699

<sup>90</sup> *Idem.*, pp. 703-710

<sup>91</sup> *Idem.*, p. 711

<sup>92</sup> There is no treaty between Israel and Palestine

<sup>93</sup> ICJ, 2004, Advisory Opinion, paras. 152-153

<sup>94</sup> Cfr. *supra* footnote 70, p. 705

recognises that judicial discretion is important to assess the nature of a breach and the type of reparation needed on a case-by-case basis.<sup>95</sup> The binding character of their decisions must either way not be considered as determinant to recognise relevant practice as to the characterization of an ICL norm. International human rights institutions count with authoritative interpretation of the treaties they are called to monitor, and therefore their decisions generally reflect international law practice.<sup>96</sup>

Therefore, the practice of the established mechanisms at international and regional level may be relevant to assess the existence of ICL. Moreover, the principal human rights bodies dealing with this issue have understood the right to an effective domestic remedy in both the procedural and the substantial dimension, and have developed their case-law according to such understanding. Some human rights instruments also follow this path.<sup>97</sup> The right to an effective domestic remedy can, therefore, still play a role in the inception of an ICL norm in this regard.

As explained, whether victims possess an enforceable right to reparation under international law is still an unanswered question. In theory, the controversy is still open, whereas, in practice, the experience of extraordinary rendition's victims search for redress does not seem very promising. The practical impediment these victims most often had to face was the lack of transparency and State secrecy. The next section will assess whether the right to truth can make any difference in this sense.

#### B) THE RIGHT TO THE TRUTH UNDER INTERNATIONAL LAW: THE OPPORTUNITY FOR THE GRP

The “right to truth” seems to be an especially compelling type of reparation for victims of human rights violations in extraordinary renditions cases. That is why plenty of victims, international NGOs, UN experts and human rights advocates in general have advanced this right before domestic and international fora, to properly respond the challenge posed by GRP.

Consequently, it is easy to find the presence of these international actors in *El-Masri case*. The search for redress undertaken by victims of these violations cannot be dissociated from a broader context, composed by a movement of truth-entrepreneurs

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<sup>95</sup> *Idem.*, p. 706

<sup>96</sup> *Idem.*

<sup>97</sup> A/RES/60/147, 21 March 2006

who largely advocate for the recognition and institutionalisation of the right to truth. This paper analyses here the interaction between such movement and the practice of extraordinary renditions (Section 1), and what the “right to truth” is as well as the position in which it is currently located under international law (Section 2).

1. An international movement towards truth and remedy under international human rights law.

Following the conceptualisation of Keck and Sikkink,<sup>98</sup> this paper characterizes the international movement towards truth and remedy recognition under international law as an international advocacy network. It observes the presence of such advocacy network in the El-Masri case, where these advocates push for the institutionalisation of the right to the truth in the European system of human rights protection.

Such movements aim to foster cooperation among potentially like-minded actors, such as NGOs and IOs, and they become therefore effective tools for norm diffusion at the global level.<sup>99</sup> They include those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.<sup>100</sup> Among the major actors, there can be found international and domestic NGOs, research and advocacy organisations, local social movements, parts of regional and international intergovernmental organizations and parts of the executive and parliamentary branches of governments.<sup>101</sup>

In the context of the GRP and, more specifically, on the application of the right to truth, certain organisations have shown their clear commitment towards full recognition of this right. It must be resolutely acknowledged the dedicated and persistent work of a small number of Parliamentarians and INGO's<sup>102</sup> towards establishment of facts in front of strenuous efforts made by a number of States to keep their involvement in the CIA programme hidden from public scrutiny.<sup>103</sup> Some of them has been present in *El-Masri case*.

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<sup>98</sup> Keck et al., 1999

<sup>99</sup> Naftali, 2010, p. 122

<sup>100</sup> Cfr. supra footnote 98, p. 89

<sup>101</sup> Idem., pp. 91-92

<sup>102</sup> Cfr. supra footnotes 29 and 5

<sup>103</sup> Ben Emmerson, UN Special Rapporteur on counter-terrorism, acknowledged the work of, among others, the Open Society Justice Initiative, Amnesty International, the International Commission of Jurists and the Redress Trust.

As a remarkable feature of these transnational networks, it can be noticed the promotion of norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with regional and international standards.<sup>104</sup> It is therefore no accident that rights claims may be the prototypical language of advocacy networks. In front of lack of recourses within domestic political or judicial arenas, they seek international connections to express their concerns.<sup>105</sup> Consequently, the concessions to the right to truth made for instance by Latin American States were the result of transnational advocacy networks: mechanisms such as the use of expertise or exchange of information were fundamental in the institutionalisation of norms by international organisations.<sup>106</sup>

The same context may be observed in the ECtHR with the *El-Masri case*. Different actors participated as third party interveners, including INGOs and IOs agencies. They all share -and presented thereby- a common view as to the matter. Besides *El-Masri* there are currently other cases involving extraordinary renditions pending before the ECtHR. On 3 December 2013, Ben Emmerson<sup>107</sup> participated as a third party intervener in the hearings held by the ECtHR, concerning the cases of two Guantanamo detainees, Al Nashiri and Abu Zubaydah.<sup>108</sup> He based his intervention in the recognition of the right to truth as understood by UN, as the effective means to accomplish accountability.<sup>109</sup>

## 2. Institutional advancements in the recognition of a “right to truth” in international law.

The efforts of those entrepreneurs to advance the institutionalisation of the right to the truth under international law have been echoed at the international level. As an example, UN holds nowadays a special commitment regarding the right to truth as a means to combat impunity, and there are, in general, several instruments at the universal level including the right to truth, with both binding and non-binding character.

### a. Instruments involving the right to truth with a binding character.

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<sup>104</sup> Cfr. supra footnote 98, p. 90

<sup>105</sup> Idem. 93

<sup>106</sup> Cfr. supra footnote 99, p. 122

<sup>107</sup> Cfr. supra footnote 10

<sup>108</sup> Application nos. 28761/11 and 7511/13, ECtHR, 2012

<sup>109</sup> International Observatory on Stability & Conflict consulted on 05/07/14 at

<http://oisc.wordpress.com/2013/12/09/al-nashiri-abu-zubaydah-v-poland-the-right-to-truth/>



On 20 December 2006, the UN took a major step in truth promotion, through the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>110</sup> In its preamble it affirms the right of any victim to know the truth about the circumstances surrounding the violation, as well as the victim's fate.<sup>111</sup> In Art. 24 it is established that:

*“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person”.*<sup>112</sup>

It also affirms the State's duty to locate and release the disappeared and, in the event of death, locate and return their remains, as well as the victims' right to obtain reparations.<sup>113</sup> Before the adoption of this instrument, the only legally binding tool recognising the right to truth was Additional Protocol I to the Geneva Conventions, applying therefore exclusively to war times, basing the right of families to know the fate of their relatives<sup>114</sup> and the duty to search for the disappeared persons.<sup>115</sup> The attainment of an instrument defining the concept and the legal consequences of the right to the truth was therefore deemed necessary, most of all given the gaps existing internationally around this right within the controversy around the right to a remedy and reparation in international law.<sup>116</sup>

The current point revolves around implementation of the convention, labour in which several international NGOs are currently working.<sup>117</sup> Among other political factors, the lack of provisions in German law on enforced disappearance was blamed to limit the criminal investigation issued in the *El-Masri*.<sup>118</sup> This is proof of the impact that the right to truth can have, as something more than a mere criminal investigation into the facts.

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<sup>110</sup> UNGA, 20 December 2006

<sup>111</sup> Idem. Preamble

<sup>112</sup> Idem. Art. 24 (2)

<sup>113</sup> Idem. Art. 24 (3 and 4)

<sup>114</sup> International Committee of the Red Cross, 8 June 1977, 1125 UNTS 3, Art. 32

<sup>115</sup> Idem. Art. 33

<sup>116</sup> Cfr. supra footnote 12, para. 80

<sup>117</sup> International Coalition against Enforced Disappearances (ICAED) consulted on 14/07/2014 at <http://www.icaed.org/the-coalition/>

<sup>118</sup> European Centre for Constitutional and Human Rights, Implementation of the Convention against Enforced Disappearance in Germany, consulted on 14/07/14 at <http://www.ecchr.de/index.php/enforced-disappearance.html>

- b. Lack of binding character of universal instruments enclosing the right to the truth.

A wide range of non-binding instruments have been adopted internationally. The most significant, for both the right to truth and the right to remedy and reparation, are the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (“UN Basic Principles”).<sup>119</sup> They are the result of more than 15 years of work by independent experts, beginning with Professor Theo van Boven and completed by M. Cherif Bassiouni, as well as long-standing participatory process of consultations which involved Member States, IOs and NGOs.

By observing this instrument, it seems that Bassiouni has followed the modalities of reparation known from inter-state law, as reflected in the DASR,<sup>120</sup> making them applicable for the individual-state’s context. The controversy as to the appropriateness of this has already been observed. He has also moved away from the view originally taken by Theo van Boven, and considered the victim’s right to reparation as the substantive aspect of the victim’s right to a remedy.<sup>121</sup>

More relevant for this study, the preamble makes explicit reference to Art. 13 ECHR, on effective domestic remedies. It mentions those provisions of the main regional and international human rights bodies enclosing an effective remedy clause, including the ACHR, the African Charter or the International Covenant on Civil and Political Rights (“ICCPR”).<sup>122</sup> A sort of linkage is intended to be established between these alike provisions and the UN Basic Principles.

In this line, the right to truth is therein incorporated as a reparatory measure, under the subtype of satisfaction. In particular, it encloses the investigation and verification of the facts surrounding the violation, the search for the whereabouts of the disappeared, the official declaration or public apology to restore the dignity of the victims, the punishment and sanction of the perpetrators,<sup>123</sup> the public disclosure of the truth<sup>124</sup> and the effective access of the victims and relatives to the proceedings.<sup>125</sup> This

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<sup>119</sup> Cfr. supra footnote 97

<sup>120</sup> Cfr. supra footnote 74 p. 160

<sup>121</sup> Cfr. supra footnote 79, p. 287

<sup>122</sup> Cfr. supra footnote 97, Preamble, mentioning Art. 25 ACHR; Art. 2 ICCPR and Art. 7 African Charter

<sup>123</sup> Idem. at 22 b) – h)

<sup>124</sup> Idem. at 22 b) and section X)

<sup>125</sup> Idem at section X)

instrument clearly links the right to truth to reparations, drawing on the precedent work on the topic developed by Theo Van Boven, at the time he was UN Special Rapporteur.<sup>126</sup>

Concerning one of the elements mentioned, the public disclosure of the truth, it is important to acknowledge here that the right to truth has generally been claimed to include two dimensions. These are, (1) an individual right to know the truth about heinous crimes and the fate of victims, and (2) a collective dimension, involving information for society at large.<sup>127</sup> The UN has consistently supported this view, and this instrument is proof of this. Further proof of such commitment toward the double dimension of this right can be found in several HRC resolutions on the right to truth, where it resolutely states the importance of “*society as a whole*” knowing the truth.<sup>128</sup> The UN has drawn on this to advance the establishment of Truth and Reconciliation Commissions (“TRC”) worldwide as a means to ensure accountability.<sup>129</sup> The Office of the High Commissioner for Human Rights (“OHCHR”) has also pointed out that the right to the truth is an individual right which also has a collective and societal dimension, constituting one of the mainstays of action in the fight against impunity.<sup>130</sup> Different experts and committees at the UN have enunciated the right to truth in its multiple dimensions.<sup>131</sup>

An important study worth recalling, crucial in the recognition of the right to truth at the international level, is the so-called Joinet Principles.<sup>132</sup> As a study aimed at combating impunity of perpetrators of human rights violations, it identifies the right to truth, in its individual<sup>133</sup> and collective<sup>134</sup> dimension, together with the right to justice and the right to reparation, as the necessary means to combat impunity.

In sum, clear gaps may be observed at the universal level regarding the right to truth and reparation. There is no universal instrument with binding character in this

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<sup>126</sup> Cfr. supra footnote 99, p. 125

<sup>127</sup> Letschert et al., 2011, p. 157

<sup>128</sup> A/HRC/RES/12/12, 2009, preamble; A/HRC/9/L.12 2007; mentioning ‘Society as a whole’

<sup>129</sup> Naftali, 2014, p. 19

<sup>130</sup> A/HRC/5/7, 2007, para. 83

<sup>131</sup> CAT/C/COL/CO/4, 2010, para. 27; CAT/C/SLV/CO/2, 2009, para. 9; A/HRC/7/3/Add.3, 2007, para. 82; A/HRC/14/23, 2010, para. 24; UN Doc. A/61/384, 2006, para. 16; A/HRC/4/CRP.2/Rev.1, 2010, paras. 40

<sup>132</sup> E/CN.4/Sub.2/1997/20, 1997

<sup>133</sup> Idem. paras. 17-25

<sup>134</sup> Idem. para. 17

regard. Even if we were to accept the existence of a customary individuals' right to reparations, its content would be very vague to include a right to truth within it. The search for redress undertaken by victims of the GRP has been generally accompanied by impunity and lack of justice. Their struggles for truth, characterized by secrecy.

At the regional level, though, some developments and positive steps might be found. The international institutionalisation of the right to truth has not been confined to its incorporation into instruments and resolutions: it has also been recognized by several human rights judicial and quasi-judicial bodies both internationally and regionally. *El-Masri* successfully got to be heard before a court of justice –the ECtHR- obtaining a condemning the practice of extraordinary renditions. Does this mean that there are international human rights bodies recognizing the right to truth? Should we therefore expect that ECtHR echoes the claims of these victims and the international actors supporting them? The next Chapter will address these questions.

## CHAPTER 2. COMPARATIVE OVERVIEW OF THE MAIN INTERNATIONAL HUMAN RIGHTS BODIES' REMEDIAL CAPACITY. EXPORTABLE EXPERIENCE?

The international actors present in *El-Masri case* advocated for a recognition of the right to truth by the ECtHR, within the right to an effective domestic remedy. They sustained their claims partly on the past experience of other human rights bodies acting at international and regional level. Given the lack of redress provided domestically, and the unclear existence of a right to truth under general international law, the feasibility of such recognition by regional courts may involve an important channel for those and other victims to attain truth and reparations.

This Chapter assesses the development the right to truth experienced in the IACtHR (Section A), for the emphasis the third party interveners in *El-Masri* made in referring to this court, and because it may shed some light into the way the right to truth could find accommodation in the European system, and the feasibility of the third party interveners when establishing such parallelism between the two courts. It will continue with the analysis of other relevant human rights bodies (Section B), in particular the HRC and the Human Rights Chamber for Bosnia and Herzegovina (“HRCBiH” hereinafter).

### A) THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The IACtHR case-law on reparation was described as “*its most important contribution to the evolution of the international human rights law.*”<sup>135</sup> The IACtHR based its power to afford reparations in Art. 63 ACHR. It is a somehow unclear provision.<sup>136</sup> It establishes an absolute obligation for the respondent State to grant the enjoyment of the breached right to the victim (“*shall rule*”).<sup>137</sup> This seems to entail a duty to cease, rather than reparations. Concerning reparations themselves, they can be ordered “*if appropriate*”, which introduces an element of discretion.<sup>138</sup>

As regards the right to truth, the Inter-American Commission of Human Rights (“IACmHR” hereinafter) has consistently adopted a very proactive work towards the recognition of the right to truth. The IACtHR itself has also shown a great deal of dynamism at receiving innovative legal trends at international level. Nowadays, we can affirm that the right to truth counts with its legal place in the Americas. The parties intervening in this judicial process were well aware of this fact. This is reflected in their arguments, language and the very formulation of the right to truth employed in their submissions to the ECtHR. Their arguments to sustain the right to the truth were to a big extent drawing from the IACtHR case-law.

This section will observe the development of such case-law. The attempt is to assess the way in which the right to truth became recognised by the IACtHR. It notes that it got first recognised under the *right to an effective domestic remedy*, and only afterwards it was included among the *measures requested by the IACtHR as reparations* (Section 1). Therefore, the interplay between the right to truth and these two provisions must be carefully taken into account, for the sought parallelism between the ECtHR and the IACtHR to be feasibly established. Subsequently, it analyses the circumstances present in the Inter-American system which led to such development (Section 2). All of this will help understand the claims made by the third party interveners in *El-Masri case*, and the relevant differences between the two courts to assess an eventual recognition of the right to truth by the ECtHR.

1. The characterization of truth as a right and as a remedy in the case-law of the Inter-American Court of Human Rights

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<sup>135</sup> Pasqualucci, 2003, p. 289

<sup>136</sup> Antkowiak, 2008, p. 357

<sup>137</sup> ACHR, Art. 63

<sup>138</sup> Cfr. supra footnote 74, p. 165

The right to the truth cannot be found along the text of the ACHR.<sup>139</sup> This explains why it had to be somehow recognised through other conventional rights. It became a necessity from very early, when the practice of disappearances became a common practice in Latin America. It was also relevant the proliferation of amnesty or “final point” laws aiming to exclude responsibility. In sum, the Latin America of 1990 was a region of widespread and systematic impunity. This scenario is not far from the European one, in the aftermath of the CIA rendition program: widespread impunity and secrecy along the whole region, perpetuated by the doctrine of “state secret”.

In this regard, the IACtHR had to find a proper answer to deal with this reality. In the late 80s, it faced the so-called Honduran disappearance cases: Velasquez-Rodríguez and Godínez Cruz. It can be noticed how, concerning the order to make reparations, the Court felt sceptical to request specific measures to Honduras. It was limited to order financial compensation, drawing on the ECHR case-law on reparations.<sup>140</sup>

Apart from that restrictive approach to reparations, the IACtHR firmly stated the State’s duty to investigate every violation of the ACHR, and the victim and his or her relatives’ right to know the fate and the location of his or her remains<sup>141</sup>. Both the duty to investigate and the access for the victim and relatives to the proceedings involve elements of the right to truth. This obligation is found under Art. 1.1 ACHR, on the general duty to respect the conventional rights. Such duty to investigate, linked to the relatives of the victim’s right to know, is therefore identified with the primary norm, with the breached right itself. It cannot be considered a proper reparatory measure. In *El Amparo Masacre*, the IACtHR repeated the same reasoning, but it also requested the State to investigate *and punish* those responsible.<sup>142</sup> The same goes for *Neira Alegría case*, where it adds the obligation to “*locate and identify the remains of the victim and deliver them to their next of kin.*”<sup>143</sup> None of them can be regarded as reparations though. In the *Garrido case*, the IACtHR explicitly confirms that the orders to investigate and prosecute are different from the court’s power to make reparations.<sup>144</sup>

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<sup>139</sup> ACHR, 1969

<sup>140</sup> Velasquez Rodríguez (IACtHR, 1989) para. 28

<sup>141</sup> Velasquez Rodríguez (IACtHR, 1988), para 181; Godínez Cruz, (IACtHR, 1989), para 191

<sup>142</sup> El Amparo Masacre (IACtHR, 1996) Op. 4

<sup>143</sup> Neira Alegría (IACtHR, 1996), para. 69

<sup>144</sup> Garrido v Argentina, (IACtHR, 1998) para. 72

A different approach is observed in *Caballero Delgado y Santana case*. The IACtHR states that the procedural duty to investigate and prosecute under Art. 1.1 ACHR must conclude with an effective reparation for the injured party.<sup>145</sup> The court is therefore linking somehow the procedural duty with a substantive right to make reparations. Consequently, the IACtHR establishes that the adequate reparation is to investigate and prosecute,<sup>146</sup> when the court is assessing the order to make reparations under Art. 63 ACHR.<sup>147</sup> Thus, the duty to investigate, and the direct order requested, are considered measures of reparation.

In 1997 the IACtHR decided on the case of a young student called Ernesto Castillo Paez, disappeared during a counter-terrorism operation in Villa El Salvador, Perú. The IACmHR pushed for the explicit recognition of the right to the truth.<sup>148</sup> The IACtHR stated that it constitutes a concept in jurisprudential development, absent in the Convention, but covered by the obligation to investigate under Art. 1.1 ACHR.<sup>149</sup>

However, an important development is that the IACtHR ordered to investigate, identify and prosecute those responsible,<sup>150</sup> and the duty to investigate is linked to let the victim's relatives know the truth and to provide them reparations.<sup>151</sup> Consequently, the IACtHR links Art. 1.1 ACHR with Arts. 8 and 25, on effective domestic remedy.<sup>152</sup> This link between the procedural duty to investigate and the right to obtain reparation is framed in the right to an effective domestic remedy.<sup>153</sup> In the “*Street Children*” case, the IACtHR states that the investigation and prosecution are aimed to redress the victims.<sup>154</sup> It ordered to investigate, prosecute and transfer the remains of the victim,<sup>155</sup> what constitutes therefore direct orders to make reparations.

In sum, the IACtHR first recognised the right to truth, despite failing to expressly mentioning it, under the right to effective domestic remedies (Arts. 8 and 25 ACHR). Afterwards, the IACtHR included truth elements among the measures to make

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<sup>145</sup> Caballero Delgado y Santana, (IACtHR, 1995), para 58

<sup>146</sup> Idem., para. 69

<sup>147</sup> Idem., para. 68

<sup>148</sup> Castillo Paez (IACtHR, 1997), para. 34

<sup>149</sup> Idem., para. 86

<sup>150</sup> Castillo Paez (IACtHR, 1998) Op. 2

<sup>151</sup> Idem., para. 105

<sup>152</sup> Idem., para. 106

<sup>153</sup> Blake (IACtHR, 1999), para. 63-65; Niños de la calle, (IACtHR, 2001), para. 225

<sup>154</sup> Niños de la calle, (IACtHR, 1998), para 227

<sup>155</sup> Cfr. supra note 153, 2001, para. 100-102, Op. 8 and 6

reparations (Art. 63 ACHR).

The landmark case in this regard is *Bámaca Velásquez*. Efrain Bámaca Velásquez was a Mayan leader of a revolutionary organisation, who was disappeared on 12 March 1992, after a gunfire with the army.<sup>156</sup> The events attracted large international attention, partly due to the alleged USA involvement into the case.<sup>157</sup>

Similarly to El-Masri, both cases attracted a great deal of international attention, including the presence of INGOs advocating for the recognition of the right to truth. The IACmHR paid special attention to the right to the truth in its intervention, stressing its individual and collective dimensions.<sup>158</sup> The ICJ presented an extensively documented *amicus* brief on the right to the truth.<sup>159</sup> To advance the collective dimension, it mentions cases where the IACmHR spoke out a right of “society as a whole”<sup>160</sup> to have an “inalienable right to know the truth”,<sup>161</sup> or the existence of a collective, in addition to the private, side of the right to the truth.<sup>162</sup> The brief also stressed that the IACtHR had already recognised important elements of the right to the truth.<sup>163</sup>

The IACtHR explicitly mentions the violation of a “right to the truth”: not as an autonomous right, but as a right subsumed in the duty to investigation under Arts. 8 and 25 ACHR<sup>164</sup>. Recognition of the right to the truth was therefore linked to the right to an effective domestic remedy.<sup>165</sup> As to the court’s power to order reparations under Art. 63, it does not limit to order an investigation: it stated that the results of such investigation must be publicly disseminate.<sup>166</sup> That reparation is not only aimed to restore an individual right to truth, but it also entails a collective dimension. The IACtHR stated that

*“the possibility of the victim’s next of kin knowing what happened to the victim*

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<sup>156</sup> Scovazzi et al. 2007, p. 155

<sup>157</sup> Mahle, 2005, 174-175

<sup>158</sup> Bámaca Velásquez (IACtHR, 2000), para. 197

<sup>159</sup> ICJ (2001) Legal Amicus Curia brief; mentioning: HRC Quintero v. Uruguay para. 14; Theo Van Boven: “truth as a form of satisfaction” E/CN.4/1990/10

<sup>160</sup> Idem. para. 33

<sup>161</sup> Idem. para. 33, citing Annual Report of the IACmHR 1985-1986 p.205

<sup>162</sup> Idem. para. 33, citing Report N° 13/99 1999 para. 224

<sup>163</sup> Among others, Velásquez Rodríguez, Godínez Cruz, Castillo Paez and Blake IACtHR.

<sup>164</sup> Bámaca Velásquez, supra footnote 158, para. 201

<sup>165</sup> Idem., para. 200

<sup>166</sup> Idem., Op. 8



and (...) the whereabouts of the victim's mortal remains, is a means of reparation, and therefore an expectation regarding which the State must satisfy the next of kin of the victims and society as a whole".<sup>167</sup>

It stated that the public disclosure serves as a guarantee of non-repetition, and therefore, the society as a whole has the right to know the truth<sup>168</sup>. The societal right is never recognised under Arts. 8 and 25 ACHR: this public dimension is only considered among the measures requested by the IACtHR under Art. 63. This must be therefore understood as a guarantee of non-repetition, under Art. 1.1. ACHR,<sup>169</sup> rather than a victim's right to remedy under Art. 8 and 25.<sup>170</sup>

Another controversy revolves around the autonomy of the right to truth. The IACmHR has largely advocated for the recognition of an autonomous right to truth under the ACHR, which is something that the IACtHR has consistently refused to accept.<sup>171</sup> It is a right subsumed in Art. 8 and 25.<sup>172</sup>

The IACtHR recognised the right to truth under the right to an effective domestic remedy, linked to the procedural duty to investigate. Once this had been established, it started to include the right to truth among the measures ordered to make reparations. While the individual dimension is constantly recognised in its case-law, the collective one is hardly considered as a right: it is understood as an expectation the State must satisfy under the right to an effective domestic remedy. Therefore, the orders to make reparations including this collective element of the right to truth entail guarantees of non-repetition, rather than measures to satisfy an individuals' right to reparation.

## 2. The reasons explaining why the IACtHR adopted a wide approach on reparations for victims

Two have been the provisions the IACtHR has used to recognise and develop the right to truth: the *right to an effective domestic remedy*, and *its power to order reparations*. The third party interveners in *El-Masri* case pushed for a recognition by the ECtHR of the right to truth in a similar fashion to the IACtHR. Despite their apparent

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<sup>167</sup> Bámaca Velásquez, (IACtHR 2001), para. 76

<sup>168</sup> Idem., para 77

<sup>169</sup> Idem., para, 77 (under Art. 1.1 ACHR)

<sup>170</sup> See also Myrna Mack-Chang (IACtHR, 2003), para. 274; Cantoral Benavides (2001), para., 69; Niños de la calle (2001) para., 100

<sup>171</sup> Blanco Romero, (IACtHR 2005), para. 62

<sup>172</sup> Idem., para. 62; Barrios Altos (IACtHR 2001), para. 48; Castillo Paez (IACtHR, 1998) para. 86

similarities, these courts differ in important elements, which are determinants to assess whether a similar trend regarding the right to the truth is something, at least, viable. This section analyses the elements considered to have played a role in such development.

First, concerning the right to an effective remedy, both the ACHR and the ECHR count with a similar provision respecting it.<sup>173</sup> On the contrary, the main institutional difference must be found in the articles concerning power to order reparations. The Art. 63 ACHR seems, like the whole convention does, to resemble its correspondent article on reparations in the ECHR,<sup>174</sup> but in a more expansive way than its European counterpart.<sup>175</sup>

Either way, the IACtHR understood Art. 63 ACHR to be influenced by the rules on reparations under general international law. Its scope, nature, beneficiaries, kind of measures, etc. is regulated by international law,<sup>176</sup> since it codifies a rule of international customary law.<sup>177</sup> Concerning the different kinds of reparations, the IACtHR stated that:

*“[R]eparation is the generic term, (...) consisting on restitutio in integrum, satisfaction, indemnification and guarantees of non-repetition, among others”.*<sup>178</sup>

Therefore the IACtHR draws on the reparation kinds enclosed in international instruments. By the time it started to recognise the right to truth as an effective domestic remedy and as a measure of reparation, important steps had been achieved at international level.<sup>179</sup> The IACtHR explicitly mentioned them,<sup>180</sup> as well as the comparative experience of other international human rights bodies,<sup>181</sup> to elaborate on the right to truth as a measure of reparation. The IACtHR has been very responsive to the evolution of international law, and something similar goes for the HRC.<sup>182</sup> This may entail fundamental differences between this court and its European counterpart.

Such dynamic development owes a lot to social components as well. The

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<sup>173</sup> ACHR Art. 8 and 25; ECHR Art. 13

<sup>174</sup> Cfr. supra footnote 74, p. 165

<sup>175</sup> Cfr. supra footnote 136, p. 356

<sup>176</sup> Castillo Paez (IACtHR, 1998), para. 49; Blake (IACtHR, 1999), para 32

<sup>177</sup> Idem. para 50 and 33, respectively

<sup>178</sup> Blake (IACtHR, 1999), para 31

<sup>179</sup> Cfr. supra footnote 132

<sup>180</sup> Bámaca: Cfr. supra footnote 158, para 76

<sup>181</sup> Idem., para. 76

<sup>182</sup> Martinot et al., 2000, p. 27

inclusion of creative jurists in the court, able to link this innovative right to existing provisions in the convention, explains to a great extent this evolution.<sup>183</sup> Judge Cançado Trindade, for example, spoke out in the *Bámaca Velásquez* case what would later become the path followed by the court:

“[T]he right to the truth constitutes the prerequisite for the very access to justice, and is linked to the impunity and non-repetition”.<sup>184</sup>

In sum, partly thanks to the broader power conferred by the ACHR to the Inter-American court to order reparations, but mainly thanks to its openness to the international sphere and the dynamisms shown by the court itself, the IACtHR was able to develop its power to afford reparations in a really expansive way. As previously outlined, the right to truth emerged under international law linked to the right to reparations. All these factors together -the power to order reparations, its connection to the international level, and the inception of the right to the truth as a kind of reparations under international law- led the IACtHR to materialize the right to truth in a direct order to repair the victims. The development of the right to truth has been therefore accompanied by the evolution of the IACtHR's power to order reparations.

Those elements present during the development of this right in the Inter-American context have been carefully treated by the interveners in *El-Masri*. However, the ECtHR seems to lack one fundamental factor for such recognition: an innovative attitude towards ordering reparations. This must be kept in mind when analysing the feasibility of the claims made by the third interveners to the ECtHR.

#### B) THE INCLUSION OF TRUTH IN OTHER RELEVANT INTERNATIONAL BODIES

The IACtHR is not the only human rights body recognising important elements of the right to truth at the international level. I have considered important to also assess the development of the right to truth in other two scenarios. This section analyses therefore the interpretation of this right within the HRC (Section 1), interesting for having drawn its power to order reparations and, among them, the right to truth, exclusively basing on the right to an effective domestic remedy. This is the provision under which the actors in *El-Masri case* intend to get the right to truth recognised.

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<sup>183</sup> Cassel, 2006, p. 211

<sup>184</sup> Bámaca: Cfr. Supra footnote 158: Dissent Opinion Cançado Trindade, para 32.

Afterwards, the analysis focuses on the HRCBiH (Section 2), which is of interest because its competence *ratione materiae* is based on the ECHR. The way in which elements of the right to truth got recognition by this court is of utmost importance to assess the legal feasibility of such thing taking place in the ECtHR.

### 1. The Human Rights Committee

Under the framework of the UN, there exists a number of international human rights bodies tasked with quasi-judicial functions, whose work and proceeding can be identified with that of the regional human rights courts. This section analyses the work developed by the HRC, for its relevance for the right to truth and reparation in international law. Its special interest comes from the fact that despite the ICCPR does not confer on the committee a power to afford reparations, the HRC has directly provided victims with measures aimed to satisfy the right to truth. The recognition of such right by the HRC is therefore of utmost importance to analyse the way in which this right may attain recognition in human rights bodies devoid of power to afford reparations, relying exclusively on the right to an effective domestic remedy.

#### a. The institutional lack of power to order reparations

The HRC is the mechanism put in place to monitor compliance with the ICCPR. With the entrance into force of the first Optional Protocol to this covenant, the HRC is competent to receive individual complaints and, under art. 5(4) of that protocol, shed its views as to the matter. These views lack, in principle, binding power, since the HCR is not a judicial court. Furthermore, no provision on a general power to grant reparations is found in the text of either the ICCPR or its Optional Protocol.

Comparatively, the text of the ICCPR is fairly similar to the ECHR.<sup>185</sup> However, as already mentioned, no provision on reparations as Art. 41 ECHR can be found along its text. This, nevertheless, has not prevented the HRC from requesting specific measures.<sup>186</sup> Such a power to order reparations has been found in the substantive provision of Art. 2(3) ICCPR, which basically entails a right to an effective remedy, in the same fashion as art. 13 ECHR or 8 and 25 ACHR.<sup>187</sup>

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<sup>185</sup> Cfr. supra footnote 182, p. 22

<sup>186</sup> Antkowiak, 2011, p. 287

<sup>187</sup> Koroteev, 2010, p. 295

This Article encloses a dual meaning. Art. 2(3)(b) ICCPR entails the procedural dimension of the remedy: the existence of a mechanism at the national level providing victims of violations with access to a relief. Art. 2(3)(a) involves a substantive dimension, where the HRC has found the legal entitlement to grant reparations to victims of covenant rights violations. It understood the right to reparation from the broader perspective of the international duty to provide with effective remedies.<sup>188</sup>

Technically speaking, this entails some problems. First, the HRC's decisions lack binding character. The HRC is the only organ which can issue authoritative interpretations of the ICCPR, even if it is not a judicial body.<sup>189</sup> The binding character of its views is a logical consequence of that.<sup>190</sup> However, the reality shows that the general compliance rate of States regarding the measures ordered in its views normally keeps very low.<sup>191</sup> In this line, the decision taken by the HRC on reparations seems problematic,<sup>192</sup> and thus it has been interpreted by States. This body has therefore interpreted its lack of explicit provision on reparations *as an implied acceptance of such power*,<sup>193</sup> *drawing on its "inherent powers"*.<sup>194</sup>

*It may be interesting for the ECtHR, since it does not count with a broad legal scope to order reparations in the ECHR. However, the practical consequences of these expansive interpretations, when it does not count with enough legal back, are polemical and not well considered by States: in practice, the consequences are not very encouraging.*

- b. The role of the provision on effective remedy: legal basis for a power to order reparations?

In the IACtHR, the right to truth evolved drawing on two provisions, which are normally linked to this right under international law. Those are the *right to an effective domestic remedy*, and the *power to order reparations*. For the HRC, both are found in the same provision: Art. 2(3) ICCPR. Therefore, a study of the development of the right to truth under the right to an effective domestic remedy cannot be detached from a study

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<sup>188</sup> Cfr. supra footnote 79, p. 360

<sup>189</sup> Cfr. supra footnote 182, p. 23.

<sup>190</sup> Buyse, 2008, p. 7

<sup>191</sup> Idem.

<sup>192</sup> Cfr. supra footnote 74, p. 167

<sup>193</sup> Klein, 1999, p. 32

<sup>194</sup> Shelton, 2007, para. 116

on the right to reparation.

The HRC has established an obligation to investigate under the procedural dimensions of the right to life<sup>195</sup> and to be free from torture,<sup>196</sup> in a similar fashion as the ECtHR.<sup>197</sup> This procedural duty to investigate is understood independently but linked to the right to an effective remedy, used to grant a broader degree of relief.<sup>198</sup> Therefore, the failure to investigate violations may give rise to a separate violation of the right to an effective domestic remedy.<sup>199</sup> The broader content of Art. 2(3) ICCPR involves a duty to prosecute, not only investigate,<sup>200</sup> serious violations of human rights.<sup>201</sup>

The HRC has truly developed a great range of reparatory measures under Art. 2(3). The measures established under this article must be considered not only as effective domestic remedies: they involve at the same time measures of reparations, since the HRC has understood it has the power to order them. Besides investigate and prosecute,<sup>202</sup> it has ordered restitution, rehabilitation and measures of satisfaction, such as public apologies or memorials.<sup>203</sup>

With regards to the right to the truth, the HRC has explicitly mentioned that the victims' relatives have a right to know about their beloved's fate.<sup>204</sup> In such cases, the reparations ordered are normally an investigation to establish what has happened to the victim, and prosecution of the perpetrators.<sup>205</sup> Providing information about the whereabouts of the victim's remains has also been ordered under Art. 2(3).<sup>206</sup> It means that the right to know the truth about the victims' fate is an important measure of reparation in the HRC. The collective dimension, though, is consistently absent in its decisions.

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<sup>195</sup> ICCPR Art. 6

<sup>196</sup> *Idem.* Art. 7

<sup>197</sup> Antkowiak, 2001-2002, p. 988

<sup>198</sup> *Amirov v. Russia* (HRC, 2009) para. 13

<sup>199</sup> *Cfr. supra* footnote 194, p. 100

<sup>200</sup> *Bautista de Arellana* (HRC, 1995) para. 8.6

<sup>201</sup> *CCPR/C/21/Rev.1/Add.13*, 2004, para. 18

<sup>202</sup> *Rodríguez v. Uruguay* (HRC, 1994), para 12.3; *Bleier v. Uruguay*, (1982); *Quinteros et al v. Uruguay* (1990); *Barbato et al. v. Uruguay* (1990), *Baboeram et al. v. Suriname* (1985); *Jean Miango Muigo v. Zaire* (1983); *Tshitenge Muteba v. Zaire* (1985).

<sup>203</sup> *Cfr. Supra* footnote 201, para. 16

<sup>204</sup> *Quinteros et al. v. Uruguay* (HRC, 1990) para. 14

<sup>205</sup> *Idem.*, p. 16

<sup>206</sup> *Sultanova v. Uzbekistan* (HRC, 2006) para. 9; *Khalilova v. Tajikistan* (2005), para. 9

The conclusion is that the right to truth was recognised, also here, by linking the procedural duty to investigate to the right to an effective remedy, which in this case also involves the HRC's power to order reparations. Even if the HRC lacks an explicit power to do so, it is not accurate to say that the right to truth has evolved along its decisions relying exclusively on an effective domestic remedies provision. It did it relying on both, the domestic remedies right and the power to order reparations. The appropriateness, theoretically and in practice, of the HRC's decision to go through this way is polemical, and therefore it is not clear whether it entails a good example to be imitated by other bodies lacking power to order reparations.

## 2. The Human Rights Chamber for Bosnia and Herzegovina

The interest to analyse the HRCBiH derives from the fact that it had its grounds on the ECHR.<sup>207</sup> It was established by the Dayton Peace Agreement ("DPA" hereinafter), which stated that the mandate would be based on the ECHR.<sup>208</sup> The HRCBiH recognised the right to know the truth about the fate and whereabouts of 7500 missing men and boys, drawing exclusively on the provisions of the ECHR:<sup>209</sup> the way in which this was done is of utmost importance to assess the feasibility of the ECtHR attaining similar results.

However, despite being based on a common document or following similar practices and procedures, the HRCBiH's approach to remedies and reparations was far more innovative.<sup>210</sup> The explanation for such divergence is found in the DPA: It provided to the HRCBiH with wider reparatory powers, in comparison with the ECtHR.<sup>211</sup> Once again, the power to grant reparations seems to involve fundamental consequences for the right to truth.

The HRCBiH had the power to indicate the steps to be taken by the respondent State to remedy breaches in the Convention, "*including orders to cease and desist, monetary relief (...), and provisional measures*".<sup>212</sup> The HRCBiH seems to be drawing

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<sup>207</sup> Cfr. supra footnote 79, p. 245

<sup>208</sup> Dayton Peace Agreement, Annex 6: Agreement on Human Rights, 14 December 1995, Arts. I, II and Appendix

<sup>209</sup> Naqvi, 2006, p. 264

<sup>210</sup> Ferstman, 2009, p., 491

<sup>211</sup> Cfr. footnote supra 208, Article XI, 1, b)

<sup>212</sup> Id.

here from the Basic Principles,<sup>213</sup> which considers the victim's right to reparation as one aspect of the victim's right to a remedy.<sup>214</sup> As a result, the HRCBiH ordered most types of reparations existing under international law, being the most frequent the measures of satisfaction and guarantees of non-repetition.<sup>215</sup>

The right to the truth was for the cases the HRCBiH had to deal with an especially compelling norm. As it was pointed out by the ICTY,

*“the most stressful traumatic event for Srebrenica survivors is the disappearance of thousands of men, (...) and many of the families still do not know the truth regarding the fate of their family members.”*<sup>216</sup>

The HRCHiB therefore ordered commonly to carry out thorough and effective investigations, with a view to bringing perpetrators to justice, disclosure of all the relevant information to the families, and transport of the victim's mortal remains.<sup>217</sup> In its early practice, the orders requested as reparations in cases of enforced disappearance resemble to the measures the ECtHR normally considers to entail, in similar cases, an effective domestic remedy under Art. 13 ECHR.<sup>218</sup> The HRCBiH is therefore drawing, in order to assess the reparations to be directly ordered, on the ECtHR case law on effective remedies.<sup>219</sup>

In the subsequent cases, the ECtHR developed a more interesting approach. Enforced disappearances are considered to breach Art. 3 ECHR,<sup>220</sup> as well as Art. 8 in its procedural dimension.<sup>221</sup> As reparations, the HRCBiH ordered the following measures: an investigation, with a view to prosecute the perpetrators, providing victims with effective access to the investigatory procedure,<sup>222</sup> and the duty to make available to

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<sup>213</sup> Cfr. supra footnote 190, p. 12

<sup>214</sup> Cfr. footnote supra 79, p.287

<sup>215</sup> Idem., p. 285

<sup>216</sup> The Prosecutor v. Vidoje Blagojevic and Dragan Jokic (ICTY 2005) para. 845

<sup>217</sup> Cfr. footnote supra 79 p. 285

<sup>218</sup> Matanovic against The Republika Srpska (HRCBiH, 1996) para. 63 (under “remedies”) and in the Op. 64.2

<sup>219</sup> Idem. Manfred Nowak dissent opinion, para. 10

<sup>220</sup> Palic against The Republika Srpska (HRCBiH,2001), para. 80

<sup>221</sup> Idem., para. 84

<sup>222</sup> Momani v. the Federation of Bosnia and Herzegovina (HRCBiH, 1999); Pržulj v. the Federation of Bosnia and Herzegovina (2000)



victim's relatives the victim's mortal remains.<sup>223</sup> The HRCBiH seems to be drawing on the comparative experience of other relevant international human rights bodies.<sup>224</sup>

The major shift in its case-law took place in the so-called *Srebrenica cases*. The HRCBiH draws on the IACtHR jurisprudence on reparations, mentioning the most important disappearance cases occurred in the Inter-American system.<sup>225</sup> It ordered the following measures:

(1) An investigation, which must be able to find out not only the perpetrator of the violations, but also the role the State itself had in such violation.<sup>226</sup>

(2) A full, meaningful and detailed investigation into the fate and whereabouts of the missing persons, with a view to reveal the truth to the victims, relatives and the general public.<sup>227</sup>

(3) An investigation and publication of the role the Republika Srpska had in the facts surrounding the massacre at Srebrenica in 1995, including the elaboration of a list with the names of the organizers.<sup>228</sup>

(4) The prosecution of the perpetrators.<sup>229</sup>

(5) Last, the public disclosure of the investigation's results.<sup>230</sup>

The purpose is therefore to establish the big picture as to the systematic character accompanying determined violations, as the enforced disappearance. In sum, the HRCBiH in the Srebrenica cases lays the foundations for a more inclusive approach to the right to truth within the right to an effective remedy in the ECHR. The obligation to publically disseminate, and the establishment of an investigation to elaborate a list as to those responsible, and the role played by the Republika Srpska in the Srebrenica massacre events, show a commitment by the HRCBiH to enclose new elements of truth within the remedial measures.

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<sup>223</sup> Palic (Cfr. supra footnote 220) Op. 7

<sup>224</sup> Matanovic (Cfr. supra footnote 218) Manfred Nowak Dissent Opinion (para. 5 and 6)

<sup>225</sup> Citing Castillo Paez at 207; Blake at 208; Barrios Altos at 210

<sup>226</sup> Groome, 2011, p. 195

<sup>227</sup> Selimovic et al v. The Republika Srpska (HRCBiH, 2003), para. 212

<sup>228</sup> Idem., para. 212

<sup>229</sup> Idem., para. 212

<sup>230</sup> Idem.,

The link between the reparations ordered by the HRCBiH and Art. 13 ECHR, the substantive provision this court drawn its decisions on, allows to regard such orders as the legal basis to expand the scope of the right to an effective domestic remedy in the ECHR. Even if the ECtHR lacks a similar power to afford reparations, nothing prevents it from interpreting the right to an effective remedy in the same line as the HRCBiH.

The observed experience of these human rights bodies seems to follow a common path regarding the right to truth. They all developed a procedural duty to investigate violations of their rights. They all understood the right to an effective domestic remedy as enclosing both a procedural and a substantive dimension. A link between the procedural duty to investigate is regarded as intimately connected to the right to an effective domestic remedy provision. The latter adds a broader scope of measures. Through this link, the investigation acquires remedial nature, and make it involve broader range of elements (such as prosecution, access for the victims and their relatives, public disclosure of the investigation results, location of mortal remains, information about victim's fate or whereabouts, etc., depending on each body).

A second step is taken then: the human rights bodies which count with power to afford reparations directly issue orders to satisfy the right to truth. It may entail different concrete measures. The important factor for this to take place is normally the existence of legal basis to do so (i.e. Art. 63 ACHR; DPA) or the body in question interprets its powers in a broad manner (i.e. drawing on inherent powers, as the HRC, or in international law, as the IACtHR). Depending on these factors, the measures to make reparations will or will not occur, and will vary in content and variety. For victims to see their right to truth satisfy, both the right to an effective domestic remedy and the power of the body to grant reparations seem to be essential.

## PART II. LIGHTS AND SHADOWS: THE PROMISE OF TRUTH IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS.

The right to truth is not recognized as such in the ECHR, the main instrument protecting human rights in Europe.<sup>231</sup> The conceptualization of the truth as a right in international law is a recent trend, which explains why it cannot be found in the text of the main human rights legal instruments, at the regional or international level. Anyhow, as it has been briefly explained above, this right has permeated the case-law of different

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<sup>231</sup> Council of Europe, 4 November 1950

human rights bodies to get to its current position. The question now is to which extent, and in which manner, a similar recognition is something feasible in the European System of human rights protection.

For the purposes of this paper, it is essential to keep in mind that the right to an effective domestic remedy is something different from the power that the ECtHR -and other human rights bodies- has to issue direct orders to make reparations. This study departs from the hypothesis that the ECtHR possesses a very restricted power to issue direct orders to make reparations, which therefore prevents any expectation of a direct request from the court, such as to order States to carry out an investigation conducting to satisfy the victim's right to truth. However, the strategy followed by the third party actors to exclusively emphasise the provision on the right to an effective domestic remedy seems to be not only a consequence of that impediment. It is also accommodated in current trends taking place at the ECtHR and the CoE, more in line with its own configuration and philosophy. Therefore, there are *prima facie* grounds to believe that the ECHR might provide to some extent a suitable framework for truth and redress in Europe, even in the absence of reparations directly ordered by the ECtHR

#### CHAPTER 1. THE SEARCH FOR TRUTH AND REMEDY BEFORE THE ECtHR

The reference point will be here *El-Masri* case. This case has attracted a great deal of international attention, and was presented as a *landmark* one with regard to the recognition of the right to truth and the fight against impunity in the context of the GRP. The different organisations intervening in the case pushed for a very similar approach as to how this right should be understood. Thus, *El-Masri* constitutes a prime example of a transnational advocacy network, gathering together different international NGOs, IOs, scholars and legal practitioners, while showing as well interesting examples of professional migration.<sup>232</sup> The aim at this time is to assess the viability of their claims, and to which extent they merged with the *dicta*, on account of the real impact that such claims would involve for victims of the GRP.

##### A) THE ARGUMENTS OF THE MAIN PROMOTERS OF THE RIGHT TO TRUTH IN EL-MASRI CASE

On 13 December 2012 the ECtHR launched the judgment on *El-Masri* case, the

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<sup>232</sup> Cfr. *supra* footnote 99, p. 125

first case concerning the system of CIA secret renditions in reaching the Strasbourg's Court.<sup>233</sup> By its very nature, this case attracted a lot of attention, and during its processing several international actors had the chance to participate and show their views as to the matter. In regard to the interest of this paper, it will be assessed here the intervention of INGOs (through the joint written submission of Amnesty International and the International Commission of Jurists and the one of Redress), IOs, such as the OHCHR, and the role played by some of the judges hearing the case, regarding the development of the right to the truth in the European system of human rights protection.

#### 1. The third party interventions

The right to the truth has emerged recently in international law, and has evolved mainly thanks to the intentional efforts of different actors in the international arena.<sup>234</sup> Following the article by Keck and Sikkink, these movements are here understood and referred to as transnational networks. Within them, we can find national and international civil society organizations, international institutions, scholars, judges and legal practitioners at any level, who have been constantly pushing for the development of an autonomous and enforceable right to the truth for victims of gross violations of human rights. Given its international interest and practical implications, *El-Masri case* seems to be an especially attractive one to intervene, as to achieve an important development in the recognition of this right in one of the judicial stages where such explicit recognition is still absent. A combined effort of INGOs and IOs, together with internal support from within the organization, as it is the case of some judges' dissent opinions, may be observed in the present case.

##### a. The content of the right to truth

AI and the ICJ jointly submitted on 24<sup>th</sup> April 2012 their written observations as to the whole case. The role of civil society, and in particular of these two INGOs, as truth advocates has already been explained when commenting on the development of the right to truth within the Inter-American system,<sup>235</sup> which may help understand the position of these two organizations. They recalled that the right to truth is an

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<sup>233</sup> ECtHR Press Release ECHR 453 (2012) 13/12/2012

<sup>234</sup> Cfr. supra footnote 209, p. 255

<sup>235</sup> Amicus Curiae ICJ in Bámaca: Cfr. supra footnote 159

internationally recognized right,<sup>236</sup> especially compelling for cases like secret renditions, given its systematic and widespread impunity.<sup>237</sup> As Redress mentioned in its submission,<sup>238</sup> the right to an effective remedy involves measures of satisfaction,<sup>239</sup> as the right to truth is. Moreover, the OHCHR roundly affirmed that the right to truth is an “*autonomous*” right under the ECHR,<sup>240</sup> which is triggered by gross violations of human rights. The position held by this international agency should not create any doubt, having regard to the stand reflected through the instruments on the right to truth launched under the UN.<sup>241</sup>

The four interveners fundamentally agreed on the measures called to remedy a violation the right to truth. The OHCHR summarizes them in, at the first place, an investigation capable of reconstructing the big picture, this is, the underlying factors provoking the violation (which reminds to a large degree to the orders requested by the HRCBiH in the Srebrenica cases)<sup>242</sup> and punish the perpetrators.<sup>243</sup> However, the content of the right to truth is broader than a mere obligation to investigate. It also includes the access of victims and their relatives to the procedure, as well as the full public disclosure of the truth.<sup>244</sup> They basically consist in those elements recognized by the relevant international instruments and the IACtHR, HRC or HRCBiH.

Nevertheless, the international body unquestionably most repeated at their interventions is the IACtHR. This judicial human rights organ recognized the right to truth based on Art. 25 taken in conjunction with Art. 8.1 and the duty to investigate under Art. 1.1 ACHR. As indicated in the OHCHR submission,<sup>245</sup> these articles find their counterpart in Art. 13 ECHR, together with the procedural limb of Arts. 2, 3 and 5 ECHR. Therefore, the four interveners agreed on allocating the right to the truth under

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<sup>236</sup> Written Submission on Behalf of Amnesty International and the International Commission of Jurists in the case of El-Masri v “The Former Yugoslav Republic of Macedonia”, Application No.39630/09, 2012, para. 37

<sup>237</sup> Id. para. 40

<sup>238</sup> Submissions of Redress to the Grand Chamber in the case of El-Masri v “The Former Yugoslav Republic of Macedonia” Application No.39630/09, 2012

<sup>239</sup> Idem. paras. 24-25

<sup>240</sup> Observations on behalf of the High Commissioner for Human Rights to the European Court of Human Rights in the case of El-Masri v “The Former Yugoslav Republic of Macedonia” Application No.39630/09, 2012 para. 35

<sup>241</sup> Cfr. supra footnote 128 (HRC) and 130 (OHCHR)

<sup>242</sup> Srebrenica cases, Cfr. supra footnote 227, para. 212

<sup>243</sup> Cfr. supra footnote 240, para. 31

<sup>244</sup> Cfr. supra footnote 227, para. 31

<sup>245</sup> Idem., para. 12

Art. 13 ACHR.<sup>246</sup> The intervening parties seem to imply that, allocating the right to the truth under the effective remedy provision, the ECtHR should draw on the existing standards in international law regarding remedies,<sup>247</sup> in the same fashion as the interpretation made by the other human rights bodies (and most particularly the IACtHR). As included in the OHCHR submission, “*Art. 13 of the Convention and its terms effective remedy must reconcile with any relevant international norm applicable to the parties.*”<sup>248</sup>

In fact, the recognition of the right to truth under effective remedy provisions led the different observed human rights bodies to progressively develop, to differing extent depending on the concrete body, the variety of elements requested by the third party interveners, which go beyond a mere investigation. It makes sense therefore the parallelism sought by them.

b. Society as a whole

From all the measures asked within the interventions, the greatest emphasis was clearly made in connection with the collective dimension of the right to truth, understood as the most effective measure to combat the impunity. To affirm this, they are dawning from the main international instruments recognizing the right to the truth,<sup>249</sup> but with a special remark for the Inter-American system.<sup>250</sup> The Inter-American system has already explicitly recognized the right to the truth, with express mention as to the importance of its collective dimension.

In the submission presented by Redress, a medical report is attached, where Dr. Robertson explains that public truth-telling is an important and fundamental step as a rehabilitation measure,<sup>251</sup> and that many victims may fear that other will not believe them, or may have suffered threats on the persons of their relatives.<sup>252</sup> He concludes that “*public recognition of the truth and proper acknowledgment (...) can play an integral role in the survivor’s journey to recovery.*”<sup>253</sup> The same practice was followed in the case of *19 Comerciantes*, when a doctor interviewed victims of enforced

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<sup>246</sup> Cfr. supra footnote 236, para. 38; supra footnote 238 para. 24 and 25; supra footnote 227 para. 18.

<sup>247</sup> Cfr. supra footnote 238, paras. 24-25

<sup>248</sup> Cfr. supra footnote 227, para. 21

<sup>249</sup> Cfr. supra footnote 236, at footnote 87

<sup>250</sup> Id. para. 37

<sup>251</sup> Cfr. supra footnote 238, para. 28

<sup>252</sup> Idem. para 32

<sup>253</sup> Idem. para 33

disappearances' relatives, to testify before the IACtHR that "*the majority of them showed a fundamental need that the facts were investigated and the crimes punished to that they could move on with their lives*".<sup>254</sup>

It is concerning the collective dimension where it is more easily noticed the sought linkage with the IACtHR. Despite the existence of several instruments enclosing the importance of the right to truth for the general public, the only legally binding recognition of this collective part has been made by the IACtHR,<sup>255</sup> even if its nature is still unclear. The INGOs' submissions employ the term "*society as a whole*" to define the right-holders of this collective dimension. It is a terminology that can be also found in some important resolutions on the right to truth,<sup>256</sup> and is used in plenty of scholar pieces of work. Interestingly, this is a concept considered to come directly from the Inter-American system.<sup>257</sup>

The first time that the IACtHR explicitly recognized the existence, even if timidly, of a right to truth in the ACHR, the IACmHR, when submitted its opinion, included the concept of the right of society *as a whole*.<sup>258</sup> The same can be found in the Amicus Curiae submission to the IACtHR made by, precisely, the ICJ.<sup>259</sup> The influence of both, the civil society and the IACmHR,<sup>260</sup> have been determinant in the development of this right and, particularly, in the advancement of its collective dimension. Even if the IACtHR has never gone that far as to speak of a right of society as a whole, the collective dimension is taken into account by the IACtHR. Hence, the four interveners roundly pushed for the recognition of the collective dimension.<sup>261</sup>

The recognition of this collective dimension would entail specific consequences. Understanding truth as a societal right implies that, as a direct consequence, anyone could demand State authorities to establish a Truth Commission to investigate past violations committed in the context of the extraordinary renditions in Europe. There are grounds to believe that this is the idea held by the OHCHR, taking into account the way in which UN has used TRCs as an international and generalized tool for peace-keeping

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<sup>254</sup> 19 Comerciantes (IACtHR, 2004), para. 72

<sup>255</sup> Myrna Mack-Chang (IACtHR, 2003) para. 274

<sup>256</sup> Cfr. supra footnote 128

<sup>257</sup> Rusten, 2008, p. 31

<sup>258</sup> Bamaca Velasquez (IACtHR 2000), para. 197

<sup>259</sup> ICJ Amicus Curiae in Bámaca: Cfr. supra footnote 159, para. 33

<sup>260</sup> Barrios Altos (IACtHR, 2001), para. 45

<sup>261</sup> Cfr. supra footnote 236, para. 37; Cfr. supra footnote 227, para. 2; Cfr. supra footnote 238 para. 3 ii)

and post-conflict rebuilding to fight impunity worldwide.<sup>262</sup> There are several proof of such tendency,<sup>263</sup> which AI, among other actors, has supported.<sup>264</sup>

In sum, the international actors present in the case are part of the advocates for the recognition of the right to the truth under international law, as a remedy to human rights violations. Basing on the mentioned instruments (i.e. resolutions, guidelines, principles), the compared experience of other organs, and taking advantage of the past path followed by the ECtHR, are pursuing the recognition of the right to truth as to remedy the gross and systematic violations committed by the GRP. They all pushed for the collective dimension of the right to truth and for its explicit recognition under the Art. 13 ECHR.

c. An order to carry out an effective investigation

For the OHCHR the ideal goal would be that the ECtHR directly orders measures to effectively redress the wrongs made during this period of horror and systemic fundamental rights violations throughout Europe. This is, the ECtHR orders a reparation. This is clearly exposed in the opening paragraph of its submission, where it is stated that:

*“as to the question of just satisfaction under art. 41 of the Convention, the European Court of Human Rights is asked to take into account the (...) right to the truth.”*<sup>265</sup>

Therefore, it is with this idea in mind that the whole submission is elaborated. In an interview with Jan Arno Hessbruegge, Human Rights Officer at the OHCHR, responsible for the drafting of the *El-Masri* submission, it was stated that, in order to advance the ICL status of the individuals' right to reparation, a direct order would be indeed ideal.<sup>266</sup> However, Art. 41 ECHR is only mentioned in the first paragraph, and

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<sup>262</sup> Cfr. supra footnote 129, p. 19

<sup>263</sup> S/2004/616, 2004; HR/PUB/06, 2006.

<sup>264</sup> Commissioning justice: truth commissions and criminal justice, published in 2010 by Amnesty International Publications, consulted on 14/07/2014 at <http://www.amnesty.org/en/library/asset/POL30/004/2010/en/1f74d7de-f82d-4942-8b3a-a5f8f7858d77/pol300042010en.pdf>; Truth, justice and reparation: Establishing an effective truth commission, 11 June 2007, published by Amnesty International Secretariat. Consulted on 12/07/2014 at <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/77ee33de-d38a-11dd-a329-2f46302a8cc6/pol300092007en.pdf>

<sup>265</sup> Cfr. supra footnote 129, para. 1

<sup>266</sup> Phone Interview Jan Arno Hessbruegge, 09 June 2014



forgotten in the rest of the intervention, where the emphasis is, in exclusive, regarding the recognition of truth linked to the effective remedies under Art. 13. He attributes this cursory allusion to the fact that they are realistic as to what can be expected from the ECtHR.<sup>267</sup>

The third party interveners in *El-Masri* seems to be aware of the differing nature of the right to remedy under Art. 13 ECHR and the court's power to order reparations. None of them make special efforts in this line: what is more, safe for the OHCHR, none of them even raise the question. The reason for that cannot be explained here, and are treated in detail in the next section (see *Infra: II. 2.1*). Suffice it here to observe that, in any case, all interveners agreed upon emphasizing Art. 13, without paying too much attention –or no attention whatsoever- to the reparatory orders.

## 2. The majority opinion and the dissenting judges

By looking carefully to the judgment issued by the ECtHR, and focusing exclusively to the eventual development as to the right to the truth and the overall intention by the intervening parties, it must be concluded that no progress has been achieved under Art. 13 ECHR. It is required an investigation capable of leading to identification and punishment, stated that the requirements under Art. 13 are broader than the State's obligation to investigate and prosecute, and that an effective access must be granted to the victim and relatives.<sup>268</sup> Article 13 is considered violated, but no mention to the collective dimension is made under art. 13 ECHR by the court.

On the contrary, under the procedural limb of Art. 3 ECHR, regarding the duty to investigate and prosecute, and drawing on the submissions made by the third party interveners, the ECtHR expressly mentions that the investigation was inadequate with regard to “*its impact on the right to the truth*”.<sup>269</sup> It mentions the importance of the investigation for the victim, victims of similar violations and for the general public, “*who had the right to know what had happened*”.<sup>270</sup>

The majority opinion of the judges sitting in the ECtHR is quite ambiguous. It rejected to recognize the right to the truth as a remedy, in the way it was asked, but it

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<sup>267</sup> Idem.

<sup>268</sup> Ctr, supra footnote 17, paras. 255-256

<sup>269</sup> Idem., para. 191

<sup>270</sup> Idem.

included a special consideration, given the extraordinary impact that for the general public has the present case and the GRP. Therefore it did mention the right to truth, even paying due attention to its collective dimension, not under Art. 13 but concerning the procedural limb of art. 3 ECHR. For the rest, under art. 41 ECHR no other measure than financial compensation is ordered.<sup>271</sup>

The failure to include a right to the truth under Art. 13 ECHR is reflected in the concurring dissent opinions of judges Tulkens, Spielmann, Sicilianos and Keller.<sup>272</sup> They regret the lack of explicit recognition of the right to truth as an effective remedy, and label it of *over-cautiousness*.<sup>273</sup> In support of the need of an explicit recognition, they recall the said by the third-party interveners, and the existing instruments in international law enclosing the whole scope of the right to truth, as for the ECtHR to abandon that over-cautious position.

It seems interesting to observe how these judges adhered to those advocates above mentioned. In the case of Dean Spielmann, having largely adopted a clear position as advocate of a wider remedial power of the ECtHR, the current president of the Court has followed an interesting path regarding remedies in enforced disappearances. Even if his numerous interventions will be discussed in larger detailed bellow, let us observe here how in *Medova case*, he explicitly decided against the inclusion of the investigation under art. 13, for considering it to suit best under art. 41 ECHR<sup>274</sup> (in order to achieve a direct order to investigate by the ECtHR, this is, the order as a *reparation*). Shortly after, in *Varnava case*, the art. 13 is considered by the ECtHR to be redundant, as it has been pointed out (*supra*: ), and a similar dissent opinion is issued by judge Spielmann, seeking for a direct order by the court.<sup>275</sup> In *El-Masri*, on the contrary, he joined a dissent opinion asking for a wider scope of art. 13 and express recognition of right to the truth on it. In this case, no direct reparation is asked to be ordered.<sup>276</sup> Once again it may be seen how the strategy changes, from emphasizing the direct order to investigate, to ask the inclusion of the truth within the effective remedy provision.

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<sup>271</sup> *Idem.*, Op. 12.

<sup>272</sup> *Idem.*, Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller

<sup>273</sup> *Idem.*, Concurring Opinion, para. 10

<sup>274</sup> *Medova v. Russia* (ECtHR, 2009), Dissent Opinion Judge Spielmann

<sup>275</sup> *Varnava v. Turkey* (ECtHR, 2009) Dissent Opinion Judge Spielmann

<sup>276</sup> *Ctr*, *supra* footnote 272

The next steps Judge Spielmann is to follow are difficult to foresee, and the intentions behind this change of strategy are unknown, but what seems to be really relevant is the fact that a judge who has largely and for long been pushing for an expansion of the reparative power of the ECtHR joined this opinion, not adding anything as to the inclusion of the investigation under art. 41 ECHR. It may give a clearer notion of what has been sought with *El-Masri* case. Equally interesting is the intervention of Judge Helen Keller, who was serving from 2008 to 2011 as a member of the HRC. During that period, she encouraged the advancement of the right to truth in the HRC case-law, as it is reflected in some of her dissent opinions. An example of this is the case *Cifuentes Elqueta*, where right to truth is presented as one example of new rights emerging thanks to the introduction of evolutive interpretation into international instruments, in the face of new challenges not sufficiently covered by them.<sup>277</sup>

This ambiguous position taken by the ECtHR in this case is also reflected in the joint concurring opinion of judges Casadevall and López Guerra. They question the position of the court when it devotes a separate analysis (para. 191 in the judgment) for a concept, right to the truth, which does not add any substantial meaning regarding the past case-law of the ECtHR.<sup>278</sup>

B) ASSESSMENT OF THEIR CLAIMS: THE IMPACT OF THEIR CLAIMS ON THE RIGHT TO TRUTH.

It was pointed out how the preamble of the Basic Principles refers to the right to effective remedy under, among other provisions, Art. 13 ECHR. Such reference aims to provide a link between the two texts,<sup>279</sup> to allow an eventual development of the provision in a similar fashion to the principles. The ECtHR has already defined Art. 13 ECHR as enclosing both a procedural and a substantial meaning.<sup>280</sup> This means that the Court understands it to ensure the existence of an access to a remedy at national level, as well as the granting of the appropriate redress by the local authorities. It is true that, under the ECHR, and in line with the principle of subsidiarity, the States enjoy a great amount of discretion to choose the measures to comply with the convention. However, the remedy must in any case be effective, which may vary depending on the nature of

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<sup>277</sup> Cifuentes Elqueta (HRC, 2009) Dissent opinion (Keller) paras. 19, 20

<sup>278</sup> Ctr, supra footnote 17: Concurring Opinion of judges Casadevall and López Guerra

<sup>279</sup> Ctr, supra footnote 187, p. 295

<sup>280</sup> Silver v. UK (ECtHR, 1983), para 113

the violation.<sup>281</sup> The question is then what should be considered *effective* in cases of enforced disappearances.

### 1. Legal issues at stake: right to truth under Art. 13 ECHR

The court has shown a clearly stricter approach in terms of effectiveness when it comes to enforced disappearances.<sup>282</sup> It has established that Art. 13 acquires a special nature in front of gross violations: it involves, in particular, a duty to prevent and cease in the violation, and also the duty to make full reparation for the damage already occurred.<sup>283</sup> Before going more in detail with it, it seems relevant to define first the content and scope of this article, as to whether it can enclose a right to the truth including the requirements advanced in the third party intervener claims.

As to its application to enforce disappearances, unlike its American counterpart, the ECtHR had not traditionally had to deal with a big number of forced disappearance cases. However, after the start in 1984 of the Kurds minority struggles in South-east Turkey,<sup>284</sup> an important caseload regarding disappearances got before the ECtHR.<sup>285</sup> At that time, most of the case-law on this topic came as a consequence of that conflict.

#### a. The broader content

In 1996 the ECtHR had to face a forced disappearance case in South-east Turkey. The case concerned Zeki Aksoy, a Turkish citizen made disappeared in 1992 and shot to death in 1994. The Court understood here that, in cases of enforced disappearances, Art. 13 entails a very specific branch of measures, for the remedy to be effective in practice as well as in law. Those were said to consist in the granting of a thorough and effective investigation capable of leading to the identification and punishment of those responsible, as well as the guarantee of an effective access for the complainant to the investigatory procedure, in addition to the payment of compensation where appropriate.<sup>286</sup>

Nevertheless, the State's duty to order an investigation in cases of violations of fundamental rights was nothing new by that time. In *McCann v. United Kingdom* the

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<sup>281</sup> Jacobs et al, 2010, p. 135

<sup>282</sup> Claude, 2010, p. 453

<sup>283</sup> Aksoy v. Turkey (ECtHR, 1996), para. 98; McGlinchey and v. UK (ECtHR 2003)

<sup>284</sup> E/CN.4/1999/62/Add.2, 1998, para. 8

<sup>285</sup> Cfr. supra footnote, 282, pp. 408-409

<sup>286</sup> Aksoy: Cfr. supra footnote 283, para. 95-98

ECtHR had already established the existence of such obligation under the procedural limb of Arts. 2 and 3 ECHR, read in conjunction with the State's general duty under Art. 1.<sup>287</sup> What seems relevant for the effects of this paper is that the scope of the obligation derived from Art. 13 is broader than the procedural limb of the mentioned rights: it explicitly mentioned the access of the complainant to the investigation, which is consistently regarded as a constitutive part of the right to truth, as well as the fact that the investigation must be capable of leading to the identification and punishment of the perpetrator, which had not been included within the procedural limb of Arts. 2, 3 or 5 ECHR before. It started to be included in such procedural duty only after it was mentioned as a remedial measure, this is, under Art. 13.

This may imply that the mentioned obligation under Art. 13 is something broader than the obligation to investigate and prosecute. In *Aksoy v. Turkey*, the Court clearly stated that:

*“[E]ven if the obligation to grant such measure was not explicitly recognized under the convention, (...) such a requirement is implicit in the notion of an effective remedy under Article 13”*.<sup>288</sup>

This view has been confirmed in the subsequent cases.<sup>289</sup> In 1998, the ECtHR heard again of an enforced disappeared case concerning Kurdish struggles in south-east Turkey. The son of the applicant, Üzeyir Kurt, was a Turkish national last seen in custody of members of the Turkish security forces in 1993, disappearing thereafter. The local authorities neglected to have any information as to his whereabouts. Here, the ECtHR expressly mentioned the broader scope of Art. 13 *vis-à-vis* the procedural obligations under Arts. 2, 3 and 5.<sup>290</sup> A strong link between the procedural duty to investigate and Art. 13 is laid down since this very early case-law.

The subsequent case-law has supported this view,<sup>291</sup> while timidly adding new elements to that broader content. The ECtHR expanded the right to access of the complainant to explicitly involve the relatives of the disappeared. In fact, in the *Kaya*

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<sup>287</sup> *McCann v. UK* (ECtHR 1995), para. 161

<sup>288</sup> *Aksoy*: Cfr. supra footnote 283, para. 98

<sup>289</sup> *Aydin v. Turkey* (ECtHR, 1997); *Assenov* (ECtHR, 1998);

<sup>290</sup> *Kurt v. Turkey* (ECtHR, 1998) para. 140

<sup>291</sup> *Timurtas* (ECtHR, 2000), *Kaya* (1998), *Keenan* (2001)

case,<sup>292</sup> the Court had to deal with a case of extrajudicial killing, and it recognized that, besides the mentioned obligation to carry out an investigation as an effective remedy, the relatives counted with a right to access to the proceeding.<sup>293</sup> Once again, the subsequent case-law has been consistent with this recognition.<sup>294</sup> It is important to notice how for the ECtHR the access of relatives to the process dealing with victims' rights acquires a particular relevance in enforced disappearances. This benign treatment cannot be observed in other situations, where there not seem to be any apparent reason for a differentiated deal.<sup>295</sup>

In this regard, the Kaya case crystallized several essential points: on the one hand, Art. 13 is considered to serve the relatives of the victim, called to redress their suffering with something more than monetary compensation. The redress is specified to consist in not only an effective investigation, but something broader: "capability" of identifying and punishing the offenders, as well as access for the relatives or the victim to the proceedings.<sup>296</sup>

The Court has thus clearly interpreted the right to an effective remedy entails an obligation for States to grant an appropriate redress, dependent upon the nature of the violation. In cases of enforced disappearances, for their fundamental importance for the human dignity and the especially vulnerable position it leaves victims in,<sup>297</sup> this redress must involve specific requirements:<sup>298</sup> some of them do not explicitly enclosed within the conventional text.

If compared to the Inter-American system, its sibling human rights court has followed a similar pattern.<sup>299</sup> It has nevertheless gone further, in the sense that the duty to investigate is triggered by any violations of the ACHR, as it is based on the general duty to respect (Art. 1.1. ACHR).<sup>300</sup> Its reparatory nature, under Art. 8 and 25, was progressively emerging later in the time, through subsequent case-law,<sup>301</sup> as previously

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<sup>292</sup> Kaya: Cfr. supra footnote 291

<sup>293</sup> Idem. para. 107

<sup>294</sup> Kurt: Cfr. supra footnote 290 para. 140; Timurtas: Cfr. supra footnote 291, para. 122, Seidova et al. para. 52; Er and others v. Turkey para. 110-113

<sup>295</sup> Rubio-Marin, 2009, p. 236

<sup>296</sup> Cfr. supra footnote 197, p. 984

<sup>297</sup> Aksoy: Cfr. supra footnote 283, para. 98

<sup>298</sup> Timurtas: Cfr. supra footnote 291, para. 111

<sup>299</sup> Cfr. supra footnote 197, p. 985

<sup>300</sup> Velasquez Rodríguez, para. 172; Godínez Cruz, para. 175; Caballero Delgado y Santana, para. 58

<sup>301</sup> Cfr. supra footnote 176, para. 106 (Castillo Páez); para. 63 and 65 (Blake)

outlined. The HRC, on the contrary, keeps closer to the interpretation made by the ECtHR, and only considers this duty to investigate, linked to the effective remedies, in cases of gross violations of human rights.<sup>302</sup> The HRCBiH also followed this second path, even if it also ordered investigations under Art. 8 ECHR,<sup>303</sup> in addition to Arts. 2, 3 or 5. Both the IACtHR and the HRC have characterized the prosecution and punishment of the perpetrators as a duty,<sup>304</sup> unlike the ECtHR and the HRCBiH, which configured it under the wording of “*with a view to*”<sup>305</sup> or “*capable to (...) punish*”,<sup>306</sup> respectively. The fundamental point here is that all of them ended up to emphasize these measures as basic elements of redress and restoration.<sup>307</sup>

#### **b. The collective dimension**

There are, on the contrary, other elements that have not still been clearly recognized by the ECtHR. Due to the emphasis it was asked with in *El-Masri*, the extent to which the collective aspect of the right to truth has been recognized must be analyzed here. It has been repeatedly stated that a right to truth entails both, an individual and a collective dimensions. In order to further analyze the treatment given by the ECtHR to this public dimension, it is presented here the relevant case-law dealing with the topic and raised by the applicants in *El-Masri*. Interestingly enough, it is noticeable how the need of *public scrutiny* has been an element present in the Court’s decisions, regarding the purpose of the investigation, but it has somehow always escaped from its inclusion as another remedial element implicitly recognized under Art. 13.

To assess the nature of the *public scrutiny* element in the ECtHR case-law, it becomes relevant to have a look to the *Northern Ireland cases*. Even if they do not deal with enforced disappearance violations themselves, they are relevant for its connection with the duty to investigate and prosecute and, mainly, for enclosing the essence of the claims the arguments in *El-Masri*, regarding the public disclosure element, are based upon.

In 2001, the ECtHR decided on *Hugh Jordan v. UK*, a case concerning an alleged extrajudicial killing in Northern Ireland, with a failure by the UK authorities to

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<sup>302</sup> Cfr. supra footnote 197, p. 988

<sup>303</sup> Palic Cfr. supra footnote 220, para. 84

<sup>304</sup> Villagran Morales (IACtHR, 2001) para. 63; Bautista de Arellana (HRC, 1995) para. 8.6

<sup>305</sup> Srebrenica, Cfr. supra footnote 227, para. 212

<sup>306</sup> Aksoy: Cfr. supra footnote 283, para. 98

<sup>307</sup> van Boven, 2003, p. 660

carry out an effective investigation. The Court mentioned that the investigation may be regarded as

“[E]ssential 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”.<sup>308</sup>

It was not included in the reasoning released under Art. 13, which in any case was not considered to have been violated.<sup>309</sup> In subsequent cases regarding analogous situations, a similar approach has been followed.<sup>310</sup>

More related to the subject, for being in connection with forced disappearance cases, but equally excluded from Art. 13, other cases came before the ECtHR where a similar reasoning as to that collective element of the “*public scrutiny*” is employed. Most of them have been a direct consequence of the other big conflict at the edges of Europe provoking systematic cases of enforced disappearance: the Chechen war. According to AI, between 3,000 and 5,000 men, women and children have disappeared in the Chechen Republic since 1999.<sup>311</sup>

Since 2005 the ECtHR has had the chance to rule on the cases of disappearances product of the second Chechen war. The court has consistently kept the same standards when it comes to the effective remedy under Art. 13, in connection with fundamental rights violations by forced disappearances.<sup>312</sup> At the same time, some of them also repeat the element of the *public scrutiny*, as to the investigation, drawing on the Northern Ireland cases.<sup>313</sup>

The exact same regarding *public scrutiny* can be found in some of the old<sup>314</sup> and more recent<sup>315</sup> Turkish cases of enforced disappearances, always in connection with the duty to investigate under art. 2, 3 or 5 ECHR. To sum, this collective element has been proven to appear always related to the procedural obligation to carry out effective

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<sup>308</sup> Hugh Jordan v. UK (ECtHR, 2001) para. 108

<sup>309</sup> Idem. para. 156-165; Also McKerr v. UK (ECtHR, 2001) para. 157; Kelly and Others (ECtHR, 2001) para. 98

<sup>310</sup> Finucane v. UK (ECtHR, 2003) para. 71

<sup>311</sup> Amnesty Int'l, Russian Federation: What Justice for Chechnya's Disappeared?, **AI Index EUR** 46/020/2007, May 2007, consulted on 14/07/2014 at <http://www.amnesty.org/en/library/info/EUR46/020/2007> . p. 3

<sup>312</sup> Isayeva v. Russia (ECtHR, 2005) para. 226-227; Bazorkina v. Russia (2006) para. 161; Imakayeva v. Russia (2006) para. 193

<sup>313</sup> Isayeva (idem.) para. 214; Medova (supra footnote 274, para. 109)

<sup>314</sup> Kaya: Cfr. supra footnote 291, para. 87

<sup>315</sup> Varnava v. Turkey (2009) para. 191



investigations. Taking into account the close connection existing between the two articles, the elaboration advanced by the ECtHR of truth elements building on the investigation, further steps in this line, despite still failing to be included in the Art. 13, deserved to be regarded as positive concerning the development of an autonomous right to truth in the European system.

It must be noted that some cases show a certain degree of innovation. In 2002, in *Anguelova v. Bulgaria*, a case concerning an alleged extrajudicial killing, the ECtHR, even if failing again in including it through the reasoning under Art. 13, it explicitly mentioned that the public shall have a right to adequate scrutiny on either the investigation or its results.<sup>316</sup> More recently, a case regarding the failure to investigate a series of suspicious deaths taking place in Romania in 1989, the ECtHR issued a quite interesting judgment, at least for the systematic location of the public dimension of the investigation in the judgment's body. It reiterates the importance of an investigation for the Romanian society to know the truth, once again failing to link it to the remedies under art. 13 (in this case no allegation of a breach of the effective remedies provision took place). Instead, it was mentioned through the reasoning under art. 46 ECHR,<sup>317</sup> on Contracting States general obligation to abide by the final judgments of the court. El-Masri approach as to the matter can be regarded as another step in that same direction.<sup>318</sup>

Either way, these timid steps are important for the inception under the European system of an autonomous right to truth. It has been stressed the interlink existing between the procedural duty to investigate and Art. 13. Norms on effective remedies have provided the legal basis for the right to truth inclusion in the different system observed, and the same path seems to be followed by the ECtHR. This invites to regard developments in the duty to investigate as relevant for the right to the truth, which entails therefore positive steps in the correct direction towards a right to the truth inclusion in the European system.

### c. An autonomous right to truth

Advocates of the existence of an autonomous right to truth contend that its

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<sup>316</sup> *Anguelova v. Bulgaria* (ECtHR, 2002) para. 140

<sup>317</sup> *Association 21 December 1989 v. Romania* (ECtHR, 2011) para. 130

<sup>318</sup> *Ctr*, supra footnote 17, para. 191

recognition must involve more than a mere obligation to investigate and prosecute: something wider than that.<sup>319</sup> Drawing on the Joinet principles, they advocate for an “inalienable right to the truth”.<sup>320</sup> The ECtHR has precisely stated that the content of Art. 13 ECHR, on effective remedies, is “broader” than the duty to investigate enclosed in Arts. 2, 3 or 5 ECHR.<sup>321</sup> Furthermore, the characterization of the right to truth carried out by the other human bodies studied goes beyond an obligation to investigate, which may come closer to such autonomy.

This recognition is regarded as something important because it would send a more powerful message, showing the path towards what justice should aspire to achieve. The aim is therefore to allocate victims in a central position in the judicial proceedings, in order to restore the social order broken by the crime.<sup>322</sup> Moreover, arguments normally employed by States to limit telling the truth, which have been constantly raised to uncover renditions, consist in national security and State secret. Even when violations concern the most fundamental human rights, domestic judicial organs have proven to accept limitations to the right to seek and receive information concerning these violations. An autonomous and inalienable right to the truth, necessary to protect other fundamental rights, separate from the right to seek information, is likely to prevent arguments on national security from restricting the consideration of this right by courts of justice.

The ECtHR has precisely stated that Art. 13 ECHR counts with an independent nature, and it can therefore be violated even if there is found no other violation in the relevant case.<sup>323</sup> Consequently, a violation of Art. 13 can be found even if no breach of Arts. 2, 3 or 5 is declared. In fact, there are some cases, such as *Kurt* and *Assenov*, a separate violation of Art. 13 was found as something different from the violations of Arts. 5 and 3, respectively,<sup>324</sup> in connection with the victim and relatives’ right to access to the procedure, or the fact that the investigation must be able to lead to identification and prosecution.<sup>325</sup> The collective dimension is also breaking through the conventional rights, although still failed to be included in Art. 13.

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<sup>319</sup> Cfr. supra footnote, 132: principle 1 - The inalienable right to the truth

<sup>320</sup> Idem.

<sup>321</sup> Kurt: Cfr. supra footnote 290, para. 140

<sup>322</sup> Cfr. supra footnote, 282, pp. 459-460

<sup>323</sup> Klass (ECtHR, 1978), para. 64-65

<sup>324</sup> Kurt: Cfr. supra footnote 290, Op. part

<sup>325</sup> Idem. para. 140

It must be thus concluded that certain aspects of the right to truth have made their way in the ECHR, linked to the procedural duty to investigate but with a view to something broader, in a similar manner as that observed in its American counterpart, the HRC and the HRCBiH. However, human rights bodies which has already gone very far in the recognition of the right to truth, as it is the case of the IACtHR, have refused to grant it autonomy.<sup>326</sup> Despite the efforts made by the IACmHR in this regard,<sup>327</sup> the court has constantly repeated that the right to truth is subsumed in existing provisions of the ACHR, while explicitly rejecting its autonomy.<sup>328</sup>

Furthermore, save for the OHCHR,<sup>329</sup> the third party interveners did not put any emphasis in this sense.<sup>330</sup> Their main concern was the explicit recognition by the ECtHR of the right to truth in its varied elements, which indeed constitutes a broader content than a merely duty to investigate. The same goes for the dissenting judges, who stated that the right to truth is not a new right within the convention, but broadly implicit in other provisions.<sup>331</sup> They all agreed upon the necessity to understand something broader than the duty to investigate for a right to truth emerge within the ECHR, but the emphasis in its autonomy was not equally shared. It looks like the recognition of truth as an autonomous right under the ECHR was not the main concern of the different truth-advocates in *El-Masri*, as long as its most important elements get to be recognized by the court. The outcome, however, regarding such recognition, is far from clear.

## 2. The outcome: significance of the judgment

The same day of the ruling it could be read in the Amnesty International webpage how this “*historic ruling*” represents “*an important step towards accountability for European complicity in rendition and torture*”.<sup>332</sup> A similar approach could be read in the ICJ one, where it was stated that it entails a milestone in the fight against impunity, because it had been emphasized that “*both the victims and the public have the right to know the truth about these serious violations*”.<sup>333</sup>

Notwithstanding, no truth about the participants, the reasons behind the

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<sup>326</sup> Bámaca Velásquez, para. 201

<sup>327</sup> Amicus Curiae ICJ: Cfr. supra footnote 159, para. 3

<sup>328</sup> Blanco Romero, Merits, para. 62; Pueblo Bello Masacre, 219; Las dos erres masacre, 151

<sup>329</sup> Cfr. supra footnote 227 para. 35

<sup>330</sup> Cfr. supra footnote 236, para. 38; supra footnote 238 para. 24 and 25

<sup>331</sup> Cfr. supra footnote 17, Concurring opinions Tulkes, Spielman, Sicilianos and Keller para. 5

<sup>332</sup> Cfr. supra footnote 18

<sup>333</sup> Cfr. supra footnote 19

violations, or the identity of the persons with the highest level of responsibility in this case has been told. The FYRM has not made public the documents proving the links with other States, the collaboration with the CIA rendition teams, or anything helping to construct the big picture of the systemic human rights violations caused by the GRP in Europe. Concerning the perpetrators, no accountability whatsoever. The European *society as a whole* still ignores the level of participation of their national States. El-Masri has received no more than a sum of money for his pain.

The question is obvious: why is this? Is the FYRM not complying with the ruling launched by the ECtHR? Are the rest of Members States of the CoE not following their obligations *vis-à-vis* victims of the counter-terrorism and the general public to disclosure to the full extent the truth about what happened?

a. A “landmark” case: substantive development on the right to truth?

As it has been tried to show in this chapter, the reality is that the approach to the right to the truth in *El-Masri case* has been timid in itself. Positive steps can be observed, but, under Art. 13 ECHR, the approach taken can hardly be regarded as qualitative different from the former path followed by the ECtHR.

It can be observed, though, a sort of an incipient willingness to change: there are grounds to believe that in the subsequent case-law the ECtHR might adopt a more explicit approach to the matter. The fact that the ECtHR explicitly mentioned the victim and society’s right to know the truth goes beyond a symbolic recognition: it reflects that the ECtHR is developing its case-law on this right in the requested direction. When it comes to the interest of right to truth’s advocates, any steps in the deepening of the collective dimension of the investigation, involving not only the victim, but also the relatives and whole society, framed in terms of “rights”, is undoubtedly of utmost importance. This is how Roisin Pillay, Senior Legal Adviser at the International Commission of Jurists, has understood such advancement. In a conversation via e-mail held with her, she pointed out the practical importance of the collective dimension is recognised in legal terms.<sup>334</sup>

Furthermore, given that Art. 13 ECHR and the procedural duty to investigate

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<sup>334</sup> Email exchange with Róisín Pillay, Senior Legal Adviser at the International Commission of Jurists, 12 June 2014

under Arts. 2, 3 or 5 are so closely connected in the jurisprudence on effective remedies, Pillay stated that there seems to be good grounds for optimism that the doctrine of right to truth can be developed under Art. 13.<sup>335</sup> In an interview with Sarah Fulton, Legal Advisor at Redress, a similar feeling is held. Given the broader scope of Art. 13 in relation with Art. 3, recognising the right to the truth under Art. 3 implies an implicit recognition under Art. 13,<sup>336</sup> which is thereby understood as guaranteeing, as a minimum, the same content as the requirements of the procedural duty to investigate under Art. 3 ECHR.

Optimistically, which does positively deserve to be noticed is that the elements which led to an effective recognition of a right to the truth in, for example, the American compared system, can also be found in the present case. They are, the existence of civil society organizations pushing for an advancement in the rights recognition, judges applying dynamic interpretation of existing rights as to allow for the reception of the new trends under international law,<sup>337</sup> and the constant flow of caseload regarding egregious violations which need appropriate answer, as it is the case of Kurds struggles in Turkey, the Chechen conflicts in Russia. Now, that landscape is filled by a system of renditions perpetrated by a big number of European States, with the only aim to keep any action away from the control of the rule of law. The regular contact with horrendous violations of judges sitting in a court has proven beneficial for the evolution of rights.<sup>338</sup>

After all, in the IACtHR the right to truth was for first time recognized as something subsumed in the duty to investigate and prosecute, under Art. 8 and 25 ACHR,<sup>339</sup> which did not require separate consideration. This starting position has evolved a lot, thanks to the efforts made by those different actors, adopting nowadays the IACtHR a much wider position towards the right to the truth in its individual and collective dimensions, going far beyond a mere obligation to investigate and prosecute.<sup>340</sup> The link between the procedural duty to investigate and the right to an effective remedy is also well established by the ECtHR, which means that any advancement in the elements concerning the investigation, as the observed in this case with regard to the collective dimension, gives grounds to believe that they may become

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<sup>335</sup> *Idem*.

<sup>336</sup> Phone Interview with Sarah Fulton, International Legal Advisor, REDRESS, London, 17 June 2014

<sup>337</sup> Cfr. *supra* footnote 307

<sup>338</sup> Cfr. *supra* footnote 183, p. 211

<sup>339</sup> *Bámaca*, para. 201

<sup>340</sup> *Contreras* (IACtHR, 2011) para. 170

incorporated in Art. 13.

b. Practical impact for *El-Masri* and alike cases

The remaining question is then whether an eventual recognition of the right to the truth, as the developments observed in *El-Masri* may lead to, involve real practical consequences as to relief and truth for victims of rendition and secret detention cases. Strong emphasis has been made on that point, but the real outcome of such recognition is far from straightforward. In itself, such recognition would not go beyond the establishment of an obligation (primary norm) for States to remedy at the national level. But, under international law, victims would not have any stage to seek for redress (secondary norm) in the case the State fails to comply with this obligation, unless the ECtHR would provide that service: this is, directly order restoration of the right to truth.

It was previously shown how the redress for victims in the other systems took place thanks to direct orders to investigate, prosecute and punish, grant access of victims and relatives to the relevant procedures and full disclosure of the information to make the facts surrounding gross violations of human rights available to the large public. The relative triumph of such incorporation in the American system when it comes to effectively redress violations of human rights and provide victims with the whole range of remedies existing under international law owes a lot to the ACHR having, in Art. 63, a really wide power to order reparations.<sup>341</sup> The exact same goes for the HRCBiH which, despite being based on the ECHR, counted with a broader reparative power in its constitutional text.<sup>342</sup> Even something similar can be said as to the HRC which simply does not count with provision in this line. This allowed the experts sitting in the Committee to interpret its power in a very expansive manner.

It must consequently be concluded that the development of the right to truth was carried out on the basis of linking it to the State duty to investigate, the effective remedies and the power to order reparations. To emphasize the right to truth under the effective remedy clause makes sense in the light of the Inter-American experience, where the right to truth was not included as reparation until the duty to investigate was endowed with reparatory nature, by linking it to the effective remedies. However, in *El-Masri* it is difficult to find references to anything other than Art. 13 ECHR. Safe for the

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<sup>341</sup> ACHR Art. 63

<sup>342</sup> Cfr. supra footnote 208, Article XI, 1, b)

first paragraph of the submission on behalf of the OHCHR, neither the third party interventions, nor the dissenting judges, some of which count with a large record in requesting reparations, raised any question in this regard.

Jan Arno Hessbruegge stated that, at the end of the day, the inclusion under Art. 13 not accompanied with a direct order would involve that the ECtHR declared two violations instead of one.<sup>343</sup> This leads us to the following questions: why so much emphasis in Art. 13 in exclusive, disregarding the option of achieving a direct order to repair from the ECtHR? Does it mean that Art. 13 would effectively lead to an effective order aiming to redress victims of the GRP, or is there any other relevant consequence of such recognition, which triggered the coordinated intervention of the observed variety of actors? In the following section it is analysed the power of the ECtHR to order reparations, and the prospective of success that the claims made in *El-Masri* have in the absence of including truth as a reparation ordered by the ECtHR. Suffice it here to keep in mind that the strategy to include the right to truth under the effective remedy clause in the ECHR may, in itself, present fundamental limits.

## CHAPTER 2. THE REMEDIAL CAPABILITY OF THE EUROPEAN COURT TO SATISFY A VICTIMS' RIGHT TO TRUTH AND REPARATIONS

Third party interveners in *El-Masri* pushed for a right to truth recognition under Art. 13 ECHR, on effective domestic remedies. Last section analysed the nature of their claims, as well as their significance in comparison with the past case-law of the ECtHR. The interrelation between those claims and the right to an effective domestic remedy under Art. 13 ECHR have been largely analysed. There is still one outstanding question though.

The international practice related to the right to truth has consistently shown that it is a right connected to the right to an effective domestic remedy, as well as to the reparations under international law. As a measure of reparation for victims of gross human rights violations, the right to truth finds its *raison d'être* in its prospective to ensure redress. Whether victims count with the right to obtain reparation relying directly on international law is not clear, and the observed practice does not seem encouraging in that line. Therefore, victims need mechanisms at the international level providing them with reparations, in the case their national States deny it. The right to truth has

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<sup>343</sup> Phone interview: Ctr, supra footnote 266

emerged in this context, and therefore providing victims with truth and redress their suffering is the very essence of its inception in the IACtHR, the HRC or the HRCBiH, as well as in any other human right body, institution or legal instrument at international level.

In this line, the right to truth was recognised under the effective domestic remedy provision, but not only: it became a measure of reparation, to some extent present among the orders requested to States by these human rights bodies. Without that, States would merely be found in violation of a primary duty –the right to an effective domestic remedy, in this case- when failing to provide truth and remedy for victims, but no measure would be taken to ensure the remedy is provided to the victim. In sum, at the end of the day victims would remain unremedied, which is what the right to truth is precisely aimed to avoid.

However, nothing in this line has been requested by the third party interveners, nor by the dissent judges. The emphasis focused merely on the right to an effective domestic remedy on its own. This Chapter will assess what is the reason for that, by observing whether the ECtHR might order reparations including the right to truth among them in the same fashion as the observed bodies (Section A). Then, it analyses the ability of an eventual recognition of the right to the truth under the right to an effective remedy provision to provide real redress to the individual victim –Khaled El-Masri in this case- and other alike victims even in the absence of explicit orders of reparations by the ECtHR (Section B). This is, whether their claims make sense, as to remedying victims in Europe, relying exclusively on the right to effective remedies at the national level.

#### A) TRUTH AS REPARATION: AN EUROPEAN APPROACH

The legal power of the ECtHR to order reparations is enclosed in Article 41 ECHR. It states that the court has the power to award “*just satisfaction*”, after a violation of the convention is found.<sup>344</sup> Compared to the observed human rights bodies, this provision is really restrictive.<sup>345</sup> Furthermore, this power has a subsidiary character: the ECtHR would only order it when the violation cannot be completely remedied at

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<sup>344</sup> ECHR Art. 41

<sup>345</sup> ACHR Art. 63; DPA, Cfr. *supra* footnote 208, Art. XI, Chapter One



national level.<sup>346</sup> Therefore, the obligation to provide reparation lies at first place within the state, which is the first called to provide redress for breaches of the ECHR.<sup>347</sup> Moreover, it does not involve an individual's right, since the court counts with a certain degree of discretion.<sup>348</sup>

Regarding the term “just satisfaction”, it is not clear what measures it entails. Under international law, the term “*satisfaction*” has never been restricted to monetary compensation,<sup>349</sup> but this seems to be the way the ECtHR has understood it.

On the other hand, Art. 46 (1) ECHR provides that the judgments issued by the ECtHR are binding on the respondent State. Their execution is however not supervised by the court itself: the Committee of Ministers (“CoM” hereinafter) is called to monitor compliance with the judgments.<sup>350</sup>

The goal here is to assess whether the ECtHR may be able to order specific measures of reparations, to ensure the right to truth to victims of the GRP. This will help understand why the third party interveners in *El-Masri* did not raise anything in this line. This section observes the past case-law of the ECtHR on reparations (Section 1) in order to analyse whether an order to make reparation, in the way of the establishment of an investigation by the ECtHR is something feasible in the European system (Section 2).

#### 1. The development of the ECtHR case-law towards ordering reparation.

For the international movement of right to truth advocates, the legal nature, scope and content of reparations ordered by the ECtHR takes extraordinary significance. The European system is the only one recognising the right to lodge an individual application before a single, independent and permanent international human rights court able to issue binding decisions.<sup>351</sup> The ECtHR were able to order a Member State measures of reparations aiming to satisfy victims right to truth would be of utmost importance for victims of the extraordinary renditions and their search for redress.

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<sup>346</sup> Cfr. footnote supra 182, p. 13

<sup>347</sup> Cfr. supra footnote 190, p. 14

<sup>348</sup> ECHR Art. 41 “if necessary”

<sup>349</sup> Shelton, 2005, pp. 280-281

<sup>350</sup> ECHR Article 46 (2)

<sup>351</sup> Cfr. supra footnote 79, p. 280

The ECtHR's lack of a clear power to order non-monetary reparations makes it essential to analyse the way it understood its restricted powers. It adopted a radically narrow approach to the matter in the early case-law, which has been progressively developing in the last years.

a. The initial conservative approach: Early practice

The ECtHR is characterized by its conservative approach when interpreting its powers to afford reparations. At first, it understood that a finding of a violation constitutes in itself just satisfaction,<sup>352</sup> which is known as a “declaratory in nature” approach. During the 1980s the ECtHR increasingly awarded monetary compensation as just satisfaction, but it consistently rejected claims for reparations other than monetary relief.<sup>353</sup>

Regarding monetary compensation, it cannot be considered as an individual right of victims. The ECtHR assesses whether the victim deserves the financial compensation,<sup>354</sup> and may be denied to relatives for a misbehaviour of the victim at the time of the violation.<sup>355</sup> In any case, the ECtHR departs from the “*declaratory in nature*” approach when a severe degree of pain is suffered by the victims. In enforced disappearances, it considers that such severe degree of pain cannot be compensated for solely by declaring a violation.<sup>356</sup>

It started to change in the 1990s.<sup>357</sup> In the *Papamichalopoulos case* the ECtHR started to recognise that

*“States are obliged to put an end to the international wrongful act and make reparations to restore as far as possible the situation existing before the breach”*.<sup>358</sup>

However, the ECtHR stated that it has not the power to directly order such measures, but it was an obligation of the States under the monitoring of the CoM.<sup>359</sup> States can therefore choose the means themselves to effect such reparation.

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<sup>352</sup> Surek v. Turkey para. 85

<sup>353</sup> Cfr. supra footnote 190, p. 14

<sup>354</sup> Cfr supra footnote 287, para. 219

<sup>355</sup> Idem., Op. 3, 4, 5

<sup>356</sup> Baysayeva (ECtHR 2007) para. 179

<sup>357</sup> Cfr. supra footnote 190, p. 14

<sup>358</sup> Papamichalopoulos (ECtHR, 1995) para. 34; Brumarescu (2001) para. 19

<sup>359</sup> Id.

*Scozzari and Giunta case* involved a second step in this development. It stated that the State, to comply with the mentioned obligation to put an end and make reparation, has also to choose, subject to supervision by the CoM, general and individual measures compatible with the conclusions set out in the Court's judgment.<sup>360</sup> Nevertheless, these measures are still considered to be up to the State's discretionary power. Furthermore, Art. 41 grants the ECtHR the power to directly order nothing else than just compensation, when reparation is considered to be impossible.<sup>361</sup>

b. An recent apparent change of attitude: between dynamism and a deception.

After 2000, the ECtHR has more clearly *specified* the individual measures to be carried out by the States to put an end or make reparations. In some cases, it has even directly ordered them.

i. *Non-monetary orders: substantive reparations or mere duty to cease?*

In the *Assanidze case* the ECtHR found that a detention in breach of Arts. 5 and 6 ECHR. Consequently, the ECtHR ordered to the respondent State in the operative part of the judgment to secure the applicant's release at the earliest moment, "*on account of the urgent need to put an end to the violation*".<sup>362</sup> The ECtHR has also ordered the restitution of property, when Art. 1 Protocol number 1 to the ECHR is violated.<sup>363</sup> However, these individual measures requested by the ECtHR are not measures of reparations. On the contrary, they involve a duty to cease the violation.

The Draft Articles on State Responsibility ("DASR" hereinafter) establishes the differences between a continuing violation<sup>364</sup> and an instant one.<sup>365</sup> The appropriate in front of continuing violations is the duty to cease the violation, rather than the duty to make reparations.<sup>366</sup> The obligation to cease normally has a content similar to the breached obligation, and is therefore considered a primary norm, while the obligation to make reparations has a different one.<sup>367</sup>

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<sup>360</sup> Scozzari and Giunta (ECtHR, 2000), para. 249.

<sup>361</sup> Ruedin, 2009, para. 294

<sup>362</sup> Assanidze (ECtHR, 2004) para. 203 Ilascu (2004), para. 490

<sup>363</sup> Brumarescu (2001, ECtHR) paras. 12-23

<sup>364</sup> DASR art. 14 para. 1

<sup>365</sup> Idem. Art. 14 para. 2

<sup>366</sup> Idem. Art. 30 para. 1

<sup>367</sup> Cfr. supra footnote 361, para. 291

A continuing detention in violation of art. 5 ECHR, and the denial of access to property in violation of Art. 1 Protocol 1 to the ECHR are examples of continuing violations.<sup>368</sup> Hence, the release and the restitution of property involve the duty to cease the violation.<sup>369</sup> The ECtHR interprets this by stating that specific non-monetary orders have been issued when the violation, by its very nature, leave no real choice as to the measures to remedy it.<sup>370</sup> Technically speaking, the ECtHR is defining the duty to cease the violations. The ECtHR repeatedly mentions that these actions are required because of “*an urgent need to put an end*” to the violation.<sup>371</sup>

The consequence would be that the ECtHR would have never ordered reparations as such, and it is solely feasible to expect specific measure coming from the ECtHR when continuing violations are at stake.

*ii. Orders to reopen procedures: assessment of the European Court of Human Rights first measures of reparations.*

That approach does not seem totally accurate anymore. On the one hand, the ECtHR has abstained from ordering specific non-monetary measures to put an end to a big number of continuing violations.<sup>372</sup> On the other hand, in recent years the ECtHR has included among the reparations directly ordered measures that must be regarded as reparations *stricto sensu*.

The ECtHR has recently ordered the reopening of procedures among the orders requested.<sup>373</sup> The reopening of a procedure, following the finding of defects on it, involves a genuine measure of reparation under international law.<sup>374</sup> In *Claes* and *Lungoci* cases, the ECtHR established that the most appropriate redress would be the reopening.<sup>375</sup> This must be contrasted against the wording employed in the former cases (“*the need to put an end*”), when the order requested must be regarded as a duty to cease. Therefore, recent orders involve as well measures of reparations.

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<sup>368</sup> Polakkiewicz, 2001, pp. 57-58

<sup>369</sup> Colandrea, 2007, p. 402

<sup>370</sup> Id.

<sup>371</sup> Assanizde (Cfr. supra footnote 362) para. 203; Fatullajev (ECtHR 2010) paras. 176-177

<sup>372</sup> Cfr. supra footnote 369, p. 63

<sup>373</sup> *Claes et autres* (ECtHR 2005) para. 53; *Lungoci* (ECtHR 2006) paras. 55-56

<sup>374</sup> Cfr. supra footnote 368, p. 59

<sup>375</sup> Cfr. supra footnote 373: “le redressement le plus approprié”

Last, there is also an intermediate position, between the direct granting of reparations and the conservative approach. Sometimes, the ECtHR refrains from ordering specific non-monetary measures, but it specifies how best the violation could be remedied. It therefore lacks legal consequences as such, but it entails relevant consequences at the monitoring phase under the CoM. As an example, in *Gencel v. Turkey* the ECtHR included along the reasoning displayed under Art. 41 ECHR that the most appropriate redress would be the reopening of a procedure, without directly ordering it.<sup>376</sup> During the supervision, the CoM emphasized this indication,<sup>377</sup> and Turkey actually took measures at the national level to allow the reopening for the victims of the concrete case.<sup>378</sup>

Even if this would be far from involving a victim's right to reparation, it is relevant on account of assessing the scope of the ECtHR's reparatory power. The development of this power has been timid and slow. The fact that it has already ordered measures of non-monetary reparation legally means that it counts with such power. However, the general practice of the court does not allow to be very encouraging.

## 2. Impact of the new approach on the 'Right to Truth'

The ECtHR should order the establishment of measures other than financial compensation for victims of extraordinary renditions see their right to truth satisfied in a concrete case. The last section analysed the ECtHR's practice on reparations, in general. Here, the focus is the experience of the ECtHR on reparations capable to restore the right to truth of victims: this is, the order to carry out an effective investigation.

### a. Feasibility of the ECtHR ordering an investigation

A direct request from a human rights body ordering an investigation aimed to satisfy the victim's right to truth is normally the kind of reparation related to the right to truth. It involve both: a measure to cease and a measure of reparation. The ECtHR has never requested such an order, even if it has already launched both measures: the duty to cease the violation and the duty to make reparations.

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<sup>376</sup> *Gencel* (ECtHR, 2003), para. 27 "le redressement le plus approprié serait de faire rejurer le requérant en temps utile par un tribunal indépendant et impartial."

<sup>377</sup> CM/ResDH, 2013, second paragraph.

<sup>378</sup> *Id.* paragraph four.

Victims of gross human rights violations have –unsuccessfully- tried to induce the court to require the State to carry out an investigation.<sup>379</sup> In *Velkhiyev v. Russia*, the applicants asked for an investigation was carried out,<sup>380</sup> and the reparation ordered by the ECtHR was reduced to the finding of a violation and the sum of money as just satisfaction. The Court considered it appropriate to leave the concrete measures to be chosen by the State.<sup>381</sup>

Drawing on the comparative experience, the European context at the present moment resemble to the one it enhanced an evolution of the right to truth and reparations in the Inter-American system. According to Douglass Cassel, there are several elements which explain that development in the Americas. First, the relentless persistence of the IACmHR and victims associations routinely pushing for the granting of specific non-monetary reparations played an important role in that evolution.<sup>382</sup> Furthermore, the fact the IACtHR had largely to deal with serious violations of human rights, in a context of impunity also facilitated the development.<sup>383</sup> Last, the evolution of the doctrine, both in Latin America and at the international level, as well as the labour of particularly creative judges in the court allowed a better reception of these concepts by the IACtHR.<sup>384</sup> Most of these elements are present -and have already been outlined- in *El-Masri case*, such as the presence of transnational advocacy networks and a context of impunity brought about by the GRP. The ECtHR also counts with proactive judges, as the dissenting opinions in this case may prove it.

Some authors argue that the current development of international public law allows the ECtHR to modify its approach. In this line, it could take into account the comparative experience of other international human rights bodies, as well as the inception at the international level of the differing efforts to advance the right to truth and reparations. The ECtHR could follow that same path, basing on the inherent power every international judicial body counts with.<sup>385</sup> However, the ECtHR does not show a

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<sup>379</sup> Bill Bowring, 2012, p. 756

<sup>380</sup> *Velkhiyev v. Russia* (2011, ECtHR) para. 175; *Timurtas op.* 8,9,10, *Kurt operative* 11, 12; *Yaşa operative* 6; *Varnava op.* 9

<sup>381</sup> *Idem.* para 176; *Varnava (ECtHR, 2009)* para. 222: “State remains free to choose the means by which it will discharge its legal obligation under Article 46”

<sup>382</sup> *Cfr. Supra* footnote 183, p. 211

<sup>383</sup> *Idem.*, p. 212

<sup>384</sup> *Idem.*, p. 213

<sup>385</sup> *Cfr. Supra* footnote 194, p. 116

good degree of openness: unlike its American counterpart, it has never understood its mandate as codifying existing norms at international level.

In sum, the ECtHR counts *prima facie* with the legal power to take the lead and directly order non-monetary reparations. There are no legal obstacles in this line. However, the practice shows a different thing: the viability of developing this approach on account of the right to the truth present serious difficulties. In *El-Masri* case, the ECtHR did not request but financial compensation. For the rest, it repeated that the individual and general measures are left to the States. Why the ECtHR adopts a different approach as to some kind of measures than to others is an outstanding question. Anyhow, the next section will try to shed some light in this regard.

b. The deterrent: a discouraging political context

The position the ECtHR has in the whole system for human rights protection within the CoE framework is not an easy one. To understand the path followed by the ECtHR on reparations it is fundamental to properly grasp the whole system in which this court works.

*i. Explanation of the new approach towards reparations: political expediency*

The ECtHR has shown a different path towards reparations in the last decade. It has included specific non-monetary measures to order States cease violations of the ECHR, and some examples of proper reparations are also observed. However, these measures are considered to be the reflection of political movements within the CoE. In this line, they were not directly requested by the ECtHR until they already counted with a widespread acceptance among the Member States.

The only measure of reparation ordered so far by the ECtHR involves the reopening of procedures. In 2000 the CoM launched an ambitious program<sup>386</sup> aimed to convince national governments to authorize their courts of justice to reopen judicial proceedings whenever the ECtHR found a violation of the convention.<sup>387</sup> In response, the national legal systems throughout CoE Member States started to implement such possibility, reducing the intrusiveness of a direct order from the ECtHR in this line.

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<sup>386</sup> CoE, Recommendation No. R(2000)2

<sup>387</sup> Helfer, 2008, p. 150

Furthermore, from that date onwards, political pressure was made by different CoE experts, asking to the ECtHR to be more specific as to which measures should be put in place to remedy the violations, even if still avoiding to directly order them.<sup>388</sup>

In a report on Execution of judgments of the European Court of Human Rights, Erik Jurgens stated that the ECtHR should not keep an “aloof position”.<sup>389</sup> It contended that, without overstepping its powers, the ECtHR should be clearer on what specific measures States must take to discharge their duties.<sup>390</sup> Another relevant example can be found in the CoE Opinion No. 209/2002, on the Implementation of the Judgments of the European Court of Human Rights: The Venice Commission asked the court to evolve towards a more active role.<sup>391</sup> In particular, it was pointed out that the ECtHR should indicate, although not ordering, what constitutes appropriate reparation for each type of violation.<sup>392</sup> It would also facilitate the CoM’s supervisory role.<sup>393</sup>

Consequently, the ECtHR started to include further details in its judgments. Such active role of the court would not undermine the division of competences between the Court and the CoM, and it would allow for a more effective functioning of the supervisory machinery.<sup>394</sup> The important fact here is that the developments observed on reparations are but the result of political movements in the CoE. Those are aiming to respect the primary role of the States, while at the same time facilitating a better functioning of the system. However, it is not clear whether an order to investigate may be accommodated in that same fashion.

*ii. The institutional integrity of the CoE: ECtHR’s ‘tug of war’*

The institutional configuration of the system itself entails the key to understand those political advancements. The way in which it is configured makes the ECtHR especially sensitive to the political. The ECtHR is not competent to monitor the compliance with its own judgments. This task is carried out by the CoM, what introduces a strong political element unmatched in other international bodies. The IACHR exercises checklist compliance where it orders a series of clear, specific steps

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<sup>388</sup> Idem. p. 147

<sup>389</sup> Doc 8808, 12 July 2000, para. 61

<sup>390</sup> Idem. para. 87

<sup>391</sup> CoE Opinion No. 209/2002, December 2002, para. 54

<sup>392</sup> Idem. paras. 58; 66

<sup>393</sup> Idem.

<sup>394</sup> Idem. para. 54



and then observes whether states actually comply with those measures.<sup>395</sup> In Europe, the CoM is therefore responsible for ensuring compliance with the court's decisions, through diplomatic means and relations with the respondent States. Hence, the ECtHR normally takes it into account when deciding to urge States to behave in a certain way.

Put in simple, the immediate consequence is that there are orders which may be politically acceptable by States, and conformed in the CoE system, and it is therefore feasible that the ECtHR orders them. The European is the only regional system that can affirm that most of the ECtHR judgments are properly executed. The ECtHR's conservative approach could be justified by arguing that the States comply with the system as it is, and applying progressive developments against the political will of the States would jeopardize its high compliance rates. However, it is relatively easy to comply when states get to decide the method of compliance.<sup>396</sup> What is evident is that, generally speaking, the States are not willing to welcome any change of attitude towards greater initiative on the ECtHR's side. The Brighton conference was a proof of the Member States' point of view: they insisted in the subsidiary role of the ECtHR.

A conservative approach minimizes risks to CoE institutional integrity.<sup>397</sup> States still challenge the rulings of international courts on the basis of sovereignty. Some States have challenges the authority of the Court's judgments with regard to specific measures required by the judgments,<sup>398</sup> causing considerable problems that threaten to undermine what has been achieved over the fifty years.<sup>399</sup>

Consequently, measures perceived as intrusive will hardly be requested by the ECtHR. Orders such as investigate, prosecute and disclose the truth about serious human rights violations in the context of the global fight against terrorism, bypassing state secret policies created within national security programs, will undoubtedly be regarded as intrusive, and would rarely be complied. In the Inter-American experience, orders to investigate into the facts surrounding a violation are rarely complied.<sup>400</sup> In the European system, the reopen of procedures was requested only when it counted with

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<sup>395</sup> Hawkins et al, 2010, p. 36

<sup>396</sup> Ctr, supra footnote 395, p. 36

<sup>397</sup> Ctr, supra footnote 186, p. 318

<sup>398</sup> CoE, CoM, report of the evaluation group to the committee o ministers on the ECtHR (2001) at 33

<sup>399</sup> Execution of judgments of the ecthr 30th Sess, res. 1226 (2000) at 5

<sup>400</sup> Kirill p. 298

enough political will: in 2006, such remedy was available by the national legislation in the 80% of member States for criminal cases.<sup>401</sup>

Hence, the political tug of war the ECtHR constantly keeps does not allow to be very encouraging in this regard. The case-law seems still to be inconsistent and timid, showing a very narrow scope to order non-monetary reparations. The legal arguments may be of less interest to a court principally worried about imposing undue costs upon States and provoking their ire.<sup>402</sup> This is in line with the drafters' intention, who sought to create a "sovereignty shield" that limited the court's intrusiveness, avoiding measures aiming to directly intervene beyond the confines of the domestic legal order.<sup>403</sup> The ECtHR must apply individual justice, while at the same time work in a broader scale towards the maintenance of the system.<sup>404</sup> This may explain the influence that the whole functioning of the CoE has in its judicial decisions.

Consequently, an order to investigate does not seem something feasible. This may explain why the third party interveners emphasized merely the right to an effective domestic remedy, in the understanding that the ECtHR would never include the right to truth among the measures ordered, in a similar fashion to the other human rights bodies. But the big question still remains: now that it is relatively clear that the right to truth cannot be linked to the power of the ECtHR to order reparations, to what extent are the claims made by the third party interveners something able to provide redress and truth to El-Masri and alike victims of the GRP in Europe? This is: is it possible for the right to truth to grant practical redress relying exclusively on the right to a domestic remedy?

*iii. Lack of hope for victims of existence of a "third avenue"? The effective remedies at national level*

The current approach to enforcement of judgments leaves far too much space for disagreement about what amounts to compliance. It leaves important questions of execution to the vagaries of an essentially political process in the CoM.<sup>405</sup> Thus, it

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<sup>401</sup> Cfr. supra footnote 393, p. 150

<sup>402</sup> Cfr. supra footnote 186, p. 321

<sup>403</sup> Cfr. supra footnote 393, p. 147

<sup>404</sup> Interview with Paul Lemmens, Belgian Judge at the European Court of Human Rights, Council of Europe, in Strasbourg 12 March 2014

<sup>405</sup> Hunt, 2005, p. 43

creates the impression that the State concerned may confine itself to pay just compensation, without remedying the violation itself.<sup>406</sup>

All the said above prevents the expectation of a direct order to investigate be politically supported and judicially requested. However, another political trend is taking currently place at the CoE. It aims to combine both necessities: strengthen the remedial capacity of the ECtHR without overstepping its powers.<sup>407</sup> This trend has found its way in the right to an effective domestic remedy. It perfectly fits in the CoE claims on specifying the remedial measures to be taken at national level without directly ordering them.

Moreover, it is in line with the general trend in international courts of enhancing the jurisdictions of courts to grant remedies. Deepening into the right to effective remedies can offset the restrictive approach on reparations kept by the ECtHR, while being perfectly in line with the general spirit of its subsidiary role.

#### B) THE IMPACT OF A RECOGNITION OF THE RIGHT TO TRUTH UNDER ART. 13 ECHR. IMPLICATIONS FOR VICTIMS OF THE GLOBAL RENDITION PROGRAM

An order requiring States to carry out an effective investigation or alike orders aiming to restore the victim's right to truth is not feasible in the ECtHR. Interestingly, the third party interveners mainly stressed the right to a national remedy provision, disregarding to advance the ECtHR's power to grant reparations. They intended to establish a parallelism between the European court and its American counterpart, but the likeliness of the former behaving in that way seems low. On the other hand, regarding the recognition of the right to truth under Art. 13 ECHR, it seems that the controversy is open, and El-Masri has posed some encouraging grounds regarding important elements of this right.

In the absent of the expectation of a direct order, Art. 13 ECHR reveals itself as the unique means to redress victims in Europe. This section analyses whether the provision on effective remedies at national level can provide in practice to victims of the GRP with redress, in particular with the right to truth. The first part assess the impact for victims in Europe of an eventual recognition of the right to truth as a substantive

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<sup>406</sup> CoE Opinion No. 209/2002, on the Implementation of the Judgments of the European Court of Human Rights 55

<sup>407</sup> Cfr. footnote supra 391

part of the convention as is sought by the interveners (Section 1). The second part focuses on the effects such recognition may entail for the general purposes of the right to truth entrepreneurs. Given that they compose an international movement with a global scope of action, the focus is established at the international level (Section 2). The goal is to assess whether the intentions of the third party interveners in El-Masri may, at the end of the day, involve a real prospective of remedial development for victims in Europe.

1. In Europe. Practical repercussions of an “embeddedness”<sup>408</sup> of effective remedies at the national level.

The third party interveners firmly contend that directs orders from the court are not the only means to ensure redress for victims in the CoE Member States. The recognition and enforcement of the right to truth as an element of the substantive protection of the ECHR -under Art. 13, in conjunction with arts. 2, 3, and 5- will involve an important step in securing redress for victims.<sup>409</sup>

Art. 13 has received over time greater attention by the ECtHR, to restrict the leeway of States regarding how to remedy especially serious violations.<sup>410</sup> It changed its restrictive approach and started to give more specific instructions.<sup>411</sup> It draws on the demands made to the ECtHR to provide more detailed information through its case-law. Strengthening Art. 13 ECHR involves a middle ground: it may find a compromise between improving the remedial power of the court without overstepping its powers.

- a. The remedial avenue of strengthening the practice at national level

The Court’s unwillingness to identify specific remedies was identified by several experts in the CoE as an impediment to speedy and full compliance.<sup>412</sup> In 2004 the CoE launched a recommendation emphasizing the importance to know exactly which specific remedy accompanies each specific violation.<sup>413</sup> Consequently the ECtHR has

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<sup>408</sup> Cfr. supra footnote 393

<sup>409</sup> Roisin Pillay, Cfr. supra footnote 334

<sup>410</sup> Cfr. supra footnote 282, p. 453

<sup>411</sup> Cfr. supra footnote 307

<sup>412</sup> Cfr. supra footnote 393, p. 147

<sup>413</sup> CoE Rec(2004)6, 2004, point 9

started to provide more details regarding the way in which national legal orders must respond to human rights violations to respect Art. 13 ECHR.<sup>414</sup>

Interpretation of Art. 13 ECHR's content potentially involves an adequate means to develop the remedial standards in the national systems.<sup>415</sup> The ECtHR could therefore specify the concrete reparation that States must provide when a right is violated.<sup>416</sup> Recognising the right to truth under Art. 13 would involve one way of specification in this line.

For all of this it is essential a great degree of political support for the strengthening of effective remedies. In this regard, the CoE Guide to Good Practice in Respect of Domestic Remedies affirms that States must conduct prompt investigations to identify and punish –while guaranteeing the access of the victims to the procedures.<sup>417</sup> The Guide explicitly draws from *El-Masri* when the right of the victim to participate in the process is mentioned.<sup>418</sup> The aim of these political instruments is to ensure that the conventional rights –also secondary rights to remedy violations- are enforced by the States, even if the ECtHR cannot directly make them comply with these secondary obligations.

This indirect approach could be beneficial for the advancement of the right to truth. Recognising for instance the mentioned “right of society at large” to know the truth under Art. 13 would have made such obligation to be included in the guidelines. Recognising this and other important elements of the right to truth under the effective remedies would impose a bigger duty on Member States to take this right seriously into account.

#### b. Ensuring respect at national level

The protection of human rights in the European system mainly lies in the Member States. The ECtHR has a subsidiary role, and the aim of the very system is that States incorporate within their domestic legal orders the conventional standards. States

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<sup>414</sup> Cfr. supra footnote 387, p. 147

<sup>415</sup> Cfr. supra footnote 281, at 471

<sup>416</sup> Cfr. supra footnote 387, p. 154

<sup>417</sup> CoE Guide on Good Practice, 2013, p. 24

<sup>418</sup> *Idem.*, p. 34 (citing *El-Masri*)

must learn on their own, and not expect everything from the ECtHR.<sup>419</sup> Roisin Pillay has therefore understood that:

*“Art. 41 ECHR is just one means by which the right to reparation can be realised within the Convention system (...) but cannot be relied on alone to ensure the right to truth, or other elements of the right to reparations, in CoE Member States”.*<sup>420</sup>

A recognition under Art. 13 ECHR of the right to the truth, in connection with the requirements considered in *El-Masri* for an investigation to be considered effective, would involve an important advancement as to the assurance of remedies in the CoE Member States. At least, this is how the interveners understand it, and there are some grounds to share their optimism. There are still some cases pending in the ECtHR regarding victims of the war on terror, and the claims follow the same line as *El-Masri*.<sup>421</sup> It seems therefore appropriate to keep an eye on their evolution.

## 2. In general international human rights law: The customary Right to Truth.

Some interveners in *El-Masri* have understood that the recognition of the right to the truth under Art. 13 also involves important consequences as an advocacy tool in their more general claims. In this line, it would advance the assertion of this right as a norm of ICL. The debate around the existence under ICL of a victims' right to reparation is far from straightforward, and therefore its content would be, anyway, too ambiguous as to include the right to truth. Furthermore, for authors like Tomuschat, the recognition under a domestic remedies clause would not make any difference concerning an international victim's right to reparations.

Nevertheless, Jan Arno Hessbruegge, Human Rights Officer at the OHCHR, has noted positive implications in this line. For advocates of the existence of a right to reparation as a norm of ICL, it is of utmost importance to develop the different kinds composing such right. It means pushing for a right to truth.

The ECtHR entails a special significance, given its reluctance to explicitly recognise the right, and the fact that it is the only permanent court of human rights providing direct access for victims. More specifically, the wording of Art. 13 ECHR

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<sup>419</sup> Judge Paul Lemmens, interview: Cfr. supra footnote 405

<sup>420</sup> Cfr. supra footnote 335

<sup>421</sup> Written Submissions on Behalf of Amnesty International and the International Commission of Jurists “interveners” in the case of *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, 2013

entails a close similarity to Art. 8 UDHR.<sup>422</sup> It was modelled following the UDHR,<sup>423</sup> and it finds its regional counterpart in the Art. 25 ACHR. Mr. Hessbruegge contends that this would allow to advance the right to the truth as a rule of ICL, given its proximity to the right to effective remedy in the UDHR and the other relevant treaties.<sup>424</sup>

This idea seems to base on the similar recognitions taking place at the observed comparative systems, the international instruments and human rights conventions (i.e. UN Convention on Enforced Disappearances). It is in line with the spirit of the UN Basic Principles' preamble, which establishes an equivalence between the rights to an effective remedy in the main human rights international and regional instruments.<sup>425</sup> Hence, for the global aims of UN, recognition under Art. 13 would involve also practical consequences as an advocacy means.

However, the path for the right to truth to achieve international customary status seems to be long yet. According to Theodor Meron, an initial inquiry into an international customary human right must aim to determine whether:

*“the definition of the core norm claiming customary law status and [...] the contours of the norm have been widely accepted”*.<sup>426</sup>

In this line, he observes, on the one hand, the degree to which a particular right in a human rights instrument has been repeated in other human rights instruments and, on the other hand, the confirmation of the right in national law.<sup>427</sup> There is only one binding human rights instruments providing the right to truth. However, the recognition of this right in the main human rights instruments, through interpretation of existing rights throughout their provisions, may involve a relevant indicator. The interpretation made by international human rights bodies of their effective remedy clauses can be considered as authoritative interpretations of the treaty provisions. They are increasingly

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<sup>422</sup> Universal Declaration on Human Rights: Art. 8.

<sup>423</sup> Shelton, 2009, p. 60

<sup>424</sup> Jan Arno Hessbruegge Phone Interview: Ctr, supra footnote

<sup>425</sup> Basic Principles: preamble ECHR Art. 13; ACHR Art. 25, UDHR Art. 8; ICCPR Art. 2(3)

<sup>426</sup> Meron, 1989, p. 93

<sup>427</sup> Idem., p. 94

considered to influence and consolidate the development of ICL in the current scenario of international law.<sup>428</sup>

For the second indicator provided by Meron, the national practice, the embeddedness in the CoE Member States of the right to truth through the way of Art. 13 ECHR might play an important role. Y. Naqvi identified one shortcoming for this indicator with regard to the right to truth in the fact that most of the experiences taking place at national level do not reflect a legal belief on this right as a State's obligation to establish the truth.<sup>429</sup> However, the emphasis exerted by international courts towards an establishment of the right to truth might lead to States consider it obligatory, as part of their duties internationally assumed.

Consequently, a combination of political and legal avenues can make that the recognition under Art. 13 ECHR of the right to truth involve some real steps towards the consolidation of truth and reparations for victims of gross violations. The third party interveners, as well as the dissenting voices in the court, seem to believe that, despite the restrictive approach of the ECtHR to directly afford reparations for victims, the European system present other prospective avenues, and they must be exploited. The eventual consecution of their claims is, in any case, still an obscure path.

## CONCLUSION

The right to truth seems, in principle, to be able to provide a great degree of redress for victims of extraordinary renditions. This is the way in which many international actors have understood it, and advocated it consequently as an effective means to combat impunity. Its recognition under international law is still unclear though, and it presents important shortcomings regarding fundamental aspects of this right, such its collective dimension or autonomy, yet in those systems which have proven to be more receptive to its evolution.

As a consequence, the claims held by the truth-entrepreneurs present in the *El-Masri* face some difficulties. First, as to the appropriateness of the right to truth's

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<sup>428</sup> *Idem.*, p. 89

<sup>429</sup> Cfr. *supra* footnote 209 p. 261



recognition under Art. 13, concerning whether it may make a difference *vis-à-vis* the current content of Art. 13, it is true that the ECtHR has already developed important aspects of the right to truth (like the duty to investigate and the access for the victim and victim's relatives to the procedure). However, its explicit recognition under Art. 13 seems to go beyond a mere symbolic issue.

Historically, this right emerged in a context of widespread impunity, as a way to legally face amnesty laws and rules excluding responsibility and investigations on gross violations. Those scenario proved that in such context, the traditional means are not able to cope with the challenges posed by secrecy and practices aiming to circumvent responsibility. All of this led to the express recognition of truth as a right, as a remedial measure in itself. Such recognition implies that the right to the truth must involve something more than a duty to investigate and criminalise violations. From this perspective an explicit recognition of the right to truth under Art. 13 would involve a substantive development, especially compelling in these cases of extraordinary renditions. As stated by Judge Cançado Trindade, in the first sentence expressly recognising the right to truth in the IACtHR, in that situations the right to truth becomes a requirement for justice.<sup>430</sup>

Second, I analysed the main elements that could allow the effective enjoyment of a right to truth by those victims of extraordinary renditions. Those are, the right to an effective remedy at national level, and the expectation of obtaining redress at the international, in the case this is not provided domestically. This calls for a separate study of the interplay between (1) the right to an effective domestic remedy (Art. 13 ECHR) and, for the interest of this study, the right to truth, on the one hand, and (2) the power of the ECtHR to afford reparations –in this case concerning the establishment of an investigation- on the other hand. Interestingly, the third party interveners in the case emphasized merely the link between the right to truth and the right to an effective domestic remedy.

In this line, and regarding the feasibility to get an explicit recognition of an individual right to truth under Art. 13 ECHR, the conclusion it that the *El-Masri* case deserves to be regarded as an important step. The ECtHR's past case-law, as well as the

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<sup>430</sup> Bámaca Velásquez Concurring Opinion Cançado Trindade para. 32: “the right to truth is the prerequisite for the effective access to justice.

comparative approach of other international bodies, shows that there are grounds to believe that it is something viable. The European court has largely understood the procedural duty to investigate serious violations of human rights as strongly linked to the effective domestic remedies provision, which is acquiring a greater degree of elaboration and specification in cases of serious human rights violations. Furthermore, the ECtHR seems to progressively be more willing to clarify which measures are considered to be appropriate to redress specific violations, through elaborating on Art. 13.

As regards the recognition of the collective dimension, however, it seems somewhat more complicated. It has been constantly present element in the case-law, intrinsically linked to the procedural duty to investigate, but never understood as a right under Art. 13. Not even in the IACtHR has this dimension been recognised so far in terms of a subjective right.

On the other hand, I assessed the feasibility to obtain an order from the ECtHR to make reparation, through a request to carry out an investigation conducting to satisfy the victim's right to truth. As a measure of reparation, the right to truth has normally been recognised as linked to the human rights bodies' power to order reparations, but in the ECtHR this does not seem to be something feasible to be expected. Even if some developments towards a wider variety of measures ordered by the court is observed, some of them involving genuine non-monetary reparation, the political situation of the ECtHR, as well as the general framework at the CoE, does not look very encouraging in this regard.

This is why lastly, given the unlikelihood of such an order coming from the ECtHR, this paper decided to analyse the advisability of the claims made by the third party interveners in El-Masri as to provide some real expectation of redress, in the absence of a direct order to afford reparations. Since the claims revolved around Art. 13, this study focused on assess to which extent, if any, Art. 13 deserves to be regarded as a potentially suitable norm to face the challenge to provide truth and redress for victims of GRP in Europe. At first glance, an important gap is observed in this regard, since Art. 13 is dependent upon States' will, lacking the ECtHR the power to make them provide victims with the factual redress. One could deduce that the third party interveners were

either expecting an order to investigate from the court to be triggered by recognition of truth under Art. 13, or following a line devoid of remedial capacity.

However, the extracted conclusion is different. It is true that they would clearly welcome an order from the ECtHR in that line (Mr. Hessbruegge declared that would be '*the ideal response from the court*').<sup>431</sup> However, they are not only aware of its unlikelihood, but they also positively affirm Art. 13 can play an important remedial role in redressing victims of human rights violations in Europe.

The right to an effective domestic remedy may in itself involve important practical consequences. It may attain an embedding of certain aspects of the effective remedies in the national legal systems, which means that the recognition of some elements of the right to truth under Art. 13 would eventually attain implementation and recognition in the national orders, thus advancing truth protection for victims. It is also more in line with the general configuration of the CoE.

The conclusion must be that the claims made by the third party interveners in the *El-Masri* case, and generally supported by the dissent judges, are something, first of all, worth pursuing, with reference to the advancement of truth and remedy in Europe. An eventual recognition of the right to truth, in its individual and collective dimensions, under Art. 13, is something that would involve a substantive development of the remedial standards in the CoE Member States. It has been considered essential to ensuring adequate remedies and investigation of human rights violations such as those involved in renditions and secret detentions at national level. Art. 13 ECHR may therefore involve a suitable framework to achieve truth and redress on its own, in the absent of reparations ordered by the ECtHR. The achievement of big developments in its power to order reparations is, in any case, hardly taking place.

Recognition under Art. 13, at least concerning certain aspects of the right to truth, seems, on the other hand, something feasibly achievable. In any case, this is a still evolving debate in the court, as illustrated by the fact that there are judges advocating for such recognition whereas some other oppose it. Its collective dimension, or autonomy status under the convention, are on the contrary posing different –and more complicate- challenges.

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<sup>431</sup> Phone interview with Jan Arno Hessbruegge, Cfr. supra footnote 266

Moreover, advancements in this norm seem to be accompanied by a great degree of international participation and scrutiny. Those actors advocate globally for common goals in a similar manner, which means that the slightest development in one part of the world would entail consequences far beyond the region, instrument or international stage where it took place. The aims of these international actors composing this transnational advocacy network are therefore pointing normally involve more global views, far beyond achieving redress in the concrete case. It has been reflected in the fact that, among other considerations, some interveners also regarded the potential impact of the case at the international level.

The *El-Masri* case is therefore an interesting case in this path. It provides certain positive grounds for optimism, but it does not entail in itself a positive substantial development, since the ECtHR failed to explicitly mention the importance of the right to truth for that case under Art. 13 ECHR. However, the strategy to emphasize this provision on effective domestic remedies with a view to the recognition of the right to truth has been established, which is especially interesting since some GRP-related cases are yet to come to the court.

The idea of victims of gross human rights violations having a right to truth involve a number of complexities. It is therefore a complex norm, still evolving under international law, which might be especially appropriate to face new threats to human rights, but also posing important challenges to the existing instruments and mechanisms internationally protecting the fundamental entitlements of individuals. The ECtHR keeps its own configuration and unfolds in a particular context. It seems that the characterization of new norms will need to conform to its features, which nevertheless does not mean to set aside the aspirations to attain truth and reparations in Europe. The *El-Masri* case deserves to be regarded as an encouraging step in this line, at least for involving the largest elaboration on the right to truth the ECtHR had ever devoted. It has shown that the majority of the court is sensitive to this matter, while at the same time there are judges who more actively advocate for its explicit recognition. The path to follow seems therefore to be traced. By this moment, let's take the -although brief-light at the end of the darkness, as an encouraging sign to keep moving forward.

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