

**TO THE HONORABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS  
OF KHALED EL-MASRI BY THE UNITED STATES OF AMERICA  
WITH A REQUEST FOR AN INVESTIGATION AND HEARING ON THE  
MERITS**

By the undersigned, appearing as counsel for petitioner  
under the provisions of Article 23 of the Commission's Regulations

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Steven Macpherson Watt  
Jamil Dakwar  
Jennifer Turner  
Melissa Goodman  
Ben Wizner  
Human Rights &  
National Security Programs \*  
American Civil Liberties Union  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY, 10004  
Ph: (212) 519-7870

\* Counsel gratefully acknowledges the assistance of Kristen Bailey, LL.M. student, New York University Law School, in compiling this petition.

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## INTRODUCTION

This petition is brought against the United States of America for violating the rights of Khaled El-Masri, a German citizen and victim of the U.S. “extraordinary rendition” program. In December 2003, while on vacation in Macedonia, Mr. El-Masri was apprehended and detained by agents of the Macedonian intelligence services. While in their custody, Mr. El-Masri was harshly interrogated. His repeated requests to meet with a lawyer, family members, and a consular representative were denied. After twenty-three days of such treatment, Mr. El-Masri was handed over to the exclusive “authority and control” of agents of the U.S. Central Intelligence Agency. These agents beat, stripped, and drugged Mr. El-Masri before loading him onto a plane and flying him to a secret CIA-run prison in Afghanistan. There, Mr. El-Masri was detained incommunicado for more than four months. He was severely interrogated, inhumanely treated, and denied access to the outside world. At the end of May 2004, Mr. El-Masri was blindfolded once again, flown to Albania, and released on a hilltop in the dead of night. Mr. El-Masri returned to Germany only to find his wife and family gone. They had traveled to his wife’s parents’ home in Lebanon, fearing that Mr. El-Masri had disappeared forever.

Despite abundant corroboration of Mr. El-Masri’s account of his torture, arbitrary detention, and forced disappearance at the hands of agents of the United States, as well as confirmation of the existence of the U.S. rendition program and many of its operational details from official sources, the United States has failed to conduct a criminal investigation into his credible allegations. Nor has the United States provided any redress to Mr. El-Masri for the violation of his rights protected under the U.S. Constitution and international law. Indeed, when he sought redress in U.S. courts, the United States refused

either to confirm or deny its involvement in his abduction, detention, and interrogation. Adding insult to injury, U.S. courts endorsed the government's position that any litigation of the case would be harmful to national security and summarily dismissed his case without any consideration of the merits of his claims.

Mr. El-Masri's "extraordinary rendition" was not an isolated incident; rather it is part of a widespread pattern and practice. Many other victims have come forward in recent years to recount very similar stories. Their graphic accounts demonstrate a chilling pattern: black-clad masked men seize foreign nationals, beat and strip them, then load them onto planes for destinations unknown to their families or governments. Like Mr. El-Masri, these men have been transported to secret "black site" prisons run by the CIA around the world, or delivered for interrogation to nations like Egypt, Jordan, Syria, and Morocco that have a long history of torturing prisoners. Once detained, they have faced unspeakable horrors: incommunicado detention under squalid conditions, as well as brutal interrogation and physical and psychological torture, including electrocutions, sexual indignities, beatings, and sensory deprivation.

As in Mr. El-Masri's case, the United States has failed to initiate any criminal investigation into any other alleged extraordinary rendition. The U.S. courts' reaction to El-Masri's claims, too, is emblematic of the outcome of other cases seeking civil redress against U.S. officials for their role in the rendition program. Courts have routinely dismissed these cases on grounds of national security or on the basis of governmental immunity laws. Thus, Mr. El-Masri and the many other victims of the extraordinary rendition program are left without a judicial remedy before U.S. courts against the United

States or its agents for U.S. involvement in egregious violations of the Constitution and international laws.

The rights to be free from torture, arbitrary detention, and forced disappearance are protected by the American Declaration on the Rights and Duties of Man (“American Declaration”). The United States has an affirmative obligation to protect these rights from violation by the State or its agents. And where, as here, a State fails to act with due diligence to prevent such violations and to provide a remedy when violations occur, the responsibility of the State is incurred under the Declaration.

The United States’ direct involvement in and failure to protect against the torture, arbitrary detention, and forced disappearance suffered by Mr. El-Masri violated his fundamental right to life under Article I of the American Declaration (the right to life and personal security), as well as his rights to due process of the laws protected under Articles XXV, XXVI, and XVII. His transfer to torture in Afghanistan also violated his rights under Article XXVII (the right to seek and receive asylum and the right to non refoulement). And, the refusal of U.S. courts to provide Mr. El-Masri with a remedy for the violation of his rights under the U.S. Constitution and international law violated his right to resort to the courts under Article XVIII. The United States is either directly responsible for the violations of these protected rights, or, alternatively, responsibility is attributable to the United States because of its failure to have acted with due diligence to prevent them.

Petitioner respectfully requests that the Commission conduct an investigation into this matter and hold a hearing on the merits.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual Background<sup>1</sup>

Khaled El-Masri was born in Kuwait in 1963 and raised in Lebanon. He fled Lebanon in 1985 to escape the civil war in that country, and settled in Germany, where he became a citizen in 1995. He attended high school for three years before leaving to become a carpenter. He has since been employed as a truck driver and a car salesman, but has been unemployed since the conclusion of the events described below.

#### Abduction and Detention in Macedonia

On December 31, 2003, Mr. El-Masri boarded a bus in Ulm, Germany, intending to visit Skopje, Macedonia, for a brief holiday. Mr. El-Masri's journey was uneventful, passing through several European border inspections without incident, until the bus crossed the Serbian border into Macedonia. There, Macedonian law enforcement officials confiscated Mr. El-Masri's passport and detained him for several hours. He was thereafter transferred by armed plainclothes officers to a hotel in the Macedonian capital, Skopje, the Skopski Merak<sup>2</sup>. Mr. El-Masri was detained in this hotel for twenty-three days, guarded at all hours by rotating shifts of armed Macedonian officers. The curtains were closed day and night, and Mr. El-Masri was never permitted to leave the room. His frequent requests to see a lawyer, translator, or German consular official, or to contact his wife, were denied. When he once moved toward the door and stated that he intended to leave, three of his captors pointed pistols at his head and threatened to shoot him.

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<sup>1</sup> For a more detailed personal account, see *Declaration of Khaled El-Masri in support of Plaintiff's Opposition to the United States' Motion to Dismiss* (hereinafter "Declaration of Khaled El-Masri"), in *El-Masri v. Tenet et al.*, Apr. 6, 2006 (E.D. Va. 2005) (No. 1:05cv1417) available at [http://www.aclu.org/pdfs/safefree/elmasri\\_decl\\_exh.pdf](http://www.aclu.org/pdfs/safefree/elmasri_decl_exh.pdf).

<sup>2</sup> Following his return to Germany, Mr. El Masri identified this hotel as the place of his incarceration. *Id.* at ¶ 14.

Mr. El-Masri was interrogated repeatedly by his Macedonian captors throughout the course of his detention. The interrogations were conducted in English, despite Mr. El-Masri's limited English proficiency. He was questioned about what he did in Ulm, the persons with whom he associated there, and the persons who attended his mosque, the Ulm Multicultural Center and Mosque. Mr. El-Masri's interrogators pressed him continuously about a meeting he allegedly had in Jalalabad, Afghanistan with an Egyptian man, and about possible Norwegian contacts. Mr. El-Masri responded that he had never been to Jalalabad and knew no one from Norway.

On the seventh day of his confinement, a man who appeared to be in charge of the interrogators proposed to Mr. El-Masri that if he confessed his involvement with Al Qaeda, he would be returned to Germany. Mr. El-Masri refused. On the thirteenth day of his confinement, Mr. El-Masri commenced a hunger strike to protest his continued unlawful detention, and he did not eat again during the remaining ten days of detention in Macedonia.

#### Transfer to Airport and Flight to Afghanistan

On January 23, 2004, seven or eight Macedonian men whom Mr. El-Masri had not seen before, and who were dressed in civilian clothes entered the hotel room. The men recorded a fifteen-minute video of Mr. El-Masri. They instructed him to say that he had been treated well, had not been harmed in any way, and would shortly to be flown back to Germany. The men then handcuffed and blindfolded him and placed him in a car.

After a drive of approximately one hour, the car came to a halt, and Mr. El-Masri could hear the sound of aircraft. He was removed from the vehicle, still handcuffed and blindfolded, and was led to a building. Inside, he was told that he would be medically

examined. Instead, he was beaten severely from all sides with fists and what felt like a thick stick. His clothes were sliced from his body with scissors or a knife, leaving him in his underwear. He was told to remove his underwear and he refused. He was beaten again, and his underwear was forcibly removed. He heard the sound of pictures being taken. He was thrown to the floor. His hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus.

Mr. El-Masri was pulled from the floor and dragged to a corner of the room. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in a diaper. He was then dressed in a dark blue short-sleeved track suit and placed in a belt with chains that attached to his wrists and ankles. The men put earmuffs and eye pads on him, blindfolded him, and hooded him.

Mr. El-Masri was marched to a waiting aircraft, with the shackles cutting into his ankles. Once inside, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. He felt an injection in his shoulder, and became lightheaded. He felt a second injection that rendered him nearly unconscious.

The men dressed in black clothing and ski masks were members of a United States Central Intelligence Agency (“CIA”) “black renditions” team, who were operating pursuant to directives given to them by senior officials in the CIA, including then Director of Central Intelligence, George Tenet, as part of the U.S. rendition program: the clandestine capture of foreign nationals suspected of involvement in terrorist activity and

their subsequent transfer to detention facilities outside the United States for intelligence gathering purposes.<sup>3</sup>

Mr. El-Masri was dimly aware of the aircraft landing and taking off again. When the plane landed for the final time, he was unchained and taken off the aircraft. It was warmer outside than it had been in Macedonia, and Mr. El-Masri realized that he had not been returned to Germany. He believed he might be in Guantánamo, or possibly Iraq. He learned later that he was in Afghanistan.

Flight records show that a Boeing 737 business jet owned by a U.S.-based corporation, Premier Executive Transportation Services, Inc., and operated by another U.S.-based corporation, Aero Contractors Limited, then registered by the U.S. Federal Aviation Administration as N313P, flew Mr. El-Masri from Macedonia to Afghanistan. Specifically, these records note that the plane took off from Palma, Majorca, Spain on January 23, 2004, and landed at the Skopje airport at 8:51 p.m. that evening. The jet left Skopje more than three hours later, flying to Baghdad and then on to Kabul, the Afghan capital. On Sunday, January 25, the jet left Kabul, flying to Timisoara, Romania.<sup>4</sup>

#### Detention and Interrogation in Afghanistan

After landing in Afghanistan, Mr. El-Masri was removed from the aircraft and shoved into the back of a waiting vehicle. The car drove for about ten minutes. Mr. El-Masri was then dragged from the vehicle, pushed into a building, thrown to the floor, and kicked and beaten on the head and the small of his back. He was left in a small, dirty, concrete cell. When he adjusted his eyes to the light, he saw that the walls were covered in

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<sup>3</sup> Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH POST, Dec. 4, 2005, at A1; see also, Council of Europe, *Parliamentary Assembly Committee on Legal Affairs and Human Rights, Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States*, Doc. 10957 (June 12, 2006), available at <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>.

<sup>4</sup> *Id.*

crude Arabic, Urdu, and Farsi writing. The cell did not contain a bed. It was cold, but Mr. El-Masri had been provided only one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. Through a window at the top of the cell, Mr. El-Masri saw a red, setting sun, and realized that he had been traveling for twenty-four hours. Media reports have identified the prison to which Mr. El-Masri was transferred as a CIA-run facility known as the “Salt Pit,” an abandoned brick factory north of the Kabul business district that was used by the CIA for detention and interrogation of some high-level terror suspects.<sup>5</sup>

Mr. El-Masri was thirsty. Through the small, barred window of his cell, Mr. El-Masri saw a man dressed in Afghan clothing. He shouted to the man for water, and the man pointed to a bottle of putrid water in the corner of the cell. Mr. El-Masri asked for fresh water, but was told he could drink from the bottle or go thirsty. That night, Mr. El-Masri was removed from his cell and transferred to an interrogation room. There were six or eight men dressed in the same black clothing and ski masks as the men in the Macedonian airport, as well as a masked doctor who spoke American-accented English and a translator who spoke Arabic with a Palestinian accent. Mr. El-Masri was stripped naked, photographed, and medically examined by one of the masked men. Blood and urine samples were taken. Mr. El-Masri complained to the man who seemed to be a doctor about the unhygienic water and poor conditions in his cell. The man responded that the Afghans were responsible for the conditions of his confinement. Then, Mr. El-Masri was returned to his cell, where he would be detained in a single-person cell, with no reading or writing materials, and without once being permitted outside to breathe fresh air, for more than four months.

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<sup>5</sup> *Id.*; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH POST, Dec. 4, 2005, at A1.

On his second night in the Salt Pit, Mr. El-Masri was woken by masked men and once again brought to the interrogation room. Again, six or eight masked, black-clad men were in the room. Mr. El-Masri was interrogated by a masked man who spoke Arabic with a South Lebanese accent. The man asked him if he knew why he had been detained; Mr. El-Masri said he did not. The man then stated that Mr. El-Masri was in a country with no laws, and that no one knew where he was, and asked whether Mr. El-Masri understood what that meant.

Mr. El-Masri was interrogated about whether he had taken a trip to Jalalabad using a false passport; whether he had attended Palestinian training camps; whether he was acquainted with September 11 conspirators Mohammed Atta and Ramzi Binalshibh; and whether he associated with alleged extremists in Ulm, Germany. Mr. El-Masri, who has never knowingly associated with any terrorist or terrorist organization, answered these questions truthfully, just as he had in Macedonia. Mr. El-Masri asked why he had been transported to Afghanistan, given that he was a German citizen with no ties to Afghanistan. His interrogator did not answer.

In all, Mr. El-Masri was interrogated on three or four occasions, each time by the same man, and each time at night. His interrogations were accompanied by threats, insults, pushing, and shoving. Two men who participated in the interrogations identified themselves as Americans. Mr. El-Masri repeatedly demanded that he be permitted to meet with a representative of the German government, but these requests were ignored. In March, Mr. El-Masri and several other inmates with whom he communicated through cell walls commenced a hunger strike to protest their continued confinement without charges. After twenty-seven days without food, Mr. El-Masri was given an audience with

two unmasked Americans, one of whom was the prison director and the second an even higher official whom other inmates referred to as “the Boss.” The Afghan prison director was also present, along with the translator with the Palestinian accent. Mr. El-Masri insisted that the Americans release him, bring him before a court, allow him access to a German official, or watch him starve to death. The American prison director replied that he could not release Mr. El-Masri without permission from Washington, but agreed that Mr. El-Masri should not be detained in the prison. Mr. El-Masri was returned to his cell, where he continued his hunger strike. As a consequence of the conditions of his confinement and his hunger strike, Mr. El-Masri’s health deteriorated on a daily basis. He received no medical treatment during this time, despite repeated requests.

Media reports quoting unnamed U.S. officials, published after Mr. El-Masri’s eventual return to Germany, note that CIA officials at the “Salt Pit” believed early on that they had detained the wrong person. According to those reports, in March, Mr. El-Masri’s passport was examined by CIA officials in Langley, Virginia and determined to be valid. Then Director of U.S. Central Intelligence George Tenet was notified in April that the CIA had detained the wrong person. By early May, Condoleezza Rice, then the President’s National Security Advisor, had also been informed that the CIA was detaining an innocent German citizen. Nonetheless, Mr. El-Masri was detained in the “Salt Pit” until May 28.<sup>6</sup>

On the thirty-seventh day of his hunger strike, hooded men entered Mr. El-Masri’s cell, dragged him from his bed, and bound his hands and feet. They dragged him into the

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<sup>6</sup> Lisa Myers, Aram Roston & the NBC Investigative Unit, *CIA Accused of Detaining an Innocent Man: If the Agency Knew He Was the Wrong Man, Why Was He Held?*, MSNBC, Apr. 21, 2005, available at <http://www.msnbc.msn.com/id/7591918/>; see also Merkel Government Stands by Masri Mistake Comments, REUTERS, Dec. 7, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/07/AR2005120700469.html>; Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee’s Lawsuit*, WASH. POST, May 13, 2006, at A03 (reporting that “[i]n December [2005] during a joint news conference with Secretary of State Condoleezza Rice, German Chancellor Angela Merkel said Rice had admitted the mistake.”).

interrogation room, sat him on a chair, and tied him to it. A feeding tube was then forced through his nose to his stomach and a liquid was poured through it. After this procedure, Mr. El-Masri was given some canned food as well as some books to read. Mr. El-Masri was weighed. Since the time of his seizure in December of 2003, Mr. El-Masri had lost more than sixty pounds. Following his force-feeding, Mr. El-Masri became extremely ill and suffered very severe pain. A doctor visited Mr. El-Masri's cell in the middle of the night and administered medication, but Mr. El-Masri remained bedridden for several days.

Around the beginning of May, 2004, the prison director brought Mr. El-Masri to an interrogation room where he met an American who identified himself as a psychologist, accompanied by a female interpreter with a Syrian accent. The psychologist told Mr. El-Masri that he had traveled from Washington D.C. to check on him and ask him some questions. At the conclusion of the conversation, the man promised that Mr. El-Masri would be released from the facility very soon.

Soon thereafter, Mr. El-Masri was visited by a German speaker who identified himself only as "Sam." "Sam" was accompanied by the American prison director and an American translator. Mr. El-Masri asked "Sam" whether he was a representative of the German government, and whether the German government knew that Mr. El-Masri was being held in Afghanistan, but "Sam," after consulting with the Americans, declined to answer. He asked "Sam" whether his wife knew where he was; "Sam" replied that she did not. "Sam" then proceeded to ask Mr. El-Masri many of the same questions he had previously been asked regarding his alleged associations with extremists in Neu Ulm, Germany.

“Sam” visited Mr. El-Masri three more times. In late May, Mr. El-Masri received a visit from “Sam,” the American prison director, and an American doctor. He was informed that he would be released in eight days. “Sam” warned him that, as a condition of his release, he was never to mention what had happened to him because the Americans were determined to keep the affair a secret.

#### Release from the Salt Pit and Flight to Albania

On May 27, the American doctor visited Mr. El-Masri’s cell. He instructed Mr. El-Masri not to eat or drink anything, as the next day he would be transported back to Germany, and during the transit back, he would not be permitted to use the bathroom. The next morning, the doctor and the American prison director arrived in his cell. Mr. El-Masri was blindfolded and cuffed, led out of his cell, and driven for about ten minutes. He was then locked in what seemed to be a shipping container until he heard the sound of an aircraft arriving.

Mr. El-Masri was released from the shipping container and his belongings were returned to him. He was told to change back into the clothes he had worn in Macedonia, and was given two new t-shirts. He was then driven to the waiting aircraft, blindfolded and ear-muffled, and led onto the plane, where he was chained to his seat.

The man named “Sam” accompanied Mr. El-Masri on the aircraft. Mr. El-Masri also heard the muffled voices of two or three Americans. Shortly after take-off, Mr. El-Masri asked “Sam” if he could have the earmuffs removed; “Sam” obliged, after consulting with the Americans. Sam informed Mr. El-Masri that Germany had a new President. He said that the plane would land in a European country other than Germany, because the Americans did not want to leave clear traces of their involvement in Mr. El-

Masri's ordeal, but that Mr. El-Masri would eventually continue on to Germany. Mr. El-Masri feared that he would not be returned home, but rather taken to another country and executed.<sup>7</sup>

In June, 2007, based on its examination of flight records, the Council of Europe confirmed that on May 28, 2004 at 7:04 a.m. Mr. El Masri "was flown out of Kabul [...] on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome," arriving there at 11.34 a.m. local time. These records also show that the aircraft was owned and operated by a U.S.-based corporation, Richmor Aviation.<sup>8</sup>

When the aircraft landed, Mr. El-Masri, still blindfolded, was taken off the plane and placed in the back seat of a vehicle. He was not told where he was. He was driven in the vehicle up and down mountains, on paved and unpaved roads, for more than three hours. The vehicle came to a halt, and Mr. El-Masri was aware of the men in the car getting out and closing the doors, and then of men climbing into the vehicle. All of the men had Slavic-sounding accents but said very little.

The vehicle proceeded to drive for another three hours, again up and down mountains and on paved and unpaved roads. Eventually, the vehicle was brought to a halt. Mr. El-Masri was taken from the car and his blindfold was removed. His captors gave him his belongings and passport, removed his handcuffs, and directed him to walk down the

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<sup>7</sup> Subsequent to his release, Mr. El-Masri identified "Sam" in a photograph and a police lineup as Gerhard Lehmann, a German intelligence officer. Don Van Natta Jr., *Germany Weighs If It Played Role in Seizure by U.S.*, N.Y. TIMES, Feb. 21, 2006.

<sup>8</sup> COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES ¶ 279 APPENDIX NO. 3 (June 7, 2007), available at [http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf).

path without turning back. It was dark, and the road was deserted. Mr. El-Masri believed he would be shot in the back and left to die.

Mr. El-Masri rounded a corner and came across three armed men. They immediately asked for his passport. They saw that his German passport had no visa in it, and asked him why he was in Albania without legal permission. Mr. El-Masri replied that he had no idea where he was. He was told that he was near the borders with Macedonia and Serbia. The men led Mr. El-Masri to a small building with an Albanian flag, and he was presented to a superior officer. The officer observed Mr. El-Masri's long hair and long beard and told him he looked like a terrorist. Mr. El-Masri asked to be taken to the German embassy, but the man told him he would be taken to the airport instead.

#### Return to Germany

Mr. El-Masri was driven to the Mother Theresa Airport in Tirana, arriving at about 6:00 a.m. One of the Albanian guards took Mr. El-Masri's passport and 320 Euros from his wallet and went into the airport building. When he returned, he instructed Mr. El-Masri to go through a door, where he was met by a person who guided him through customs and immigration control without inspection. Only after he boarded the aircraft and it was airborne did Mr. El-Masri finally believe he was returning to Germany.

The plane landed at Frankfurt International Airport at 8:40am. Mr. El-Masri was by then about forty pounds lighter than when he had left Germany, his hair was long and unkempt, and he had not shaved since his arrival in Macedonia. From Frankfurt he traveled to Ulm, and from there to his home outside the city. His house was empty and clearly had been so for some time. He proceeded to the Cultural Center in Neu Ulm and

asked after his wife and children. He was told that his family had relocated to Lebanon when he failed to return from his holiday in Macedonia.

#### Corroboration of Mr. El-Masri's Rendition and Detention

In June 2004, having been notified by Mr. El-Masri's German lawyer, the Office of the Prosecuting Magistrate in Munich, Germany opened an investigation into Mr. El-Masri's allegations that he had been unlawfully abducted, detained, and interrogated in Macedonia and Afghanistan.<sup>9</sup> The investigation continues to this day. During the investigation, German officials have corroborated much of Mr. El-Masri's account. They have verified from eye-witnesses that Mr. El-Masri did indeed travel to Macedonia by bus at the end of 2003, and that he had been detained shortly after entering that country.<sup>10</sup> To evaluate Mr. El-Masri's account of his detention in Afghanistan, German authorities conducted scientific tests, including radioactive isotope analysis of Mr. El-Masri's hair. Those tests proved that he had spent time in a South Asian country and had been deprived of food for an extended period.<sup>11</sup>

Following his return to Germany, Mr. El-Masri was contacted by one of his fellow inmates at the "Salt Pit." A citizen of Algeria, Laid Saidi, in a report published in the New York Times, confirmed that he had, at the beginning of 2004, been detained with Mr. El-Masri in a secret prison in Afghanistan run by Americans.<sup>12</sup>

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<sup>9</sup> See, *Declaration of Manfred Gnidjic in support of Plaintiff's Opposition to the United States' Motion to Dismiss* at ¶ 6-15 (hereinafter "Declaration of Manfred Gnidjic"), in *El-Masri v. Tenet et al.*, Apr. 6, 2006 (E.D. Va. 2005) (No. 1:05-cv-1417) available at, [http://www.aclu.org/pdfs/safefree/gnjidic\\_decl\\_exh.pdf](http://www.aclu.org/pdfs/safefree/gnjidic_decl_exh.pdf).

<sup>10</sup> *Id.* Prosecutors also confirmed from stamps in El Masri's passport that he entered Macedonia on December 31, 2003 and exited on January 23, 2004.

<sup>11</sup> *Id.* at ¶ 13.

<sup>12</sup> Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES, July 7, 2006.

On January 31, 2007 the Prosecutor filed indictments against thirteen CIA agents for their involvement in Mr. El-Masri's rendition.<sup>13</sup> Their names had been given to the German Prosecutor by Prosecutors in Spain who uncovered them in the course of their investigation into the alleged use of Spanish airports by the CIA in the U.S. rendition program.<sup>14</sup>

In addition to the criminal investigation by the German Prosecutor, the German Parliament convened an inquiry into Mr. El-Masri's case.<sup>15</sup> This inquiry too is ongoing. At the European level, parallel inquiries into the alleged involvement of European nations in the transfer and detention of terrorist suspects in Europe have been conducted by both the Council of Europe and European Parliament.<sup>16</sup> Following testimony from victims of the program (including Mr. El-Masri), interviews with U.S. and European officials, and an exhaustive examination of documentary evidence, including flight records filed with Eurocontrol -- the inter-governmental organization responsible for air traffic control through European air space -- and national civil aviation authorities, the Council of Europe and European Parliament corroborated the details of Mr. El-Masri's rendition in its entirety, including his secret detention and interrogation in Macedonia and Afghanistan.<sup>17</sup>

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<sup>13</sup> Craig Whitlock, *Travel Log Aids Germans' Kidnap Probe*, WASH. POST, Feb. 2, 2007, at A11. However, concerned that seeking to extradite the thirteen officers would cause "an open conflict with the American authorities", the German government decided not to pursue matters further. *Germany 'Drops CIA Extradition'*, BBC, Sep.23, 2007, available at <http://news.bbc.co.uk/2/hi/europe/7008909.stm>.

<sup>14</sup> Whitlock, *Id.*

<sup>15</sup> Declaration of Manfred Gnidjic, *supra* note 9, at ¶ 16.

<sup>16</sup> COUNCIL OF EUROPE, 2006, *supra* note 3; COUNCIL OF EUROPE, 2007, *supra* note 8; EUROPEAN PARLIAMENT, TDIP TEMPORARY COMMITTEE, REPORT ON THE ALLEGED USE OF EUROPEAN COUNTRIES BY THE CIA FOR THE TRANSPORTATION AND ILLEGAL DETENTION OF PRISONERS (Jan. 30, 2007), available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf).

<sup>17</sup> Numerous U.N. bodies have also inquired into Mr. El-Masri's allegations, including the Committee Against Torture, Human Rights Committee, U.N. Special Rapporteur on Torture and the U.N. Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism.

Specifically, the Council of Europe found “credible his account of detention in Macedonia and Afghanistan for nearly five months.”<sup>18</sup>

#### The Consequences of Mr. El-Masri’s Rendition, Detention, and Torture

Mr. El-Masri was and remains deeply traumatized by his treatment during the course of his seizure and detention. He was repeatedly beaten and threatened; had an object forced into his anus; was denied access to counsel, consular officials, or his family; was harshly interrogated on numerous occasions; was forcibly fed; and was secretly detained in squalid conditions for nearly half a year without charge or explanation. Although he has sought an explanation for why he was detained and interrogated by agents of the United States, and an official apology for his mistreatment, to date, none has been forthcoming. Indeed, the United States has failed even to carry out an investigation into his credible allegations of torture, arbitrary detention, and forced disappearance, taking the extraordinary position that it can neither confirm nor deny its involvement in such acts. The United States’ failure to acknowledge its wrongful detention and treatment of Mr. El-Masri, and the U.S. courts’ subsequent failure to examine his case on the merits and provide him with a remedy, have compounded his trauma, making it impossible for him to put the past behind him and return to his life before these tragic events.

#### **B. Domestic Legal Proceedings**

On December 6, 2005, Mr. El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents

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<sup>18</sup> COUNCIL OF EUROPE, 2006, *supra* note 3, at ¶ 92.

of the United States.<sup>19</sup> Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution, as well as customary international law prohibiting prolonged arbitrary detention, cruel, inhuman, or degrading treatment, and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Claims Act.<sup>20</sup> Although not named as a defendant, the United States government intervened, before the named defendants answered the complaint and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In support of its assertion that Mr. El-Masri's case should be dismissed without consideration of the merits of his case, including evidence in the public domain, the United States filed two declarations: one public and the other for the judge's consideration only. Both were signed by then-CIA director Porter Goss. In his public declaration, Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and urged dismissal of Mr. El-Masri's claims on that basis.<sup>21</sup>

The district court held oral argument on the United States' motion to dismiss on May 12, 2006, and in an order dated that same day, the United States' motion was granted.<sup>22</sup> Mr. El-Masri thereafter filed a timely appeal with the Court of Appeals for the Fourth Circuit on the grounds that the state secrets privilege was inappropriate in this case because the facts necessary to prove Mr. El-Masri's case were already a matter of public record and that application of the privilege in such a manner amounted to a form of de

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<sup>19</sup> Complaint, in *El Masri v. Tenet et al.*, Dec. 6, 2005 (E.D. Va. 2005) (No. 1:05cv1417) available at, [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf).

<sup>20</sup> *Id.* at ¶ 5.

<sup>21</sup> Declaration of State Secrets Privilege by Porter J. Goss, Director, Central Intelligence at ¶ 7, in *El-Masri v. Tenet et al.*, Mar. 8, 2006 (E.D. Va. 2005) (No. 1:05cv1417).

<sup>22</sup> Order, in *El-Masri v. Tenet et al.*, May 12, 2006 (E.D. Va. 2005) (No. 1:05-cv-1417).

facto immunity for the U.S. government.<sup>23</sup> The court of appeals held oral argument on November 28, 2006, with Mr. El-Masri, who had been granted a visa to enter the United States, in attendance. On March 2, 2007, the court of appeals, without consideration of the merits of Mr. El Masri's claims, upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.<sup>24</sup>

On October 9, 2007, the United States Supreme Court, without comment, denied Mr. El-Masri's petition to review the decision of the court of appeals.<sup>25</sup>

## CONTEXT AND PATTERNS

### A. The United States Extraordinary Rendition Program

Beginning in the early 1990s and continuing to this day, the CIA, together with other U.S. government agencies, has developed an intelligence-gathering program involving the apprehension and transfer of foreign nationals suspected of involvement in terrorism to detention and interrogation in countries where, in the United States' view, federal and international legal safeguards do not apply. This program forms part of a broader detention and interrogation policy established and developed by the United States in the aftermath of the September 11 attacks.<sup>26</sup> Pursuant to the program, suspects are detained at facilities outside U.S. sovereign territory, run by either U.S. or foreign authorities, where they are interrogated by U.S. or foreign intelligence agents. In all

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<sup>23</sup> Mr. El Masri's pleadings in this matter are available at <http://www.aclu.org/safefree/torture/25540res20060511.html>.

<sup>24</sup> Khaled El Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667) available at [http://www.nytimes.com/packages/pdf/world/20070303\\_MASRI.pdf](http://www.nytimes.com/packages/pdf/world/20070303_MASRI.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Michael Hayden, Director, Central Intelligence Agency, A Conversation with Michael Hayden, Council on Foreign Relations (Sept. 7, 2007) available at [http://www.cfr.org/publication/14162/conversation\\_with\\_michael\\_hayden\\_rush\\_transcript\\_federal\\_news\\_erv\\_ice.html](http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_erv_ice.html).

instances, the detention and interrogation methods employed do not comport with federal and internationally recognized standards. The program is commonly known as “extraordinary rendition.”<sup>27</sup> While the United States’ engagement in rendition -- the extra-legal transfer of an individual from one State to another -- has a long history,<sup>28</sup> “extraordinary rendition,” and specifically, the U.S. “extraordinary rendition” program -- the transfer of terrorist suspects for secret detention and harsh interrogation outside the United States -- does not.

The roots of the current program can be traced to the Reagan administration, when rendition was employed to affect the transfer of terrorism suspects to stand trial in the United States. During the Clinton presidency this practice was expanded to affect the transfer of suspects from one country to another where they were expected to stand trial.<sup>29</sup> Testifying before a hearing of the Joint House/Senate Intelligence Committee in October 2002, George J. Tenet, then Director of Central Intelligence, described rendition as a key counterterrorism tool, and testified that in an unspecified period before September 11, 2001, the United States had undertaken seventy such renditions. Since this time, the initial objectives of CIA renditions -- the transfer of suspects to stand trial -- have altered

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<sup>27</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, at A1; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec 26, 2002, at A 01; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A 01. *See generally*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NYU CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITION”* (2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

<sup>28</sup> MICHAEL JOHN GARCIA, *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE*, CRS REPORTS FOR CONGRESS Oct. 12, 2007 available at <http://fas.org/sgp/crs/natsec/RL32890.pdf>.

<sup>29</sup> Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2006). *See also*, *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Before H. Subcomm. on International Organizations, Human Rights, and Oversight and H. Subcomm. on Europe, Comm. on Foreign Affairs*, 110th Cong. 18-45 (2007) (Testimony of Michael Scheuer) available at <http://foreignaffairs.house.gov/110/34712.pdf>.

significantly and are now aimed at the clandestine apprehension, transfer, detention, and interrogation of foreign nationals suspected of involvement in terrorism outside the United States.<sup>30</sup> Thus, it is the transfer of individuals to detention and interrogation outside the United States, and entirely outside the rule of law, that makes rendition as practiced by the United States in the post 9/11 era “extraordinary.”

The program serves two discrete functions: it permits agents of the United States to apprehend and detain foreign nationals whom it considers terrorist suspects outside U.S. sovereign territory; and it permits those agents, either on their own or through counterparts in foreign intelligence agencies, to employ interrogation methods prohibited under U.S. or international law as a means of obtaining information from suspects. Memoranda prepared by the U.S. Department of Justice’s Office of Legal Counsel have consistently advanced the position that foreign nationals held at such facilities, outside U.S. sovereign territory, are not protected by the U.S. Constitution or by U.S. obligations under international law, and that U.S. officials cannot, therefore, be held accountable in U.S. courts for actions carried out in relation to such persons. For example, government lawyers have consistently advanced this argument in habeas corpus proceedings brought on behalf of foreign nationals detained and interrogated at Guantánamo.<sup>31</sup> In short, the extraordinary rendition program has been developed to enable U.S. officials to detain and interrogate terrorism suspects outside the rule of law and to evade accountability for their unlawful acts in U.S. courts.

The program has enabled the United States to apprehend and transport terrorism suspects to detention and interrogation facilities in Morocco, Egypt, Afghanistan, Syria,

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<sup>30</sup> Testimony of Michael Scheuer, *Id.*

<sup>31</sup> *See, e.g.*, Brief, United States of America, in *Boumediene, et al. v. Bush*, Oct. 2007 (WL 695614) (Nos. 06-1195 & 06-1196) available at <http://www.usdoj.gov/osg/briefs/2007/3mer/2mer/2006-1195.mer.aa.pdf>.

Jordan, and other countries where the U.S. Department of State, Human Rights Watch, Amnesty International, and other international and national human rights organizations have reported that the use of torture is routine.<sup>32</sup> Other suspects, including Mr. El-Masri, have been transferred to detention and interrogation outside the United States in facilities -- so-called “black sites” -- run by the CIA.<sup>33</sup> Ultimately, many of the men subjected to the program are held in indefinite detention either at Guantánamo or in the custody of foreign governments.<sup>34</sup>

Since October 2001, the media has reported on the existence of the program and many of its operational details. Following these initial reports, literally thousands of press reports and a handful of books about the “extraordinary rendition” program have been published; documentaries and films have been aired worldwide; criminal investigations have commenced; and inter-governmental and national-level inquiries as well as human rights organizations have reported on the rendition program.<sup>35</sup> The discovery of a fleet of some twenty-six aircraft used by the CIA in the program is one of the facets of the program that has enabled these investigations and that has resulted in the exposure of what the United States intended to be a covert operation.

Beginning in 2004, reports have been published identifying a network of aviation corporations run by the CIA. Some of these corporations own the aircraft used to transport

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<sup>32</sup> See, e.g., U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1999-2008, NEAR EAST AND NORTH AFRICA, available at <http://www.state.gov/g/drl/rls/hrrpt/>; HUMAN RIGHTS WATCH, WORLD REPORTS 1999-2008 available at <http://www.hrw.org/doc/?t=pubs>.

<sup>33</sup> Priest, *CIA Holds Terror Suspects in Secret Prisons*, supra note 27.

<sup>34</sup> See, e.g., AMNESTY INTERNATIONAL, USA: BELOW THE RADAR - SECRET FLIGHTS TO TORTURE AND ‘DISAPPEARANCE’ (2006) available at [http://www.amnestyusa.org/stoptorture/pdf/below\\_the\\_radar\\_full\\_report.pdf](http://www.amnestyusa.org/stoptorture/pdf/below_the_radar_full_report.pdf).

<sup>35</sup> For a non-exhaustive list of these media reports, books, documentaries and reports, see, Declaration of Steven Macpherson Watt in Support of Plaintiffs’ Opposition to United States’ Motion to Dismiss, or, in the alternative (hereinafter “Declaration of Steven Macpherson Watt”), Summary Judgment, in Mohammed et al., v. Jeppesen, Dec. 14, 2007 (N.D. Ca. 2005) (No. 5:07-cv-02798).

rendition victims around the world, while others furnish the personnel to fly them.<sup>36</sup>

Although many of these corporations appear to be CIA front companies, the CIA has also contracted with legitimate U.S.-based corporations to provide flight and logistical support services to the aircraft and crew, most notably Jeppesen Dataplan Inc., a wholly owned subsidiary of the Boeing Aerospace Company.<sup>37</sup>

## **B. Official U.S. Acknowledgement of the Program**

Despite widespread media coverage of the extraordinary rendition program, as well as criminal investigations and public inquiries into the program in Europe and Canada,<sup>38</sup> U.S. officials initially said little about the program or its objectives. In September 2006, however, President Bush announced the transfer of fourteen so-called “high-value detainees” from secret overseas prisons run by the CIA to Guantanamo for further detention and eventual trial by military commission.<sup>39</sup> In announcing these transfers, President Bush publicly acknowledged the existence of the rendition program, including the existence of secret overseas detention facilities operated by the CIA and the interrogation of terrorist suspects at those sites using “an alternative” set of techniques.

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<sup>36</sup> See, e.g., Trevor Paglen & A.C. Thompson, *TORTURE TAXI: ON THE TRAIL OF THE CIA’S RENDITION FLIGHTS* (2006); Stephen Grey, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* (2006); See also, Council of Europe, 2006, *supra* note 3 (discussing “spider web” of flights European Parliament working document N07).

<sup>37</sup> See, e.g., Declaration of Sean Belcher in Support of Plaintiffs’ Opposition to United States’ Motion to Dismiss, or, in the alternative, Summary Judgment, in *Mohammed et al., v. Jeppesen*, Oct. 15, 2007 (N.D. Ca. 2005) (No. 5:07-cv-02798) available at [http://www.aclu.org/pdfs/safefree/mohamed\\_v\\_jeppesen\\_declaration\\_sean\\_belcher.pdf](http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_declaration_sean_belcher.pdf) (Mr. Belcher is a former employee of Jeppesen Dataplan Inc.); See also, Council Of Europe, 2007, *supra* note 8, at ¶ 185 (identifying Jeppesen as the “... aviation services provider customarily used by the CIA ...”).

<sup>38</sup> Stephen J. Toope, COMMISSIONER OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT (2005) available at [http://www.ararcommission.ca/eng/ToopeReport\\_final.pdf](http://www.ararcommission.ca/eng/ToopeReport_final.pdf).

<sup>39</sup> George Bush, President, United States of America, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006) transcript available at <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.

The President also indicated that although no other suspects were then held by the CIA, the program itself would remain operative.<sup>40</sup>

Since September 2006, President Bush and other senior members of the administration, including the current Director of Central Intelligence, General Michael Hayden, have publicly discussed the program and defended its utility on numerous occasions.<sup>41</sup> While the President and others have disclosed that the program exists, and confirmed that its purpose is the detention and interrogation of persons suspected of involvement in terrorist activities, they have repeatedly denied that detainees are tortured in the program or sent to countries where they will be subjected to such mistreatment.<sup>42</sup> Their assertions, however, are contrary to the testimony of individuals who have been subject to the program, including Mr. El-Masri, as well as the findings of journalists and numerous overseas governmental investigations and inquiries.<sup>43</sup>

### **C. United States' Failure to Investigate the Program**

Evidence suggests that since September 11, the use of “extraordinary rendition” by the United States has been both widespread and systemic. Although the precise number of

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<sup>40</sup> *Id.* Recent media reports citing U.S. officials, confirm that the program was still in operation after this announcement. Mark Mazzetti, *CIA Secretly Held Qaeda Suspect, Official Say*, N.Y. TIMES, Mar. 15, 2008 (reporting on the detention and interrogation of Muhammad Rahim, an Afghan citizen, by the CIA for at least six months in the summer of 2007).

<sup>41</sup> *See*, Declaration of Steven Macpherson Watt, *supra* note 35, at ¶ 3.

<sup>42</sup> Both President Bush and CIA Director Hayden have openly admitted, however, that an “alternative” set of procedures has been employed during interrogations and they have acknowledged also that detainees are indeed sent to countries where there is a likelihood of torture but that international accountability should torture eventuate is avoided through the procurement of so-called “diplomatic assurances” from the government concerned before the transfer takes place. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, *supra* note 39, at ¶ 16; Hayden, *A Conversation with Michael Hayden*, *supra* note 26.

<sup>43</sup> *See, e.g.*, Declarations of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Bashmillah and Bisher Al-Rawi in *Mohamed v Jeppesen*, , in *Mohammed et al., v. Jeppesen*, Dec. 14, 2007 (N.D. Ca. 2005) (No. 5:07-cv-02798); Toope, COMMISSIONER OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT, *supra* note 38. *See also*, Council of Europe, 2006, *supra* note 3; and AMNESTY INTERNATIONAL, USA: BELOW THE RADAR - SECRET FLIGHTS TO TORTURE AND ‘DISAPPEARANCE’, *supra* note 34.

individuals subjected to the program is not known, U.S. officials have publicly stated that at least “several dozen”<sup>44</sup> or “mid-range two figures”<sup>45</sup> have been rendered. However, in 2005, the Prime Minister of Egypt, Ahmed Nazif, stated that Egypt alone had assisted the United States with “60 or 70” renditions since September 11.<sup>46</sup> Investigative journalists have reported that as many as 100 or 150 men have been subjected to extraordinary rendition;<sup>47</sup> the Council of Europe and European Parliament have identified 18 men, mainly European nationals and legal residents, who had been rendered; and, in a report published in 2007, six human rights organizations listed the names of 39 men they believed had been rendered and remain in CIA custody.<sup>48</sup>

Despite these reports substantiating the widespread and systemic nature of the practice, no investigation has been launched into either those involved in devising and developing the program or those individual agents of the CIA who are personally responsible. Indeed, since September 11, with the exception of one CIA contractor charged with the death of a detainee in Afghanistan,<sup>49</sup> no member of the CIA has ever been

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<sup>44</sup> Michael Duffy & Timothy J. Burger, *Ten Questions for John Negroponte*, TIME, Apr. 16, 2006, at 6, available at <http://www.time.com/time/printout/0,8816,1184080,00.html>.

<sup>45</sup> Hayden, A Conversation with Michael Hayden, *supra* note 26.

<sup>46</sup> Interview between NBC’s Tim Russert and Egyptian Prime Minister Ahmed Nazif, MEET THE PRESS, May 15, 2005, transcript available at <http://www.msnbc.msn.com/id/7862265/>; See also, HUMAN RIGHTS WATCH, BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT (May, 2005) available at <http://hrw.org/reports/2005/egypt0505/> (based on interviews with exiled activists, Egyptian lawyers, human rights groups, and family members of current detainees, as well as reviews of English and Arabic press accounts, identifying at least 63 individuals who have been rendered to, and in a few cases from, Egypt since 1995 [see Appendix I]. Human Rights Watch notes that the United States was actively involved in these cases.).

<sup>47</sup> Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106; see also, Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra* note 27.

<sup>48</sup> AMNESTY INTERNATIONAL ET AL., OFF THE RECORD: U.S. RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE “WAR ON TERROR” (2007) available at <http://hrw.org/backgrounder/usa/ct0607/ct0607web.pdf> (presenting information on 39 detainees suspected to have been held at CIA “black site” detention facilities outside the United States and who remain unaccounted for).

<sup>49</sup> R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee Who Died*, WASH. POST, Apr. 13, 2005, at A 07.

charged, let alone prosecuted, in relation to widespread allegations of abuse. In January 2006, the Department of Justice disclosed that since the commencement of armed hostilities in Afghanistan, only nineteen referrals have been made to federal prosecutors regarding allegations against civilians who have engaged in torture and abuse.<sup>50</sup> In October 2005, citing current and former intelligence and law enforcement officials, The New York Times reported that federal prosecutors do not intend to bring criminal charges in several cases involving the handling of detainees by the CIA, including the case of a death by hypothermia of an Afghan detainee held by the CIA in the “Salt Pit” detention facility.<sup>51</sup>

Moreover, following the enactment of the Military Commissions Act of 2006 (MCA),<sup>52</sup> future prosecution of any member of the CIA for involvement in the rendition program is a remote possibility. Section 8 of the MCA provides immunity to government officials who authorized or ordered acts of torture and other abuse since 1997. Subsection 8(b) amends the War Crimes Act of 1996<sup>53</sup> to replace the prohibition on all breaches of Common Article 3 of the Geneva Conventions with a less inclusive list of prohibited acts. Section 950v, paragraph (b)(12)(B)(iii)(II) makes the revisions to the War Crimes Act retroactive to 1997, and also makes the prohibition on “serious and non-transitory mental harm (which need not be prolonged)” inapplicable entirely to the date of enactment of the MCA. Thus, government officials who authorized or ordered acts of torture and abuse will not be subject to prosecution for many of the acts that they authorized or ordered.

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<sup>50</sup> Letter from William E. Moschella, Assistant Attorney General, to Richard Durbin, U.S. Senator (Jan. 17, 2005) available at [http://www.aclu.org/images/asset\\_upload\\_file606\\_23910.pdf](http://www.aclu.org/images/asset_upload_file606_23910.pdf); Letter from Richard Durbin, U.S. Senator, to Alberto Gonzales, Attorney General (Nov. 3, 2005) available at [http://www.aclu.org/images/asset\\_upload\\_file406\\_23912.pdf](http://www.aclu.org/images/asset_upload_file406_23912.pdf).

<sup>51</sup> Douglas Jehl & Tim Golden, *CIA is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A48239-2005Apr12.html>.

<sup>52</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>53</sup> *Id.* at § 8 (b).

#### **D. Denial of Legal Remedies for Torture, Arbitrary Detention, and Forced Disappearance in U.S. Courts**

Victims of the extraordinary rendition program also face significant legal hurdles to securing remedies in U.S. courts. Although both the Constitution and federal statute allow for the possibility of civil redress in federal court for torture and other egregious human rights violations,<sup>54</sup> to date, in all those cases in which victims have sought such redress, the U.S. government has sought dismissal of their claims, asserting either that named government employees are immune from suit or, as in Mr. El-Masri's case, that further litigation would be harmful to national security. To date, lower courts have upheld these government assertions and denied redress to victims.

For instance, in *Arar v. Ashcroft*, a case challenging the rendition to Syria of Canadian citizen Maher Arar, a federal court in New York held that national security and foreign policy considerations precluded the court from evaluating the actions of federal officials under the U.S. constitution.<sup>55</sup> The court concluded that adjudicating Arar's claims would improperly interfere with "policy-making" by the political branches and might produce "embarrassment of our government abroad." The court held that "in the international realm . . . judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States."<sup>56</sup> In the course of his ruling, the judge also suggested that it might be an open question whether the

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<sup>54</sup> Alien Tort Claims Act (ATCA), 28 U.S.C. §1350; Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73, (1992); U.S. CONST. amend. V.

<sup>55</sup> *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. Feb 16, 2006) (NO. CV-04-0249 DGT VVP), *appeal pending*, No. 06-4216 (2<sup>nd</sup> Cir. argued Nov. 9, 2007) (Arar had sued the former attorney general, the former commissioner of the Immigration and Naturalization Service, the former secretary for homeland security, the director of the Federal Bureau of Investigation, and other U.S. officials for detaining him incommunicado at the U.S. border for thirteen days and for ordering his deportation to Syria for the express purpose of detention and interrogation under torture by Syrian officials).

<sup>56</sup> *Id.* at 281, 282.

U.S. Constitution protects individuals from torture under all circumstances, and especially in the context of the “war on terrorism.”<sup>57</sup>

In the two other cases seeking remedies for injuries sustained as a consequence of the program, the United States intervened to invoke the state secrets privilege and seek dismissal at the outset, contending that further litigation would be harmful to national security. As earlier discussed, in *El-Masri v. United States*, the Court of Appeals for the Fourth Circuit, without consideration of the merits, upheld the district court’s decision and dismissed the case on state secrets grounds.<sup>58</sup> Likewise, in *Mohamed v. Jeppesen Dataplan Inc.*, a case filed on behalf of five men against a U.S.-based corporation that furnished flight and logistical support services to aircraft used by the CIA to render them to detention and interrogation in Morocco, Egypt, and CIA-run prisons overseas, a district court in California dismissed their case on the pleadings following the United States’ intervention and assertion of the state secrets privilege. The reasons for dismissal given by the district court were largely based on the same reasoning adopted by the court of appeals in the *El-Masri* case.<sup>59</sup>

## ADMISSIBILITY

### **I Mr. El Masri’s Petition is Admissible under the Commission’s Rules of Procedure**

#### **A. The Commission Has Jurisdiction over This Case**

Although Mr. El-Masri’s rendition, detention, and interrogation were perpetrated by agents of the United States outside the western hemisphere, the Commission has jurisdiction in this matter. Neither the Charter of the Organization of American States

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<sup>57</sup> *Id.* This case is currently pending appeal before the Second Circuit Court of Appeals.

<sup>58</sup> *El-Masri*, 479 F.3d 296, *cert. denied*, 128 S.Ct. 373 (2007).

<sup>59</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, WL 782802 (No. C07-02798 JW). This case is pending appeal before the Ninth Circuit Court of Appeals.

“OAS”) nor the Commission’s Statute expressly restricts the exercise of the Commission’s jurisdiction to this region. The Commission views its jurisdiction in relation to the American Declaration as extending to all OAS Member States and in respect of persons “subject to their authority and control.”<sup>60</sup> At all times material, Mr. El-Masri was subject to the “authority and control” of the United States and its agents and thus was protected by the American Declaration.

In *Coard v. United States*, several individuals filed a petition against the United States, alleging violations of the prohibition against arbitrary detention under the American Declaration. The detentions were alleged to have taken place during the U.S. military incursion in Grenada. In its report, the Commission set forth the “authority and control test”:

Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.<sup>61</sup>

The Commission, citing the *Coard* decision with approval in its *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba*, stated that “[t]he determination of a state’s responsibility for violations of the international human rights of a

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<sup>60</sup> Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002).

<sup>61</sup> *Coard et al. v. United States*, Case No. 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 37 (1999); *see also*, Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. *República de Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev., ¶¶ 23, 25 (1999) (holding that individuals in a plane shot down by Cuban military in international airspace were under Cuban authority, and therefore they were within the State’s jurisdiction and Cuba was bound by the American Declaration to protect their human rights).

particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether under the specific circumstances, that person fell within the state's authority or control."<sup>62</sup>

In its decisions, the Commission has cited the case law of the European Commission in support of its "authority and control" test for jurisdiction, including the two seminal cases on this issue, *Cyprus v. Turkey*<sup>63</sup> and *Loizidou v. Turkey*.<sup>64</sup> In both cases, the European Commission set forth an "effective overall control" test as a basis for the jurisdictional reach of the European Convention. Importantly, the Inter-American Commission did *not* cite as additional authority for its "authority and control" test the more recent European Court case to address the issue of jurisdiction, *Banković v. Belgium*.<sup>65</sup>

In *Banković*, the applicants, all of whom were citizens of the Federal Republic of Yugoslavia (FRY), filed against members states of NATO (states that were also party to the European Convention) on behalf of themselves and relatives who had been killed or seriously injured following the NATO bombing of a radio station in Belgrade. The applicants relied on violations of Article 2 (Right to Life), Article 10 (Freedom of Expression), and Article 13 (Right to a national remedy and compensation) of the European Convention. The European Court declined to exercise jurisdiction in the circumstances. Significantly, the Court did not do so because it considered that the reach of the Convention was restricted to the control of territory within the European public order (*espace juridique*). As the FRY did not fall within this "legal space" of the Convention, the

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<sup>62</sup> Detainees in Guantanamo Bay, *supra* note 60, at n.7.

<sup>63</sup> *Cyprus v. Turkey*, 18 Y.B. Eur. Conv. H.R. 83, at ¶ 118 (1975) (Eur. Comm'n on H.R.).

<sup>64</sup> *Loizidou v. Turkey*, Eur. Comm. H.R., Preliminary Objections, Judgment, Series A No. 310, ¶¶ 59-64 (1995).

<sup>65</sup> *Banković and Others v. Belgium and 16 Other Contracting States (Admissibility)*, App. No. 52207/99, Eur. Ct.H.R. (2001).

Court found that it did not apply to govern the actions of Belgium and the other Member States.<sup>66</sup> By omitting reference to *Banković*, the Commission has indicated that it does not consider that similar territorial restrictions apply in regards to the scope of the protections afforded by the American Declaration. Moreover, in the European Court’s most recent jurisprudence on the issue of the territorial application of the Convention, *Öcalan v. Turkey*, the Court exercised jurisdiction despite the fact that some of the alleged violations occurred outside European territory, in Nairobi, Kenya. Significantly, the Court held that “[i]t is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the ‘jurisdiction’ of that state for the purposes of Art. 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.”<sup>67</sup>

Furthermore, in *Bankovic*, although the Court declined to exercise extraterritorial jurisdiction, it did so based on the particular facts of the case. Additionally, it did not reject outright the possibility of exercising such jurisdiction under “exceptional” circumstances. Referring to its earlier decisions in *Loizidou v. Turkey*<sup>68</sup> and *Cyprus v. Turkey*,<sup>69</sup> the Court considered that exceptional circumstances would exist when “the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”<sup>70</sup> This definition of “exceptional circumstances” would clearly cover the

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<sup>66</sup> *Id.* ¶ 80.

<sup>67</sup> *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct.H.R., at ¶ 91 (2005).

<sup>68</sup> *Loizidou v. Turkey*, *supra* note 64.

<sup>69</sup> *Cyprus v. Turkey* (Grand Chamber), App. No. 25781/94, Eur. Ct.H.R., Judgment (2001).

<sup>70</sup> *Bankovic et. al. v. Belgium et. al.*, *supra* note 65, at ¶ 70 (“the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and

United States' actions in areas outside the western hemisphere, including the circumstances surrounding Mr. El-Masri's apprehension at a Macedonian airport and his subsequent detention in a CIA-run prison in Afghanistan. In Macedonia, the intelligence services of that country clearly consented or acquiesced to agents of the CIA operating in their territory and specifically at the airport where they handed over Mr. El-Masri. In Afghanistan, too, the United States operates with the consent of the Afghan authorities, and in the prison in particular, it was apparent that U.S. agents exercised "authority and control" over Mr. El-Masri. In both circumstances, therefore, the United States and its agents were subject to the provisions of the American Declaration.

Thus, the prior case law of this Commission supports the exercise of jurisdiction in this case over persons detained and controlled by the United States both in the western hemisphere and elsewhere.

In addition to its case law, the Inter-American Commission has also recognized its ability to address actions that occur beyond the geographic scope of the western hemisphere. In its 1985 Report on Suriname, the Commission commented on Suriname's attacks on and harassment of Surinamese citizens living in Holland. The Commission had convened a Special Commission and spent two days taking testimony from various victims of human rights violations in Holland. In its report following the Special Commission, the Commission did not exclude the possibility of taking some form of action in relation to

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freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration." citing *Loizidou (preliminary objections)*).

these events, stating: “The Commission, before adopting any measure on this matter, will await the findings of the Dutch judicial investigation.”<sup>71</sup>

In sum, the jurisprudence of the Inter-American system, as well as the case law of other jurisdictions, recognizes the exercise of jurisdiction regardless of where an individual is detained. The key determination is whether a state has “authority and control” over the affected individuals.

In this matter, it is particularly important that the Commission exercise jurisdiction, as the United States apprehended and held Mr. El-Masri outside of what it deems U.S. sovereign territory, thereby circumventing the protections that would be otherwise afforded him under U.S. domestic law. Moreover, it is appropriate that this Commission assume jurisdiction as there is no other regional human rights institution available to Mr. El-Masri to seek a remedy for violation of his rights to be free from torture, arbitrary detention, and forced disappearance.

**B. Mr. El-Masri Has Properly Exhausted All Remedies in the Domestic Courts of the United States.**

For this petition to be found admissible, domestic remedies must have been pursued and exhausted.<sup>72</sup> Mr. El-Masri filed a complaint with the United States District Court for the Eastern District of Virginia on December 6, 2005, alleging violations of the U.S. Constitution and international law. Following dismissal of his complaint, Mr. El-Masri filed an appeal with the Fourth Circuit Court of Appeals, and when this court affirmed the lower court’s dismissal, he sought review of that decision by the U.S. Supreme Court. On

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<sup>71</sup> Second Report on the Situation of Human Rights in Suriname, Inter-Am. C.H.R., OAS/Ser.L/V/II.66, doc. 21 rev. 1, at ¶¶ 14, 40 (1985).

<sup>72</sup> Inter-Am. C.H.R., Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109<sup>th</sup> special session held from December 4 to 8, 2000, amended at its 116<sup>th</sup> regular period of sessions, held from October 7 to 25, 2002, and at its 118<sup>th</sup> regular period of sessions, held October 7 to 24, 2003.

October 9, 2007, the Supreme Court denied review of his petition, bringing an end all to possible recourse before U.S. courts. In all of those proceedings, the United States was placed on notice of and had the opportunity to respond to all claims now pending before this Commission.

**C. Mr. El-Masri has filed this Petition within Six Months from the Date on Which He Exhausted Available and Effective Domestic Remedies**

On October 9, 2007, the highest court of appeal in the United States, the Supreme Court, declined to review the opinion of the Fourth Circuit Court of Appeals affirming dismissal of Mr. El-Masri's complaint by the district court on the basis of the state secrets privilege. Thus, this petition is timely filed.

**D. There are no Parallel Proceedings pending in any Other International Tribunal.**

Petitioner confirms that the subject matter of this petition is not pending before any other international tribunal, nor has it been previously examined and settled by the Commission or another international tribunal.

**E. The American Declaration on the Rights and Duties of Man is binding on the United States.**

As the United States is not a party to the Inter-American Convention on Human Rights ("American Convention"), it is the Charter of the Organization of American States ("OAS Charter") and the American Declaration on the Rights and Duties of Man ("American Declaration") that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,<sup>73</sup> and the General Assembly of

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<sup>73</sup> Organization of American States Charter [hereinafter "OAS Charter"], Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48, *entered into force* Dec. 13, 1951 [ratified by the United States, June 15, 1951]; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force*

the OAS has repeatedly recognized the American Declaration as a source of international legal obligation for OAS member states, including the United States.<sup>74</sup> This principle has been affirmed by the Inter-American Court, which has found that that the “Declaration contains and defines the fundamental human rights referred to in the Charter,”<sup>75</sup> as well as by the Commission, which recognizes the American Declaration as a “source of international obligations” for OAS member states.<sup>76</sup>

Moreover, the Commission’s Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states’ compliance with the human rights norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission’s Rules provides that “[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration,”<sup>77</sup> and Articles 49 and 50 of the Commission’s Rules confirm that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention.<sup>78</sup> Likewise, Articles 18 and 20 of the Commission’s Statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any

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Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also* James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3-87, Annual Report of the Inter-Am. C.H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987).

<sup>74</sup> OAS Charter, *Id.* *See also* *Pinkerton v. United States*, *Id.*

<sup>75</sup> Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct.H.R. (ser. A) No. 10, ¶ 43, 45 (July 14, 1989).

<sup>76</sup> *See* Hector Geronimo Lopez Aurelli, Case 9850, Annual Report of the Inter-Am. C.H.R. 41, OEA/ser. L/V/II.79, doc. 12 rev. 1, ¶ III.6 (1990) (quoting Inter-Am. Ct.H.R., Advisory Opinion OC-10/89, ¶ 45); *see also* Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, doc. 5 rev. 1, ¶ 163 (2002).

<sup>77</sup> Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 72, at art. 23.

<sup>78</sup> *Id.* at arts. 49, 50.

OAS member state, and “to pay particular attention” to the observance of certain key provisions of the American Declaration by States that are not party to the American Convention, including the right to life, protected by Article I.

Finally, the Commission itself has consistently asserted its general authority to “supervis[e] member states’ observance of human rights,” including those rights prescribed under the American Declaration, and specifically as against the United States.<sup>79</sup>

In sum, all OAS member states, including the United States, are legally bound by the provisions contained in the American Declaration. Here, petitioner has alleged violations of the American Declaration, and the Commission has the necessary authority to adjudicate them.

**F. The Commission should interpret the American Declaration in the context of recent developments in human rights law.**

The Inter-American Commission has consistently held that international human rights instruments should be construed in light of the developing standards of human rights law articulated in national, regional, and international frameworks. In 1971, the International Court of Justice declared that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation.”<sup>80</sup> The Inter-American Court recently cited this principle in ruling that “to determine the legal status of the American Declaration it is appropriate to look to the Inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that

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<sup>79</sup> Detainees in Guantanamo Bay, *supra* note 60; *see also*, *Pinkerton v. United States*, *supra* note 73, at ¶¶ 46-49 (affirming that, pursuant to the Commission’s statute, the Commission “is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights”).

<sup>80</sup> Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. (June 21, 1971).

instrument was believed to have had in 1948.”<sup>81</sup> This notion of maintaining an “evolutive interpretation” of international human rights instruments within the broad system of treaty interpretation brought about by the Vienna Convention was again cited in 1999 by the Inter-American Court.<sup>82</sup> Following this analysis, the Court found that the U.N. Convention on the Rights of the Child, an international instrument ratified by every OAS member except the United States, signaled expansive international consent (*opinio juris*) on the provisions of that instrument, and can therefore be used to construe the American Convention and other international instruments pertinent to human rights in the Americas.<sup>83</sup>

The Commission has consistently applied this interpretative principle, specifically in relation to its interpretation of the American Declaration. In the *Villareal* case, for example, the Commission held that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member States against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing

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<sup>81</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct.H.R. (ser. A) No. 10, ¶ 37 (July 14, 1989).

<sup>82</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Partially Dissenting Opinion of Judge Oliver Jackman, Advisory Opinion OC-16/99, Inter-Am. Ct.H.R. (ser. A) No. 16, ¶¶ 114-15 (Oct. 1, 1999) (citing, *inter alia*, the decisions of the Eur. Ct.H.R. in *Tyrer v. United Kingdom*, App. No. 00005856/72 (1978), *Marckx v. Belgium*, App. No. 6833/74 (1979), and *Loizidou v. Turkey*, *supra* note 64; *see also* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct.H.R. (ser. A) No. 18, ¶ 120 (Sept. 17, 2003) (citing Advisory Opinion OC-16/99).

<sup>83</sup> Juridical status and human rights of the child, Advisory Opinion OC-17/02, Inter-Am. Ct.H.R. (ser. A) No. 17, ¶¶ 29-30 (Aug. 28, 2002).

international and regional human rights instruments.”<sup>84</sup> Adopting this principle, the Commission has relied upon various universal and regional human rights treaties and other instruments, as well as the jurisprudence of other international tribunals and human rights institutions, to construe rights recognized in the American Declaration.<sup>85</sup>

## LEGAL ARGUMENT

### **II. Under the American Declaration, the United States Must Ensure the Right of Everyone to be Free from Torture, Arbitrary Detention, and Forced Disappearance**

As a consequence of his “extraordinary rendition,” Mr. El-Masri was subject to torture, arbitrary detention, and forced disappearance. The American Declaration prohibits such unlawful acts and, where they occur, imposes responsibility on the State if either the State or its agents was directly involved or where the State has either supported or acquiesced in such acts. Moreover, even if it cannot be shown that the State or its agents were so involved, State responsibility may attach where a victim can demonstrate that either (1) the legal system failed to provide for judicial investigation, prosecution and punishment, or compensation when violations of these rights occurred in his or her specific case; or (2) the State systematically fails to provide for such processes, in the face of a widespread pattern and practice of human rights violations. Here, the United States is responsible for the violation of Mr. El-Masri’s rights to be free from torture, arbitrary

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<sup>84</sup> Ramon Martinez Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, doc. 5 rev. 1 at 821, ¶ 60 (2002) (citing Juan Raul Garza v. United States, Case 12.243, Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000)); *see also* Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 86-88 (2004); *Mary and Carrie Dann v. United States*, *supra* note 76, at ¶¶ 96-97.

<sup>85</sup> *See, e.g.*, Report On The Situation Of Human Rights of Asylum Seekers Within The Canadian Refugee Determination System, Inter-Am. C.H.R., Country Report, OEA/Ser.L/V/11.108, doc. 40 rev., ¶¶ 28, 159, 165 (2000) (referencing the U.N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community of the Toledo District v. Belize*, *supra* note 84, at ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration).

detention, and forced disappearance because its agents were directly involved in the violations or, alternatively, because the United States has failed to investigate and prosecute those responsible in his case and because of the United States' systematic failure to investigate, prosecute, and punish U.S. officials and others involved in the extraordinary rendition program.

**A. Mr. El-Masri's "Extraordinary Rendition" Violated His Rights to be Free from Torture, Arbitrary Detention, and Forced Disappearance.**

**1. Articles I, XXV, and XXVI Protect against Torture and Other Inhumane Treatment**

The right to humane treatment and the prohibitions against torture and inhuman and degrading treatment are provided for under Articles I, XXV, and XXVI of the American Declaration. Although the American Declaration does not contain an explicit provision on the right to humane treatment, the Commission has interpreted Article I of the Declaration to include similar protections to those under Article 5 of the American Convention.<sup>86</sup> Article 5, sections (1) and (2) establishes the right of all people to respect for their "physical, mental and moral" integrity and to be free from "cruel, inhuman or degrading treatment." Article I guarantees analogous rights.

Reading Articles I, XXV, and XXVI of the Declaration together, the Commission has stated that the Declaration's right to humane treatment encompasses three broad categories of prohibited treatment: (1) torture; (2) other cruel, inhumane, or degrading treatment or punishment; and (3) other prerequisites for respect for physical, mental or

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<sup>86</sup> Report on Terrorism and Human Rights, Inter-American C.H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 155 (2002) (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention). *See also, e.g.*, Juan Antonio Aguirre Ballesteros, Case 9437, Annual Report of the Inter-Am. C.H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985).

moral integrity.<sup>87</sup> The Commission has also noted that “the Inter-American Court of Human Rights has consistently ruled that ‘every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to . . . humane treatment.’”<sup>88</sup>

The Commission has specified that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.”<sup>89</sup> The Commission has also held the prohibition to be a *jus cogens* norm,<sup>90</sup> and has emphasized that the prohibitions on torture and other inhumane treatment apply equally in time of war and peace.<sup>91</sup> As evidenced by their incorporation in universal and regional human rights treaties as well as the Geneva Conventions, the prohibitions of torture and cruel, inhuman, or degrading treatment form part of customary international law.<sup>92</sup> As such, interrogation methods that amount to torture are strictly prohibited under Articles I, XXV, and XXVI of the Declaration.

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<sup>87</sup> Report on Terrorism and Human Rights, *Id.* ¶¶ 149-150.

<sup>88</sup> *See, e.g.*, Victor Rosario Congo v. Ecuador, *supra* note 88, at ¶ 195.

<sup>89</sup> Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, *supra* note 85, at ¶ 118.

<sup>90</sup> *See, e.g.*, *Id.* at ¶¶ 118, 154.

<sup>91</sup> American Convention on Human Rights, art. 27(2), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); Inter-American Convention to Prevent and Punish Torture, art. 5, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992) (providing that “The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture. Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”). *See also*, Asencios Lindo *et al.* (Peru), Case 11.182, Annual Report of the Inter-Am. C.H.R., Report No. 49/00, ¶ 75 (2000).

<sup>92</sup> *See, e.g.*, Universal Declaration of Human Rights, G.A. res. 217A (III), art. 5, U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, art. 7, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 32, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of

Although the substance of the Article 5 right to be free from “cruel, inhuman or degrading treatment” is not defined in the two Inter-American treaties that specifically refer to it, namely the American Convention and the Inter-American Convention to Prevent and Punish Torture, certain guiding principles as to its content can be derived from the jurisprudence of the Inter-American Court and the Commission for the purpose of determining relevant proscribed conduct.

Consistent with its interpretative mandate, the Commission and the Inter-American Court have drawn on other international instruments, customary and international humanitarian law, as well as the decisions of other international bodies interpreting these legal standards, to define the content of the norm. When analyzing allegations of violations of Article 5 of the American Convention, for example, the Commission has considered decisions of the European Commission on Human Rights, according to which “inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable.”<sup>93</sup> The Commission has also considered the jurisprudence of the European Court, according to which the evaluation of the level of severity of treatment is relative and depends on the circumstances in each case, such as the duration of the treatment or its physical and mental effects.<sup>94</sup>

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War, art. 17, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, 8 June 1977; Common Article 3, Geneva Conventions.

<sup>93</sup> Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Inter-Am. C.H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 821, ¶ 77 (1997) (citing *The Greek Case*, 12 Y. B. Eur. Conv. on H.R. 12, at 186 (1969)).

<sup>94</sup> *Id.* at ¶ 78 (citing *Ireland v. United Kingdom*, Eur. Ct.H.R., (ser. A) No. 25, ¶ 162-163).

Thus, in its assessment of Mr. El-Masri's treatment, the Commission should have recourse not only to its own jurisprudence, but also to those standards established under both conventional and customary international human rights law and humanitarian law.<sup>95</sup>

**2. Articles I and XXVII Prohibit Transfer of any Person to a Country where there is a Substantial Likelihood that the Person will be subjected to Torture**

A State violates the prohibition against torture not only when it uses torture directly, but also when it is complicit in torture committed by another State or when it transfers a person to a State where it is likely that the person will be tortured or otherwise mistreated.<sup>96</sup> The prohibition against rendering persons to countries that practice torture is incorporated in Articles I and XXVII of the American Declaration. The Commission has held that a State that expels, returns, or extradites a person to another State where there are substantial grounds for believing that the person would be in danger of being tortured will be considered responsible for violating that person's right to personal security or humane treatment.<sup>97</sup>

This *non-refoulement* principle is well established in international law.<sup>98</sup> The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or

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<sup>95</sup> The Commission has noted that the application of international humanitarian law does not "exclude or displace" the application of international human rights law, since both share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity." See e.g., *Coard et al. v. United States*, *supra* note 61, at ¶ 39.

<sup>96</sup> See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 93, at arts. 3, 4.

<sup>97</sup> Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, *supra* note 85, at ¶ 154.

<sup>98</sup> See, e.g., *Soering v. U.K.*, 161 Eur. Ct.H.R. (ser. A) (1989); *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991 (1993), 98 I.L.R. 479; *Agiza v. Sweden*, Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) (holding that Sweden violated articles 3 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment for relying upon "diplomatic assurances" of formal guarantees from the Egyptian government that the applicants would not be tortured upon their return in seeking to repatriate them to Egypt); *Arana v. France*, Comm. No. 63/1997, U.N. Doc. CAT/C/23/D/63/1997, at ¶ 11.5 (2000) (holding that article 3 had been violated because, among other reasons, the transfer of the individual by the French authorities to the hands of the Spanish police had not been subjected to judicial review).

Punishment (“CAT”) prohibits State parties from sending persons to countries where it is known that such practices are likely to occur, providing: “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.”<sup>99</sup> The principle of *non-refoulement* is also contained in Article 13 of the Inter-American Convention to Prevent and Punish Torture, which prohibits extradition of an individual where his life is in danger, there is reason to believe that he may be subject to torture or cruel, inhuman, or degrading treatment, or tried by special or ad hoc courts.<sup>100</sup> Article 22(8) of the American Convention similarly provides that no person may be returned to any country, even his country of origin, if in that country there is a danger that his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.<sup>101</sup> The Third Geneva Convention contains similar provisions prohibiting State parties from making such transfers in relation to prisoners of war.<sup>102</sup>

The Inter-American Court has held that the prohibition of torture proscribes the transfer of anyone to a country where that person is likely to be tortured, even if the individual is suspected of terrorist activities.<sup>103</sup> Likewise, the European Court has found that the prohibition against returning or expelling a person to a State that practices torture

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<sup>99</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 93.

<sup>100</sup> Signed at Cartagena de Indias, Colombia, on December 9 1985 at the fifteenth regular session of the General Assembly.

<sup>101</sup> American Convention on Human Rights, *supra* note 92, at art. 22 (8).

<sup>102</sup> Third Geneva Convention, *supra* note 92, at art. 12.

<sup>103</sup> Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, *supra* note 85, at ¶ 154 (“[T]he prohibition of torture as a norm of *jus cogens* – as codified in the American Declaration generally, and Article 3 of the U.N. Convention against Torture in the context of expulsion – applies beyond the terms of the 1951 [Refugee] Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.”).

is absolute, “irrespective of the victim’s conduct.”<sup>104</sup> The Human Rights Committee has similarly interpreted Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) to contain a protection against *refoulement* in cases where there are “substantial grounds for believing that there is a real risk of irreparable harm.”<sup>105</sup>

Notably, the Committee Against Torture and the Human Rights Committee (“HRC”) have explicitly stated that the United States is required to apply its *non-refoulement* obligations to individuals outside of its territory, particularly in the context of the United States’ extraordinary rendition practices.<sup>106</sup>

### **3. Mr. El-Masri Was Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment**

The prolonged incommunicado detention, severe mistreatment, and interrogation methods to which United States government agents subjected Mr. El-Masri constitute cruel, inhuman, and degrading treatment rising to the level of torture. Mr. El-Masri was subjected to:

- Repeated severe beatings with fists, boots, and a stick
- Being forcibly thrown to the ground
- Forced anal penetration with an object
- Sensory deprivation during transfer, including hooding and blindfolding
- Forcible injection with a drug during transfer
- Shackling of his hands and feet
- Denial of adequate food and water
- Denial of requested medical treatment
- Forced stripping

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<sup>104</sup> *Chahal v. United Kingdom*, Eur. Ct. H.R., 1996-V No 22, at ¶ 1831 (1996). The Grand Chamber of the Court recently reaffirmed that the ban on deporting people to countries where they are at risk of torture or ill-treatment is absolute and unconditional and could not be circumvented through the procurement of assurances from that the receiving State that the individual would not be tortured, where there was evidence of widespread torture in that State. *Saadi v. Italy*, App. No. 37201/06, Eur. Ct.H.R. (2008).

<sup>105</sup> See Human Rights Committee, Gen. Cmt. 31, ¶ 12, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); Human Rights Committee, Gen. Cmt. 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994); *Kindler v. Canada*, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1990 (1993).

<sup>106</sup> Human Rights Committee, Concluding Observation, United States, CCPR/C/USA/CO/3, ¶ 16 (2006); Committee Against Torture, Concluding Observation, United States, CAT/C/USA/CO/2, ¶ 20 (2006).

- Forced feeding
- Threats of imminent death and other serious harm
- Prolonged incommunicado detention for more than four months
- Prolonged exposure to cold while in detention

With respect to the conceptual difference between whether these acts constitute “torture” or the less severe “inhuman or degrading treatment,” the Inter-American Commission shares the view of the European Commission on Human Rights that torture is an aggravated form of inhuman treatment perpetrated with a purpose, namely to obtain information or confessions or to inflict punishment.<sup>107</sup> The Commission has also relied upon the European Court’s view that the essential criterion to distinguish between torture and other forms of cruel, inhuman, or degrading treatment or punishment “primarily results from the intensity of the suffering inflicted.”<sup>108</sup> In the case of *Ireland v. United Kingdom*, for example, the European Court indicated that the difference between torture and inhuman or degrading treatment derives principally from the intensity of the suffering inflicted.<sup>109</sup> Thus, if certain acts are deliberately inflicted, carefully thought-through before being administered, and carried out with the express purpose of obtaining admissions or information from the victim, it will constitute torture.<sup>110</sup> The Commission has followed this analysis.<sup>111</sup> Under these definitions of torture, although the acts listed above, when applied in isolation, may constitute the lesser violation of inhuman and degrading treatment, when administered together, they constitute torture.

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<sup>107</sup> *Luis Lizardo Cabrera v. Dominican Republic*, *supra* note 93, at ¶ 79, citing *The Greek Case*, at ¶ 186.

<sup>108</sup> *Id.* at ¶ 80, citing *Ireland v. United Kingdom*, Eur. Ct. H.R., at ¶ 167. *See also Tyrer v. United Kingdom*, *supra* note 82, at ¶ 28.

<sup>109</sup> *Ireland v. United Kingdom*, *supra* note 94, at ¶ 41.

<sup>110</sup> *Aksoy v. Turkey*, App. No. 100/1995/606/694, Judgment, Report of Judgments and Decisions, ¶ 64 (1996).

<sup>111</sup> *See, e.g., Victor Rosario Congo v. Ecuador*, *supra* note 88, at ¶¶ 58, 59, 62.

In its 2002 Report on Terrorism and Human Rights, the Inter-American Commission drew from existing Inter-American jurisprudence to enumerate a non-exhaustive list of acts committed in the context of interrogation and detention that constitute torture or other cruel, inhuman, or degrading punishment or treatment.<sup>112</sup> Among the acts listed are: prolonged incommunicado detention,<sup>113</sup> beating,<sup>114</sup> keeping detainees hooded and naked,<sup>115</sup> threats of a behavior that would constitute inhumane treatment,<sup>116</sup> and death threats.<sup>117</sup> Mr. El-Masri has experienced *all* of these recognized forms of torture or other inhuman or degrading treatment.

The Commission and the Inter-American Court have considered violative of Article 5 of the American Convention circumstances in which persons were held for a prolonged period of time in solitary confinement; were held in conditions of confinement that included inadequate hygiene, ventilation, and natural light; were allowed out of their cells infrequently; were abused by police and prison staff; or were provided inadequate medical care.<sup>118</sup> Mr. El-Masri was subjected to *all* of these recognized forms of torture or other inhuman or degrading treatment.

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<sup>112</sup> Report on Terrorism and Human Rights, *supra* note 87 (citing “Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” Report of the Special Rapporteur, Mr. P Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, ¶ 119, Feb. 19 1986).

<sup>113</sup> *See, e.g.*, Velásquez Rodríguez, 4 Inter-Am. C.H.R. (ser. C) No. 4, ¶ 156 (1988). *See also* Godínez Cruz Case, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 5, ¶ 164 (1989); Villagrán Morales et al. Case, Preliminary Objections, Judgment of September 11, 1997, Inter-Am. Ct.H.R. (ser. C) No. 32, ¶¶ 162-164 (1997).

<sup>114</sup> *See, e.g.*, Hechos ocurridos en Caracoles (Bolivia), Case 7481, Annual Report of the Inter-Am. Comm. H.R. (1981/82), Resolution N° 30/82, ¶¶ 36, 39, 40 (1982).

<sup>115</sup> Report on the Situation of Human Rights in El Salvador, Inter-Am. C.H.R., OEA/Ser.L/V/II.46, doc. 23 rev. 1, 17, Ch. III, ¶¶ 7, 8, 9 (1978) (in particular the case of Lil Ramírez).

<sup>116</sup> Street Children Case (Villagrán Morales et al.), 1999 Inter-Am. C.H.R. (ser. C) No. 63, at ¶ 165 (1999).

<sup>117</sup> *See, e.g.*, Lissardi & Rossi (Guatemala), Case 10.508, Annual Report of the Inter-Am. C.H.R., Report No. 25/94, ¶¶ 51, 54 (1994).

<sup>118</sup> Hilaire, Constantine and Benjamin et al. Case, Inter-Am. Ct.H.R., Judgment, (ser. C) No. 94, ¶ 84(m), (o), 168-169 (2002); Cases 12.023 (Desmond McKenzie), 12.044 (Andrew Downer y Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) v. Jamaica, Report No. 41/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 918, ¶ 288 (1999). *Cf.* Rudolph Baptiste (Grenada), Case 11.743, Annual Report of the Inter-Am. Comm. H.R., Report No. 38/00, ¶¶ 133-138 (2000).

The Commission and the Inter-American Court have been particularly critical of circumstances, like Mr. El-Masri's, in which individuals are held incommunicado for extended periods of time in poor conditions, finding that these circumstances amount to torture or other cruel, inhuman, or degrading treatment. For example, in *Velásquez Rodríguez*, the Inter-American Court held that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being,” constituting a violation of Article 5 of the American Convention’s prohibition against torture and inhuman and degrading treatment.<sup>119</sup> In *Victor Rosario Congo v. Ecuador*, the Commission similarly declared that “isolation can in itself constitute inhumane treatment,” and subsequently found in that case that solitary confinement for approximately 40 days, during which the complainant was held in isolation and “unable to satisfy his basic needs,” constituted inhuman and degrading treatment.<sup>120</sup> In the *Suárez Rosero* case, the Inter-American Court found that a 36-day detention and deprivation of any communication with the outside world constituted cruel, inhuman, and degrading treatment, considering in particular the fact that it had been proven that the incommunicado detention was arbitrary and carried out in violation of the State’s domestic laws.<sup>121</sup>

The Commission has found further guidance on what constitutes torture and inhuman and degrading treatment by reference to the decisions of the HRC. The Committee has held that beatings, forced standing for long periods of time, and holding persons incommunicado for prolonged periods constitute torture and other cruel, inhuman,

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<sup>119</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶¶ 156, 187.

<sup>120</sup> *Victor Rosario Congo v. Ecuador*, *supra* note 88, at ¶¶ 58, 59.

<sup>121</sup> *Suárez Rosero Case*, Inter-Am. Ct.H.R., Judgment, (ser. C) No. 35, ¶ 91 (1997).

or degrading treatment in violation of Article 7 and 10(1) of the ICCPR.<sup>122</sup> In *El Megreisi v. Libya*, the HRC held that “prolonged incommunicado detention in an unknown location” constitutes “torture and cruel, inhuman treatment in violation of Articles 7 and 10(1).”<sup>123</sup> In that case, the individual had been detained, apparently by Libyan security police, for three years in unacknowledged detention until his wife was allowed to visit him, after which he continued to be held in an undisclosed location. The Committee’s position suggests that the detention of persons in circumstances that give them or others grounds for fearing serious threat to their physical or mental integrity—as in Mr. El-Masri’s case—will violate Article 7. Notably, unlike the European Court, the Committee’s analysis of Article 7 does not draw a clear distinction between treatment that amounts to torture and that which constitutes cruel, inhuman, or degrading treatment, in part because all forms of mistreatment are proscribed under international law. Specifically, the HRC observed that “[t]he Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a prohibited list of prohibited acts or

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<sup>122</sup> Human Rights Committee, Report, *Bouton v. Uruguay* (3711978), GAOR, 36<sup>th</sup> Sess., Supplement No. 40, Annex XIV, ¶ 13 (1981) (in which the victim was forced to stand for 35 hours, with minor interruptions; her wrists were bound with a strip of coarse cloth which hurt her and her eyes were continuously kept bandaged; she could hear the cries of other detainees being tortured; and she was verbally threatened, at ¶ 2.3); Human Rights Committee, Report, *Birindwa and Tshisekedi v. Zaire* (241 and 242/1987), Vol. II, GAOR, 45<sup>th</sup> Session, Supplement No. 40, Annex I, ¶ 13(b) (1990) (in which victim was “deprived of food and drink for four days after arrest” and kept under unacceptable sanitary conditions.) *See also* Human Rights Committee, Report, *Muteba v. Zaire*, (124/1982), UN Official Records of the General Assembly, 22<sup>nd</sup> Session, Supplement N° 40, Comm. No 124/1982, Democratic Republic of the Congo, 24/07/84. CCPR/C/22/D/124/1982, ¶10.2 (1984); Human Rights Committee, Report, *Setelich v. Uruguay*, (63/1979), UN Official Records of the General Assembly, 14<sup>th</sup> Session, Comm. No 63/1979, Uruguay. 28/10/81 CCPR/C/14/D/63/1979, ¶ 16.2 (1979); Human Rights Committee, Report, *Weinberger v. Uruguay*, (28/1978), UN Official Records of the General Assembly, 31<sup>st</sup> Sess., Comm. N° 28/1978, UN Doc. CCPR/C/11/D/28/1978, ¶ 12 (1978).

<sup>123</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990, ¶ 5.4 (1994).

to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.”<sup>124</sup>

In numerous cases and reports, the Inter-American Commission has also looked to specific provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners<sup>125</sup> as a benchmark in its evaluation of what types of treatment constitute torture and cruel, inhuman, and degrading treatment.<sup>126</sup> The Commission has also looked to the United Nations Special Rapporteur on Torture for guidance on this issue.<sup>127</sup> In particular, the Commission has noted the Special Rapporteur’s list of acts rising to the level of torture, which includes beating; total isolation and sensory deprivation; administration of drugs in detention; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; and being held in constant uncertainty in terms of space and time.<sup>128</sup> Mr. El-Masri has experienced *all* of the foregoing recognized forms of torture.

Significantly, both the Commission and the Court have found that proscribed conduct need not necessarily be physical in nature but rather may include conduct that

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<sup>124</sup> ICCPR, Gen. Cmt. 20, ¶ 4, 44<sup>th</sup> Sess. (1992).

<sup>125</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

<sup>126</sup> *See, e.g.*, Cases 12.023 (Desmond McKenzie), 12.044 (Andrew Downer y Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) v. Jamaica, Report No. 41/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 918, ¶ 289 (1999). *See also Rudolph Baptiste, supra* note 118, at ¶¶ 136 and following (2000); Hilaire, Constantine and Benjamin et al. Case, *supra* note 118, at ¶ 19 (Opinion of Judge García).

<sup>127</sup> Report on Terrorism and Human Rights, *supra* note 87, at ¶ 162.

<sup>128</sup> *Id.* (citing “Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, ¶ 119, referred to in ICTY, Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, ¶ 467).

causes psychological suffering.<sup>129</sup> Accordingly, the Commission and the Court have found that acts resulting in “emotional trauma,”<sup>130</sup> “trauma and anxiety,”<sup>131</sup> “psychic disturbance during questioning,”<sup>132</sup> and “intimidation” or “panic”<sup>133</sup> violate Article 5. Furthermore, as the HRC has found, any act that “affects the normal development of daily life and causes great tumult and perturbation to [an individual and his] family ... seriously damages his mental and moral integrity,” violates an individual’s right to respect for his physical, mental and moral integrity and to be free from cruel, inhuman, or degrading treatment.<sup>134</sup>

In addition to the physical effects of his rendition, detention, and interrogation, Mr. El-Masri has suffered severe, long-term psychological effects resulting from his mistreatment. In addition, Mr. El-Masri experienced intense fear, anguish, and acute psychological disturbances during his prolonged arbitrary detention and during United States government agents’ interrogations.

Mr. El-Masri also suffered a violation of his right to be free from being transferred (“*refouler*”) to a State where there are substantial grounds for believing that he would be tortured. In rendering him from Macedonia to Afghanistan, the United States did not use

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<sup>129</sup>See *Ireland v. United Kingdom*, *supra* note 94, at ¶ 167; *Luis Lizardo Cabrera v. Dominican Republic*, *supra* note 93, at ¶ 77 (citing *The Greek Case*, 12 Y. B. Eur. Conv. on H.R. 12 (1969)); *Loayza Tamayo Case*, Reparations, 1998 Inter-Am. Ct.H.R. (ser. C) No. 42, 169, at ¶ 152 (1998).

<sup>130</sup>See *e.g.*, *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Inter-Am. C.H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 127, ¶ 106 (1997) (finding Cuba responsible for violating the personal integrity of 31 survivors of a refugee boat fleeing to U.S. as a consequence of the emotional trauma resulting from the shipwreck caused by Cuba).

<sup>131</sup>See, *e.g.*, *María Mejía v. Guatemala*, Case 10.553, Inter-Am. C.H.R. Report No. 32/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 370, ¶ 60 (1997) (Guatemalan military officials found liable for causing “trauma and anxiety to the victims [constraining] their ability to lead their lives as they desire”).

<sup>132</sup>*Loayza Tamayo*, *supra* note 29, at ¶ 57 (1997). See also, *Caesar V. Trinidad and Tobago*, Judgment, Inter-Am. Ct.H.R., (ser. C) No. 123, ¶ 69 (2005); *Ireland v. United Kingdom*, *supra* note 94, at ¶ 167.

<sup>133</sup>See, *e.g.*, *Id.* at ¶ 58 (finding Guatemalan military responsible for actions designed to “intimidate” and “panic” among community members).

<sup>134</sup>*Gallardo Rodríguez v. Mexico*, Case 11.430, Inter-Am. C.H.R., Report No. 43/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 485, ¶ 79 (1997). See also Human Rights Committee, Gen. Cmt. 20, *supra* note 106, at ¶ 2 (noting that the purpose of the ICCPR’s prohibition of torture and other cruel, inhuman or degrading treatment is to protect both the dignity and the physical and mental integrity of the individual).

any existing legal procedures designed to regulate the transfer of individuals between States. At the time of his transfer, the United States was plainly aware, and reasonably should have been aware, of the occurrence of torture and other cruel, inhuman, or degrading treatment in detention facilities it operates in Afghanistan. The media has reported on such abuses since late 2001 and the policy memoranda and interrogation directives issued by senior officials beginning in January 2002 and applicable to foreign nationals in United States custody in Guantanamo, Afghanistan, and Iraq substantiate that the use of torture and other abuse was sanctioned for use at facilities in these countries as a matter of U.S. policy.<sup>135</sup>

Because the United States violated its *non-refoulement* obligations under the American Declaration, the United States is responsible for *refoulement* of Mr. El-Masri to a country where he was likely to face torture. In fact, the HRC has denounced the United States' extraordinary rendition program as a gross violation of the prohibition on *refoulement* to torture enshrined in Article 7 of the ICCPR. The Committee noted:

The Committee is concerned that in practice the State party appears to have adopted a policy to remove, or to assist in removing, either from the United States or other States' territories, suspected terrorists to third countries for the purpose of detention and interrogation, without the appropriate safeguards to protect them from treatment prohibited by the Covenant. The Committee is also concerned by numerous, well-publicized and documented allegations that persons sent to third

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<sup>135</sup> See generally, JAMEEL JAFFER & AMRIT SINGH, THE ADMINISTRATION OF TORTURE (2007); See also, Bybee Memo, Aug. 1, 2002, available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf#search=%22bybee%20memo%20pdf%22](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf#search=%22bybee%20memo%20pdf%22) (a legal opinion for the CIA justifying the use of harsh interrogation methods. Specifically, this memorandum argued that torturing al-Qaeda detainees in captivity overseas "may be justified," and defined physical and psychological torture narrowly, asserting that: "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" *Id.* at 1. And that "mental torture" only included acts that resulted in "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.*) The media has reported extensively on the widespread torture and abuse of prisoners in U.S. custody in Guantanamo, Afghanistan, Iraq and CIA secret prisons elsewhere, since early 2002 and, U.S. government documents confirm this fact. For a non-exhaustive list of these media accounts and government documents, see, ENDURING ABUSE, ACLU SHADOW REPORT (2006), available at [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf).

countries in this way were indeed detained and interrogated under conditions grossly violating the prohibition contained in article 7, allegations that the State party did not contest.<sup>136</sup>

The Committee Against Torture has similarly condemned the United States' practice of extraordinary rendition as violating the CAT's prohibition on *refoulement*. The Committee noted its concern that "the State party's rendition of suspects, without any judicial procedure, to States where they face a real risk of torture," violates Article 3 of the Convention, finding that the United States "should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention."<sup>137</sup>

#### **B. Article XXV Protects against Arbitrary Detention**

The right to personal liberty and security and to be free from arbitrary arrest or detention is provided for in both Article XXV of the American Declaration and Article 7 of the American Convention. Both the Commission and Court have emphasized that no one may be deprived of liberty except in cases or circumstances expressly provided by law, and that any deprivation of liberty must strictly adhere to the procedures defined thereunder.<sup>138</sup>

The Commission has elaborated on the specific content of the norm, insisting that "any deprivation of liberty be carried out in accordance with pre-established law, that a detainee be informed of the reasons for the detention and promptly notified of any charges against them, that any person deprived of liberty is entitled to juridical recourse, to obtain,

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<sup>136</sup> Human Rights Committee, Concluding Observations, United States, CCPR/C/USA/CO/3, ¶ 16 (2006).

<sup>137</sup> Committee Against Torture, Concluding Observations, United States, CAT/C/USA/CO/2, *supra* note 110, at ¶ 20 (2006).

<sup>138</sup> *See, e.g.*, Inter-Am. Comm. H.R., Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter VII, ¶ 37, *citing* Case 11.245, Report No. 12/96, Jorge Alberto Giménez (Argentina), Annual Report of the Inter-Am. Comm. H.R. 1995; I/A Court H.R., *Suárez Rosero Case*, *supra* note 121, at ¶ 43.

without delay, a determination of the legality of the detention, and that the person be tried within a reasonable time or released pending the continuation of proceedings.”<sup>139</sup>

The Commission has held that the protection afforded by Article XXV of the and Article 7 of the American Convention “includes ensuring prompt and effective judicial oversight of instances of detention, in order to protect the well-being of detainees at a time when they are wholly within the control of the state and therefore particularly vulnerable to abuses of authority.”<sup>140</sup> The Commission has determined also that these provisions obligate States to “ensure[] against arbitrary arrest and detention by strictly regulating the grounds and procedures for arrest and detention under law.”<sup>141</sup>

The Inter-American Court has held States liable for violations of Article 7 of the American Convention in numerous cases.<sup>142</sup> For instance, in the *Suárez Rosero* case, the Court found a violation of the prohibition of arbitrary detention when the complainant had not been brought before a judicial official upon arrest and was held incommunicado for 36 days.<sup>143</sup> And, in *Velásquez Rodríguez*, the Court established the nexus between arbitrary detention and the practice of “disappearances,” stating that “the kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee’s right to be taken without

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<sup>139</sup> Report on Terrorism and Human Rights, Inter-Am. C.H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 120 (Oct. 22 2002).

<sup>140</sup> *Id.*, at ¶ 121. See similarly Jorge Luis Bronstein and others (Argentina), Case 11.205, Annual Report of the Inter-Am. Comm. H.R. 1997, Report No. 2/97, ¶ 11 (1997); Damion Thomas (Jamaica), Case 12.069, Report No. 50/01, Annual Report of the Inter-Am. Comm. H.R. 2000, ¶¶ 37, 38.

<sup>141</sup> Michael Gayle v. Jamaica, Case 12.418, Report No. 92/05, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.124 Doc. 5, ¶ 73 (2005).

<sup>142</sup> See, e.g., Maritza Urrutia v. Guatemala, Inter-Am. Comm. H.R. (2003) (holding that an arrest without warrant followed by an incommunicado detention lasting eight days violated Article 7.3); Juan Humberto Sanchez v. Honduras, Inter-Am. Comm. H.R., 2003 (holding that the arrest without warrant followed by continued refusals to render the appropriate process, followed by the discovery of the detainees dead body ten days later violated Article 7.3).

<sup>143</sup> *Suarez Rosero Case*, Expansion of Provisional Measures in the Matter of Ecuador, Order of the President of April 24, 1996 Inter-Am. Ct.H.R.

delay before a judge and to invoke the appropriate procedures to review the legality of the arrest.”<sup>144</sup>

In *Biscet et al. v. Cuba*, the Inter-American Court held that Article XXV requires that any detention must be based on an order issued by a competent authority, except where the individual was caught *in flagrante*.<sup>145</sup> The Court also noted that Article XXV requires that the legality of the detention must be ascertained by a competent, impartial court without undue delay, and that preventive detention without any hearing is unlawful under the Declaration.<sup>146</sup> In *Biscet*, the Court held that the arrest of dissidents and independent journalists, detention in conditions marked with violence, intimidation and generally inhumane conditions, and brief, summary proceedings resulting in sentences ranging from six months to 28 years, constituted a violation of the Declaration’s prohibition on arbitrary detention.<sup>147</sup>

The European Court<sup>148</sup> and the HRC have also elaborated on the scope of the prohibition of arbitrary detention on numerous occasions. For example, in *Lilian Celiberti de Casariego v. Uruguay*, the HRC held that the apprehension and trans-border abduction of the applicants by agents of the Uruguayan security forces in Brazil and their subsequent four-month incommunicado detention in Uruguay amounted to arbitrary arrest and detention under the ICCPR.<sup>149</sup> The Committee has also clarified that preventive detention

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<sup>144</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 155.

<sup>145</sup> *Biscet, et al. v. Cuba*, Case 12.476, Inter-Am. C.H.R., Report No. 68/06, ¶ 143 (2006).

<sup>146</sup> *Id.* at ¶¶ 143, 146.

<sup>147</sup> *Id.*

<sup>148</sup> *See, e.g.*, *G.K. v. Poland*, Eur. H.R. App. No. 38816/97, Jan. 20, 2004 [Section IV]; *Ahmet Özkan and Others v. Turkey*, App. No. 21689/93, Apr. 6 2004 [Section II]; *J.G. v. Poland*, App. No. 36258/97, Apr. 6, 2004 [Section IV]; *Hamanov v. Bulgaria*, App. No. 44062/98, Apr. 8, 2004 [Section I].

<sup>149</sup> *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R.13/56, U.N. Doc. Supp. No. 40 (A/36/40) at ¶ 11 (1981).

for public security purpose is not exempt from the requirements of due process and has emphasized the absolute nature of judicial review of all deprivations of liberty.<sup>150</sup>

The U.N. Working Group on Arbitrary Detention has provided extensive guidance on the specific context of the norm. The Working Group has held that deprivation of liberty is arbitrary if a case falls into one of three categories: (1) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; (2) when the deprivation of liberty results from the exercise of rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10, and 21 of the Universal Declaration of Human Rights (“UDHR”), or articles 12, 18, 19, 21, 22, and 25 of the ICCPR; or (3) when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out by the UDHR and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.<sup>151</sup>

The Working Group has amassed a body of decisions that further clarify what constitutes a case of arbitrary detention. Significantly, one case the working group considered was the “administrative detention” of several women for four to six months because they had aided Hamas, which Israel identifies as a terrorist group.<sup>152</sup> The women were not informed of the exact nature of the charges against them because the government argued that the information would endanger informers and was generally a state secret.<sup>153</sup>

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<sup>150</sup> Human Rights Committee, Gen. Cmt. 8: Right to liberty and security of persons (Art. 9), A/37/40, ¶ 4 (1982).

<sup>151</sup> See Office of the High Commissioner for Human Rights, The Working Group on Arbitrary Detention *Fact Sheet No. 26*; see also Jailton Neri da Fonseca v. Brazil,, Case 11.634, Inter-Am. C.H.R., Report No. 33/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 845, ¶ 54 (2004); Pinheiro & Dos Santos v. Paraguay, Case 11.506, Inter. Am. Comm. H.R., Report No. 77/02, OEA/Ser.L/V/II.111 doc. 20 rev., ¶ 50 (2001).

<sup>152</sup> See Working Group on Arbitrary Detention, Opinion No. 3/2004, Israel, concerning Abla Sa’adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba’neh. E/CN.4/2005/6/Add.1, 19 November 2004.

<sup>153</sup> *Id.*

The Working Group determined that the proceedings that Israel instituted were not sufficient to render the women's detention legitimate.<sup>154</sup>

### 1. Mr. El-Masri was arbitrarily detained

Mr. El-Masri's arrest and detention lacked any measure of due process. Mr. El-Masri was held incommunicado for over four months. For the duration of his detention, Mr. El-Masri was not afforded any hearing to determine the legality of his arrest, was denied access to legal counsel, was not informed of any charges against him, was not provided access to consular officials, and was never charged, let alone tried, during the whole period he was detained. While the Commission has suggested that a delay of merely two or three days in bringing a detainee before a judicial authority will generally be considered unreasonable,<sup>155</sup> Mr. El-Masri was *never* brought before a judicial authority in his over four months of detention.

In order to respect Mr. El-Masri's right to due process during his initial apprehension, at a minimum, the United States was required to comply with arrest procedures established under its domestic laws and all the protections established under international human rights law relevant to arrest.<sup>156</sup> Other examples of elementary due process that were not extended to Mr. El-Masri include: failing to inform him of the nature of the charges against him, and failing to bring him before a judicial officer with the

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<sup>154</sup> *Id.*

<sup>155</sup> *See, e.g., Desmond McKenzie Case, supra* note 120, at ¶¶ 248-251. *See similarly* Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 8 ¶ 2 (1994); *Brogan and Other v. United Kingdom*, Eur. Ct.H.R., Judgment of November 29, 1988, Ser. A No. 145B, p. 33, ¶ 62.

<sup>156</sup> *Pinheiro v. Paraguay, supra* note 154, at ¶¶ 24-27, 50, 56. *See also, Öcalan v. Turkey, supra* note 67 (holding that in addition to compliance with national law, the European Convention "requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness").

independence to evaluate the appropriateness of the detention. Mr. El-Masri's detention also constitutes prolonged arbitrary detention on account of its four-month duration.

### **C. The American Declaration Recognizes the Right to be Free From Forced Disappearance**

Taken together, Articles I, XVII, XXV, and XXVI of the American Declaration prohibit the practice of forced disappearance. Relying on these articles and parallel provisions of the American Convention, the Commission has developed the prohibition on forced disappearance in its jurisprudence.<sup>157</sup> In *Britoon v. Guyana*, the Commission held that forced disappearance violates Articles I, XXV, and XXVI of the American Declaration, in particular the rights to life, liberty, and personal security recognized by Article I; the right to be free from arbitrary arrest and to be deprived of one's liberty only in cases and according to procedures established by pre-existing law enshrined in the Article XXV; and the right to be presumed innocent until proven guilty as a result of an impartial and public hearing protected by Article XXVI.<sup>158</sup>

The Commission has relied on flexibility in its interpretive mandate to draw pertinent developments "from established jurisprudence on the issue of forced disappearance, including the Inter-American Convention on Forced Disappearance."<sup>159</sup> In *Britoon*, the Commission cited the content of the prohibition on forced disappearance contained in the American Convention and the Inter-American Convention on the Forced Disappearance of Persons to interpret the relevant provisions of the American

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<sup>157</sup> See, e.g., Annual Report of the Inter-Am. C.H.R. 1985-6, OEA/Ser.L/V/II.68, doc. 8 rev. 1, pp. 40-41 (1986); Annual Report of the Inter-Am. C.H.R. 1982-83, OEA/Ser.L/V/II.61, doc. 22, rev. 1, pp. 48-50 (1983); Annual Report of the Inter-Am. C.H.R. 1980-81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, pp. 113-14 (1981); Luis Gustavo Morroquín v. Guatemala, Case 8075, Report No. 54/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 doc. 7 rev. at 298, ¶ 21 (1997); Estiles Ruiz Davila v. Peru, Case 10.491, Report No. 41/97, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 736, ¶ 12 (1997).

<sup>158</sup> Franz Britoon and Aka Collie Wills v. Guyana, Case 12.264, Inter-Am. C.H.R., Report No. 01/06, OEA/Ser./L/V/II.114 Doc. 5 rev. at 191, ¶¶ 28, 33, 40(a) (2001).

<sup>159</sup> *Id.* at ¶ 14.

Declaration.<sup>160</sup> The Commission noted that while Guyana was not a party to the Inter-American Convention on Forced Disappearance, “the mere elaboration of a definition of ‘forced disappearance’ by the drafters of the Convention is useful in order to identify the elements of” forced disappearance.<sup>161</sup> Reviewing existing sources of law on forced disappearance, the Commission held that “[t]he essential element is the deprivation of an individual’s liberty by agents of the State ostensibly under law, followed by the refusal or incapacity of the State to explain what occurred to the victim or to provide information regarding his whereabouts.”<sup>162</sup>

The Inter-American Convention on Forced Disappearance defines a forced disappearance as:

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>163</sup>

The definitions in the Inter-American Convention, the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>164</sup> and the U.N. Declaration on the Protection of All Persons from Enforced Disappearance<sup>165</sup> are substantially similar.

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<sup>160</sup> *Id.* at ¶¶ 14-18.

<sup>161</sup> *Id.* at ¶ 19.

<sup>162</sup> *Id.*

<sup>163</sup> Inter-American Convention on Forced Disappearance of Persons, art. II, 33 I.L.M. 1429 (1994).

<sup>164</sup> The UN Convention defines “enforced disappearance” as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” International Convention for the Protection of All Persons from Enforced Disappearance, Article 2, December 20, 2006, U.N. Doc. A/61/488.

<sup>165</sup> While the UN Declaration does not specifically define the term, its preamble describes forced disappearance as occurring when “persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal

The common elements are: (1) deprivation of liberty; (2) action perpetrated by or with the support of the state; and (3) an absence of information or refusal to acknowledge the deprivation of liberty, which, taken together, have the effect of placing the individual outside the protection of the law.

The Inter-American Court has consistently held that forced disappearance violates multiple articles of the American Convention. Citing the establishment of the Working Group on Enforced or Involuntary Disappearance and resolutions of the United Nations General Assembly and the OAS in *Velásquez Rodríguez*, the Court found that there is an international consensus prohibiting forced disappearance.<sup>166</sup> Specifically, the Court cited resolutions by the OAS General Assembly condemning forced disappearance as “an affront to the conscience of the hemisphere and [] a crime against humanity,”<sup>167</sup> and held that it “is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety.”<sup>168</sup> The Court held that “[t]he forced disappearance of human beings is a multiple and continuous violation of many rights under the [American Convention] that the States Parties are obligated to respect and guarantee,”<sup>169</sup> including Articles 5 (right to humane treatment) and 7 (right to liberty) of the American Convention, with an additional violation of Article 4 (right to life) in cases where the victim is proven or presumed dead.<sup>170</sup>

The following year, in the *Godínez Cruz* case, the Court reiterated this holding when it unanimously held that the forced disappearance of Saúl Godínez Cruz by

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to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.” Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, Dec. 18, 1992, U.N. Doc. A/47/49.

<sup>166</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶¶ 151-52.

<sup>167</sup> *Id.* at ¶ 153, citing AG/RES.666 ( XIII-0/83 ) of November 18, 1983.

<sup>168</sup> *Id.*, citing AG/RES.742 ( XIV-0/84 ) of November 17, 1984.

<sup>169</sup> *Id.* at ¶ 155.

<sup>170</sup> *Id.* ¶¶ 155-157.

Honduras violated Godínez Cruz’s Article 4, 5, and 7 protections.<sup>171</sup> In so doing, the Court emphasized that “the practice of disappearance [...] constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the [I]nter-American system and the Convention.”<sup>172</sup> In more recent jurisprudence, the Inter-American Court has reiterated these holdings, bolstering its rationale by more recent international instruments such as the Inter-American Convention on the Forced Disappearance of Persons and the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.<sup>173</sup> In the *Blake Case*, for example, the Court noted that “[f]orced or involuntary disappearance is one of the most serious and cruel human rights violations” and concluded that it not only violated the rights of the victims but also those of the victims’ family.<sup>174</sup>

As the Inter-American Court has recently observed, the “extraordinary rendition” program is strikingly similar in purpose and method to state-sponsored disappearance programs implemented by several Central and South American governments in the 1970s and 1980s to terrorize left-wing opposition. In *Goiburú, et al. v. Paraguay*,<sup>175</sup> the petitioners alleged that they were victims of Operation Condor and that as part of this program, they were illegally detained in Argentina by Paraguayan officials, denied contact

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<sup>171</sup> *Godínez Cruz*, *supra* note 115, at ¶ 203. *See also*, *Fairen Garbi and Solis Corrales Case*, Judgment of March 15, 1989, Inter-Am. Ct.H.R. (Ser. C) No. 6 (1989), (reiterating the rationale of the *Velásquez Rodríguez* and *Godínez Cruz* cases as to the violations of rights perpetrated by forced disappearance, even though the court found that the facts in the case did not prove such a violation).

<sup>172</sup> *Id.* at ¶ 166.

<sup>173</sup> Inter-American Convention on the Forced Disappearance of Persons, *supra*; Declaration on the Protection of All Persons from Enforced Disappearance, *supra*. *See Blake Case*, 1998 Inter-Am. Ct.H.R. (ser. C) No. 36 (Jan. 24, 1998).

<sup>174</sup> *Id.* at ¶ 66, 97.

<sup>175</sup> *Goiburú et al. v. Paraguay*, Inter-Am. Ct.H.R., (*Merits, Reparations and Costs*) (2006).

with the outside world, and tortured on accusation of belonging to a terrorist group.<sup>176</sup> In holding that these events constituted forced disappearance of the petitioners, the Inter-American Court held that on these facts, Paraguay had “violated non-derogable provisions of international law (*jus cogens*), in particular the prohibition of . . . forced disappearance of persons.”<sup>177</sup>

In a separate opinion, Judge Antônio Augusto Cançado Trindade compared the United States’ “extraordinary rendition” program with Operation Condor: “The repressive acts of ‘Operation Condor,’ on a widespread inter-State scale, that occurred—as has been historically proved—in the 1970s, can happen again.”<sup>178</sup> Whether it is the “war against subversion” or the “war against terrorism,” in either case, “for the perpetrators of grave human rights violations, the ends justify the means, and anything is allowed, outside the law.”<sup>179</sup> He added that “extraordinary rendition” is simply the “atrocious and inhuman methods and practices” of Operation Condor “applied, in a different context, today!”<sup>180</sup>

### **1. Mr. El-Masri was forcibly disappeared**

As detailed above, forced disappearance comprises three elements: (1) deprivation of freedom (2) perpetrated by agents of the state (3) followed by an absence of information or refusal to acknowledge the deprivation of freedom or to give information as to the person’s whereabouts which, taken together, have the effect of placing the individual outside the protection of the law.

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<sup>176</sup> *Id.* at ¶ 2.

<sup>177</sup> *Id.* at ¶ 128.

<sup>178</sup> *Id.* at Separate Opinion of Judge Antônio Augusto Cançado Trindade Concerning the Judgment of the Inter-American Court of Human Rights in *Goiburú et al. v. Paraguay* of September 22, 2006 , at ¶ 54.

<sup>179</sup> *Id.* at ¶ 55.

<sup>180</sup> *Id.* at ¶ 59.

The circumstances of the United States' abduction and detention of Mr. El-Masri meet each of the three elements of a forced disappearance. First, agents of the United States deprived him of his liberty. Second, Mr. El-Masri was abducted with the complicity of the United States and subsequently detained under its authority and control. Third, Mr. El-Masri was held outside the protections of the rule of law for over four months without any form of due process and a refusal, even now, to acknowledge the fact of his detention.

**D. The United States is Responsible for the Violation of Mr. El-Masri's Protected Rights Because Agents of the United States Participated in the Violations or Because the Violations Occurred with the Support or Acquiescence of the United States**

The United States is directly responsible for the violations of Mr. El-Masri's rights to be free from torture, arbitrary detention and forced disappearance because agents of the United States participated in the violations while Mr. El-Masri was subject to their "authority and control." However, even if the Commission is unable to conclude that agents of the United States were directly involved, the United States can be held responsible for the violations because they occurred with the support or acquiescence of the United States.

The Articles on State Responsibility for Internationally Wrongful Acts (ILC Articles) establish the basic rules of international law governing the responsibility of States for their "internationally wrongful acts."<sup>181</sup> Under the ILC Articles, for a wrongful act to result in international responsibility on the part of a State, two elements must be established: (1) the conduct must constitute a breach of an international legal obligation in force for that State at that time, and (2) the conduct in question must be attributable to the

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<sup>181</sup> The ILC Articles were adopted by the International Law Commission on August 9, 2001, commended to governments by a resolution of the General Assembly on December 12, 2001, and are reproduced in full in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (hereinafter ILC Articles and Commentaries") at 74.

State. The violations of Mr. El-Masri's rights are directly attributable to the United States because of the involvement of United States agents, and are indirectly attributable to the United States because the perpetrators acted under the instructions, direction, or control of the United States—that is, the United States supported or acquiesced to the violations.

The United States is directly liable for the authorized and unauthorized actions of its officials. Under the general rules of attribution, the United States is directly responsible for human rights violations perpetrated by the State through its many organs and officials. According to the Inter-American Court, “a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”<sup>182</sup> Under ILC Article 4, “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”<sup>183</sup>

In the Inter-American system, States are also responsible for violations that occur with the support or acquiescence of the State. According to the Court, State responsibility attaches when the violation of an individual's rights “has occurred with the support or acquiescence of the government.”<sup>184</sup> The Inter-American Court has reaffirmed this principle in numerous cases.<sup>185</sup> In the *Blake* case, for example, the Court held that the

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<sup>182</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 170.

<sup>183</sup> ILC Articles and Commentaries, *supra* note 185, at part. 4.

<sup>184</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 173. The Commission too has recognized affirmative obligations of a state to protect the right to life, both from violations by state and non-state actors. For example, in *Newton Coutinho Mendes v. Brazil*, Case 11.405, Inter-Am. C.H.R., Report No. 59/99, OEA/Ser.L/V/II.95, doc. 7 rev. at 399 (1998), the Commission held Brazil responsible for failure to investigate and punish murders committed by private agents.

<sup>185</sup> See e.g., *Godínez Cruz Case*, *supra* note 115, at ¶ 183; *Street Children Case*, *supra* note 116, at ¶ 62; *Paniagua Morales et al. Case*, Inter-Am. Ct.H.R., Judgment, Series C No. 37, ¶ 91 (1998).

actions of civil patrols in Guatemala were attributable to the Guatemalan State because of the State's acquiescence to their activities. It held that "the acquiescence of the State of Guatemala in the perpetration of such activities by the civil patrols indicates that those patrols should be deemed to be agents of the State and that the actions they perpetrated should therefore be imputable to the State."<sup>186</sup>

As demonstrated *supra*, there is a significant and growing body of evidence confirming that agents of the United States were directly involved in the violation of Mr. El-Masri's rights in both Macedonia and Afghanistan. Mr. El-Masri's detailed testimony of his detention and mistreatment when under the "authority and control" of agents of the United States has been corroborated by a number of credible, independent sources. A non-exhaustive list of this evidence follows:

#### Apprehension in Macedonia

- Entry and exit stamps in his passport correspond to the dates that Mr. El-Masri arrived and departed Macedonia.
- Subsequent to his release, Mr. El-Masri identified the Skopje hotel in which he was held and, on the hotel website, photographs of the room in which he was detained and a waiter who served him food.
- Council of Europe investigators have established that Mr. El-Masri's account of his mistreatment at the airport in Macedonia parallels treatment experienced by sixteen other men subjected to extraordinary rendition by agents of the United States.<sup>187</sup>
- Flight records obtained by the Council of Europe and others are consistent with Mr. El-Masri's account of his departure from Macedonia and arrival the next day in Afghanistan. These records show that the aircraft in which Mr. El-Masri was transported is owned and operated by two U.S.-based aviation corporations that have been linked to the CIA.
- A Spanish criminal investigation has uncovered the identities of the thirteen individuals onboard the aircraft involved in Mr. El-Masri's transportation from Macedonia to Afghanistan, and German prosecutors have filed indictments against these individuals for such involvement. All are employed or in some other way connected with the CIA.

#### Detention in Afghanistan

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<sup>186</sup> *Blake Case*, *supra* note 173, at ¶ 78.

<sup>187</sup> COUNCIL OF EUROPE, 2006, *supra* note 22, at § 2.7.1 – how a detainee is treated during a rendition.

- The United States is known to operate detention facilities in Afghanistan. More specifically, investigative journalists have identified the facility where Mr. El-Masri alleges that he was detained for over four months.<sup>188</sup>
- Radio isotope analysis of Mr. El-Masri's hair follicles upon his return by a German laboratory confirms that Mr. El-Masri was in a South-Asian country for an extended period of time in 2004 and that during this period he was deprived of food.
- An eye-witness confirms that he was detained in the same detention facility in Afghanistan as Mr. El-Masri.
- Mr. El-Masri has identified the German man, "Sam" who visited with him while he was detained.
- Flight records and other documents obtained by the Council of Europe are consistent with Mr. El-Masri's account of his return from Afghanistan and arrival in Albania.

**E. In the Alternative, the United States is Responsible for the Violation of Mr. El-Masri's Rights Because it Failed to Take "Reasonable Steps" to Prevent the Violations or Hold Accountable Those Responsible**

Even if the Commission is unable to conclude that Mr. El-Masri was abducted, arbitrarily detained forcibly disappeared and tortured by State officials or their agents, or that the United States supported or acquiesced in these unlawful acts, the failure of the government to take preventative measures to protect against the violation of Mr. El-Masri's rights, investigate his case after the violations occurred, and hold accountable those responsible represents a failure on the part of the United States to ensure Mr. El-Masri's rights. Responsibility for the violations, therefore, is attributable to the United States.

In *Velásquez Rodríguez*, the Inter-American Court held that States have an affirmative obligation to investigate, prosecute, and punish human rights violators and that this duty must be implemented through the State's judicial tribunals. In fulfillment of this obligation, the Court found that the State must "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights." According to

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<sup>188</sup> See, e.g., Priest, *supra*; Paglen and Thompson, *supra*.

the Court, State responsibility is implicated when violations occur and “the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”<sup>189</sup>

Thus, even if the Commission is not fully satisfied on the evidence available that the United States supported and acquiesced to violations of Mr. El-Masri’s rights, the Commission can find State responsibility because of the United States’ failure to have taken measures to prevent the violations from occurring or to hold accountable those responsible. In these circumstances, the United States is responsible “not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as required by” the American Declaration.<sup>190</sup> In the *Godínez Cruz* case, and three more recent decisions, *Ximenes Lopes*, *Pueblo Bello Massacre*, and *Mapiripán Massacre*, the Court has reaffirmed these principles of State responsibility.<sup>191</sup>

The European Court has likewise held that in certain circumstances States assume affirmative obligations to protect the rights contained in the European Convention. For example, in *Osman v. United Kingdom*, the Court noted that Article 2 of the European Convention affirmatively obliges State authorities “to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”<sup>192</sup> Likewise, the HRC has interpreted Article 2 of the ICCPR to impose

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<sup>189</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 173.

<sup>190</sup> *Id.* at ¶ 172 (1988). *See also* Caballero Delgado and Santana Case, 1995 Inter-Am. Ct.H.R. (ser. C) No. 22, at ¶ 56 (Dec. 8, 1995).

<sup>191</sup> *Godínez Cruz Case*, *supra* note 115, at ¶ 183; *Damião Ximenes Lopes v. Brazil*, Case 12.237, Inter-Am. C.H.R., Report No. 38/02, doc. 5 rev. 1 at ¶¶ 24-25 (2002); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. C.H.R. (ser. C) No. 140, at ¶ 120 (Jan. 31, 2006); *Mapiripán Massacre*, Case 12.250, Inter-Am. C.H.R., Report No. 34/01 ¶ 232 (2000); *see also* Case 0322/2001, *Sawhoyamaya Indigenous Community of the Enxet People v. Paraguay*, Inter-Am. C.H.R., Report No. 12/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at ¶ 153 (2003).

<sup>192</sup> *Osman v. United Kingdom*, Reports of Judgments and Decisions, 1998-VIII Eur. Ct.H.R. at ¶ 115 (Oct. 28, 1998).

affirmative obligations on States to take necessary steps to prevent violations of rights protected by the Convention by State.<sup>193</sup> Specifically, the Committee held that “State Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts” can give rise to a violation of the ICCPR by the State.<sup>194</sup>

In elucidating the content of the obligation to protect, the Inter-American system has adopted a clear standard for determining when a State may be held responsible for violations that are initially not directly imputable to the State. Under this standard, State responsibility is engaged when the State (1) “knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual,” and (2) “failed to take reasonable steps within the scope of its powers which might have had a reasonable possibility of preventing or avoiding that risk.”<sup>195</sup>

This standard was first adopted by the European Court in *Osman*, where the Court determined that State responsibility is incurred if “authorities [know] or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual ... [and fail] to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”<sup>196</sup>

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<sup>193</sup> Human Rights Committee, Gen. Cmt. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 8 (2004).

<sup>194</sup> *Id.*

<sup>195</sup> *Pueblo Bello Massacre*, *supra* note 191, at ¶¶ 123-24 (citing and quoting the European Court of Human Rights’ decision in *Kiliç*, Eur. Ct.H.R. Application No. 22492/93); Case 0322/2001, *Sawhoyamaya Indigenous Community*, *supra* note 191.

<sup>196</sup> *Osman v. United Kingdom*, *supra* note 192; *Id.* at ¶ 116; *see also Id.* at ¶ 118-121. Cf. *Younger v. United Kingdom*, Eur. Ct.H.R. 22 (2000) (decision on admissibility) (finding no violation of positive obligation to protect against prison suicide when authorities had no knowledge of mental health problems or suicidal tendencies); *Osman*, *supra* note 192, at ¶ 118-121 (finding no violation of positive obligation when police had no knowledge that killer was mentally ill or prone to violence, and no proof that killer was responsible for prior non-violent incidents of harassment).

Two years after *Osman*, the European Court applied this same standard in the case of *Kiliç v. Turkey*.<sup>197</sup> In *Kiliç*, the Court held that Turkish authorities failed to take adequate measures to protect the life of Kermal Kiliç, a journalist for a Kurdish newspaper who had requested State protection. Taking note of a “significant number of serious incidents involving killings of journalists,” the European Court found that Kiliç was “at particular risk of falling to an unlawful attack.”<sup>198</sup> The Court highlighted that even absent evidence of any specific or particular instance where Kiliç was at risk of violence, the risk could be generally regarded as “real and immediate.”<sup>199</sup>

The *Kiliç* standard was subsequently adopted by the Inter-American Court in the *Sawhoyamaxa Indigenous Community* case, where the Court found that violations of indigenous community members’ right to life were attributable to Paraguay because the government had actual or constructive knowledge of the special vulnerability of the community and notice of real health risks to the community, but failed to exercise due diligence to prevent problems related to these risks.

Although *Velásquez Rodríguez* focused on the State’s affirmative obligation to protect the right to life, the principles of State responsibility elaborated therein extend beyond the right to life to all rights protected under the American Declaration. As the *Velásquez Rodríguez* court itself noted, the State has a duty to ensure the “full and free exercise and enjoyment of human rights.”<sup>200</sup> The Commission has also consistently articulated positive governmental obligations to protect individuals from other forms of harm, under both the Declaration and the Convention. For example, in the *Ache* and

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<sup>197</sup> *Kiliç v. Turkey*, App. No. 22492/93, Eur. Ct.H.R. 128 (2000).

<sup>198</sup> *Id.* ¶ 66

<sup>199</sup> See *Sawhoyamaxa Indigenous Community*, *supra* note 191.

<sup>200</sup> See *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 166.

*Coulter* cases, the Commission affirmed that under the Declaration, the State was obligated to take appropriate measures to protect indigenous communities from environmental harm caused by miners and prospectors in Brazil and Paraguay.<sup>201</sup> Although the State had initially built a highway through the territory that aided the entrance of private third parties (and thus their disease vectors and cultural influences), the Commission's decision focused on the State's failure to take appropriate measures to protect the indigenous community from these harms.

Other international bodies have similarly held that the State's affirmative obligations extend beyond the right to life to, for example, the right to humane treatment. In *M.C. v. Bulgaria*, for instance, the European Court held that Bulgaria had violated the rights of a 14-year-old alleged rape victim to be free from inhumane or degrading treatment and to privacy guaranteed under Articles 3 and 8 of the European Convention by failing to fully and effectively investigate the rape allegations.<sup>202</sup> The European Court concluded that "[w]hile the choice of the means to secure compliance with [international human rights] law...is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions."<sup>203</sup> Specifically in relation to the right to humane treatment, the European Court held that the general obligation on States to protect human rights "requires States to take measures designed to

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<sup>201</sup> Ache Tribe, Case 1802: Inter-Am. C.H.R. 151, (1977); *Coulter et al. v. Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985). See also *Maya Indigenous Community of the Toledo District v. Belize*, *supra* note 84; *Aloeboetoe et al. Case*, Judgment of December 4, 1991, Inter-Am. Ct.H.R. (Ser. C) No.11 (1994); *La Comunidad Moiwana vs. Suriname*, Sentencia de 15 de junio de 2005, Corte I.D.H., (Ser. C) No. 124 (2005); *Sarayaku Indigenous People Case*, Order of the Court of July 6, 2004, Inter-Am. Ct.H.R. (Ser. E) (2003); *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001.( Ser. C) No. 79 (2001).

<sup>202</sup> *M.C. v. Bulgaria*, Eur. Ct.H.R. 646 (2003).

<sup>203</sup> *Id* at ¶ 150.

ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”<sup>204</sup>

**1. Because the United States Devised and Developed the Rendition Program, it knew of the Risk to Mr. El-Masri**

As noted, the United States had an obligation to take reasonable measures to prevent situations that could have resulted in the violation of Mr. El-Masri’s rights under the American Declaration. Because the United States devised and developed the rendition program, it knew or reasonably should have known that the rendition of Mr. El-Masri presented a “real and immediate risk” to his rights to be free from torture, arbitrary detention, and forced disappearance. Moreover, as in the *Sawhoyamaxa Indigenous Community* case, responsibility attaches because the United States was aware, or reasonably should have been aware from media reports and other credible sources, since at least 2002, that there was a real risk of human rights violations occurring as a consequence of the rendition program’s operation.<sup>205</sup>

**2. Because the Express Purpose of the Rendition Program is to Remove Persons from the Protections of the Rule of Law, the United States knew of the Risk to Mr. El-Masri**

As discussed *supra*, the United States devised and developed the rendition program with the intent of apprehending, transferring, detaining, and interrogating terrorist suspects outside the United States, and thus, in its view, avoiding the constraints imposed by the U.S. Constitution and international law on the detention and interrogation of prisoners. Thus, the United States knew of the precise risk to Mr. El-Masri when he was subjected to

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<sup>204</sup> *Secic v. Croatia*, App. No. 40116/02, Eur. Ct.H.R., ¶ 52 (2007). *See also* Human Rights Committee, *supra* note 197 (noting states’ obligation to protect against violations of the right to privacy, torture and other cruel, inhumane or degrading treatment by state as well as private persons).

<sup>205</sup> *Id.*

the rendition program -- detention and interrogation without judicial review<sup>206</sup> -- and that the injuries Mr. El-Masri suffered were a reasonable outcome of the program.

**3. The United States Failed to Conduct Any Investigation into Mr. El-Masri's Credible Allegations of Torture, Arbitrary Detention, and Forced Disappearance**

The United States also incurs responsibility for the violation of Mr. El-Masri's rights because of its failure to initiate any investigation into Mr. El-Masri's credible allegations of torture, arbitrary detention, and forced disappearance. Stemming from the State's affirmative obligation to ensure effective human rights protection of all persons under its "authority and control," the United States has an obligation to "prevent, investigate, and punish any violation of the rights" under the American Declaration.<sup>207</sup> The Commission has interpreted the American Convention's Article 1(1) duty to "ensure and respect," and the Article 25 "right to a remedy" duty, to encompass an obligation to investigate and prosecute responsible individuals in cases of torture or disappearance.<sup>208</sup>

In the *Velásquez Rodríguez* case, the Inter-American Court outlined the nature of the State's duty to investigate:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty . . . .<sup>209</sup>

The Court as well as the Commission has consistently affirmed the obligation of the State to investigate alleged human rights abuses, regardless of the substantive nature of the

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<sup>206</sup> The Commission and Court have recognized that periodical reviews of detention is necessary to avoid incidents of torture and other inhumane treatment of persons in the custody of the State. *See, e.g.*, Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct.H.R. (ser. A) No. 9, ¶ 31 (1987).

<sup>207</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 166.

<sup>208</sup> Case No. 6586, Inter-Am. C.H.R. 91, OEA/ser.L./V/II/61, doc. 22 rev. 1, ¶ 93 (1983); *see also* Garay Hermosilla et. al. v. Chile, Case No. 10.843, Inter-Am. C.H.R. OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997).

<sup>209</sup> *Id.* at ¶ 176.

violation. Significantly, the Commission and Court have found violations, *inter alia*, of Article 1,<sup>210</sup> Article 5,<sup>211</sup> Articles 8 and 25,<sup>212</sup> and Article 13<sup>213</sup> of the American Convention where a State has failed adequately to investigate alleged human rights violations.

The obligation to investigate rights violations allegedly perpetrated by agents of the State has also been recognized by other international human rights bodies, including the European Court and the HRC. Like the Inter-American Court, the European Court has interpreted the “right to a remedy” language of Article 13 of the European Convention to include the obligation to investigate and prosecute violations of the European Convention.<sup>214</sup> For example, in *Tanrikulu v. Turkey*, a case that involved the murder of the petitioner’s husband, allegedly at the hands of “State security forces or with their connivance,”<sup>215</sup> the European Court found that the inadequate investigation into the allegations itself gave rise to State responsibility for the violation despite insufficient

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<sup>210</sup> Manuel Stalin Bolaños Quiñones v. Ecuador, Case 10.580, Inter-Am. Ct.H.R., Report No. 10/95, OEA/Ser.L/V/II.91 Doc. 7 at 76, ¶ 32 (1996).

<sup>211</sup> *Moiwana Village v. Suriname*, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 124, at ¶ 43, 92 (June 15, 2005); *Bámaca Velásquez v. Guatemala*, Judgment of Merits, Inter-Am. Ct.H.R., ¶ 165 (Nov. 25, 2000).

<sup>212</sup> *Castillo Paez Case*, Inter-Am. Ct.H.R. (Ser. C) No. 35, at ¶¶ 86, 90 (Nov. 3, 1997); *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 166; *Manuel Stalin Bolaños Quiñones*, *supra* note 210, at ¶ 45; *Moiwana Village*, *Id.* at ¶ 136(h); *Barrios Altos Case*, Inter-Am. Ct.H.R. ¶¶ 45, 48 (ser. C) No. 75 (May 14, 2001).

<sup>213</sup> *Barrios Altos Case*, *Id.* at ¶ 45. (“With regard to [article 13], the Commission [arguing before the Court] added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.”); *Blanco Romero and Others vs. Venezuela*, Judgment, (ser. C) No. 138 (Nov. 28, 2005). *See also* <http://www.cidh.org/relatoria/showarticle.asp?artID=156&IID=1> (discussing development of the right to truth). Note that Art. 13 of the American Convention has as its corollary Art. IV of the American Declaration.

<sup>214</sup> *See, e.g.*, *McCann and others v. United Kingdom*, 324 Eur. Ct.H.R. 31 (ser. A) (1995). *See* European Convention, art. 13, provides that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>215</sup> *Tanrikulu v. Turkey*, App. No. 23763/94, Eur. Ct.H.R. ¶ 7 (1999).

evidence to prove that an agent of the State actually carried out the killing.<sup>216</sup> Specifically, the Court held that:

[The duty to investigate] is not confined to cases where it has been established that the killing was caused by an agent of the State . . . . The mere fact that the authorities were informed of the murder of the applicant’s husband gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.<sup>217</sup>

Likewise, the European Court found that under the European Convention, the obligation on States to ensure human rights protection “requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. . . .”<sup>218</sup> As the European Court observed in *Avsar v. Turkey*, “[t]he essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life” and to ensure accountability of those involved in the violation.<sup>219</sup>

In the case of *Irene Bleier Lewenhoff & Rosa Valino de Bleier v. Uruguay*, concerning arbitrary arrests, torture, and disappearances in Uruguay in the late 1970s, the HRC held that Uruguay had a duty to investigate allegations including violations of Article 7 (prohibiting torture), Article 9 (arbitrary detention), and Article 10(1) (humane treatment) of the ICCPR, to prosecute those responsible for those violations, and to pay reparations.<sup>220</sup> Similarly, in *Tshitenge Muteba v. Zaïre*, the Committee found that in response to allegations of torture, Zaïre was “under a duty to . . . conduct an inquiry into

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<sup>216</sup> *Id.* at ¶¶ 47-48.

<sup>217</sup> *Id.* at ¶ 103.

<sup>218</sup> *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct.H.R. at ¶ 393 (2001).

<sup>219</sup> *Id.*

<sup>220</sup> *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 109, ¶ 13.3 (1985); *see also Alberto Grille Motta v. Uruguay*, Communication No. 11/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 54, ¶ 14 (1984).

the circumstances of [the victim's] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future.<sup>221</sup>

In *Velásquez Rodríguez* and its progeny, the Court has described the scope of the investigation that States must conduct when addressing alleged human rights violations.

Most importantly, the Court held:

[The investigation] must be undertaken in a *serious manner* and *not as a mere formality* preordained to be ineffective. An investigation *must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family* or upon their offer of proof, without an effective search for the truth by the government.<sup>222</sup>

Thus, the key features of the duty to investigate include: (1) a serious investigation, not undertaken as a mere formality; (2) that is undertaken as part of a search for truth; (3) that has a clear objective; and (4) that the State assumes as its own legal duty, irrespective of private interests or solicitations from the victim's family. Although a Government may conduct various judicial proceedings relating to the facts, it may still be in violation of its obligation to investigate crime if the investigations are perfunctory, ineffective, and not independent.

In the *Bulacio* case, the Court elaborated on the components of the duty to investigate in its examination of the Argentine Federal Police's arrest and assault on a seventeen-year old boy that eventuated in his death. At issue was a prolonged and unproductive investigation into the circumstances surrounding the boy's death and a delayed and ineffective prosecution of those individuals who were ultimately held

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<sup>221</sup> *Tshitenge Muteba v. Zaire*, Communication No. 124/1982 (25 March 1983), Human Rights Committee, U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984); *see also John Khemraadi Baboeram at al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/40/40) at 187, ¶ 13.2 (1985) (same with respect to extra-judicial executions); *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, U.N. Doc. Supp. No. 40 (A/38/40) at 216 (1983) (same with respect to forced abductions by state agents).

<sup>222</sup> *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 177 (emphasis added); *see also Bámaca Velásquez v. Guatemala*, Inter-Am. Ct.H.R., ¶ 212.

responsible. Adopting and expanding upon its findings in *Velásquez*, the Court noted that a State investigation “[m]ust have a purpose and be undertaken by [the State] as a juridical obligation of its own and not as a mere processing of private interests, subject to procedural initiative of the victim or his or her next of kin or to evidence privately supplied, without the public authorities effectively seeking the truth.”<sup>223</sup>

Notably, in *Bulacio* some investigation had been conducted by the State, but the incomplete and years-long nature of the effort, in combination with continuing impunity for those apparently responsible, led the Court to determine that harm to family members continued.<sup>224</sup> As a result, the Court required the State “to continue and conclude the investigation of the facts and to punish those responsible for them.”<sup>225</sup> The Court also awarded compensation to the next-of-kin for non-pecuniary damages.<sup>226</sup>

In *Avsar v. Turkey*,<sup>227</sup> the European Court set forth a similar standard for the scope and nature of investigations that must be conducted by the state into alleged human rights violations. First, the Court determined that the investigation must be “official” and “independent from those implicated in the events.”<sup>228</sup> Second, the “authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility of any investigatory procedures.”<sup>229</sup> Third, “the authorities must have taken reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate an autopsy which provides a

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<sup>223</sup> *Bulacio Case*, Judgment, Inter-Am. Ct.H.R., (ser. C) No. 100, ¶ 112 (Sept. 18, 2003).

<sup>224</sup> *Id.* at ¶ 119-120.

<sup>225</sup> *Id.* at ¶ 121.

<sup>226</sup> *Id.* at ¶¶ 101, 102.

<sup>227</sup> *Avsar v. Turkey*, App. No. 25657/94, at ¶¶ 393-395.

<sup>228</sup> *Id.* at ¶ 394.

<sup>229</sup> *Id.* at ¶ 393.

complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.”<sup>230</sup> Finally, the Court held that any investigation must be conducted promptly so as to maintain “public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”<sup>231</sup>

Here, no criminal investigation has been initiated by the United States into Mr. El-Masri’s credible allegations of torture, arbitrary detention, or forced disappearance. Indeed, even after he filed suit in the United States in December 2005, more than a year after his allegations against the United States first surfaced, the government took the position it could neither confirm nor deny those allegations in urging dismissal of his civil suit. Not only has the United States itself failed to conduct a criminal investigation, it has even sought to impede other nations’ attempts to investigate and prosecute U.S. officials identified as involved in Mr. El-Masri’s case and others. Moreover, the United States’ failure to conduct a criminal investigation into Mr. El-Masri’s allegations is not unique; rather, his case is part of a systematic failure on the part of the United States to investigate and hold to account those U.S. officials responsible.

## **II. The Failure of U.S. Courts to Consider the Merits of Mr. El-Masri’s Claims Violated his Right to Resort to the Courts Guaranteed Under Article XVIII of the American Declaration**

In the absence of a criminal investigation into his allegations, Mr. El-Masri sought civil redress in U.S. courts for the severe psychological and emotional trauma he suffered as a direct result of his torture, arbitrary detention, and forced disappearance. Although Mr. El-Masri submitted abundant credible evidence in support of his claims that the United States and its agents were responsible for his injuries, U.S. courts refused to consider the

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<sup>230</sup> *Id.* at ¶ 394.

<sup>231</sup> *Id.* at ¶ 395.

merits of his case or to provide him with compensation or other relief for the violation of his rights. These actions of the United States violated Article XVIII of the American Declaration.

**A. Article XVIII of the American Declaration Guarantees an Effective Right of Access to a Tribunal and, Where Appropriate, the Enforcement of Remedies.**

Article XVIII guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority that violate any fundamental constitutional rights. The Commission has interpreted Article XVIII in light of the more specific but analogous terms of Articles 8 and 25 of the American Convention.<sup>232</sup> Article 25 entitles everyone to effective recourse for “protection against acts that violate [ ] fundamental rights recognized by the constitution or laws of the state or by the Convention,” and Article 8 provides “the right to a hearing with due guarantees . . . for the determination of [ ] rights . . .” The Commission has held that together with Articles 1(1) and 2 of the Convention, Article 25<sup>233</sup> encompasses three separate but related elements: first, “the right of every individual to go to a tribunal when any of his rights have been violated”; second, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place”; and third, the right to have remedies enforced when granted.<sup>234</sup> Thus the right to a remedy guaranteed by Article XVIII encompasses a procedural

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<sup>232</sup> The Inter-American Court has found that the right to a remedy under the Declaration and the Convention (Articles 8 and 25) are similar in scope. *See Maya v. Belize* at ¶ 174; *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev, ¶ 37 (2000).

<sup>233</sup> Article 1(1) of the American Convention requires States to “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” Article 2 requires States to “adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

<sup>234</sup> *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157, art. 25 (1996).

component (access to justice) and a substantive component (redress for violations of rights protected by national and international laws).

Both the Commission and the Court have determined that a judicial tribunal should be available to all persons who allege violations of their fundamental rights and that the tribunal in question must be capable of granting a remedy that effectively and adequately addresses the infringement of the right alleged.<sup>235</sup> Importantly, the right to a remedy requires that a State do more than simply ensure that the door of the courthouse is open to aggrieved individuals; rather, it must ensure that available remedies are “effective” in affording the individual whose rights have been violated adequate redress for the harm suffered.<sup>236</sup> In the *Constitutional Court Case*, for instance, the Inter-American Court held that:

The inexistence of an effective recourse against the violation . . . constitutes a transgression of the Convention . . . . [F]or such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.<sup>237</sup>

The Commission has discussed the requirements of a full and fair remedy under Articles 8 and 25 in a case with a broadly similar procedural history and fact pattern to Mr. El-Masri’s. In the *Gustavo Carranza* case,<sup>238</sup> the Commission held that Argentina violated the Convention when its courts applied the political question doctrine and refused to decide a

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<sup>235</sup> See, e.g., *Velásquez Rodríguez Case*, *supra* note 115, at ¶ 64; see also Report on Terrorism and Human Rights, Inter-Am. Ct.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 334 (2002)

<sup>236</sup> See, e.g., *Mayagna Case*, *supra* note 201 at 113-114; Ivcher Bronstein Case, 2001 Inter-Am. Ct.H.R. (ser. C) No. 74, at 136-137 (Feb. 6, 2001).

<sup>237</sup> “Five Pensioners” Case, Judgment of February 28, 2003, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 136 (2003); See also *Durand & Ugarte Case*, 2001 Inter-Am. Ct.H.R. (ser. C) No. 68, at 118, ¶ 62 (Aug. 16, 2001); *Cantoral-Benavides Case*, 2001 Inter-Am. Ct.H.R. (ser. C) No. 88, at 164 (Dec. 3, 2001).

<sup>238</sup> *Gustavo Carranza v. Argentina*, Case 10.087, Inter-Am. C.H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. (1997).

case on the merits. The petitioner was a judge removed from office in 1976 by the military government of Argentina. He sought a judicial remedy but was denied access to domestic courts on the grounds that his dismissal constituted a political question.<sup>239</sup> In finding a violation of both Articles 8 and 25, the Commission, highlighting the need for “effective” judicial protection, elaborated on the nature of the right to a remedy guaranteed under Article 25:

[T]he logic of every judicial remedy – including that of Article 25 – indicates that the deciding body must specifically establish the truth or error of the claimant’s allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and a discussion of the allegation, must decide whether the claim is valid or unfounded.<sup>240</sup>

The Commission also has held that the right to a remedy encompassed by Articles 25 and 8, and by extension Article XVIII of the Declaration, includes the right of victims and society as a whole to know the truth of the facts connected with serious violations of human rights, as well as the identity of those who committed them. In the *Oscar Romero* case, for example, the Commission found that the right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them [forms part] of the right to reparation for human rights violations.”<sup>241</sup>

Finally, the Commission has noted the “fundamental” importance of the protections afforded by Article 25, holding in particular that “states of emergency ‘cannot entail the suppression or ineffectiveness of the judicial guarantees that that the Convention requires

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<sup>239</sup> Under this doctrine domestic courts had abstained from reviewing acts that presuppose a political or discretionary judgment reserved exclusively for another branch of government.

<sup>240</sup> *Carranza v. Argentina*, *supra* note 244, at ¶ 73.

<sup>241</sup> Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm. H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 147 (1999). *See also*, Alfonso René Chanfeau Orayce et al. v. Chile, Cases 11.505; 11.532; 11.541; 11.546; 11.449; 11.569; 11.573; 11.583; 11.585; 11.595; 11.652; 11.655; 11.657; 11.675 and 11.705, Inter-Am. C.H.R., Report No. 25/98, OEA/Ser.L/V/II.95. (ser. C).

States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency,<sup>7</sup> or to control the legality of measures adopted by the executive body due to the state of emergency.”<sup>242</sup> Among the non-derogable rights recognized by the Convention are, of course, rights implicated here, including the right to life, judicial review of detention, and the right to be free from torture and other inhumane treatment.

The European Court also has recognized the importance of the right to a remedy and its importance in safeguarding other rights, even when national security concerns are raised by the State. In *Tinnelly and McElduff v. United Kingdom*,<sup>243</sup> for example, the applicants, Catholics based in Northern Ireland, lodged complaints under the Fair Employment (Northern Ireland) Act 1976, alleging that they had been unlawfully discriminated against in tendering for government contracts. The Secretary of State for Northern Ireland issued certificates under section 42 of the 1976 Act stating that the refusal to offer contracts was “an act done for the purpose of protecting national security or the protection of public safety or order.” By virtue of section 42(2) of the Act, these certificates were deemed conclusive evidence of the facts asserted. In an application for judicial review of the certification process, the domestic court believed that it could not look behind the terms of the certificate to examine the merits of the underlying factual basis for refusing the contracts on national security grounds.<sup>244</sup> Nor did the court have sight of the relevant documents; rather, it dismissed the case on the ground that the section

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<sup>242</sup> *Carranza v. Argentina*, *supra* note 244, at ¶ 80 (citing Inter-American Court of Human Rights, *Advisory Opinion*, *supra* note 21,1 at ¶ 25 n.25, and ¶ 39 n.39).

<sup>243</sup> *Tinnelly & Sons Ltd and others and McElduff v. United Kingdom and others*, Eur. Ct. H.R., Case 62/1997/846/1052–1053, App. No. 20390/92, Judgment of 10 July 1998, (1998) 27 EHRR 249.

<sup>244</sup> *Id.* at ¶ 70.

42 certificates were conclusive on the issue of national security.<sup>245</sup> In other words, there was no “independent judicial scrutiny of the facts grounding” the judge’s determination.<sup>246</sup>

On appeal, the European Court held that the certificates constituted a disproportionate restriction on the applicants’ right to a judicial determination on the issue and a violation of Article 6 of the European Convention. Although the Court accepted that the right to a remedy recognized therein might be subject to certain limitations, including on national security grounds, it determined that where imposed, limitations must not restrict the exercise of the right in such a way that the very essence of the right is impaired. The Court added that any such limitation must pursue a legitimate State objective and that there must be a reasonable proportionality between this objective and the means employed to achieve it. Specifically, the Court held:

The conclusive nature of the section 42 certificates had the effect of preventing a judicial determination of the merits of the applicants’ complaints that they were victims of unlawful discrimination. The Court would observe that *such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case*. The right guaranteed . . . under . . . the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.<sup>247</sup> (Emphasis added.)

Importantly, in its assessment of whether the certification process was a proportionate limitation on the applicants’ rights, the Court considered it significant that in other context, arrangements had been found “to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at ¶ 77.

<sup>247</sup> *Id.* at ¶ 77.

procedural justice.”<sup>248</sup> Ultimately, the Court was not persuaded that alternative measures could not have been introduced that might have accommodated both of these interests.<sup>249</sup>

**B. Mr. El-Masri was Denied a Right to a Remedy before U.S. Courts**

Shortly after Mr. El-Masri filed his civil lawsuit, the United States government intervened in the case and sought dismissal on the basis of an evidentiary privilege, arguing that any further litigation of Mr. El-Masri’s allegations would cause harm to U.S. national security interests. In support of its claims, the United States produced two declarations, one of which was made public and the other provided to the judge alone. The U.S. Court of Appeals for the Fourth Circuit, affirming the district court’s earlier dismissal, upheld invocation of the privilege, and dismissed Mr. El-Masri’s case on the pleadings.

In applying the state secrets privilege, the court of appeals did not independently consider whether the evidence that the government sought to have removed from the case was genuinely secret; whether disclosure of particular information would reasonably have caused harm to national security; and whether, even if state secrets were legitimately implicated, dismissal of Mr. El-Masri’s entire suit at the pleading stage was warranted. Moreover, the Court failed to adequately consider possible alternatives to dismissal of the case, including admission of state secrets evidence in camera or under seal, the appointment of a Special Master, the establishment of Protective Orders, and the possibility of holding an in camera trial.<sup>250</sup>

Thus, the court of appeals did not even address the truth or falsity of Mr. El-Masri’s claims of torture, arbitrary detention, or forced disappearance. There was no attempt on

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<sup>248</sup> *Id.* at ¶ 78.

<sup>249</sup> *Id.*; *see also*, *Devenney v. United Kingdom*, 35 Eur. Ct.H.R. 643, App. No. 24265/94, Judgment 19 March 2002, (2002); *Al-Nashif and Others v. Bulgaria*, 36 Eur. Ct. H.R 655, App. No. 50963/99 (2002).

<sup>250</sup> *See, Opening Brief for Plaintiff-Appellant in El-Masri v. Tenet* at pp. 52-57 available at <http://www.aclu.org/pdfs/safefree/20060724elmasriplsopeningbrief.pdf>.

the part of the Court, therefore, to elucidate the “truth as to the events that transpired, their specific circumstances, and who participated in” the violation of his rights. And, Mr. El-Masri’s suggestion that there were alternatives to dismissal that would have accommodated both the government’s national security interests and his own interests in the litigation proceeding were summarily dismissed.<sup>251</sup> The Court simply held that Mr. El-Masri’s right to redress must be “subordinated to the collective interest in national security.”<sup>252</sup> In so doing, the Court failed to protect Mr. El-Masri’s right to a remedy in violation of Article XVIII.

### CONCLUSION AND PETITION

The facts stated herein establish that the United States of America is responsible for the violation of the rights of Mr. El-Masri under Articles I, XVII, XXV, XXVII, and XXVIII, guaranteed under the American Declaration. Thus, Petitioner Khaled El-Masri respectfully requests that the Inter-American Commission on Human Rights:

1. Declare this Petition admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;
3. Declare that the United States of America is responsible for the violation of the Petitioner’s rights under the American Declaration of the Rights and Duties of Man, including, *inter alia*, his rights to be free from torture, arbitrary detention and forced disappearance guaranteed under Articles I, XVII, XXV, XXVI, and XXVII, and his right to a remedy protected under Article XXVIII;
4. Declare that the continued operation of the U.S. “Extraordinary Rendition” Program violates the American Declaration on the Rights and Duties of Man and international law generally;
5. Recommend such remedies as the Commission considers adequate and effective for addressing the violation of Petitioner’s fundamental human rights, including, *inter alia*, requesting that the United States government and those

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<sup>251</sup> *Id.* at 20.

<sup>252</sup> *Id.* at 21.

directly responsible for Mr. El-Masri's "extraordinary rendition" publicly acknowledge such involvement and publicly apologize to Mr. El-Masri and his family for the violation of his rights to be free from torture, arbitrary detention and forced disappearance.

Dated: April 9, 2008

Respectfully submitted:

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Steven M. Watt  
ACLU, Human Rights Program