

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

**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS
OF BINYAM MOHAMED, ABOU ELKASSIM BRITEL,
MOHAMED FARAG AHMAD BASHMILAH, AND BISHAR AL-RAWI
BY THE UNITED STATES OF AMERICA
WITH A REQUEST FOR AN INVESTIGATION
AND HEARING ON THE MERITS**

By the undersigned, appearing as counsel for petitioners
**UNDER THE PROVISIONS OF ARTICLE 23 OF THE RULES OF PROCEDURE OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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I. Statement of the Case

The Petitioners in this case are victims and survivors of a widespread and systematic program of forced disappearance, secret detention, and torture designed and implemented by the United States of America following the attacks of September 11, 2001. The U.S. “extraordinary rendition” and secret detention program (“the U.S. program”) used Central Intelligence Agency (CIA) officials, and a fleet of chartered aircraft owned and operated by private U.S.-based corporations, to abduct and transport persons suspected by the U.S. government of having links to terrorist activities to secret detention facilities known as “black sites.” The United States also colluded with other nations to apprehend, interrogate, and torture these men in proxy detention centers around the globe. After months—or years—of torture, some were transferred to publicly known U.S. detention facilities such as the one at Guantánamo Bay, Cuba. Still others were held entirely in secret detention, only to be released years later and without any acknowledgement of their detention by the United States. The Petitioners in this case fall into both categories of detainees.

The United States designed the program to instill fear, disorientation, and dependency in its victims. In so doing, it subjected them to torture and other forms of cruel, inhuman and degrading treatment, including psychological abuse. Survivors of the U.S. program, including the Petitioners, still suffer serious physical and psychological trauma as a consequence of their forced disappearance and torture.

The Petitioners’ allegations are not unique. To the contrary, Petitioners Mohamed, Britel, Bashmilah, and al-Rawi were victims of a widespread and systematic program devised and approved by officials at the highest levels of the U.S. government. Former

President George W. Bush publicly acknowledged that the United States engaged in secret detention, and numerous executive department memoranda detailing the U.S. program's detainee treatment and interrogation procedures have been released over the past several years, confirming the use of so called "enhanced interrogation" techniques including "water-boarding," "stress positions," prolonged exposure to cold, slapping, shaking, and forced standing. A myriad of additional official documents and other corroborating evidence have been made publicly available through investigations by foreign governments, international organizations, lawsuits, media reports, and accounts of former detainees.

Despite this credible evidence of official involvement in forced disappearance and torture, the United States has failed to conduct a comprehensive investigation into these allegations and hold to account those responsible. Moreover, the Petitioners have been unable to secure relief for their injuries in U.S. courts. When they tried to sue Jeppesen Dataplan, Inc., a private flight services and logistics corporation, for colluding with the United States in their forced disappearance and torture by facilitating the Petitioners' "torture flights," the United States intervened to invoke the so-called "state secrets" privilege to end the litigation before pretrial discovery. In addition, U.S. courts have repeatedly denied claims made by other victims of the U.S. program by upholding the government's assertion of the state secrets privilege or acceding to claims of governmental immunity. Despite years of effort to obtain acknowledgment and redress for their treatment, Petitioners and other victims and survivors of the U.S. program have failed in their attempts to seek redress in the United States.

The American Declaration on the Rights and Duties of Man ("American

Declaration”) prohibits torture, cruel treatment, arbitrary detention, and forced disappearance. It also protects against *refoulement*. In addition, the Declaration imposes affirmative obligations on States to protect against these rights violations, requiring States to adopt reasonable measures to prevent violations, investigate allegations of abuse, and in cases where violations may have occurred, to prosecute perpetrators, and provide victims and survivors with redress. The Petitioners bring this case to vindicate violations of their human rights guaranteed by the American Declaration, and they seek an acknowledgment, an apology, and other appropriate redress.

The United States is responsible for the violations of the Petitioners’ rights because it violated Articles I, XXV, and XXVI by subjecting petitioners to forced disappearance, torture, other forms of inhumane treatment, and arbitrary detention. Further, by colluding with other States and private corporations in apprehending, detaining, and interrogating petitioners, the United States has violated the Petitioners’ rights under Articles I, XVIII, XXV, XXVI, and XXVII, which protects the right to *non-refoulement*. The United States is also responsible for the violations of Petitioners’ rights because it failed to act with “due diligence” to prevent the violations from occurring. Finally, by failing to investigate Petitioners’ allegations and consider the merits of their claims, the United States has violated petitioners’ right to truth as well as their right to resort to the courts guaranteed under Article XVIII.

Petitioners respectfully request that the Commission declare this Petition admissible, conduct an investigation into this matter, and hold a hearing on the merits.

II. Factual and Procedural Background

A. Factual Background

On April 10, 2002, Binyam Mohamed, a British resident seeking to return to the United Kingdom from Pakistan, was seized in Karachi, Pakistan and turned over to agents of the U.S. Federal Bureau of Investigation and the CIA. After four months of interrogation, during which time he was denied access to a lawyer, CIA agents stripped him, dressed him in a track-suit, blindfolded him, shackled his hands and feet, strapped him to the seat of a plane, and rendered him to Rabat, Morocco.

For the next eighteen months, Moroccan intelligence agents secretly detained, interrogated, and tortured Mr. Mohamed. During his time in Morocco, he suffered beatings, broken bones and, on occasion, loss of consciousness. His torturers cut off his clothes with a scalpel and used the same scalpel to make incisions on his body, including his penis. Then, they poured a hot stinging liquid into the open wounds on his penis. They also frequently threatened him with rape, electrocution, and death. He was handcuffed, fitted with earphones, and forced to listen to extremely loud music day and night, depriving him of sleep for forty-eight hours at a time. He was confined to a damp, moldy room with open sewage for a month at a time. When he refused to eat food that he believed to be drugged, he was forcibly hooked up to two different IVs which, in combination, induced painful withdrawal symptoms. In the end, Mr. Mohamed decided to return to eating solid food.

On January 21, 2004, Mr. Mohamed was once more stripped, blindfolded, and shackled by CIA agents and flown to the secret U.S. detention facility known as the “Dark Prison” in Afghanistan. There, he suffered several more months of interrogation

and torture by U.S. intelligence agents. Specifically, he was kept in complete darkness for extended periods, hung from a pole in his cell, constantly exposed to blaring music, deprived of sleep, kept either naked or with inadequate clothing in frigid cells, denied sanitary facilities, and fed so little that he lost between 40 and 60 pounds over four months. He was transferred to Bagram Air Base outside Kabul in late May 2004.

In September 2004, Mr. Mohamed was transferred to the Naval Station at Guantánamo Bay, Cuba. The United States eventually dropped all charges against him, and he was released and returned to the United Kingdom in February 2009. In November 2010, the government of the United Kingdom paid millions of pounds in compensation to three victims of the U.S. extraordinary rendition and secret detention program, including Mr. Mohamed.

On March 10, 2002, Abou Elkassim Britel, an Italian citizen, was apprehended and tortured by Pakistani police in Lahore, Pakistan. In their custody, Mr. Britel was beaten severely with a cricket bat, deprived of sleep, hung from the walls or ceiling of his cell for extended periods, denied access to a toilet, and was subjected to threats against his family's safety. His repeated requests to speak with the Italian consulate were denied. In April 2002, after weeks of torture, Mr. Britel falsely confessed to being a terrorist and was turned over to CIA agents. The CIA agents interrogated him, stripped him, dressed him in overalls, blindfolded him, shackled his hands and feet, and rendered him to Rabat, Morocco. Mr. Britel was immobilized and denied access to a toilet for the nine hour flight; when he asked permission to change positions, U.S agents taped his mouth shut.

For the next eight months, Mr. Britel was secretly detained, interrogated, and tortured by Moroccan intelligence agents until he was released without charge in

February 2003. During this time, he was denied access to his family, friends, counsel, and the Italian consulate. He was also kept in complete isolation and deprived of adequate sleep and food. During interrogations, he was handcuffed, blindfolded, severely beaten, and repeatedly threatened with worse torture, including sexual assault. As a result of his torture, Mr. Britel has suffered dizziness, chronic diarrhea, permanent damage in his left ear, and permanent areas of black and blue discoloration on his skin.

In May 2003, he was arrested by Moroccan authorities while attempting to return to Italy. They returned him to the same prison, held him *incommunicado* under atrocious conditions, and forced him to sign a confession that he was never permitted to read. In the same month, following a trial that failed to comport with universally recognized fair trial standards, Mr. Britel was sentenced to fifteen years in prison for involvement in terrorist-related activities, partially as a result of his forced confession. On appeal, his sentence was later reduced to nine years. In April 2011, Mr. Britel was granted a pardon by the King of Morocco and was finally released.

On or about October 21, 2003, Mohamed Farag Ahmad Bashmilah, a Yemeni citizen, was taken into custody by the Jordanian General Intelligence Department. After several days of interrogation under torture, Mr. Bashmilah was handed over to CIA agents. The agents violently pushed, beat, and kicked him before rapidly cutting off all of his clothing. One agent lifted him up from behind while another took photos of him. Mr. Bashmilah was then subjected to a roughly administered anal cavity search; this, combined with the beating, caused him to lose consciousness briefly. He was then dressed in a diaper, shackled, blindfolded, hooded, and flown to Kabul, Afghanistan.

For the next nineteen months, the U.S. government secretly detained Mr.

Bashmilah. For roughly six months, he was interrogated and tortured by U.S. intelligence agents at Bagram Air Base in Afghanistan. In his cell at Bagram, Mr. Bashmilah endured severe sleep deprivation and shackling in painful positions. For some periods, excruciatingly loud music played twenty-four hours per day, seven days per week, and guards woke him every half hour. Initially, the cell was pitch black, his hands were cuffed together, and his legs were shackled, severely restricting his movement and causing him pain. Later, he was chained to a wall and the light in his cell was left on at all times, except for brief moments when guards came to his cell. Mr. Bashmilah became so depressed that he tried to kill himself three separate times while at this facility. Toward the end of April, 2004, Mr. Bashmilah was again stripped, diapered, shackled, hooded, and transferred to a secret prison in an unknown country.

In this CIA “black site,” Mr. Bashmilah was subjected to more than a year of interrogation, torture, and *incommunicado* detention. Mr. Bashmilah suffered sensory manipulation through alternating exposure to white noise and deafeningly loud music, which was blasted into his cell and the area where he was taken to shower once a week. His unceasing isolation fostered a sense of despair, and continual monitoring by video cameras deprived him of any sense of privacy. Mr. Bashmilah’s psychological torment was such that he used a piece of metal to slash his wrists. On another occasion, Mr. Bashmilah went on a hunger strike that lasted for ten days. Prison personnel took him to the interrogation room, strapped him down, and forced a feeding tube up his nose. On May 5, 2005, he was again “prepared” for flight by a CIA team. This time he was sent to Yemen, where he admitted to having used a forged passport in Indonesia. Mr. Bashmilah stood trial and was sentenced to two years in prison for the offense, but the court

sentenced him to time served, holding that his time in detention, both in and outside of Yemen, constituted time served that was greater than his sentence.

On November 8, 2002, Bisher al-Rawi, an Iraqi citizen and long-term British permanent resident, was apprehended by Gambian intelligence agents at Banjul airport in the Republic of The Gambia, where he was attempting to establish a legitimate business venture. He was detained and interrogated for two weeks by Gambian officials and CIA agents. Gambian officials then returned him to the airport in Banjul where, acting on CIA instructions, they hooded, cuffed, and shackled him. He was then handed off to a U.S. rendition team, stripped, dressed in a diaper and track-suit, chained, shackled, blindfolded, and placed on a plane to Kabul, Afghanistan. Throughout the flight, he was unable to move and was denied access to food, water, and the toilet.

In Afghanistan, Mr. al-Rawi was detained for two weeks at the "Dark Prison." He was held in complete darkness and isolation, his legs were shackled 24 hours per day, he was denied adequate clothing or blankets in spite of the extreme cold, and he was subject to constant loud music and sounds. After two weeks, Mr. al-Rawi was again shackled, hooded, and handcuffed. His captors then punched and severely beat him before throwing him into a truck and piling other prisoners on top of him. As a result of this experience, Mr. al-Rawi sustained cuts and bruises all over his body and was unable to see properly for some time.

U.S. agents took Mr. al-Rawi from the truck and placed him on a helicopter that transported him to Bagram Air Base, where he endured two more months of interrogation and torture. At Bagram, U.S. agents beat him and dragged him along the floor, denied him access to a toilet, shower, or clean clothes, held him in isolation in a squalid cell,

deprived him of sleep for prolonged periods, and threatened him with worse torture. On February 7, 2003, U.S. agents covered his eyes with goggles and a hood, covered his ears with headphones, shackled and cuffed him, and flew him to the U.S. detention facility at Guantánamo.

After over four years at Guantánamo, on March 30, 2007, Mr. al-Rawi was released and returned to his home in England, where he currently resides. Like Mr. Mohamed, he received compensation from the U.K. government for its role in his victimization in the U.S. extraordinary rendition and secret detention program.

B. Background Concerning the U.S. Extraordinary Rendition and Secret Detention Program

After the September 11, 2001 attacks on the United States, then-President George W. Bush authorized senior intelligence officials to disappear individuals suspected of terrorist activities into a network of secret prisons operated by the CIA¹ in contradiction with the stated U.S. position that that it “has long been and remains among the strongest champions of the right of everyone to be free from enforced or involuntary disappearances.”² President Bush issued an Executive Order on November 13, 2001 that purported to give him complete control over who could be detained as part of the Bush administration’s “war on terror.”³ For detainees in “known” facilities like Guantánamo, the Executive Order created specially constituted administrative boards to determine a

¹ Sixth Decl. of Marilyn A. Dorn, Info. Review Officer, CIA, Am. Civ. Libs. Union v. Dep’t of Def., 04 Civ. 4151 (S.D.N.Y. Jan. 5, 2007) *available at* http://www.aclu.org/pdfs/safefree/20070110/cia_dorn_declaration_items_1_29_61.pdf.

² Digest of United States Practice in International Law 2004, Statement by T. Michael Peay, Enforced or Involuntary Disappearances (L.59): Explanation of Position 363 (April 19, 2004). <http://www.state.gov/documents/organization/139391.pdf>.

³ See “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 Fed. Reg. 57833, §§ 2(a), 7(b)(2) (Nov. 16, 2001).

detainee's status;⁴ detainees were otherwise intended to be kept outside the protection of U.S. Courts. Secret detainees, however, were completely bereft of any review of their status or detention, including the cursory review provided by the administrative boards at Guantánamo.

Although the United States did not officially acknowledge the program until 2006, journalists and human rights groups had investigated and reported on its existence since 2002.⁵ Also since 2002, official documents were leaked to the media in which the United States took the position that neither the U.S. Constitution and other federal laws, nor international law restrained U.S. agents interrogating non-citizen detainees abroad. One of these now-infamous "Torture Memos" informed the President that aggressive interrogation procedures, including "waterboarding," did not constitute torture since they were not understood to cause pain and suffering commensurate with that of "death, organ failure, or the permanent impairment of a significant body function."⁶

On September 6, 2006, President Bush officially acknowledged the existence of the CIA program through which the United States held and interrogated individuals abroad by means of an "alternative set of procedures,"⁷ that far exceeded limits previously set for intelligence interrogations.⁸ On the same day, the United States Office

⁴ *Id.*

⁵ See, e.g., STEPHEN GREY, *GHOST PLANE* (2007); HUMAN RIGHTS FIRST, *BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS* (2005), available at http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf [hereinafter *BEHIND THE WIRE*]; CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *BEYOND GUANTÁNAMO: TRANSFERS TO TORTURE ONE YEAR AFTER RASUL V. BUSH* (2005) available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

⁶ Memorandum from Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 6 (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter *Torture Memo*].

⁷ White House Office of the Press Secretary, *News Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists*, (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (last visited Oct. 10Nov. 3, 2011).

⁸ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A01.

of the Director of National Intelligence (ODNI) publicly released an outline of the U.S. program.⁹ The United States designed the program's procedures, including sensory manipulation, exposure to cold, denial of food and drink, and forced nudity, to create as much distress as possible during detainees' transportation, detention and while they were being interrogated.¹⁰ Other publicly available documents indicate that the U.S. program also had a detailed set of procedures for detainee transport.¹¹

Each Petitioner describes a nearly identical set of procedures surrounding his extraordinary rendition. He was confronted by a team of black-clad, masked agents who beat and kicked him; forcibly stripped him, usually by cutting off his clothes; photographed him while naked; dressed him in a diaper; shackled him; manhandled him onto an aircraft; and immobilized him in a painful position for the duration of the flight.¹² In addition, some Petitioners report being forcibly drugged via an anal suppository. In all cases, the victim was forbidden to speak or move, and attempts to do so resulted in more physical abuse.

Survivors of the U.S. program, including the Petitioners, also report similar types of torture and cruel treatment in "black sites." Specifically, they suffered prolonged periods of forced nudity, shackling to the walls or floor, exposure to frigid temperatures,

⁹ OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF THE HIGH VALUE TERRORIST DETAINEE PROGRAM (2006) *available at* <http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf>.

¹⁰ OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, BACKGROUND PAPER ON CIA'S COMBINED USE OF INTERROGATION TECHNIQUES, (Dec. 30, 2004), *available at* <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf> [hereinafter *CIA INTERROGATION TECHNIQUES*].

¹¹ *Id.* See also Richard Esposito & Brian Ross, *Coming in from the Cold: CIA Spy Calls Waterboarding Necessary But Torture, Former Agent Says the Enhanced Technique Was Used on Al Qaeda Chief Abu Zubaydah*, ABC NEWS, Dec. 10, 2007, Part 1 of Transcript at 20-21, *available at* http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf (last visited Sept. 24, 2008) (describing transport procedures wherein "detainees are typically stripped naked; handcuffed, shackled, and blindfolded; have earplugs inserted in their ears and their mouths covered; and are hooded, before being bundled onto a plane and rendered").

¹² CIA Interrogation Techniques, *supra* note 10.

confinement in total darkness, and denial of adequate food, water, and sanitary facilities. They were also deprived of sleep for extended periods via exposure to painfully loud sounds and/or music, bright light, and repeated rousing by guards.

The United States implemented the U.S. program in a widespread and systematic manner. Government officials admit to having rendered “several dozen”¹³ or “mid-range two figures”¹⁴ individuals. 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 11.¹⁵ The Council of Europe and the European Parliament have identified 18 men 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 remained in secret CIA custody.¹⁶ In 2005, the Council of Europe noted that former intelligence officials had estimated that “hundreds” of people had been rendered by the United States.¹⁷ In addition, the UN Human Rights Council’s *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* (“UN Secret Detention Report”) found that at least 28 high value detainees and 66 other prisoners had

¹³ Michael Duffy, *Ten Questions for John Negroponte*, TIME, Apr. 16, 2006, at 6, available at <http://www.time.com/time/printout/0,8816,1184080,00.html>.

¹⁴ Council on Foreign Relations, A Conversation with Michael Hayden, (Sept. 7, 2007), http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_rvice.html.

¹⁵ NBC News’ Meet the Press, Transcript for May 15 (May 15, 2005), available at <http://www.msnbc.msn.com/id/7862265/> (Interview between NBC’s Tim Russert and Egyptian Prime Minister Ahmed Nazif); See also, HUMAN RIGHTS WATCH, BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT 54 (2005) available at <http://www.hrw.org/sites/default/files/reports/egypt0505.pdf> (identifying at least 63 individuals who have been rendered to, and in a few cases from, Egypt since 1995, 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, and noting that the United States was actively involved in these cases).

¹⁶ 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).

¹⁷ DICK MARTY, ALLEGED SECRET DETENTIONS IN COUNCIL OF EUROPE MEMBER STATES ¶ 66, note 13 (2006) (citing Michael Scheuer, former Chief of the Bin Laden Unit of the CIA).

been subject to extraordinary rendition between 2001 and 2005.¹⁸ The UN Secret Detention Report names each of the Petitioners in this case as victims of the U.S. program, and it provides an extensive account of their torture and abuse by U.S. agents and in proxy detention centers.¹⁹

Despite these and many other reports substantiating the widespread and systematic nature of the U.S. program, victims and survivors have been unable to pursue claims within the United States because American courts consistently accept the government's invocation of the state secrets privilege to bar litigation. In addition, no member of the CIA or others involved in designing and authorizing the U.S. program has ever been fully investigated, charged, let alone prosecuted, for widespread or systematic abuses.

On assuming the Office of President, Barack Obama promised to end the worst of the Bush-era practices, such as torture and the use of "black sites."²⁰ Although he ordered the dismantling of the CIA prisons, President Obama did not order an end to all renditions. Instead, he appointed a Task Force charged with advising him on how to change the Bush-era policies.²¹ The Task Force did not urge fundamental changes to the U.S. program, instead recommending certain improvements in the procedures used to

¹⁸ U.N. Human Rights Council, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, ¶ 131, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010) [hereinafter UN Secret Detention Report] (Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism).

¹⁹ See generally UN Secret Detention Report, *supra* note 18. In addition to the "black sites," where detainees were secretly held, the U.S. Program also held "ghost detainees," who are kept in acknowledged places of detention, but off the official registry lists. BEHIND THE WIRE, *supra* note 5.

²⁰ Margaret L. Satterthwaite, The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism 3 (May 2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157583 (citing Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009)).

²¹ *Id.* (citing Press Release, U.S. Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> [hereinafter "Task Force Press Release"]. (noting that the recommendations themselves have not been made public).

transfer detainees.²² It seems likely, therefore, that renditions will continue, as will the secrecy that surrounds them.

C. Procedural Background - Domestic Legal Proceedings in *Mohamed v. Jeppesen Dataplan, Inc.*

In May 2007, the American Civil Liberties Union (ACLU) filed suit in the Northern District of California on behalf of Binyam Mohamed, Abou Elkassim Britel, and Ahmed Agiza. Mohamed Bashmilah and Bisher al-Rawi joined the suit in August 2007.²³ The Complaint alleged that Jeppesen, an aviation logistical and travel services corporation, had knowingly participated in the U.S. program by providing aircraft and crew used by the CIA in the U.S. program with logistical support services for “torture flights” to “black sites” and proxy detention centers. The Complaint drew on publicly available information substantiating the existence of the U.S. program in general and the plaintiffs’ renditions in particular, including:

- A 2007 Council of Europe report on the U.S. extraordinary rendition and secret detention program involvement with European states;²⁴
- Detailed flight records compiled by a European Parliamentary inquiry;²⁵
- Reports by investigative journalists detailing the use of torture within the U.S. program;²⁶

²²Satterthwaite, *supra* note 20, at 3.

²³ First Amended Complaint, *Mohamed v. Jeppesen Dataplan, Inc.*, (N.D. Cal. Aug. 1, 2007) [hereinafter Jeppesen complaint].

²⁴ Jeppesen complaint ¶ 17 (citing Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report* 3 (Jun. 7, 2007), available at http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf [hereinafter “Marty Report”]).

²⁵ Jeppesen Complaint ¶ 52-55, 236-250.

²⁶ *Id.* ¶ 16 (citing Jane Mayer, *Outsourced: The C.I.A.’s Travel Agent*, *The New Yorker*, Oct. 30, 2006). A whistleblower claimed that a senior Jeppesen official knew of Jeppesen’s role in the extraordinary rendition and interrogation program, and that the official said in a board meeting that “[w]e do all of the

- Testimony by the former Director of the CIA acknowledging the U.S. program;²⁷
- White House memoranda purporting to justify abusive treatment of detainees;²⁸
- A public statement from the Egyptian prime minister acknowledging Egypt's role in the U.S. program;²⁹
- News reports containing eyewitness accounts of detainees being loaded onto "torture flights";³⁰
- NGO reports of detainee mistreatment by U.S. forces;³¹ and
- The U.S. Department of State's assessment of the use of torture against detainees in Morocco and Egypt.³²

In October 2007, before Jeppesen had filed its response, the U.S government moved to intervene, invoked the state secrets privilege, and moved to have the case dismissed before pretrial discovery.³³ In February 2008, the District Court granted both motions, holding that "there is a reasonable danger that compulsion of the [requested] evidence will expose military matters which, in the interest of national security, should not be divulged."³⁴

The District Court held that, since the action's subject matter was the essence of

extraordinary rendition flights - you know, the torture flights. Let's face it, some of these flights end up that way." See also ¶¶ 39, 45, 46.

²⁷ Jeppesen Complaint ¶ 33.

²⁸ *Id.* ¶36.

²⁹ *Id.* ¶¶ 37-39.

³⁰ *Id.* ¶¶ 38, 39.

³¹ *Id.* ¶ 47.

³² *Id.* ¶ 39.

³³ Notice of Motion and Motion to Intervene, Mohamed v. Jeppesen Dataplan, Inc., No. C-07-02798-JW (N.D. Cal. Oct. 19, 2007).

³⁴ Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128, 1133 (2008) (citing United States v. Reynolds, 345 U.S 1, 10 (1953)).

the privileged information, the case could not proceed.³⁵ It rejected the plaintiffs' argument that, due to President Bush's 2006 disclosure as well as the enormous amount of publicly available information about the U.S. program, the defendants' role in the case was no longer protected by the state secrets privilege. Choosing instead to cite to the government's classified declaration, the court held that allowing the case to proceed would "elicit facts which might tend to confirm or refute as of yet undisclosed state secrets."³⁶

The plaintiffs appealed to the Ninth Circuit Court of Appeals, and the United States, then a party to the case, again moved to dismiss under the state secrets privilege. In April 2009, a three judge panel of the Ninth circuit held that the District Court had erred in dismissing the suit.³⁷ Instead of making "an unnecessary zero-sum decision" between the judiciary and the executive branch of government,³⁸ the panel found that the District Court should have assessed each disputed piece of evidence individually to determine whether the state secrets privilege should apply to exclude that specific evidence.³⁹ Only then could the court determine whether the case could proceed without risking the publication of harmful state secrets. The panel remanded the case for further proceedings before the District Court.

The Ninth Circuit heard the case *en banc* and reversed the panel's decision by a vote of 6-5.⁴⁰ Although the Court did not question the government's assertion that extremely broad categories of information were privileged, it held that even though it was

³⁵ Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d at 1135.

³⁶ *Id.* at 1136.

³⁷ Mohamed v. Jeppesen Dataplan Inc., 579 F.3d 943, 962 (9th Cir. 2009).

³⁸ *Id.* at 955.

³⁹ *Id.* at 955-56.

⁴⁰ Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) cert. denied, 131 S. Ct. 2442, 179 L. Ed. 2d 1235 (U.S. 2011).

possible for the plaintiffs to proceed without relying on privileged evidence, “dismissal is nonetheless required . . . because there is no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets. . . .”⁴¹ The Court went on to suggest that the executive should honor “the fundamental principles of justice,” in light of the plaintiffs’ claims of grave human rights abuses.⁴² It urged the government to consider alternative means of providing redress, and it urged the U.S. Congress to investigate any possible wrongdoing by the executive branch.⁴³

Five dissenting judges forcefully argued that the District Court was the proper body to determine whether there was a feasible way to litigate Jeppesen’s liability without divulging state secrets. They felt that this would only be possible after Jeppesen had been obliged to file a responsive pleading and some discovery had been conducted into non-privileged information.⁴⁴ The dissent underscored the voluminous public materials submitted by the plaintiffs, stating that it was the District Court’s responsibility to analyze those materials and to rule on Jeppesen’s ability to litigate without infringing on state secrets.⁴⁵ The dissent also found the majority’s suggestion of “alternate remedies” to be insufficient.⁴⁶ The plaintiffs filed a petition for certiorari before the United States Supreme Court, which was denied in May 2011.⁴⁷

At no time during the pendency of the lawsuit did Jeppesen file any substantive documents in the proceedings outlined above. The United States, as interveners, presented the arguments at every stage, ensuring that the case was dismissed without any

⁴¹ *Id.* at 1087.

⁴² 614 F.3d at 1091.

⁴³ *Id.*

⁴⁴ *Id.* at 1094, 1101 (Hawkins, J., dissenting).

⁴⁵ *Id.* at 1095. Appendix A, beginning at page 1102, contains a complete list of the dozens of pieces of evidence upon which the plaintiffs base their claims.

⁴⁶ *Id.*

⁴⁷ *Mohamed v. Jeppesen Dataplan, Inc.* 131 S. Ct. 2442 (2011).

discovery.

III. ADMISSIBILITY

A. The Petition is Admissible Under the Commission's Rules of Procedure

The Petition is admissible in its entirety under the Rules of Procedure of the Inter-American Commission on Human Rights (“Commission’s Rules of Procedure”).

1. The Commission has Jurisdiction *Ratione Personae* to Consider the Petition

The Commission is competent *ratione personae* to consider this Petition. Pursuant to Article 23 of the Commission’s Rules of Procedure, each of the four Petitioners is a natural person who was subject to the jurisdiction of the United States and whose rights were protected under the American Declaration when the violations occurred.⁴⁸

2. The Commission has Jurisdiction *Ratione Materiae* to Consider the Petition

The Petitioners allege violations of Articles I, XVIII, XXV, XXVI and XXVII of the American Declaration. Therefore, the Commission has jurisdiction *ratione materiae* to consider this Petition. The Commission has consistently held that that the American Declaration constitutes a source of binding international obligations for the United States.⁴⁹

3. The Commission has Jurisdiction *Ratione Temporis* to Consider the Petition

⁴⁸ See *Gonzales v. United States*, Petition 1490-05, Inter-Am. Comm’n H.R., Report No. 52/07 Admissibility, OEA/Ser L/V/II 128, doc. 19, ¶ 37 (2007).

⁴⁹ 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 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 *Roach v. United States*, Case 9647, Inter-Am. Comm’n H.R., Resolution No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987); *Smith v. United States*, Petition 8-03, Inter-Am. Comm’n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. 1, ¶¶32-33 (2006).

The Commission has jurisdiction *ratione temporis* to examine this Petition. The United States has violated the Petitioners' rights and has further denied the Petitioners an effective remedy for the harms that they have suffered. This Petition alleges violations of the rights guaranteed by the American Declaration. Some of the alleged violations continue as at the date of this petition. These continuing violations are based upon the United States' continuing refusal to provide an effective remedy for the Petitioners' injuries.

4. The Commission has Jurisdiction *Ratione Loci* to Consider the Petition

Although the Petitioners' rights were violated outside of the territory of the United States, rights protected by the Declaration, and concomitant obligations on the U.S. to protect them, are not geographically limited to the United States. The Commission has developed its jurisprudence on the extraterritorial application of human rights most fully in relation to the Declaration, which applies to all OAS member states.⁵⁰ In developing its case law, the Commission has consistently looked to the jurisprudence of international and regional human rights systems, and the approach that they have taken

⁵⁰ For discussion of the Commission's application of regional human rights law to extra-regional conduct, see generally John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, AM. SOC'Y OF INT'L LAW INSIGHTS (Oct. 25, 2005), <http://www.asil.org/insights051025.cfm>; Christina M. Cerna, *Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law* (Ctr. for Human Rights & Global Justice, Working Paper No. 6, 2006), available at http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Cerna_Final.pdf; Christina M. Cerna, *Current Issues in Extraterritoriality: How Long Is the Long Arm Jurisdiction of International Human Rights Bodies?*, 11 ILSA J. INT'L & COMP. L. 465 (2005). For a discussion of the jurisprudence of other human rights bodies, see MICHAL GONDEK, *THE REACH OF HUMAN RIGHTS IN A GLOBALIZING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2009). See also Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1359-60 (2007) (quoting U.N. Human Rights Comm., *Comments of the Human Rights Committee: United States of America*, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995) (explaining the Human Rights Committee's disagreement with the U.S. view that the Covenant lacks extraterritorial reach and explaining that, "in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that State's territory.")).

regarding the extraterritorial application of obligations imposed on States parties by relevant human rights treaties and other instruments.⁵¹ In short, the Commission's competence *ratione loci* is not restricted to conduct taking place within the territory of the violating State or indeed the western hemisphere, so long as the conduct at issue took place under the "authority and control" of the violating State.

The Commission first set forth its "authority and control" test in *Coard v. United States*.⁵² In *Coard*, the Commission made clear that, in determining the application of the Declaration (or Convention), the critical factor is the relationship between the State and the victim, and not the geographic location of the individual or the conduct in question.⁵³ This approach was followed by the Commission in adopting Precautionary Measures on behalf of detainees at the Guantánamo Bay military base. There, the Commission found that the detainees were under the United States' jurisdiction because they were "wholly within the authority and control" of the United States, noting that they were held at the "unfettered discretion of the US."⁵⁴ The Commission's expansive conception of *rationae loci* is further evidenced in *Alejandro v. Cuba*, where the State conduct at issue took place

⁵¹ See, e.g., Ecuador *ex rel.* Molina v. Colombia, Inter-State Petition IP-02, Inter-Am. Comm'n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc. 10, ¶¶ 91-95 (2010).

⁵² *Coard v. United States*, Case No. 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. (1999).

⁵³ See *id.* ¶37 (suggesting that the important issue is not the victim's nationality or presence within "a particular geographic area" but whether under the circumstances the state observed rights of those subject to its "authority and control.") Notably, in this case concerning allegations that the United States violated petitioners' rights when it detained them, held them *incommunicado*, and mistreated them during a military action in Grenada, the Commission did not base its determination that the petition was subject to its jurisdiction on the fact that the victim was taken into U.S. custody from U.S. territory or that the United States had "effective" territorial control over Grenada.

⁵⁴ Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc 5 rev. 1 P 80 (Mar. 13, 2002) (stating that, regarding jurisdiction over extraterritorial activities, individuals at Guantánamo are under "authority and control" of the United States and that "no one who is under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights"); see also Decision of the Commission as to the Admissibility [of Haitians to the United States], Case 10.675, Inter-Am. Comm'n H.R., Report No. 28/93, OEA/Ser.L/V.85 Doc. 9 rev. (1994); *Salas v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report No. 31/93, OEA/Ser.L/V.85 Doc. 9 rev. (1994).

outside of the territory of Cuba, and thus outside the territory of any OAS member state. Despite this, the Commission applied its “authority and control” test to find a violation of the Convention.⁵⁵

More recently, in 2010, the Commission deemed admissible an inter-State petition brought by the State of Ecuador against the State of Colombia, alleging that the latter was responsible for the extrajudicial execution of an Ecuadorian national on Ecuadorian territory.⁵⁶ In its defense, Colombia argued that the American Convention bound States with respect to their conduct *on their territories* and when they were formally *occupying another territory*, and did not therefore apply in this case because Colombia exercised no territorial control over Ecuador. Colombia thus argued that the victim was not under its jurisdiction at the time of his death. Rejecting this argument, the Commission reiterated that human rights obligations run with a member State’s *control over an individual—not only a territory*—by its agents.⁵⁷ In arriving at this conclusion, the Commission set forth a framework for the exercise of its jurisdiction:

the Inter-American Commission has considered that it has competence *ratione loci* with respect to a State for acts occurring on the territory of another State, when the alleged victims were subjected to the authority and control of its agents. There would otherwise be a legal *lacuna* in the protection of those individuals' human rights that the American

⁵⁵ *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rec. (1999) (addressing claims related to an incident in which a Cuban military aircraft shot two civilian planes in international airspace).

⁵⁶ *Ecuador ex rel. Molina v. Colombia*, Inter-State Petition IP-02, Inter-Am. Comm’n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc. 10 (2010).

⁵⁷ *Id.* ¶ 92 (“In international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well. In this sense, the IACHR has established that ‘under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain.’ Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents. This position accords with [how] other international organizations in analyzing the sphere of application of international human rights instruments have assessed their extraterritoriality.”).

Convention seeks to protect, which would run counter to the object and purpose of this instrument.

Thus, the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.⁵⁸

Similarly, the Commission placed no geographical limitation on the exercise of its jurisdiction in the case of *Alikhani v. United States*, a petition brought under the American Declaration. There, the Commission held that it had jurisdiction *ratione loci* because the petitioner “was under the jurisdiction of the United States at the time of his arrest, detention and subsequent criminal proceedings.”⁵⁹ The fact that Mr. Alikhani was apprehended by the United States, without a warrant, in the territory of Bermuda, and that his arrest was formally effectuated on an international flight without Bermuda’s consent to extradition, did not affect the Commission’s analysis of its jurisdiction to hear the claim against the United States. In the Commission’s view, the U.S. agents’ physical custody over the petitioner, regardless of his geographic location, was sufficient to establish the state’s jurisdiction over him, and the imposition of human rights obligations on the United States.

The Commission has looked to other international human rights systems as a

⁵⁸ *Id.* ¶¶ 98-99.

⁵⁹ *Alikhani v. United States*, Case 4618/02, Inter-Am. Comm’n H.R. Report No. 63/05, ¶ 42 (2005).

guide to the contours of its “authority and control” test.⁶⁰ Like the Commission, the European Court of Human Rights has taken a broad view on the jurisdictional reach of the European Convention on Human Rights. In *Issa v. Turkey*, the European Court noted that if applicants establish either a State Party’s (a) “overall control” of the region, or (b) *custody of the individual* in question, the State could be held responsible for violations of the Convention, regardless of their geographic locus.⁶¹ Further, in *Ocalan v. Turkey*—a rendition case—the European Court emphasized that the physical transfer of an individual to the custody of a State Party brought him within the jurisdiction of that State for purposes of application of the Convention.⁶² This approach was followed most

⁶⁰ *Gonzales V. United States.*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 ¶ 135 (July 21, 2011) (citing *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report 63/08, ¶ 80 (2008)); *Statehood Solidarity Committee v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report 98/03, OEA/Ser. L/V/II.114, doc. 70 rev. 2, ¶¶ 91-93 (2003).

⁶¹ *Issa v. Turkey*, 41 Eur. H.R. Rep. 567 (2004) (holding that even where state did not occupy a territory, it was responsible for violations of the rights of individuals under its control/authority of its agents). According to the Supreme Court of the U.K., the European Court’s decision in *Issa* “clearly advances state agent authority as an alternative to effective territorial control as a basis of [European Convention] art 1 jurisdiction.” *R. v. Sec’y of State for Def.*, [2010] UKSC 29, [20]. In 2001, the European Court passed a somewhat anomalous decision in *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, to which the Inter-American Commission has not made reference. In *Bankovic*, the Court declined to exercise jurisdiction on the grounds that the Federal Republic of Yugoslavia, of which the plaintiffs were citizens, was not within the European Union and thus outside the *espace juridique* (legal domain) of the Convention. This silence by the Inter-American Commission is an indication that the Commission does not consider that similar territorial restrictions apply in relation to the scope of the protections afforded by the American Declaration. Indeed even in *Bankovic*, the European Court recognized that that under “exceptional circumstances,” jurisdiction would attach extra-regionally ¶ 78 (finding that because the Convention’s jurisdiction is limited to “*espace juridique*” of the EU, it could not consider a complaint concerning NATO bombings of Belgrade TV and radio station. The Court further explained that the “exceptional circumstances” in which jurisdiction would attach extra-regionally included 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.”)

⁶² *Ocalan v. Turkey*, 41 Eur. Ct. H.R. 45 (2005). This case concerned the actions of Turkish officials who had taken custody of the applicant in Nairobi, Kenya. Because the applicant was under “effective Turkish authority,” the Court deemed him to be within the jurisdiction of that member state (Turkey), despite being outside of its own territory and the European region, and thus subject to the Court’s jurisdiction. Similarly, in a recent case brought by individuals who were confined aboard a Cambodian vessel by French agents, the Grand Chamber of the European Court held that the applicants were within the jurisdiction of France for the purposes of Article 1 of the European Convention when they were detained and subject to the authority and control of the French state. *Medvedyev v. France*, Eur. Ct. H.R., App. No. 3394/03, (Mar. 29, 2010). For further discussion of *Ocalan*, see Satterthwaite, *Rendered Meaningless*, *supra* note 49 at 1372.

recently in *Al-Saadoon and Mufdhi v. the United Kingdom*,⁶³ where the European Court emphasized that the United Kingdom had “total and exclusive control over the prisons and the individuals detained in them.” The International Court of Justice has adopted a similar approach with regard to Israeli obligations in the Occupied Territories. In its Advisory Opinion to the General Assembly on the Construction of a Wall in Occupied Palestinian Territory, the ICJ found that the International Covenant on Civil and Political Rights (“ICCPR”) “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”⁶⁴ This Opinion endorsed the approach adopted by the U.N. Human Rights Committee (“HRC”) in General Comment 31,⁶⁵ which focuses on the issue of control over individuals as a separate basis from territorial control when determining the scope of the application of the ICCPR.⁶⁶

Thus the jurisprudence of the Inter-American System, as well as that of other international human rights systems, recognizes the extra-territorial reach of human rights obligations. The determinative factor in each system is whether a State has “authority and control” over the person or territory, and whether there is a “causal nexus” between the State’s acts and the violations alleged by the victim.

⁶³ *Al-Saadoon and Mufdhi v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89, (June 30, 2009) (holding that Iraqi nationals in British-controlled military prisons in Iraq were under the jurisdiction of the United Kingdom).

⁶⁴ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9).

⁶⁵ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (Mar. 29, 2004); *see also* Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee regarding United States of America*, CCPR/C/USA/CO/3, ¶ 10 (Sept. 15, 2006) (“The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice.... The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war.”).

⁶⁶ Satterthwaite, *Rendered Meaningless*, *supra* note 49, at 1365, n.182 and accompanying text.

Here, the Petitioners were each within the jurisdiction of the United States at the time of the violations alleged in the Petition. Each of the Petitioners was turned over to the United States by authorities in the States where they were initially detained. Binyam Mohamed and Abou Elkassim Britel were arrested in Pakistan and turned over to the United States, whose personnel subsequently rendered them to Morocco for interrogation. Mohamed Bashmillah was arrested in Jordan and turned over to the United States, which rendered him to Bagram Air Base. Bisher al-Rawi was arrested in the Gambia where he was turned over to the United States, which rendered him to the “Dark Prison” in Kabul.

Furthermore, Mr. Mohammed, Mr. Bashmillah, and Mr. al-Rawi were under the authority and control of the United States while being detained by the CIA in secret detention at Bagram Air Base in Afghanistan. Mr. Mohammed and Mr. al-Rawi were also detained under the authority and control of the United States at the “Dark Prison.” Mr. Bashmillah was held under the authority and control of the United States in a “black site” in an unknown country to which the United States transferred him. All the Petitioners were under the authority and control of the United States at the time they were detained pending their *refoulement* to third States.

Thus the Petitioners were all under the “authority and control” of the United States at the time that they suffered the violations alleged in the Petition, and there exists a clear causal nexus between the United States and the violations of Petitioners’ rights.

Moreover, under the circumstances it is appropriate for the Commission to exercise jurisdiction in this case because there is no other venue, domestic or international, in which the Petitioners could seek redress. As the Commission noted in the *Molina* case, permitting a legal *lacuna* in the protection of an individual’s human rights

would run counter to the object and purpose of the American Declaration.⁶⁷ The very purpose of the U.S. program was to apprehend, transfer, detain, and interrogate terrorist suspects outside the physical territory of the United States, and to thereby circumvent the protections that would otherwise be afforded under U.S. domestic law. If the Commission fails to exercise its jurisdiction here, the Petitioners will have no venue in which to seek a remedy for the violation of their human rights by the United States because there is no other regional human rights institution available to them. For this reason alone, the Commission should exercise its jurisdiction over this matter.

5. The Petitioners Have Met the Exhaustion of Domestic Remedies Requirement

Under Article 31 of the Commission's Rules of Procedure, a petitioner must demonstrate that she has exhausted all domestic remedies available to her. This exhaustion requirement does not apply, however, when the legislation of the State concerned does not afford adequate due process of law, when the petitioner has been denied effective access to legal remedies, or when there has been "unwarranted delay" in issuing a decision on those remedies.⁶⁸ As the Commission has stated, "[t]he rule of prior

⁶⁷ Ecuador *ex rel.* Molina v. Colombia, Inter-State Petition IP-02, Inter-Am. Comm'n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc.10, ¶ 98 (2010).

⁶⁸ See Rules of Procedure of the Inter-Am. Comm'n on Human Rights, art. 31, Nov. 13, 2009, *available at* <http://www.cidh.org/basicos/english/Basic18.RulesOfProcedureIACHR.htm>.

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
2. The provisions of the preceding paragraph shall not apply when:
 - a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
 - b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

exhaustion has as its aim to give the national authorities an opportunity to examine the alleged violation of a protected Convention [or Declaration] right and apply the available procedures of domestic law to remedy the situation before being examined by an international organ.”⁶⁹

Thus, the only domestic remedies that need be exhausted are those remedies that are “adequate to protect the rights allegedly infringed and effective in securing the results envisaged in establishing them.”⁷⁰ The Petitioners must show, therefore, that domestic remedies have been exhausted, or that the remedy is unavailable as a matter of law, fact, or delay, or that any potential remedy would be inadequate or ineffective to rectify the violations alleged.

The Petitioners allege violations of several substantive rights enshrined in the American Declaration. For the purposes of assessing the admissibility of this Petition, the alleged violations can be separated into two categories: direct violations of the American Declaration for abuses by U.S. agents, and indirect violations of the Declaration arising

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

⁶⁹ Ecuador *ex rel. Molina*, IP-02, ¶ 152.

⁷⁰ *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. Comm’n H.R., Report No. 24/06, OEA/Ser.L/V/II.124 doc. 5 ¶ 33 (2006); *see also Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 62-66 (July 29, 1988); *Fairén Garbí v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 06, ¶¶ 86-90 (Mar. 15, 1989); *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 05, ¶¶ 65-69 (Jan. 20, 1989); *Donoso v. Panama*, Petition 12.360, Inter-Am. Comm’n H.R., Report No. 71/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 21-22 (2002). The Commission has incorporated the longstanding jurisprudence of the Inter-American Court which states that “[a]dequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.” *Colmenares Castillo v. Mexico*, Petition 12.170, Inter.-Am. Comm’n H.R., Report No. 36/05, OEA/Ser.L/V/II.124 doc.5, ¶ 35 (2005) (citing *Velásquez Rodríguez*, Inter-Am. Ct. H.R., (Ser. C) No 4, ¶ 64.

as a consequence of the United States' failure to take reasonable measures to prevent violations of the Declaration and to hold accountable those responsible. The direct violations include violations of Article I (right to life, liberty and personal security), XXV (right of protection from arbitrary arrest), XXVI (right to due process of law) and XXVII (right to asylum) of the American Declaration. In addition, the Petitioners seek to hold the United States responsible for violations of these rights because the United States' failed to exercise "due diligence" to prevent and investigate violations of their rights by state and private actors. The Petitioners also seek to vindicate their rights guaranteed under Article XVIII, their right to truth and recourse to the courts.

To demonstrate that this Petition is admissible, the Petitioners must prove that they have exhausted domestic remedies in relation to these two categories of violations, and failing this, the Petitioners must establish that they are exempt from exhausting such remedies under Article 31(2).

- a. Arguments Concerning Exhaustion of Domestic Remedies Pertaining to Direct Violations of the American Declaration**
- i. The Petitioners Have Exhausted Domestic Remedies for Allegations of Direct Violations of the American Declaration**

Concerning the alleged violations of torture and other forms of ill-treatment (including *non-refoulement*) while under the jurisdiction of the United States ("direct violations"), the Petitioners have exhausted all available domestic remedies through the filing and prosecution of *Mohamed v. Jeppesen Dataplan, Inc.*, before the United States District Court for the Northern District of California on May 30, 2007. Following an order granting the government's motions to intervene and for dismissal of this case, the Petitioners filed an appeal with the Ninth Circuit Court of Appeals. Although a panel of

the Court of Appeals reversed the lower court, upon rehearing the case *en banc*, the Court of Appeals dismissed the action pursuant to the state secrets privilege. The Petitioners sought review of that decision by the U.S. Supreme Court, but on May 16, 2011, the Supreme Court denied that application, effectively ending Petitioners' attempt to seek redress before U.S. courts.

While the suit was brought against a civilian flight logistics company, Jeppesen Dataplan, Inc., at the earliest stage of the domestic proceedings,⁷¹ the United States intervened to become a party to the litigation and to have the case dismissed without further consideration. Thus, the U.S. government was on notice of the claims of direct violations now brought before this Commission. As a party to the lawsuit, the United States had ample opportunity to respond to the allegations in the complaint but instead opted to block any form of redress available to the Petitioners by intervening and preventing the courts from considering and determining the merits of their claims.⁷²

The principle underlying the exhaustion rule is that States must be afforded an opportunity to remedy violations of human rights before victims can bring their claims before an international body.⁷³ Accordingly, the Commission has stated that “if the

⁷¹ Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1076 (9th Cir. 2010), *aff'g en banc* 579 F.3d 943 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 2442 (U.S. 2011) (“Before Jeppesen answered the complaint, the United States moved to intervene and to dismiss plaintiffs’ complaint under the state secrets doctrine.”).

⁷² *See id.* (quoting the Public Declaration of the Director of the CIA, General Michael Hayden, who stated that “because highly classified information is central to the allegations and issues in this case, the risk is great that further litigation will lead to disclosures harmful to U.S. national security and, accordingly, this case should be dismissed.”).

⁷³ *See* DIEGO RODRIGUEZ-PINZON & CLAUDIA MARTIN, WORLD ORG. AGAINST TORTURE, 2 OMCT HANDBOOK SERIES: THE PROHIBITION OF TORTURE AND ILL TREATMENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES 77 n. 188 (2006). The Commission has stated that “[t]he reason for the rule of prior exhaustion of domestic remedies lies in the principle that the defendant State must be allowed, before anything else, to provide redress on its own and within the framework of its internal legal system.” Salvador Jorge Blanco v. Dominican Republic, Case 10.208, Inter-Am. Comm’n H.R., Report No. 15/89, OEA/Ser.L/V/II.76, doc.10, Conclusions ¶ 5 (1989). Following this rule affords States the opportunity “to resolve the problem under internal law.” *See* Velásquez Rodríguez, *supra* note 70, ¶ 61.

alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”⁷⁴

By intervening to become a party to the suit, presenting legal arguments seeking to dismiss the claim *in toto*, and successfully having the case dismissed, the United States engaged fully in the Petitioners’ attempts to seek a remedy before domestic courts and failed to provide redress to the Petitioners. Thus, the Petitioners have exhausted domestic remedies in relation to the direct violations carried out by the U.S. government.

ii. In the Alternative, the Petitioners are Exempt from Exhausting Domestic Remedies for Allegations of Direct Violations of the American Declaration

Under Article 31(2) of the Commission’s Rules of Procedure, Petitioners are granted exceptions to the exhaustion requirement where: (a) the domestic legislation of the State does not afford due process of law; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been an unwarranted delay. Here, the Petitioners are exempt from the exhaustion requirement as domestic legislation does not afford due process of law for the rights that are alleged to have been violated.

Article 31(2)(a) requires that “domestic remedies must be (1) adequate, in the sense that they must be suitable to address an infringement of a legal right; and (2) effective, in that they must be capable of producing the result for which they were

⁷⁴ Cárdenas v. Venezuela, Petition 667/01, Inter-Am. Comm’n H.R., Report No. 70/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 52 (2004).

designed.”⁷⁵ In its analysis of these requirements, the Commission has considered the receptivity of domestic courts to individuals bringing claims similar to those of a petitioner when determining whether remedies have been properly exhausted.⁷⁶ Thus, in *Gonzales v. United States*, the Commission stated that “a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of prevailing jurisprudence of the state’s highest courts... and therefore would not be effective in accordance with general principles of international law.”⁷⁷

Recent decisions of U.S. courts, including the U.S. federal district courts, courts of appeal and the Supreme Court, have consistently refused to consider the merits of claims similar to those of the Petitioners. Any further pursuit of remedies before U.S. courts by the Petitioners would have met a similar fate. In *El Masri v. Tenet*, for example, the United States intervened and successfully sought dismissal of the case on the basis of the state secrets privilege. In *El Masri*, the court dismissed the plaintiff’s claims from the

⁷⁵ *Housel v. United States*, Petition 129/02, Inter-Am. Comm’n H.R., Report 16/04, OEA/Ser.L/V/II.122, doc. 5 rev., 1 ¶ 31 (2004) (citing Velásquez Rodríguez, Judgment of July 29, 1988, Inter-Am. Ct. H.R., (ser. C) No. 4, ¶¶ 64-66.), accord *Graham v. United States*, Case No. 11.193, Inter-Am. Comm’n H.R., Report 51/00, OEA/Ser.L/V/II.111 doc. 20, rev. ¶ 55 (2000), and *Villareal v. United States*, Case 11.753, Inter-Am. Comm’n H.R., Report No. 108/00, OEA/Ser.L/V/II.111, doc. 20, rev., ¶ 60 (2000)

⁷⁶ See Velásquez Rodríguez, Inter-Am. Ct. H.R. (ser. C) No 4, ¶¶ 64-66; see also *Shibayama v. United States*, Petition 434-03, Inter-Am. Comm’n H.R., Report 26/06, OEA/Ser.L/V/II.7, ¶ 51 (2006) (“[I]ndividuals similarly situated to the Petitioners had raised [domestic] claims unsuccessfully before the U.S. Court of Appeals for the Ninth Circuit and that the U.S. Supreme Court denied certiorari review of those findings”); see also *Elliott v. United States*, Petition 28/03, Inter-Am. Comm’n H.R., Report No. 68/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 35 (2004) (basing its finding that further pursuit of domestic remedies would have no reasonable prospect of success in part on showing that Supreme Court had consistently refused to consider the issue); *Medellin v. United States*, Case 12.644, Inter-Am. Comm’n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37, ¶117 (2009) (finding that the Supreme Court’s recent rejection of a challenge to a similar method of lethal injection as was at issue in petitioner’s case meant that petition should be deemed to have exhausted local remedies).

⁷⁷ *Gonzales*, *supra* note 48, ¶ 49 & ¶ 49 n. 23.

outset and failed to consider them on the merits.⁷⁸ Likewise, in *Arar v. Ashcroft, Padilla v. Rumsfeld, Arkan Mohamed v. Rumsfeld, Ali v. Rumsfeld, Rasul v. Rumsfeld, Saleh v. Titan, Al-Shimari v. CACI Int'l Inc.*, and *Al-Quraishi v. Nakhla*, the courts dismissed similar claims of torture and inhumane treatment without any consideration of the merits of the claims.⁷⁹ In these cases the victims' and survivors' efforts to seek civil redress for

⁷⁸ In *El-Masri v. Tenet*, a German citizen who was seized at the Serbian-Macedonian border, held *incommunicado* and handed over to U.S. agents sued for redress. In his filing, he alleged that after his apprehension he was transported to a CIA prison in Afghanistan where he was subjected to inhuman conditions and coercive interrogation and was held without charge or public disclosure for several months. Five months after his abduction, he was released on a hill in Albania. Mr. El-Masri brought an action in the Eastern District of Virginia against George Tenet, the former Director of the CIA and three aviation corporations alleging that he was illegally detained as part of the CIA's extraordinary rendition program, tortured and subjected to other inhumane treatment. The District Court granted the government's motion to dismiss the case on state secrets grounds. The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's decision and the Supreme Court denied review. 437 F. Supp. 2d 530 (E.D. Va.), *aff'd sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied* 552 U.S. 947 (2007).

⁷⁹ In *Arar v. Ashcroft*, a Canadian citizen who was held *incommunicado* after seizure at John F Kennedy airport in New York sought remedies in U.S. court. He alleged that, pursuant to the CIA rendition program, he was rendered to Syria, where he was tortured. He filed an action in the Eastern District of New York. The Court dismissed the suit against U.S. government officials on grounds that he was unable to show a viable cause of action under the Torture Victim's Protection Act, and that national security and foreign policy considerations foreclosed a constitutionally derived individual right of action. The U.S. Court of Appeals for the Second Circuit affirmed the court lower decision and the Supreme Court denied review, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (2006), *aff'd* 532 F.3d 157 (2d Cir. 2008), *aff'd en banc* 585 F.3d 559 (2d Cir. 2009), *cert. denied* 130 S.Ct. 3409 (2010). In *Lebron v. Rumsfeld*, a U.S. citizen whose rights were violated sought redress in court. Mr. Padilla alleged that he was seized from a U.S. jail and declared an "enemy combatant" and secretly transported to a military prison in South Carolina where he was held for three years and eight months and was subjected to torture and other forms of coercive interrogation. In dismissing the suit on grounds of qualified immunity, the Court hesitated to allow a constitutionally derived individual right of action related to detention and treatment. *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011). In *In re Iraq and Afghanistan Detainees Litigation*, nine plaintiffs who were detained in U.S. military custody in Iraq or Afghanistan and were subjected to torture and other cruel, inhumane or degrading treatment brought an action against the former Defense Secretary and other senior military leaders. The District of Columbia District Court granted the defendants' motion to dismiss holding that they were entitled to qualified immunity for constitutional torts and absolute immunity for alleged violations of international law. The Court also dismissed claims brought under a constitutionally derived cause of action and the Alien Tort Statute on immunity and national security grounds. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (2007), *aff'd sub nom.* *Ali v. Rumsfeld*, 649 F.3d 762 (2011). In *Rasul v. Myers*, four citizens of the United Kingdom who were former detainees at Guantánamo Bay Naval Station brought suit alleging prolonged arbitrary detention, torture, inhumane treatment, denial of liberties without due process and the prevention of free exercise of religion. The Court dismissed all claims holding that the defendants were entitled to qualified immunity. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.), *cert. denied* 130 S. Ct. 1013 (2009). In *Saleh v. Titan Corp.*, more than 250 Iraqi nationals filed claims relating to allegations of torture and other forms of ill-treatment at the U.S. military prison at Abu Ghraib by private contractors as well as U.S. military personnel. The Court of Appeals affirmed the dismissal of the case by the lower courts holding that the tort claims arising of the defendants' alleged involvement in the abuse were federally preempted and that the alleged acts of torture were not actionable under the Alien Tort Statute. *Saleh v. Titan Corp.*, 580 F.3d 1 (2009), *cert. denied* 131 S. Ct. 3055 (2011).

violations of their human rights were blocked on procedural grounds using legal arguments identical to those employed by the government of the United States in *Mohamed v. Jeppesen*, or arguments based on immunities doctrines and deference to military decision-making.⁸⁰

While domestic remedies may theoretically exist in the United States legal system, they are not effective. Available remedies are not capable of providing any form of redress to the Petitioners due to the invocation of the state secrets privilege, immunities, and deferential doctrines by the government, and the acceptance of such assertions by the courts. In light of such a systemic failure to consider cases, insofar as the Commission finds that there are any direct claims left unexhausted, the Petitioners are exempted from exhausting domestic remedies in relation to those claims.

- b. Arguments Concerning Exhaustion of Domestic Remedies Pertaining to the Government’s “Due Diligence” Obligations to Protect Against Human Rights Violations and to Guarantee the Petitioners’ Right to Truth and Recourse to the Courts**
- i. The Petitioners are Exempt from Exhausting Domestic Remedies for the Government’s Violations of its “Due Diligence” Obligations**

The United States has repeatedly invoked the “state secrets” privilege and

In *Al Shimari v. CACI Int’l Inc.*, four Iraqi nationals who were detained at Abu Ghraib military prison alleged that they were subject to torture and other forms of ill-treatment. The U.S. Court of Appeals for the Fourth Circuit reversed a lower court decision and dismissed the case stating that “conduct carried out during war and the effects of that conduct, for the most part, [are] not properly the subject of judicial evaluation.” *Al-Shimari v. CACI Int’l, Inc.*, 2011 WL 4382081 (4th Cir. 2011). In *Al-Quraishi v. L-3 Svcs., Inc.*, 72 Iraqi nationals alleged that they were victims of violations of human rights at Abu Ghraib military facility. The Court of Appeals for the Fourth Circuit dismissed the case, noting the important interest that lies in “insulat[ing] the battlefield from the unjustified exertion of power by the Courts of the 51 States and to free military operatives from the fear of possible litigation and the hesitancy that such fear engenders.” *Al-Quraishi v. L-3 Svcs., Inc.*, 657 F.3d 201, 207 (4th Cir. 2011). On November 8, 2011, the Fourth Circuit issued an order granting the petition for rehearing *en banc*, and scheduled oral argument for the January 24-27, 2012 session. Order Granting Petition for Rehearing 657 F.3d 201 (2011) available at <http://ccrjustice.org/files/2011-11-08%20Rehearing%20order%20in%20Al%20Quraishi.pdf>.

⁸⁰ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *aff’d en banc* 579 F.3d 943 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 2442 (U.S. 2011).

governmental immunities to seek dismissal of cases seeking civil redress for human rights violations committed by U.S. officials and others in counter-terrorism operations. U.S. courts by and large have acceded to these government demands, leaving the Petitioners and other victims and survivors of the U.S. program with no judicial recourse for violations of their human rights.

The Petitioners claim that the United States is responsible for the violations of their rights because it has failed in its obligation to prevent and investigate these alleged violations. In addition, the Petitioners claim that the United States failed to guarantee their right to truth and their right to a remedy before U.S. courts. These violations arise as a direct consequence of the government's design and implementation of the U.S. program. Effective redress for the Petitioners requires that the United States provide a forum where details of the program and the rights violations it gave rise to can be considered; a mechanism that the United States has refused to allow. Thus, there exists no domestic remedy that could provide the Petitioners with any form of redress and as such, no existing remedy could be considered effective in this case. Accordingly, this Petition is admissible under Article 31 of the Commission's Rules of Procedure.

6. The Petition has been Submitted Within Six Months of the Exhaustion of Domestic Remedies

A petitioner must submit her petition to the Commission within six months following the date on which she has been notified of the final decision of country's highest court.⁸¹ And, where one of the exceptions to exhaustion under Article 31(2) of the Commission's Rules of Procedure is relied upon, a petitioner must present their petition within a reasonable time period.

⁸¹ Rules of Procedure of the Inter-Am. Comm'n, *supra* note 68, art. 32(1).

Here, the U.S. Supreme Court denied the Petitioners' petition for review of the lower court's decision on May 16, 2011.⁸² Thus, a petition filed by November 16, 2011 is timely. For any claims the Commission finds to fall within an exception to the exhaustion requirement, a petition will be considered timely if submitted promptly and in a reasonable time. This petition meets both criteria.

7. There Are no Proceedings Pending Before Any Other International Tribunals

In accordance with Article 33 of the Commission's Rules of Procedure, the Petitioners confirm that none of the issues in this Petition are the subject matter of proceedings before any other international tribunal; nor have they been previously examined and settled by the Commission or another international tribunal.⁸³

⁸² For example, in the case of *Powell v. United States*, the Commission looked to the date of the Supreme Court's denial of the petition for certiorari to determine whether the petition to the IACHR was timely filed. *Powell v. United States*, Petition 3885/02, Inter-Am. Comm'n H.R., Report No. 12/05, OEA/Ser.L/V/II.124, doc. 5, ¶ 48 (2005). *See also* *Hall v. United States*, Petition 1349-07, Inter-Am. Comm'n H.R., Report No. 77/09, OEA/Ser.L/V/II.135, doc. 51, corr. 1, ¶ 41 (2009) ("Article 32(1) of the IACHR's Rules of Procedure require that for a petition or communication to be admitted, it must be lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment. In the present case, the petitioners submit that the judgment that exhausted the domestic remedies was the U.S. Supreme Court decision of April 16, 2007 to decline review of the denial of post-conviction relief. The State has not submitted observations in this regard. Accordingly, since the petition was presented on October 16, 2007, the IACHR considers that it is not barred from consideration under Article 32 of its Rules of Procedure.").

⁸³ An exception to this rule applies in the two circumstances listed under Article 33(2). The Commission may consider a petition where the other relevant international organization has only examined the general human rights situation in the State in question and has not made a decision on the specific facts contained in the petition. Secondly, the Commission may consider the petition when the petitioner before the other organization is a third party or non-governmental entity having no mandate from the victim. *See* Inter-Am. Comm'n Rules of Procedure, *supra* note 68, art. 33(2). *See generally* JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS*, 127-29 (2003). Amnesty International has made several submissions to UN Special Procedures concerning the treatment of Mr. Bashmilah by the United States. These proceedings were brought before bodies without adjudicatory mandates. Amnesty International filed a communication with the Working Group on Arbitrary Detention, in response to which the group issued opinion 48/2005. Rep. of the Working Group on Arbitrary Detention, 62d Sess., Jan. 1, 2006 – Mar. 27, 2006, ¶ 56, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005). Amnesty International also made a submission to the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. *See* Declaration of Margaret Satterthwaite in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss Or, in the Alternative, For Summary Judgment, *Mohamed v. Jeppesen*, 539 F. Supp. 2d 1128 ¶ 14 (N.D. Cal. 2008) (No. 5:07-cv-02798) ("The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental

IV. LEGAL ARGUMENT

A. The Commission Should Interpret the American Declaration in Light of Recent Developments in Human Rights Law

The Inter-American Commission has consistently determined that the American Declaration and other Inter-American human rights instruments should be construed in light of the developing standards of human rights law articulated in national, regional and international fora. Thus, the Commission looks to a broad array of international treaties, other instruments, and decisional authority to interpret the nature and scope of the obligations established under the American Declaration.⁸⁴ The Commission has found that the American Convention “may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”⁸⁵ The Commission, therefore, considers the jurisprudence developed in the context of the American Convention a particularly important guide to the proper interpretation of analogous but less specific provisions of the Declaration. The Commission has also noted

Freedoms While Countering Terrorism, Professor Martin Scheinin, together with the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Manfred Nowak, communicated with several countries concerning Mr. Bashmilah, relaying the facts regarding abuses that he suffered during his rendition and secret detention and requesting an official response.”)

⁸⁴ Gonzales, *supra* note 60, ¶ 118 (“The Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to members states.”)(citing generally *Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010); *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08 (July 25, 2008); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report 40/04, OEA/Ser.L/V/II.122, doc. 5 (2004); *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); *Domingues v. United States*, Case 12.285, Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)).

⁸⁵ *Solidarity Statehood Comm. v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 ¶ 87 n.79 (2003) (citing *Garza v. United States*, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 88-89 (2000)). *See also* Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000) [hereinafter *Canadian Asylum Seekers Report*] (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

that other international laws and practices provide constructive insights into the proper interpretation and application of rights recognized by the American Declaration,⁸⁶ including authorities from the Human Rights Committee, the Committee Against Torture, and U.N. Special Rapporteurs, as well as regional bodies, such as the Council of Europe and the European Court of Human Rights.⁸⁷

B. The United States Is Responsible for Violating Petitioners’ Rights to be Free from Torture and Other Cruel, Inhuman, and Degrading Treatment (CIDT), Arbitrary Detention, Forced Disappearance, and *Refoulement*

As victims and survivors of the U.S. program, the Petitioners suffered torture/CIDT, arbitrary detention, forced disappearance, and *refoulement*, all of which are prohibited under the American Declaration.⁸⁸ The Petitioners suffered multiple rights violations during their transport on rendition flights, during their detention in CIA-run “black sites,” and during their detention in known U.S. facilities. U.S. agents were directly responsible for these violations.

⁸⁶ See, e.g., Report on the Situation of Human Rights in the Peruvian State of Cayara, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.83, doc. 32 rev. (1993); Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); Solidarity Statehood Comm. v. United States, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser./L/V/II.114, doc. 70 rev. 1 ¶ 91-93 (2003).

⁸⁷ See, e.g., *Ximenes-Lopes v. Brazil*, Inter Am. Ct. H.R. (ser. C) No. 149 ¶ 51 (2006) (citing *Storck v. Germany*, Eur. Ct. H.R., App. No 61603/00 (2005) and other international declarations, standards and principles in order to “illuminate the reach and content” of the right to life and the right to human treatment” in the Inter-American system, and finding “these soft-law documents helpful for the adjudication of the instant case”; *Ricardo Canese Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111 ¶ 115-35 (relying on HRC General Comment 27); *YATAMA Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 ¶ 208 (quoting from HRC General Comment 25); *Raxcacó Reyes Case*, 2005 Inter-Am. Ct. H.R., (ser. C) No. 133 ¶¶ 47, 69 (citing HRC Concluding Observations on reports of Iran and Iraq); *Canadian Asylum Seekers Report*, *supra* note 85, ¶¶ 28, 159, 165 (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*, *supra* note 84, ¶¶ 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);

⁸⁸ American Declaration on the Rights and Duties of Man arts. I, XXV, XVI, XXVII May 2, 1948 (*reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)) [hereinafter *American Declaration*].

1. Articles I, XXV, and XXVI of the American Declaration Prohibit Torture and Other Inhumane Treatment

a. The American Declaration Prohibits Torture and CIDT

Articles I, XXV, and XXVI of the American Declaration prohibit torture and other cruel, inhuman or degrading treatment. Article I ensures “life, liberty, and the security of [the] person,” while Article XXV prohibits deprivation of an individual’s liberty without due process of law.⁸⁹ Article XXV also expressly protects an individual’s right to “humane treatment” while in custody.⁹⁰ Article XXVI mandates that every individual accused of an offense receive due process of law, and not be subjected to “cruel, infamous or unusual punishment.”⁹¹ In establishing the scope of the protection against torture, the Commission⁹² has relied on the definition of that right under Article 2 of the Inter-American Torture Convention.⁹³ According to the Commission, torture must “(1) produce physical or mental pain or suffering, (2) be inflicted intentionally; and (3) be inflicted by state agents or persons acting under the orders or instigation “of such

⁸⁹ *Id.* arts. I, XXV.

⁹⁰ *Id.* art. XXV.

⁹¹ *Id.* art. XXVI.

⁹² Raquel Martin de Mejia v. Peru, Case 10.970, Inter-Am. Ct. H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 157, 185 (1995).

⁹³ Organization of American States, 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) [hereinafter *Inter-American Torture Convention*].

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

agents.”⁹⁴ Significantly, an act must be intentional to constitute torture, but need not be committed with any particular purpose.

Inter-American case law recognizes the prohibition against torture as a *jus cogens* norm that is non-derogable in times of war, emergency or terrorist activity.⁹⁵ In addition, 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*.”⁹⁶

The Commission has recognized Article I protections as co-extensive with those afforded by Article 5 of the Convention.⁹⁷ Article 5 expressly guarantees every person’s “right to have his physical, mental, and moral integrity respected...No one shall be subjected to torture or cruel, inhuman, or degrading treatment.”⁹⁸ Reading Articles I, XXV, and XXVI together, the Commission has concluded that the Declaration prohibits three categories of treatment: (1) torture, (2) other CIDT, and (3) other violations of one’s physical, mental, or moral integrity.⁹⁹ Incorporating the Court’s jurisprudence into its own, the Commission has noted that detainees “have the right to live in prison conditions that are in keeping with personal dignity, and the State must guarantee their rights to life

⁹⁴ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 154 (2002); *see also* Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Inter-Am Comm’n H.R. Report No. 35/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 ¶ 79 (1997).

⁹⁵ *See* Canadian Asylum Seekers Report, *supra* note 85 ¶¶ 118, 154; Cabrera v. Dominican Republic, Report No. 35/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 ¶ 79 (1997); Goiburú v. Paraguay, Inter-Am. Ct. HR (ser. C) No. 154 ¶ 128 (Sept. 26, 2006) (on torture).

⁹⁶ Canadian Asylum Seekers Report, *supra* note 85, ¶ 118.

⁹⁷ Report on Terrorism and Human Rights, *supra* note 94, ¶ 155 n. 388 (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. Comm’n H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985).

⁹⁸ Inter-American Convention on Human Rights, art. 5.

⁹⁹ Report on Terrorism and Human Rights, *supra* note 94, ¶¶ 149-150.

and personal integrity. . . .”¹⁰⁰

The difference between torture and CIDT hinges on “the intensity of the suffering inflicted.”¹⁰¹ Inhuman or degrading treatment must reach a minimum threshold of suffering, depending on “the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.”¹⁰² Infliction of mental and emotional suffering, even without physical abuse, is sufficient to constitute inhuman treatment.¹⁰³

The Commission has previously determined that holding detainees *incommunicado* or in isolation constitutes CIDT.¹⁰⁴ The Court has also held that the sole act of holding an individual *incommunicado* for periods ranging from eight to thirty-seven days constituted CIDT.¹⁰⁵ In *Velásquez Rodriiguez*, the Court held that subjecting a person to prolonged *incommunicado* detention and deprivation of contact from the outside world constitutes “cruel and inhuman treatment, harmful to the psychological and moral integrity of the person...”¹⁰⁶ Due to the secrecy surrounding their captivity, the Commission has found that detainees held in *incommunicado* detention are more vulnerable to other forms of abuse, and their lack of access to the outside world

¹⁰⁰ Ferreira Braga v. Brazil, Case 12.019, Inter-Am. Comm’n H.R., Report No. 35/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008) ¶ 73.

¹⁰¹ Cabrera v. Dominican Republic, Case 10.832, Inter-Am. Comm’n H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 821 ¶ 80 (citing Ireland v. United Kingdom, App. No. 5310/71, Ser A, No. 25 (Eur. Ct. H.R.) ¶ 167).

¹⁰² *Id.* ¶ 78.

¹⁰³ Urrutia v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003). ¶ 93 (“[A]ccording to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture, particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts. . .”).

¹⁰⁴ Suárez Rosero v. Ecuador, Judgment Inter-Am. Ct. H.R., (Ser. C) No.35, ¶ 90 (Nov. 12, 1997).

¹⁰⁵ Castillo-Petruzzi v. Peru, Judgment, Inter-Am. Ct. H.R., (Ser. C) No. 52, ¶ 192 (May 30, 1999); Cantoral-Benavides v. Peru, Judgment, Inter-Am. Ct. H.R., (Ser. C) No. 69 ¶ 81 (Aug. 18, 2000); De la Cruz-Flores v. Peru, Judgment, Inter-Am. Ct. H.R., (Ser. C) No.115 ¶ 130 (Nov. 18, 2004).

¹⁰⁶ Velásquez Rodríguez, *supra* note 70, ¶ 156.

contributes significantly to a deterioration in their moral and psychological state, thus elevating their level of suffering.¹⁰⁷

Inter-American case law recognizes that solitary confinement *per se* can be a form of torture or, at the very least, CIDT, and consequently has imposed limitations on its use.¹⁰⁸ In *Suárez Rosero v. Ecuador*, the Court stated that solitary confinement should be used only as “a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights.”¹⁰⁹ In *Lori Berenson Mejia v. Peru*, the Court held that prolonged detention in solitary confinement amounted to CIDT.¹¹⁰ Berenson was held in solitary confinement in a small cell for over a year, and was only allowed outside for a half hour each day.¹¹¹ In all cases where solitary confinement is imposed, it must be subject to strict judicial control.¹¹² And, where such controls are not in place, the Commission has stated that “its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment.”¹¹³

b. International Law and Practice Prohibits Torture and CIDT

The Committee Against Torture (“CAT”) and the HRC have both found that the U.S. program violates fundamental human rights, specifically the prohibition on torture

¹⁰⁷ *Id.*

¹⁰⁸ *Montero-Aranguren v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 94 (July 5, 2006). The Inter-American Court specifically referred to other international instances in this regard, including the report of the UN Committee Against Torture on Turkey, the U.N. Standard Minimum Rules for the Treatment of Prisoners and the findings of the European Court in *Mathew v. Netherlands*, Appl. No. 24919/03, Eur. Ct. H.R. (2005).

¹⁰⁹ INTER-AM. COMM’N H.R., PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS, Principle XXII (2008) *available at* <http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>.

¹¹⁰ *Berenson-Mejia v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004) ¶¶ 106, 109.

¹¹¹ *Id.* 88(74)(i).

¹¹² *Id.*

¹¹³ *Id.*

and CIDT.

In their recent review of U.S. compliance with the relevant treaties, the CAT examined the U.S. program.¹¹⁴ The CAT observed that practices such as secret detention and the interrogation techniques approved for use on detainees held in connection with the “war on terror,” including sexual humiliation, “waterboarding,” “short shackling,” and “using dogs to induce fear,” violate the Convention Against Torture.¹¹⁵ The CAT noted that the Convention’s prohibitions on torture are universal and non-derogable, and that its rules against CIDT apply to “all areas under the *de facto* effective control of the State Party, by whichever military or civil authorities such control is exercised.”¹¹⁶ It also found that holding individuals in secret detention facilities is a “*per se* violation” of the Convention.¹¹⁷ In addition, the Committee expressed concern over vague and confusing language in U.S. interrogation rules that provided an open door to abuse.¹¹⁸ It directed the United States to “rescind any interrogation technique . . . that constitutes torture or cruel,

¹¹⁴ Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) *available at* [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf). The CAT issued the findings in this subsection in response to the U.S. 2006 report. The United States, which is expected to report to CAT every four years, has not yet submitted the report that was due in 2010. *See* Office of the United Nations High Comm’r for Human Rights, <http://www2.ohchr.org/english/bodies/cat/reports2011.htm> (last visited Nov. 7, 2011). The Committee has expressed concerns similar to the ones noted above in relation to the pending U.S. report. *See* U.N. Comm. against Torture, List of issues prior to the submission of the fifth periodic report of United States of America, 43rd Sess., Nov. 2-20, 2009, U.N. Doc. CAT/C/USA/Q/5 (Jan. 20, 2010), *available at* <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.USA.Q.5.pdf>.

¹¹⁵ Conclusions and Recommendations of the Committee Against Torture: United States of America, *supra* note 114, ¶ 24. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) (defining torture as “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. . .”).

¹¹⁶ Conclusions and Recommendations of the Committee Against Torture: United States of America, *supra* note 114, ¶ 15.

¹¹⁷ *Id.* ¶¶ 17, 22 (specifically mentioning that prolonged detention without charge at Guantánamo Bay may violate CAT and recommending closure of the facility and judicial process for those therein).

¹¹⁸ *Id.* ¶ 24.

inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control...¹¹⁹

The HRC has likewise determined that CIA rendition procedures violate Articles 7 and 10 of the ICCPR.¹²⁰ The HRC has also found that other techniques employed by the United States in its programs violate the prohibitions of torture and CIDT, including prolonged sleep deprivation,¹²¹ physical beatings, prolonged use of stress positions, and prolonged forced standing.¹²²

Outside the context of the U.S. program, other human rights bodies have found that similar practices to those used in the program violate the prohibition on torture and CIDT. In *Akosy v. Turkey*, the European Court held that stripping a victim and suspending him by his tied arms for the purposes of interrogation was an act of torture.¹²³ In addition, the European Court has held that wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation/reduction of food and drink constitute CIDT.¹²⁴ Examining similar techniques many years later, the UN Special Rapporteur on Torture, stated that practices such as beating, suspension by the arms or legs, exposure to excessive light or noise, prolonged sleep deprivation, prolonged denial of food, sanitary

¹¹⁹ *Id.*

¹²⁰ *Cf. Agiza v. Sweden*, United Nations, Comm. Against Torture, 34th Sess., Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, ¶ 13.3 (May 24, 2005) (determining that Agiza's treatment during the extraordinary rendition process constituted cruel, inhuman or degrading treatment).

¹²¹ *See* Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture*, U.N. Doc. A/52/44, ¶ 257 (Sept. 5, 1997). The Committee does not state what constitutes a "prolonged period," the Committee considered a specific case from Israel in which the detainee was "interrogated and tortured over the course of the next 30 days" while another detainee was "forced to sit handcuffed and hooded in painful and contorted positions, subjected to prolonged sleep deprivation and beaten over the course of three weeks" and found it to be torture. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1997/38: Addendum: Summary of Cases Transmitted to Governments and Replies Received*, U.N. Doc. E/CN.4/1998/38/Add.1 (Dec. 24, 1997).

¹²² Report on Terrorism and Human Rights, *supra* note, 94 ¶ 162.

¹²³ *Id.* ¶ 163.

¹²⁴ *Ireland v. United Kingdom*, *supra* note 101, ¶ 167.

facilities, or medical attention, and total isolation and sensory deprivation can be severe enough to rise to the level of torture.¹²⁵ In addition, the CAT has stated that acts such as hooding, sleep deprivation, exposure to cold, and prolonged exposure to loud music, when applied in combination with other CIDT, can constitute torture.¹²⁶

c. Petitioners were Subject to Torture and CIDT by U.S. Agents During Their Renditions, in CIA “Black Sites,” and in Other U.S.-Run Detention Centers

Under Articles I, XXV, and XXVI of the Declaration, the Petitioners have the inalienable right to be free from all forms of torture and CIDT. Detention and transfer within the U.S. program, however, entailed multiple violations of these rights on a repeated and regular basis. The Petitioners suffered literally hundreds of instances of physical and psychological torture and CIDT by U.S. agents, including:

- Beating
- Kicking
- Forced stripping and prolonged forced nudity
- Forced administration of a drug via painful anal insertion
- Shackling and immobilization in painful positions, often for extended periods
- Sensory deprivation through prolonged detention in specially designed cells
- Sensory manipulation/overload through prolonged exposure to bright light and painfully loud noise or music
- Exposure to extreme cold without adequate clothing
- Sleep deprivation, sometimes for prolonged periods

¹²⁵ Special Rapporteur on 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, U.N. Doc. E/CN.4/1986/15, ¶ 119 (Feb. 19, 1986).

¹²⁶ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED STATES’ INTERROGATION OF DETAINEES 18-19 (2003), *available at* <http://www.abcnny.org/pdf/HUMANRIGHTS.pdf>.

- Denial of exposure to sunlight for periods exceeding one year
- Denial of adequate nutrition, resulting in severe weight loss
- Forced feeding through painful insertion of nasogastric tubes
- Confinement to tiny, squalid cells
- Prolonged *incommunicado* detention
- Prolonged solitary confinement
- Denial of access to sanitary facilities
- Threats of worse torture in other countries

These abuses, applied consistently and in combination with one another, produced tremendous suffering in the Petitioners. Each of these men carries the physical and mental scars of his treatment by U.S. agents. Thus, their torture and abuse amount to multiple violations of Articles I, XXV, and XXVI.

2. Article XXV of the American Declaration Prohibits Arbitrary Detention

a. The American Declaration Prohibits Arbitrary Detention

Article XXV states that “no person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.”¹²⁷ Every detainee “has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.”¹²⁸ The protections afforded by Article XXV are non-derogable and apply with equal force both in times of war and peace.¹²⁹

Significantly, in regards to detention on national security grounds, the

¹²⁷ American Declaration, *supra* note 88, art. XXV.

¹²⁸ *Id.*

¹²⁹ Report on Terrorism and Human Rights, *supra* note 94, ¶ 61.

Commission has held that, “when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom.”¹³⁰ The Commission has stressed that even in such situations, detainees have the right to prompt access to legal counsel and judicial review of their detention.¹³¹ Thus, the right to judicial review of detention is absolute and exists even where “a terrorist situation within a state’s jurisdiction [is] of such nature or degree as to give rise to an emergency that threatens a state’s independence or security.”¹³²

Article 7(6) of the American Convention provides that detainees “shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”¹³³ The Court has repeatedly held that arbitrary detention also violates Article 7(2).¹³⁴ The Commission has stated that judicial review of detention must occur “without delay,”¹³⁵ in part due to a detainee’s vulnerability.¹³⁶ Even a brief period of unlawful detention, the Court has held, violates an individual’s mental and moral integrity.¹³⁷

Neither the Commission nor the Court offer a bright line rule for determining timeliness,

¹³⁰ Inter-Am. Comm’n H.R., *Resolution No. 2/11, Regarding the Situation of Detainees at Guantánamo Bay, United States*, MC 259-02 (July 22, 2002) [hereinafter IACHR Resolution No. 2/11] (citing Inter-Am. Comm’n H.R., Annual Report, 1976, OEA/Ser.L/V/II.40 Doc. 5 corr. 1, section II, Part II (June 7, 1977)).

¹³¹ Report on Terrorism and Human Rights, *supra* note 94, ¶ 139. The Commission, however, is highly suspicious of the U.S. judiciary’s objectivity in regard to extraordinary rendition and interrogation, noting that, “U.S. courts appear consistently to defer to the Executive in a manner that renders [the right to judicial review] illusory.” Inter-Am. Comm’n H.R., *Resolution No. 2/11*, *supra* note 130.

¹³² Report on Terrorism and Human Rights, *supra* note 94, ¶ 139.

¹³³ Inter-American Convention on Human Rights, *supra* note 98, art. 7(6).

¹³⁴ *Id.* art. 7(2) (“No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”). See *Bamáca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 143 (Nov. 25, 2000); *Street Children v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 132 (Nov. 19, 1999).

¹³⁵ Report on Terrorism and Human Rights, *supra* note 94, ¶ 120.

¹³⁶ *Id.* ¶ 121.

¹³⁷ *Sanchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 98 (June 7, 2003).

but their jurisprudence suggests that periods in excess of three days (in ordinary circumstances)¹³⁸ to twenty days (in cases where terrorism is alleged),¹³⁹ violate the prohibition of arbitrary detention. In determining whether a period of detention is unlawful, the Court has held that it can “infer, even if there is no additional evidence in this regard, that treatment of the victim during his isolation was inhuman, degrading, and extremely aggressive.”¹⁴⁰ Thus, the Court has found that arbitrary detention is both a violation in its own right and may also violate the prohibition on inhumane treatment.

Finally, the Inter-American system recognizes the right to judicial review of detention, including the right to *habeas corpus*, as a non-derogable right that must be made available even during states of emergency.¹⁴¹

b. International Law and Practice Prohibits Arbitrary Detention

Like the Commission, the HRC has held that judicial review of detention, including *habeas* protections, are non-derogable.¹⁴² In 2006, the HRC considered the operation of the U.S. program, and expressed concern over “credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly for months and years on end, without keeping the International Committee of the

¹³⁸ Report on Terrorism and Human Rights, *supra* note 94, ¶ 122, n. 334; *See also* Suarez-Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997) (finding that judicial review one month after a defendant’s arrest constituted arbitrary detention).

¹³⁹ Cantoral-Benavides v. Peru, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 69, ¶¶ 63, 66, 74 (Aug. 18, 2000).

¹⁴⁰ Maritza Urrutia v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003); Gomez-Paquiyaui Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 108 (July 8, 2004). The Commission has recently upheld the Court’s jurisprudence on this particular topic. *See* Ferreira Braga v. Brazil, Case 12.019, Inter-Am. Comm’n H.R., Report 35/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ¶ 89 (July 18, 2008).

¹⁴¹ Report on Terrorism and Human Rights, *supra* note 94, ¶ 126. *See also* Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser.A) No.8 ¶¶ 12-13 (1987).

¹⁴² Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 16 n. 9 (July 24, 2001) (stating that the provisions of Article 9(4) are non-derogable).

Red Cross (“ICRC”) informed.”¹⁴³ The HRC stated that prolonged detention outside of the protection of law violated Articles 7 and 9 of the ICCPR, and it directed the United States to ensure that detainees, “regardless of their place of detention,” always have access to judicial review.¹⁴⁴

The UN Secret Detention Report states that secret detention violates both international human rights law and international humanitarian law and concludes that secret detention is *per se* arbitrary.¹⁴⁵ Significantly, the report named each of the Petitioners in this case as having been subject to unlawful secret detention by the CIA.¹⁴⁶ The Working Group on Arbitrary Detention found that all detainees named in the UN Secret Detention Report were held in conditions that “clearly fell within Category I of arbitrary detention,” which the Working Group defines as “[w]hen it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.”¹⁴⁷ The Working Group also held that the right to *habeas corpus* is non-derogable, “even where a threat to the life

¹⁴³ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40: Concluding Observations of the Human Rights Committee: The United States of America*, U.N. Doc. CCPR/C/USA/CO/3, ¶ 12 (July 28, 2006).

¹⁴⁴ *Id.*

¹⁴⁵ UN Secret Detention Report, *supra* note 18, ¶ 20.

¹⁴⁶ *Id.* ¶¶ 132, 151, 133, 132.

¹⁴⁷ *Id.* ¶ 22. The UN Working Group on Arbitrary Detention categorizes arbitrary detention as follows:
“A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);
B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);
C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).”

U.N. Office of the High Commissioner for Human Rights, Individual Complaints, Urgent Appeals, Deliberations, <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx> (last visited Nov. 7, 2011).

of the nation existed.”¹⁴⁸

The European Court of Human Rights has likewise held that arbitrary detention violates Article 5(1) of the European Convention on Human Rights.¹⁴⁹ In *A. and Others v. United Kingdom*, the European Court specifically addressed preventive detention of terrorism suspects.¹⁵⁰ The European Court rejected the government’s claim “that Article 5 § 1 permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat.”¹⁵¹ While acknowledging that some derogation might be permissible for security reasons, it found that the preventive detention measures imposed by the United Kingdom in the wake of September 11, 2001, were disproportionate in that they discriminated between nationals and non-nationals.¹⁵²

Similarly, in *Al-Nashif v. Bulgaria*, the European Court held that the *incommunicado* detention and subsequent deportation of a person with suspected extremist ties was inconsistent with the protection against arbitrariness guaranteed by Article 5(4).¹⁵³ The European Court found that “[n]ational authorities could not do away with effective control of lawfulness of detention by the domestic courts on the grounds of national security and terrorism.”¹⁵⁴

c. The United States Subjected the Petitioners to Arbitrary Detention

Binyam Mohamed was kept in secret, *incommunicado* detention for four months in the CIA-run “Dark Prison.” He was not permitted access to the outside world, legal

¹⁴⁸ *Id.* ¶ 48.

¹⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No.: 005, art 5(1) [hereinafter European Convention on Human Rights] (“Everyone has the right to liberty and security of person.”).

¹⁵⁰ *A. v. UK*, Eur. Ct. H.R., App. No. 3455/05 (Feb. 19 2009)

¹⁵¹ *Id.* ¶ 171-72.

¹⁵² *Id.* ¶ 190.

¹⁵³ *Al-Nashif v. Bulgaria*, Eur. Ct. H.R., App. No. 50963/99, ¶ 94, (Jun. 20, 2002)

¹⁵⁴ *Id.*

counsel, or the ICRC. The ICRC saw him once he was transferred to Bagram, but was prevented from relaying a message to his family.¹⁵⁵ He was not charged with an offense until after he arrived at Guantánamo in September 2004, over two years after his arrest. There, he was charged with conspiracy by a military commission that was later found to be unlawful by the United States Supreme Court, and subsequent charges against him were also dropped. Nonetheless, Mr. Mohamed was not released from Guantánamo until February 2009. To protect Mr. Mohamed's right to judicial review of his detention under Article XXV, the United States was required to grant him access to a court of law within a reasonable time. This was not done. Thus, Mr. Mohamed was arbitrarily detained in violation of Article XXV.

After his initial apprehension in Pakistan, Abou Elkassim Britel encountered American intelligence agents four times over the course of two weeks. Each time, he requested that he be allowed to contact the Italian consulate, but he was refused. Instead of granting Mr. Britel's request, U.S. agents rendered him to Morocco.

Under Article XXV of the Declaration, Mr. Britel had the right to judicial process while he was in U.S. control. He was not permitted to exercise that right, and his detention therefore violated Article XXV.

Mohamed Bashmilah was held *incommunicado* by the U.S. government from October 26, 2003 until May 5, 2005. He was completely isolated from the outside world and denied access to legal counsel or any form of judicial review. He was also denied contact with the ICRC or his family.

Article XXV demands that all detainees have prompt access to, at minimum, *habeas* style legal proceedings, but Mr. Bashmilah did not have access to any process

¹⁵⁵UN Secret Detention Report, *supra* note 18, 179-81.

whatsoever during his time under U.S. control. The United States therefore violated his rights under Article XXV.

Bisher al-Rawi was rendered to Afghanistan on December 8, 2002. He was held *incommunicado* at both the “Dark Prison” and at Bagram Air Base. Although the ICRC visited him on January 8, 2003, he was not permitted to speak with a lawyer, nor was he informed of any charges against him. Mr. al-Rawi was transferred to Guantánamo Bay on February 7, 2003, where he remained until his release without charge on March 30, 2007.

Article XXV entitled Mr. al-Rawi to timely access to the courts. His detention was completely devoid of judicial review, however, and the United States is therefore responsible for violating Mr. al-Rawi’s Article XXV rights.

3. Articles I, XVIII, XXV, and XXVI of the American Declaration Prohibit Forced Disappearance

a. The American Declaration Recognizes the Prohibition on Forced Disappearance

Read together, Articles I, XVIII, XXV, and XXVI of the American Declaration prohibit forced disappearance. Forced disappearance infringes on several of the most fundamental rights protected by the American Declaration, including Article I (right to life, liberty, and personal security); Article XVIII (right to a fair trial); Article XXV (right of protection from arbitrary arrest); and Article XXVI (right to due process of law). In *Velásquez Rodríguez*, the Inter-American Court noted that “[t]he phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.”¹⁵⁶ The Court subsequently adopted the definition set

¹⁵⁶ Velásquez Rodríguez, *supra* note 70, ¶ 150; *see also* Bámaca Velásquez, *supra* note 134, ¶ 128 (“Involuntary or forced disappearance constitutes a multiple and continuing violation of a number of rights

out in Article II of the Inter-American Convention on Forced Disappearance to define 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.¹⁵⁷

Both the Court and the Commission have held that forced disappearance arbitrarily deprives the victim of liberty and endangers his rights to life, safety, and personal integrity.¹⁵⁸ Significantly, some members of the Court have observed that the U.S. 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.¹⁵⁹ In *Goiburú, et al. v. Paraguay*, the petitioners alleged that, as victims of Operation Condor, they were illegally detained in Argentina by Paraguayan officials, denied contact with the outside world, and tortured on accusation of belonging to a terrorist group.¹⁶⁰ In holding that these events constituted forced disappearance of the petitioners, the Inter-American Court held that on these facts,

protected by the Convention, because not only does it produce an arbitrary deprivation of liberty, but it also endangers personal integrity, safety and the very life of the detainee.”).

¹⁵⁷ Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art. 2, Jun. 9 1994, *entered into force* Mar. 28, 1996; *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); 33 I.L.M. 1429 (1994) [hereinafter “Convention on Forced Disappearance”].; *see also*, Bámaca Velásquez, *supra* note 134, ¶ 126

¹⁵⁸ Rodríguez-Pinzon & Martin, *supra* note 73, ¶ 115 (citing Bámaca Velásquez, *supra* note 134, ¶ 128; *see also* Blake v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 65 (Jan. 24, 1998); Fairén-Garbi v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6 ¶147 (Mar. 15, 1989); Godínez-Cruz, *supra* note 70, ¶¶ 163, 166; Velásquez Rodríguez, *supra* note 70, ¶¶ 155, 158; Marroquín v. Guatemala, Case 8075, Inter-Am. Comm’n H.R., Report No. 54/96, OEA/Ser. L/V/II.95 Doc. 7 rev. ¶ 22 (1996); Solares Castillo v. Guatemala, Case 9111, Inter-Am. Comm’n H.R., Report No. 60/01, OEA/Ser.L/V/II.111 Doc. 20 rev. ¶ 31 (2000).

¹⁵⁹ *Goiburú v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 153, Separate Opinion of Judge Antônio Augusto Cançado Trindade ¶ 54 (Sept. 22, 2006).

¹⁶⁰ *Goiburú v. Paraguay*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 153, ¶ 2 (September 22, 2006).

Paraguay had “violated non-derogable provisions of international law (*jus cogens*), in particular the prohibition of . . . forced disappearance of persons.”¹⁶¹

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.”¹⁶² 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.”¹⁶³ He added that extraordinary rendition is simply the “atrocious and inhuman methods and practices” of Operation Condor “applied, in a different context, today!”¹⁶⁴

Inter-American jurisprudence recognizes that forced disappearances encompass multiple fundamental rights violations. For example, the Court has held that enforced disappearance constitutes arbitrary detention because “[t]he kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee’s right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest”¹⁶⁵ The Court, citing European Court jurisprudence, has held that detentions that occur without judicial review and detentions that are not recognized by the State constitute arbitrary and illegal deprivations of liberty.¹⁶⁶ In addition, Inter-American case law has held that prolonged *incommunicado* detention, when proven in

¹⁶¹ *Id.* ¶ 128.

¹⁶² *Goiburú v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 153, Separate Opinion of Judge Antônio Augusto Cançado Trindade* ¶ 54 (Sept. 22, 2006)

¹⁶³ *Id.* ¶ 55.

¹⁶⁴ *Id.* ¶ 59.

¹⁶⁵ *Velásquez Rodríguez, supra* note 70, ¶ 155.

¹⁶⁶ *Sanchez, supra* note 137, ¶ 84 (citing *Aksoy v. Turkey, Eur. Ct. H.R. (ser. A) 2263* ¶ 76 (1996); *Brogan v. United Kingdom, Eur. Ct. H.R., (ser. A) 145-B* ¶ 58 (1988)).

connection with a forced disappearance, is *per se* CIDT.¹⁶⁷

b. International Law and Practice Prohibits Forced Disappearance

The UN Secret Detention Report states that secret detention constitutes forced disappearance.¹⁶⁸ In cases where a State resorts to forced disappearance “in a widespread or systematic manner, such an aggravated form of enforced disappearance can reach the threshold of a crime against humanity.”¹⁶⁹ In addition, the UN Working Group on Enforced or Involuntary Disappearances has repeatedly asserted that States cannot, in any circumstances, justify secret detention centers, and that such centers amount to *per se* violations of the Convention Against Forced Disappearances.¹⁷⁰ The HRC has also linked forced disappearance with violations of the Article 7 of the ICCPR,¹⁷¹ and the UN Secret Detention Report finds that the right to be free from forced disappearance is non-derogable.¹⁷² The European Court has held that “[t]he unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5 (the right to liberty and security of the person).”¹⁷³ Enforced disappearance also violates the right to life,¹⁷⁴ the right to freedom from torture and CIDT,¹⁷⁵ and the

¹⁶⁷ Bamáca Velásquez *supra* note 134, ¶ 143; Trujillo v. Colombia, Case 10.337, Inter-Am. Comm’n H.R., Report No. 7/00, OEA/Ser.L/V/II.106 doc. 6 rev. ¶ 37 (1999); *see also* Castillo v. Guatemala, Case 9111, Inter-Am. Comm’n H.R., Report No. 60/01 Annual report 2000, OEA/Ser.L/V/II.111 doc. 6 rev. ¶ 31(2000); Charry v. Colombia, Case 11.221, Inter-Am. Comm’n H.R., Report No. 3/98, Annual Report 1997, OEA/Ser.L/V/II.98 doc. 6 rev. ¶¶ 67-68; Velásquez Rodríguez, *supra* note 70, ¶ 156.

¹⁶⁸ UN Secret Detention Report, *supra* note 18, ¶ 28.

¹⁶⁹ *Id.* ¶ 30.

¹⁷⁰ *Id.* ¶ 49.

¹⁷¹ U.N. Human Rights Comm., Mojica v. Dominican Republic, U.N. Doc. CCPR/C/51/D/449/1991, ¶¶ 5.7-6 (Aug. 10, 1994); U.N. Human Rights Comm., Celis Laureano v. Peru, U.N. Doc. CCPR/C/56/D/540/1993, ¶ 8.5 (Aug. 10, 1994), *See also* Kurt v. Turkey Eur. Ct. H.R., ¶ 122 et seq. (1998).

¹⁷² International Covenant on Civil and Political Rights, arts. 4, 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]

¹⁷³ Akdeniz v. Turkey, Eur. Ct. H.R., ¶ 106 (2005); *see also* Taniş v. Turkey, Eur. Ct. H.R., ¶ 214 (2005); Kurt, *supra* note 171, ¶ 124.

¹⁷⁴ European Convention on Human Rights, *supra* note 149, art. 2.

¹⁷⁵ European Convention on Human Rights, *supra* note 149, art. 3.

right to an effective remedy.¹⁷⁶

c. The Petitioners Were Forcibly Disappeared as a Result of Their Extraordinary Rendition by the United States

The Petitioners were all deprived of their freedom and held secretly by U.S. agents. The United States secretly detained Petitioners Mohamed and al-Rawi until it transferred them to Guantánamo. Petitioners Bashmilah and Britel were secretly held throughout their detention. This section addresses those periods in which the Petitioners were secretly held in U.S.-run facilities, as well as their time on rendition flights. While the length of time each Petitioner was held varies, all were subjected to forced disappearance through the U.S. program.

Binyam Mohamed was in secret U.S. custody from January to May or June of 2004. He was finally visited by an ICRC representative after his transfer to Bagram Air base, but his family was not informed of his whereabouts until early 2005, several months after he reached Guantánamo. Owing to the United States' failure to inform either the courts or Mr. Mohamed's family of his whereabouts, he was forcibly disappeared for that period.

Abou Elkassim Britel was secretly detained in Pakistan for two weeks, during which time he was repeatedly interrogated by U.S. intelligence agents. Despite having him within their control, those agents failed to grant his requests for consular assistance. He was subsequently placed aboard a CIA rendition flight to Morocco. The United States failed to acknowledge Mr. Britel's captivity in Pakistan or inform anyone as to his whereabouts, and it subjected him to forced disappearance by secretly transferring him to

¹⁷⁶ European Convention on Human Rights, *supra* note 149, art. 13 (“Everyone 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.”).

Morocco.

Mohamed Bashmilah was held in secret detention from October 2003 to May 2005, both at Bagram Air Base and at a CIA “black site.” Throughout this period, the United States did not acknowledge his detention, nor did the U.S. grant him access to justice. Thus, Mr. Bashmilah was subjected to forced disappearance by the United States during this time.

Bisher al-Rawi was secretly detained from December 2002 to February 2003 at both a CIA “black site” and at Bagram Air Base. During that time, he was cut off from the outside world, and the United States did not acknowledge his detention. During this time, the U.S. government subjected Mr. al-Rawi to forced disappearance.

The United States has now officially acknowledged the U.S. program. The program was structured, organized, and approved at the highest levels within the executive branch, yet those secretly detained within it were completely cut off from the outside world. As such, the U.S. program amounted to a carefully constructed and bureaucratically controlled system of forced disappearance.

4. Articles I and XXVII Prohibit the Transfer of any Person to a Country where there is a Substantial Likelihood that the Person will be Subjected to Torture and/or CIDT

a. The American Declaration Protects the Right to *Non-Refoulement*

The prohibition against rendering persons to countries that practice torture is implicitly protected under Articles I and XXVII of the American Declaration. The Commission has held that Article I of the Declaration encompasses *non-refoulement* as part of the right to personal security.¹⁷⁷ In the *Haitian Interdiction Case*, the Commission

¹⁷⁷ *The Haitian Centre for Human Rights v. United States*, Case 10.657, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 150 (1997). [hereinafter the *Haitian Interdiction Case*]

held that the United States exposed the petitioners to a significant risk of arrest and violence by repatriating them to Haiti, thus violating their right to personal security.¹⁷⁸ Although the Commission applied only the American Declaration to reach this finding, it noted that the principle of *non-refoulement* is widely incorporated into other human rights instruments and is understood to prohibit the transfer of a person to a nation where he may be subject to violations of his fundamental rights, including the rights to be free from torture and other CIDT.¹⁷⁹ In addition, the Commission held that *refoulement* violated the petitioners' rights to liberty and asylum.¹⁸⁰ As noted, Article I rights are non-derogable, regardless of circumstances affecting national security, and *non-refoulement* is within the ambit of those rights.

b. International Law and Practice Protects the Right to *Non-Refoulement*

The Convention Against Torture expressly prohibits *refoulement* to a risk of torture in Article 3.¹⁸¹ In addition, Article 7 of the ICCPR implicitly protects the right by “requir[ing] that States refrain from transferring persons under their effective control to the custody of another State if the transfer would put the individual at a real risk of torture.”¹⁸² *Non-refoulement* also protects individuals from being transferred to States where they face the risk of forced disappearance, both because it is a fundamental rights

¹⁷⁸ *Id.* ¶¶ 171.

¹⁷⁹ American Convention, *supra* note 98, art. 22(8); Inter-American Torture Convention, *supra* note 98, art. 13.

¹⁸⁰ Haitian Interdiction Case *supra* note 177 ¶¶ 163, 169.

¹⁸¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

¹⁸² Margaret L. Satterthwaite, *The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism* 20-21 (Public Law and Legal Theory Research Paper Series, Working Paper No. 10-27) (May 2010). (citing ICCPR Article 7, as interpreted in General Comment No. 20. See U.N. Human Rights Comm., *General Comment No. 20: Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 9 (1992). See also *Byahuranga v. Denmark*, U.N. Doc. CCPR/C/82/D/1222/2003, (Aug. 15, 2003) (finding that the transfer of an individual to a risk of treatment contrary to Article 7 was a violation of the ICCPR)).

violation on its own and also because forced disappearance is a form of CIDT.¹⁸³ The Committee Against Torture has indicated that, with respect to countries that routinely violate CAT, a transferring State may not rely on diplomatic assurances from those countries to fulfill its *non-refoulement* obligations.¹⁸⁴

The UN Secret Detention Report states that the U.S. program's use of proxy detention centers in States that practice torture and CIDT is a direct violation of *non-refoulement* by both the sending and receiving state.¹⁸⁵ The report also states that the use of proxy detention centers essentially amounts to "reverse diplomatic assurances"; in other words, when it agrees to detain the transferee, the receiving State has essentially promised to violate his rights, particularly his right to be free from arbitrary detention.¹⁸⁶

c. The United States Transferred Petitioners Mohamed and Britel to Morocco Despite a Manifest Risk of Torture and CIDT upon Transfer

The United States rendered Binyam Mohamed to a proxy detention center in Morocco in July 2002. There, Mr. Mohamed was secretly detained and repeatedly tortured for a year and a half. Under the American Declaration, the United States is required to refrain from transferring Mr. Mohamed to a country where he risked suffering grave human rights violations. Not only did the United States transfer him in the face of a real risk, its agreement with Morocco to secretly detain Mr. Mohamed virtually ensured that his rights would be violated. Thus, the United States breached its *non-refoulement* obligations.

¹⁸³ *Id.* ¶ 23-24.

¹⁸⁴ *Id.* at 30 (citing U.N. Comm. Against Torture, U.S. Conclusions at 21; U.N. Human Rights Comm., Concluding Observations of the U.N. Human Rights Committee, Sweden, 16, U.N. Doc. CCPR/C/SWE/CO/6 (2009) ("[T]he more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be.")).

¹⁸⁵ UN Secret Detention Report, *supra* note 18, ¶ 36.

¹⁸⁶ *Id.* ¶ 38.

Abou Elkassim Britel was rendered to the Témara prison in Morocco, where he was held in secret detention for eight and a half months. He was tortured regularly, and was confined in conditions that in themselves constituted torture and CIDT. The United States rendered Mr. Britel to Témara under a proxy detention agreement, knowing that Morocco was more likely than not to violate his rights. In addition, Morocco has a long history of arbitrary detention, torture, and CIDT, which further establishes the United States' direct violation of Mr. Britel's right to *non-refoulement* under the American Declaration.

The U.S. State Department has repeatedly criticized Morocco's human rights abuses in its annual country reports. The 2002 report states that, although torture is illegal in Morocco, it is still practiced within the prison system.¹⁸⁷ The report also notes that the Moroccan authorities arbitrarily arrested and detained individuals.¹⁸⁸ In 2003, the report notes that torture continued to be practiced within the prison system, and that "several detainees died in custody, with little or no investigation."¹⁸⁹

Petitioners Mohamed and Britel were rendered to Morocco despite a serious risk that they would face torture and CIDT upon transfer. While in proxy detention centers in Morocco, they suffered physical and psychological torture as well as CIDT. The United States had ample reason to believe that transferring the Petitioners would expose them to a real risk of torture, CIDT, arbitrary detention and forced disappearance, and yet it remanded them to Moroccan proxy detention centers. By doing so, the United States breached its *non-refoulement* obligations under the American Declaration.

¹⁸⁷ U.S. State Dept., *Morocco: Country Reports on Human Rights Practices* (2002) available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18284.htm>.

¹⁸⁸ *Id.*

¹⁸⁹ U.S. State Dept., *Morocco: Country Reports on Human Rights Practices* (2003) available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27934.htm>.

V. THE UNITED STATES IS RESPONSIBLE FOR THE VIOLATION OF PETITIONERS' RIGHTS BECAUSE IT FAILED TO ACT WITH "DUE DILIGENCE" TO PREVENT THE VIOLATIONS, TO INVESTIGATE PETITIONERS' ALLEGATIONS OF ABUSE, AND TO HOLD ACCOUNTABLE THOSE RESPONSIBLE

Even if the Commission is unable to conclude that the Petitioners were abducted, arbitrarily detained, forcibly disappeared, and tortured by U.S. officials or their agents, the failure of the U.S. government to take preventive measures to protect against the violation of the Petitioners' rights, to investigate their cases after the violations occurred, and to hold accountable those responsible for the violations represents a failure on the part of the United States to ensure the Petitioners' rights. In these circumstances, the United States is responsible for the violation of the Petitioners' rights to be free from forced disappearance, arbitrary detention, torture, and inhumane treatment because it failed to act with "due diligence" to protect them.

A. The United States has an Affirmative Obligation to Protect Rights Guaranteed by the American Declaration from Violation by the State, its Agents and Private Actors

The Inter-American system imposes affirmative obligations on Member States to ensure against violations of rights by the State, its agents, or by private actors. In *Gonzales v. United States*, the Commission interpreted the American Declaration as requiring States to adopt affirmative measures to guarantee that the individuals subject to their jurisdiction can exercise and enjoy the rights contained in the Declaration.¹⁹⁰ Where a State fails to adequately protect these rights and violations occur, State liability is incurred because of its failure to adequately protect rights. In such situations the State will incur international responsibility for failing to act with "due diligence" to prevent,

¹⁹⁰ Gonzales, *supra* note 60, ¶ 118

investigate, and hold accountable those responsible for the violations.

Long established, these principles were first elaborated by the Inter-American Court in the case of *Velásquez Rodríguez*, where the 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.¹⁹¹ In fulfillment of this obligation, the Court found that the State had an obligation “to 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.”¹⁹² In establishing this principle, the Court set forth a reasonableness standard for the general positive obligation on States to prevent human rights violations.¹⁹³ Significantly, the Court also held that a State's obligation to take reasonable steps to prevent human rights violations extends not only to the actions of agents of the State, but also to actions perpetrated by private actors, a principle now long recognized in the Inter-American and European systems for the protection of human rights as well as under universal human rights standards, including the ICCPR.¹⁹⁴

In the *Velásquez* case, the Inter-American Court held that “when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention ... the State has failed to comply with its duty to ensure the

¹⁹¹ *Velásquez Rodríguez*, *supra* note 70, ¶ 166

¹⁹² *Id.*

¹⁹³ *Id.* ¶ 174 stating that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”

¹⁹⁴ More recently, the Commission has noted that the principle of “due diligence” “has been applied in a range of circumstances to mandate States to prevent, punish, and provide remedies for acts of violence, when these are committed by either State or non-State actors.” *Gonzales*, *supra* note 60, ¶ 122.

free and full exercise of those rights to the persons within its jurisdiction.”¹⁹⁵ As the Court found, “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of “due diligence” to prevent the violation or to respond to it as required by the Convention.”¹⁹⁶ According to the Court, state responsibility for the acts of private persons attaches either when the violation of an individual’s rights “has occurred with the support or acquiescence of the government, or when the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”¹⁹⁷ In four recent cases, *Gonzales*, *Ximenes-Lopes*, *Pueblo Bello Massacre*, and *Mapiripán Massacre*, the Court reaffirmed these principles of State responsibility.¹⁹⁸

For state responsibility to attach it is not necessary to determine the guilt of the perpetrators or even identify the agents, if any, to whom the violations are attributable, “[i]t is sufficient to demonstrate that public authorities have supported or *tolerated the*

¹⁹⁵ *Id.* ¶ 176.

¹⁹⁶ *Id.* ¶ 172; Godinez Cruz, *supra* note 70, ¶ 172. See also Cecilia Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System: Report on the American Convention on Human Rights 9-12 available at <http://www.reports-and-materials.org/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf>*

¹⁹⁷ *Gonzales*, *supra* note 60, ¶ 173

¹⁹⁸ *Id.* ¶ 119; *Lopes v. Brazil*, Case 12.237, Inter-Am. Ct. H.R., Report No. 38/02, doc. 5 rev. 1 at ¶¶ 124-25 (Oct. 9, 2002); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, at ¶ 120 (Jan. 31, 2006); *Mapiripán Massacre*, Case 12.250, Inter-Am. Ct. H.R., Report No. 34/01 ¶ 232 (2000). In *Pueblo* the Court stated that “it is sufficient to prove that public officials have provided *support to or shown tolerance* for the violation of rights enshrined by the Convention, that their *omissions have enabled* the commission of such violations, or that the State has *failed to comply with any of its duties*” ¶ 112 (emphasis added); see also *Sawhoyamaya Indigenous Community of the Enxet People v. Paraguay*, Case 0322/2001, Inter-Am. Comm’n H.R., Report No. 12/03, OEA/Ser.L/V/II.118 Doc. 70 rev. ¶ 153 (2003); *Juan Humberto Sánchez Case*, 2003 Inter-Am. Ct. H.R. (Ser. C) No. 99, ¶ 110 (June 7, 2003); *Street Children case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, at ¶ 144 (Nov. 19, 1999).

violation of the rights established in the Convention.”¹⁹⁹ Thus, in *Velásquez*, the Inter-American Court found that Honduras had violated the right to humane treatment (Article 5) even though it was not possible to prove that the victim was subjected to torture. The Court stated that Honduras was responsible for the violation of the petitioner’s rights simply because the victim was kidnapped and imprisoned by government agents who had been shown to practice torture and CIDT.²⁰⁰

The European Court has likewise held that in certain circumstances States Parties assume affirmative obligations to protect rights guaranteed by the European Convention. For example, in *Osman v. United Kingdom*, the Court noted that Article 2 of the ECHR 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.”²⁰¹ Applying this principle in *Secic v. Croatia*, the European Court held that the general obligation on States to protect human rights “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.”²⁰²

The HRC has also interpreted Article 2 of the ICCPR²⁰³ to impose affirmative obligations on States to take necessary steps to prevent violations of rights protected by

¹⁹⁹ 19 *Tradesman v Colombia*, Merits, Inter-Am. Ct. H.R., (ser. C) No. 109 (July 3, 2004) (emphasis added). In *Velásquez*, *supra* note 70, ¶ 173, the Court stated that “the violation can be established even if the identity of the individual perpetrator is unknown.”

²⁰⁰ *Velásquez Rodríguez*, *supra* note 70, ¶ 187. The Court also stated ¶ 175 that subjecting a person “to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.”

²⁰¹ *Osman v. United Kingdom*, [1998] Eur. Ct. H.R. 101 ¶ 115.

²⁰² *Secic v. Croatia*, App. No. 40116/02, Eur. Ct. H.R. ¶ 52 (2007).

²⁰³ ICCPR, *supra* note 172, art. 2.

the Convention by State and private actors.²⁰⁴ Finally, the Committee Against Torture has interpreted Article 2 of CAT as imposing obligations on State Parties to adopt effective measures preventing public authorities and other persons acting in an official capacity from “directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in” acts of torture.²⁰⁵

The Inter-American System has adopted a clear standard for determining when a State may be held responsible for violations of protected rights. State responsibility is engaged when the State:

- (i) “knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual;” and
- (ii) “failed to take reasonable steps within the scope of its powers which might have had a reasonable possibility of preventing or avoiding that risk.”²⁰⁶

This standard was first adopted by the European Court in *Osman*, where the Court determined that State responsibility is engaged where “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.”²⁰⁷

²⁰⁴ Human Rights Comm., General Cmt. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 8 (Mar. 29, 2004) (stating 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).

²⁰⁵ Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 17 (Jan 24, 2008).

²⁰⁶ Pueblo Bello Massacre v Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 140, ¶¶ 123-24 (Jan. 31, 2006).

²⁰⁷ *Osman v. United Kingdom*, 1998-VIII Eur. Ct.H.R. 95, ¶ 116, (“For the Court, and having regard to the nature of the right protected by article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities *did not do all that could be reasonably expected of them to avoid a real and immediate risk* to life of which *they have or ought to have knowledge*. This is a question which can only be answered in the light of all the circumstances of any particular case.”) [emphasis added].

This standard was applied again by the European Court soon after *Osman*, where the Court determined 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 victim to an unlawful attack.”²⁰⁸ The Court highlighted that even absent evidence of any specific or particular instance where Kiliç was at risk of violence, the risk could be regarded as “real and immediate.”²⁰⁹

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.²¹⁰

Although in *Velásquez* the focus was on the State’s affirmative obligation to protect the right to life, the principle of State responsibility flowing from a State’s failure to exercise “due diligence” in preventing human rights violations has been applied by the Commission in cases covering a broad spectrum of rights violations including forced disappearances,²¹¹ extra judicial executions,²¹² excessive use of force,²¹³ arbitrary

²⁰⁸ *Kiliç v. Turkey*, 2000-III Eur. Ct. H.R., App. No. 22492/93 (2000) ¶ 66.

²⁰⁹ *Id.*

²¹⁰ *Sawhoyamaxa Indigenous Community*, Case 0322/2001, Inter-Am. Ct. H.R. (Ser. C) No. 146 ¶ 153 (2006).

²¹¹ *Heliodoro Portugal v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶¶ 243-7.

²¹² *Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 232-3 (Nov. 25, 2003); *Jaramillo v. Colombia*, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 72 (Nov. 27, 2008).

detention, rape, torture,²¹⁴ and environmental harms.²¹⁵ Other international bodies have similarly held that the State's affirmative obligations to ensure rights extend beyond the right to life, to, for example, the rights to humane treatment. The European Court in *M.C. v. Bulgaria* found that, in relation to the right to humane treatment, the general obligation on States to protect human rights "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals."²¹⁶

1. The United States Knew of the Risk to the Petitioners

As noted, the United States had an obligation to take reasonable measures to prevent situations that could have resulted in the violation of the Petitioners' rights. Because the United States devised and developed the extraordinary rendition and secret detention program, it knew or reasonably should have known that the rendition of the Petitioners presented a "real and immediate risk" to their rights to be free from torture, CIDT, arbitrary detention, and forced disappearance.

Binyam Mohamed was arrested and interrogated in Pakistan, then transferred by the United States to Morocco for interrogation and later transferred to the "Dark Prison" in Kabul, then to Bagram, and finally to Guantánamo. Abou Elkassim Britel was arrested and interrogated in Pakistan, and then transferred by the United States to Morocco.

²¹³ Sanchez v. Colombia, *supra* note 137, ¶ 112.

²¹⁴ González Pérez v. Mexico, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. 1097 ¶ 90 (2000).

²¹⁵ Ache Tribe Case 1802, Inter-Am. Comm'n H.R. 36 OEA/Ser.L/V/II.43, doc. 21, corr. 1 (1977)

²¹⁶ *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H. R. 646, ¶ 150; *see also* Human Rights Committee, *supra* note 204 ¶ 8 stating that "[t]he Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."

Mohamed Farag Ahmad Bashmilah was arrested and interrogated in Jordan, then transferred by the United States to Bagram for further interrogation, and later to a “black site” in an unknown country. Bisher al-Rawi was arrested and interrogated in the Gambia, then transferred by the United States to the “Dark Prison” in Kabul, and later to Bagram and finally to Guantánamo.

By transferring the Petitioners to situations, both within the effective control of the United States and to third States where the United States knew, or ought to have known, that there was a real and immediate risk of a violation of the Petitioners’ rights. The United States is, therefore, responsible for the violations of the Petitioners’ rights.²¹⁷

The recognition of risk is reflected in the formulation and development of the U.S. Program as a counter-terrorism measure to apprehend, transfer, detain, and interrogate terrorist suspects outside of the physical territory of the United States, and in its view, to avoid the constraints imposed by the U.S. Constitution and international law. Thus, the United States clearly knew of the precise risk faced by the Petitioners, and that the injuries suffered by them were a foreseeable risk of the program.²¹⁸

2. The United States Failed to Conduct Any Investigation into the Petitioners’ Credible Allegations of Torture, Arbitrary Detention, and Forced Disappearance

The United States also incurs responsibility for the violation of the Petitioners’ rights because of its failure to initiate any investigation into their credible allegations of torture, arbitrary detention, and forced disappearance. The United States has a “due

²¹⁷ U.S. State Dept., *supra* note 187, (noting that Morocco is known to practice torture).

²¹⁸ The Commission and Court have recognized that periodical reviews of detention are 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, Inter-Am. Ct. H.R., Advisory Opinion OC-9/87 (ser. A) No. 9 ¶ 31 (Oct. 6, 1987).

diligence” obligation to “prevent, investigate, and punish any violation of the rights”²¹⁹ under the American Declaration. In *Franz Britton v. Guyana*, the Commission noted that this requirement imposes an obligation on States to have alleged violations of the Declaration investigated. Applying this principle in *Marguerite Fenelon*, the Commission determined that the American Convention’s Article 1(1) duty to “ensure and respect” rights and the “right to a remedy” guaranteed by Article 25 encompass an obligation on States to investigate and prosecute individuals responsible for torture or forced disappearances.²²⁰

In *Velásquez Rodríguez*, the Inter-American Court defined the parameters 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 to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely with impunity to the detriment of the rights recognized by the Convention.²²¹

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

²¹⁹ *Velásquez Rodríguez*, *supra* note 70, ¶¶ 166, 172.

²²⁰ *Marguerite Fenelon v. Haiti*, Inter-Am. Comm’n. H.R. 91, Case No. 6586, OEA/ser.L/V/II/61, doc. 22 rev. 1, ¶ 93 (1983); *see also* *Hermosilla v. Chile*, Case No. 10.843, Inter-Am. Comm’n H.R., Report No. 36/96 OEA/Ser.L/V/II.95 Doc. 7 rev. 156, ¶ 73 (1997). *See also* *Gonzales*, *supra* note 60, ¶ 172 (noting that Article VXIII is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass the right of every individual . . . to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place”) (citing *Maya Indigenous Community*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, ¶ 174 (2004); *Maria Da Penha Fernandes*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, Doc. 20, rev. 16, ¶ 37 (2001).

²²¹ *Marguerite Fenelon*, *supra* note 220, ¶ 176.

of the violation. Significantly, the Commission and Court have found violations, *inter alia*, of Article 1,²²² Article 5,²²³ Article 8,²²⁴ Article 25, and Article 13²²⁵ of the American Convention where a State failed adequately to investigate alleged human rights violations as part of its “due diligence” obligations.

The obligation to investigate rights violations as an integral component of a State’s affirmative obligation to protect rights has also been recognized by other international human rights bodies, including the European Court and the HRC. For example, in *Tanrikulu v. Turkey*, a case involving the murder of the petitioner’s husband, allegedly at the hands of “State security forces or with their connivance,”²²⁶ the European Court found that the inadequate investigation into the allegations gave rise to State responsibility for the violation despite insufficient evidence to prove that an agent of the State actually carried out the killing. 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.²²⁷

²²² *Quiñones v. Ecuador*, Case 10.580, Inter-Am. Comm’n H.R., Report No. 10/95, OEA/Ser.L/V/II.91 Doc. 7 76, ¶ 32 (1996).

²²³ *Moiwana Village v. Suriname*, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 124, ¶ 43, 92 (June 15, 2005); *Bámaca Velásquez*, *supra* note 134, ¶ 165.

²²⁴ *Castillo Paez Case*, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶¶ 86, 90 (Nov. 3, 1997); *Velásquez Rodríguez Case*, *supra* note 70, ¶ 166; *Quiñones*, *supra* note 222, ¶ 45; *Moiwana Village*, *supra* note 223, ¶ 136(h); *Barrios Altos Case*, Inter-Am. Ct.H.R. ¶¶ 45, 48 (ser. C) No. 75 (May 14, 2001).

²²⁵ *Barrios Altos*, *supra* note 224, ¶ 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.

²²⁶ *Tanrikulu v. Turkey*, App. No. 23763/94, Eur. Ct.H.R. ¶ 7 (1999).

²²⁷ *Id.* ¶ 103.

The European Court also has held 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. . . .”²²⁸ 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.²²⁹

The HRC has also established that States party to the ICCPR have a duty to investigate allegations of rights violations as an integral component of their obligation to protect rights under the Convention. 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.²³⁰ 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 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.”²³¹

²²⁸ *Avsar v. Turkey*, App. No. 25657/94, Eur. Ct.H.R. ¶ 393 (2001).

²²⁹ *Id.*

²³⁰ *Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 109, ¶ 13.3 (1985); see also *Motta v. Uruguay*, Communication No. 11/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 54, ¶ 14 (1984).

²³¹ Human Rights Committee, *Muteba v. Zaire*, Communication No. 124/1982 (25 March 1983), U.N. Doc. Supp. No. 40 (A/39/40) 182 (1984); see also Human Rights Committee, *Baboeram v. Suriname*, Communication No. 146/1983 and 148 to 154/1983, U.N. Doc. Supp. No. 40 (A/40/40) 187, ¶ 13.2 (1985) (same with respect to extra-judicial executions); Human Rights Committee, *Quinteros v. Uruguay*,

In the *Velásquez Rodríguez* case and its progeny, the Court described in detail the precise nature and scope of the investigation that must be conducted. Most importantly, the Court found,

[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. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.²³²

This highlights *four* key components of the duty to investigate.²³³

- (i) The State must engage in a serious investigation not undertaken as a mere formality;
- (ii) The investigation must be undertaken as part of a search for the truth;
- (iii) The investigation must have a clear objective;

Communication No. 107/1981, U.N. Doc. Supp. No. 40 (A/38/40) 216 (1983) (same with respect to forced abductions by state agents).

²³² Velásquez Rodríguez, *supra* note 70, ¶ 177 (emphasis added); *see also* Bámaca Velásquez, *supra* note 134, ¶ 212. The Commission has recently stated that the “Inter-American system has affirmed for many years that it is not the formal existence of such remedies that demonstrates “due diligence”, but rather that they are available and effective.” *See* Gonzales, *supra* note 60, ¶ 172 (Wayne Smith v. United States, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 62 (2010); Gonzales, *supra* note 60, ¶ 42; Inter-Am. Comm’n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68, ¶ 26 (2007); Villagrán Morales v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 235 (Nov. 19, 1999).

²³³ The Commission in Gonzales, *supra* note 60, ¶ 181 noted that “Investigations must be serious, prompt, thorough, and impartial, and must be conducted in accordance with international standards in this area. In addition, the IACHR has established that the State must show that the investigation “was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth.” (Citing IACHR, Report N° 53/01, González Pérez v. Mexico, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser.L/V/II.111, doc. 20, rev. ¶¶ 84-88 (2001); Inter-Am. Comm’n H.R., *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, Doc. 44, ¶ 132 (2003); Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev., ¶ 412 (1997); Inter-Am. Comm’n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68), ¶ 40 (2007); Godínez Cruz, *supra* note 70, ¶ 188.

- (iv) The State must assume the conduct of the investigation as its own legal duty.

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 of 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 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."²³⁴

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.²³⁵ As a result, the Court required the State "to continue and conclude the investigation of the facts and to punish those responsible for them."²³⁶ The Court also awarded compensation to the next-of-kin for non-pecuniary damages.²³⁷

In *Avsar v. Turkey*,²³⁸ 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

²³⁴ *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 100, ¶ 112 (Sept. 18, 2003).

²³⁵ *Id.* ¶ 119-120.

²³⁶ *Id.* ¶ 121.

²³⁷ *Id.* ¶¶ 101, 102.

²³⁸ *Avsar*, *supra* note 228, ¶¶ 393-395.

rights violations. First, the Court determined that the investigation must be “official” and “independent from those implicated in the events.”²³⁹ 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.”²⁴⁰ 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 complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.”²⁴¹ 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.”²⁴²

The Committee Against Torture has set forth a similar standard for the scope and nature of investigations required under Article 12 of the CAT.²⁴³ CAT requires States to undertake a “prompt and impartial investigation, wherever there is reasonable ground to

²³⁹ *Id.* ¶ 394.

²⁴⁰ *Id.* ¶ 393.

²⁴¹ *Id.* ¶ 394.

²⁴² *Id.* ¶ 395.

²⁴³ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ENABLING TORTURE: INTERNATIONAL LAW APPLICABLE TO STATE PARTICIPATION IN THE UNLAWFUL ACTIVITIES OF OTHER STATES 10 (2006) (citing Crawford & Evans, James Crawford & Kylie Evans, Opinion for All Party Parliamentary Group on Extraordinary Rendition: *Extraordinary rendition of terrorist suspects through the United Kingdom*, Dec. 9, 2005, ¶ 22 available at, http://www.extraordinaryrendition.org/data/Rendition_Opinion_Prof_Crawford.doc; Redress, *Taking Complaints of Torture Seriously Rights of Victims and Responsibilities of Authorities*, Sept. 2004, available at <http://www.redress.org/publications/PoliceComplaints.pdf>; UN Commission on Human Rights, Resolution 2003/32, 57th session, ¶ 8, U.N. Doc. E/CN.4/Res./2003/32 (2003) (stressing in particular that “...all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, notes in this respect the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Principles) annexed to Commission resolution 2000/43 and General Assembly resolution 55/89 as a useful tool in efforts to combat torture...”). Article 16 contains a similar obligation to investigate CID.

believe that an act of torture has been committed in any territory under its jurisdiction.”

This investigation must be launched irrespective of the source of the suspicion that the act has occurred;²⁴⁴ and it must be launched immediately to protect the victim and to enable evidence to be collected before it is no longer available (e.g. before physical signs of torture fade or disappear).²⁴⁵ The duty to investigate under Article 12 is triggered when there is “reasonable ground to believe” that torture has taken place.²⁴⁶

In the present case, no investigation, criminal or otherwise, that complies with the investigative standards required by the American Declaration has been initiated by the United States into the credible allegations made by the Petitioners of torture, cruel, inhuman and degrading treatment, arbitrary detention, and forced disappearance. Even when the Petitioners sought judicial consideration of their allegations by filing a civil suit against a civilian flight logistics company, Jeppesen Dataplan, Inc., the U.S. government immediately intervened in the proceedings to shut them down and prevent any investigation of the allegations by U.S. courts.

Moreover, the position of the United States in the Petitioners’ civil suit is not unique; rather it is part of a systemic failure to investigate allegations of rights abuses perpetrated by U.S. officials, their agents and private contractors in the design and implementation of the U.S. Program and to hold to account those responsible. Indeed, not only has the United States failed to conduct a comprehensive criminal or other

²⁴⁴ Encarnacion Blanco Abad v. Spain, Communication No, 59/1996, Committee Against Torture, CAT/C/20/D/59/1996 (1998), ¶ 8.2.

²⁴⁵ *Id.*

²⁴⁶ James Crawford & Kylie Evans, Opinion for All Party Parliamentary Group on Extraordinary Rendition: *Extraordinary rendition of terrorist suspects through the United Kingdom*, Dec. 9, 2005, ¶ 22 available at http://www.extraordinaryrendition.org/data/Rendition_Opinion_Prof_Crawford.doc, (“The duty to investigate arises where a prima facie case exists that the Convention has been breached. Credible information suggesting that foreign nationals are being transported by officials of another State, via the United Kingdom, to detention facilities for interrogation under torture, would imply a breach of the Convention and must be investigated.”)

investigation into allegations of forced disappearance and torture of the Petitioners and other victims and survivors of the program, it has also reportedly sought to impede the investigations of other nations into these allegations.²⁴⁷

VI. THE U.S. GOVERNMENT VIOLATED THE PETITIONERS' RIGHT TO TRUTH AS PROTECTED BY THE AMERICAN DECLARATION

A. The American Declaration Recognizes the Right of Victims of Human Rights Abuses to Know the Truth About Those Violations

States are obliged to guarantee victims of serious violations of human rights, their families, and society as a whole, the right to truth. While there is no express provision in the American Declaration establishing this right, the Commission has recognized that it derives from explicit provisions of the Declaration and from the general obligation imposed on States to respect and ensure the free and full enjoyment of rights enumerated therein.²⁴⁸

The Court's approach to the right to the truth has shifted over time, from an early approach that viewed the right as encompassed within Article 8's guarantees concerning the right to a fair trial and Article 25's protections of the right to judicial protection in the Convention.²⁴⁹ The contemporary cases approach the right in significantly broader terms.

²⁴⁷ See, e.g., Giles Tremlett, *Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture*, THE GUARDIAN, (Dec. 1, 2010), <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>; John Goetz and Matthew Gebauer, *US Pressured Italy to Influence Judiciary*, DER SPIEGEL, (Dec. 17, 2010), <http://www.spiegel.de/international/europe/0,1518,735268,00.html>; Bob Egelko, Chronicle Staff Writer, *WikiLeaks cables recount how U.S. pressured allies*, SAN FRANCISCO CHRONICLE, (Mar. 6, 2011), http://articles.sfgate.com/2011-03-06/opinion/28661808_1_wikileaks-cables-wikileaks-disclosures-cia-agents; John Goetz and Matthew Gebauer, *Cables show Germany Caved to Pressure from Washington*, DER SPIEGEL, (Dec. 9, 2010), <http://www.spiegel.de/international/germany/0,1518,733860,00.html>.

²⁴⁸ See generally OAS, *Right to Truth*, (discussing the development of the right to truth) available at <http://www.cidh.org/relatoria/showarticle.asp?artID=156&IID=1>

²⁴⁹ Bamáca Velásquez, *supra* note 134, ¶ 201; Barrios Altos, *supra* note 224, ¶ 48.

The case of *Moiwana Community v. Suriname* is illustrative. When examining an army-perpetrated massacre, the Court found that:

... all persons, including the family members of *victims of serious human rights violations*, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims.²⁵⁰

In *Gomes*, the legitimacy of Brazilian amnesty legislation was questioned before the Court. The Court affirmed its earlier recognition of the right to truth when faced with serious violations of human rights. The Court based the right to truth on Article 8 (right to a fair trial), Article 13 (freedom of thought and expression), and Article 25 (judicial protection of rights) of the American Convention. Significantly, the Court further stated that States may not invoke state secrecy as a basis for the denial of information regarding serious breaches of human rights.²⁵¹

The Inter-American Commission has emphasized the crucial nature of the right, especially in contexts where amnesties and similar legal measures have interfered with the ability of a country to identify, investigate, and prosecute those responsible for significant human rights violations.²⁵² Most recently, in *Gonzales*, the Commission reiterated that the right to access information was a crucial component of a victim's right to truth through adequate access to judicial recourse. The Commission noted that

²⁵⁰ *Moiwana Village*, *supra* note 223, ¶ 204 (emphasis added).

²⁵¹ *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 ¶ 202 (Nov. 24, 2010) (“Finally, the Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.”).

²⁵² *Parada Cea v. El Salvador*, Case No. 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L/V/II.95 doc. 7 rev. ¶ 151 (1999).

[a] critical component of the right to access information is the right of the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation. The Inter-American system has established that this right – the right to truth is not only a private right for relatives of the victims, affording them a form of reparation, but also a collective right that ensures that society has access to information essential for the workings of democratic systems.²⁵³

Thus in Gonzales, the Commission found a violation of Article XVIII on the basis of, *inter alia*, a failure of the United States to convey information to the victim’s family members.²⁵⁴

Numerous authoritative human rights bodies, including the HRC,²⁵⁵ the U.N. Working Group on Enforced or Involuntary Disappearances,²⁵⁶ and the Parliamentary Assembly of the Council of Europe,²⁵⁷ have recognized the right to truth as a crucial protection in the context of disappearances. The HRC examined the issue in *Quinteros v. Uruguay*, emphasizing that the mother of a disappeared daughter suffered from “anguish and stress caused . . . by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts.”²⁵⁸ The HRC found that the mother had a freestanding “the right to know what . . . happened to her daughter” under the ICCPR

²⁵³ Gonzales, *supra* note 60, ¶ 193 (citing *Ellacuria v. El Salvador*, Case 10.488, Inter-Am. Comm’n H.R., Report N° 136/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 608 (1999) ¶ 224-226).

²⁵⁴ *Id.* ¶ 197 (stating that “In light of the considerations presented, the Commission finds that the United States violated the right to judicial protection of Jessica Lenahan and her next-of-kin under Article XVIII, for omissions at two levels. First, the State failed to undertake a proper inquiry into systemic failures and the individual responsibilities for the non-enforcement of the protection order. Second, the State did not perform a prompt, thorough, exhaustive and impartial investigation into the deaths of Leslie, Katheryn and Rebecca Gonzales, and failed to convey information to the family members related to the circumstances of their deaths.”).

²⁵⁵ *Quinteros*, *supra* note 231, ¶ 14.

²⁵⁶ Comm’n on H.R., Working Grp. On Enforced or Involuntary Disappearances, First Rep., U.N. Doc. E/CN.4/1435, ¶187 (1981).

²⁵⁷ Eur. Parl. Ass., *Res. 1463 (2005) on Enforced Disappearances*, ¶ 10(2) (Oct. 3, 2005); Eur. Parl. Ass., *Res. 1414 (2004) on Persons Unaccounted for As a Result of Armed Conflicts or Internal Violence in the Balkans*, ¶ 3 (Nov. 23, 2004); Eur. Parl. Ass., *Recommendation 1056 (1987) on National Refugees and Missing Persons in Cyprus*, (May 5, 1987).

²⁵⁸ *Quinteros*, *supra* note 231, ¶ 14.

and that “she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7 [of the ICCPR – i.e. the right to be free of cruel, inhuman, or degrading punishment or treatment].”²⁵⁹ The Committee has emphasized that the right to the truth is central to assuaging the psychic injury suffered by the relatives of the disappeared.

In 2006, the Office of the United Nations High Commissioner for Human Rights conducted a study on the right to truth, concluding that:

The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels.²⁶⁰

Thus the Inter-American System, as well as other international tribunals and human rights mechanisms, has defined and confirmed the central contours of the right to truth, and its importance in respecting and ensuring the free and full enjoyment of rights.

B. The Petitioners’ Right to Truth was Violated

In the current case, the refusal of the United States government to acknowledge, let alone apologize for, the forced disappearance and torture to which its agents subjected the Petitioners, violates their right to truth. The Petitioners, as well as society as a whole, are entitled to know the full truth about the grave human rights violations that took place.

The Petitioners have a right to know the full truth about the circumstances of their extraordinary rendition. To fulfill that right, the U.S. government should make available

²⁵⁹ *Id.*

²⁶⁰ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Guatemala*, U.N. Doc. CCPR/C/79/add.63, ¶ 55 (Apr. 3, 1996); Comm’n on H.R., *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).

to the Petitioners an accurate and complete account of their enforced disappearance and torture, the motivation and processes that resulted in the unlawful State actions, an explanation for the failures of any existing mechanisms that could have prevented the violations, and an accounting of which officials and agencies were responsible for the violations.

Instead of providing Petitioners and other victims of the U.S. program with such an accountability mechanism, the United States has consistently invoked the state secrets privilege, governmental immunities, and doctrines of deference to military decision-makers in U.S. courts to prevent disclosure of the scope and nature of the U.S. program. The continuing failure of the United States to furnish the Petitioners with any information regarding the circumstances surrounding their extraordinary rendition violates their right to truth as guaranteed by the American Declaration.

VII. THE FAILURE OF U.S. COURTS TO CONSIDER THE MERITS OF PETITIONERS' CLAIMS VIOLATED THEIR RIGHT TO RESORT TO THE COURTS GUARANTEED UNDER 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. Consistent with its interpretative mandate, the Commission has interpreted Article XVIII in light of the more specific but analogous

terms of Articles 8 and 25 of the American Convention.²⁶¹ 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 25²⁶² 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.²⁶³ Thus, the right to a remedy guaranteed by Article XVIII encompasses a procedural component (access to justice) and a substantive component (redress for violations of rights protected by national and international law).

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.²⁶⁴ Importantly, the right to a

²⁶¹ 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 Indigenous Community*, *supra* note 84, ¶ 174; *Fernandes*, *supra* note 220, ¶ 37.

²⁶² 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.”

²⁶³ *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am, Ct. H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 ¶ 157.

²⁶⁴ *Velásquez Rodríguez*, *supra* note 70, ¶ 64; Report on Terrorism and Human Rights, Inter-Am. Comm’n. H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 334 (2002). In *Wayne Smith v. United States*, the Commission affirmed the fundamental role played by Article XVIII in ensuring that the basic rights enshrined in the American Declaration are protected. Citing *Rafel Ferrer-Mazzora*, the Commission reiterated that “when a state fails to provide an adequate and effective remedy to a violation of 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.²⁶⁵ 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.²⁶⁶

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 the case of the Petitioners. In the *Gustavo Carranza* case,²⁶⁷ the Commission held that Argentina violated the Convention when its courts applied the political question doctrine and refused to decide a 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

fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration.” *Wayne Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 62 (2010) (citing *Ferrer-Mazorra v. United States*, Case No. 9903, Inter-Am. Comm’n H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20, rev. t 1188, ¶ 243 (2001)). *See also* *Gonzales*, *supra* note 60, ¶ 172 (stating that “Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations”) (citing *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20, rev., ¶ 37 (2001)).

²⁶⁵ *See, e.g.*, *Mayagna (Sumo) Awas Tingni Community Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶ 113-114 (Aug. 31, 2001); *Ivcher Bronstein Case*, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 74 ¶ 136-137 (Feb. 6, 2001).

²⁶⁶ “Five Pensioners” Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 136 (Feb. 28, 2003).

²⁶⁷ *Carranza v. Argentina*, Case 10.087, Inter-Am. Comm’n.H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 80 (1997).

political question.²⁶⁸ 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.²⁶⁹

As noted, 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 *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, 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.”²⁷⁰

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 States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency, or to control the legality of

²⁶⁸ Under this doctrine domestic courts had abstained from reviewing acts that presuppose a political or discretionary judgment reserved exclusively for another branch of government.

²⁶⁹ Carranza, *supra* note 267, ¶ 73.

²⁷⁰ *Galdamez v. El Salvador*, Case 11.481, Inter-Am. Comm’n. H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 147 (1999). *See also* Orayce et al. v. Chile, Cases 11.505, Inter-Am. Comm’n. H.R., Report No. 25/98, OEA/Ser.L/V/II.95. (ser. C) (1998).

measures adopted by the executive body due to the state of emergency.”²⁷¹ 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 Court has considered the right of access to courts and to a remedy in circumstances broadly similar to those at issue here: where States failed to provide recourse to courts due to domestic amnesty provisions. Such provisions, like the state secrets privilege and immunity doctrines, operate to shield individuals from prosecution for serious human rights violations:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them are prohibited because they violate non-derogable rights recognized by international human rights law.²⁷²

In addition, the Commission has found that laws granting amnesty for human rights violations committed in the context of alleged threats to national security violate Article XVIII of the American Declaration.²⁷³ The Commission has also emphasized the fundamental importance of the protections extended under Article 25 of the Convention, noting that these protections cannot be suppressed or rendered ineffective even in “states of emergency.”²⁷⁴

The European Court too has recognized the importance of the right to a remedy

²⁷¹ Carranza, *supra* note 267, ¶ 80.

²⁷² Barrios-Altos, *supra* note 224, ¶ 41.

²⁷³ Consuelo v. Argentina, Case 10.147, Inter-Am. Comm’n H.R., Report No. 28/92, OEA/Ser.L/V/II.83 Doc. 14 ¶ 50 (1992); Mendoza v. Uruguay, Case 10.029, Inter-Am. Comm’n H.R., Report No. 29/92, OEA/Ser.L/V/II.83 Doc. 14 ¶¶ 37-38 (1992).

²⁷⁴ Carranza, *supra* note 267, ¶ 80.

and its importance in safeguarding other rights, even when national security concerns are raised by the State. In *Tinnelly & Sons Ltd. v. United Kingdom*,²⁷⁵ 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 stating that the refusal to offer contracts was “an act done for the purposes of protecting national security or the protection of public safety or order.” In an application for judicial review of the certification process, the domestic court found 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.²⁷⁶ Nor did the court have sight of the relevant documents; rather, it dismissed the case on the ground that the section 42 certificates were conclusive on the issue of national security.²⁷⁷ In other words, there was no “independent judicial scrutiny of the facts grounding” the judge’s determination.²⁷⁸

On review, the European Court held that the use of unreviewable national security certificates constituted a disproportionate restriction on the applicants’ right to judicial determination on the issue, resulting in a violation of Article 6 (right to a fair trial) of the European Convention. Although the Court accepted that the right to a remedy recognized by the Convention might be subject to certain limitations, including limits based on national security grounds, it determined that any such limitations must not restrict the exercise of the right in a manner that impaired the very essence of the right. The Court

²⁷⁵ *Tinnelly & Sons Ltd v. United Kingdom*, Eur. Ct. H.R., App. No. 20390/92, ¶ 79 (1998).

²⁷⁶ *Id.* ¶ 70.

²⁷⁷ *Id.*

²⁷⁸ *Id.* ¶ 77.

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.²⁷⁹ (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 contexts, 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 procedural justice."²⁸⁰ Ultimately, the Court was not persuaded that alternative measures could not have been introduced that might have accommodated both of these interests.²⁸¹

B. The Petitioners were Denied a Right to a Remedy before U.S. Courts

Shortly after the Petitioners filed a civil lawsuit against Jeppesen Dataplan, Inc., a flight logistics company allegedly complicit in their forced disappearance and torture — and indeed even before the company submitted any response to the allegations — the United States government intervened in the case and sought dismissal on the basis of an

²⁷⁹ *Id.* ¶ 77.

²⁸⁰ *Id.* ¶ 78.

²⁸¹ *Id.*; see also, *Devenney v. United Kingdom*, Eur. Ct. H.R., App. No. 24265/94, ¶ 29 (2002); *Al-Nashif v. Bulgaria*, Eur. Ct. H.R., App. No. 50963/99 ¶ 138 (2002).

evidentiary privilege — the state secrets privilege — arguing that any further litigation in the Petitioners’ case would cause harm to U.S. national security interests.

Accepting the government’s arguments, the U.S. courts failed to consider the merits of the Petitioners’ claims, instead dismissing the case at the outset. None of the three U.S. courts that examined the case examined in any detail those claims that could be substantiated on the basis of publicly available information²⁸²; nor did any Court independently consider the nature of the evidence, its alleged secrecy or whether any disclosure would have indeed caused harm to national security.²⁸³ In dismissing the case, the Ninth Circuit Court of Appeals, sitting *en banc*, stated that “[t]he government, having access to the secret information, can determine whether plaintiffs’ claims have merit and whether misjudgments or mistakes were made that violated plaintiffs’ human rights.”²⁸⁴

Such broad decisions resemble the amnesty provisions enacted by Peru, Chile and Brazil, which were invalidated by the Inter-American Court in *Barrios Altos v. Peru*,²⁸⁵ *Almonacid-Arellano v. Chile*,²⁸⁶ and *Gomes Lund v. Brazil*.²⁸⁷ The Inter-American

²⁸² *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1102-31 (9th Cir. 2010),

²⁸³ The Court held that “even assuming plaintiffs could establish their case *solely* through nonprivileged evidence – unlikely as that may be – any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d at 1090.

²⁸⁴ *Id.* at 1091.

²⁸⁵ *Barrios Altos*, *supra* note 224, ¶ 44 (finding that there was a breach of the right to fair trial and to judicial protection enshrined in Articles 8 and 25 of the American Convention as a consequence of the enactment and enforcement of amnesty laws).

²⁸⁶ *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 125 (Sep. 26, 2006). The court found that there was a violation of Article 8 of the American Convention. While domestic judges and courts are bound to apply the provisions in force within the legal system, “according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation.” *Id.* (citing International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 35 (Dec. 9, 1994)).

²⁸⁷ *Gomes Lund*, *supra* note 251, ¶ 202. “Finally, the Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.” *Id.*

System has taken a strong stance against such systematic attempts to deprive victims of serious human rights violations of the opportunity to access recourse to courts and an effective remedy. In dismissing the Petitioners' claims and effectively granting immunity to those responsible for human rights violations at issue, the United States has failed to protect the Petitioners' right to recourse to a court and for an effective remedy for the violations of their rights under Article XVIII.

VIII. CONCLUSION AND PETITION

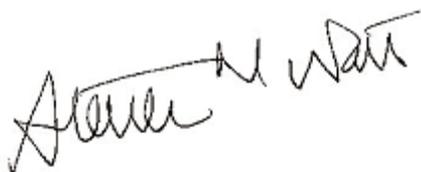
The facts alleged in this Petition establish that the United States of America is responsible for the violation of the rights of the Petitioners guaranteed under Articles I, XVIII, XXV, XXVI and XXVII of the American Declaration. Thus, Petitioners Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi respectfully request 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 Petitioners' rights under the American Declaration, including, *inter alia*, their rights to be free from torture, inhumane treatment, arbitrary detention and forced disappearance guaranteed under Articles I, XVIII, XXV, XXVI and XXVII and their rights to truth and to a remedy protected under Article XVIII;
 4. Declare that the operation of the U.S. program violated the American Declaration;
 5. Recommend such other remedies as the Commission considers adequate and
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effective for addressing the violations of the Petitioners' fundamental human rights, including, *inter alia*, requesting that the United States government and those directly responsible for the Petitioners' "extraordinary rendition" publicly acknowledge such involvement and publicly apologize to the Petitioners' for the violation of their rights.

Dated: November 14, 2011

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Steven Macpherson Watt", written in a cursive style.

Steven Macpherson Watt

Steven Macpherson Watt
Ben Wizner
American Civil Liberties Union
Human Rights &
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Margaret L. Satterthwaite
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