TO THE HONORABLE MEMBERS OF THE

either to confirm or deny its involvement in his abduction, detention, and interrogation. Adding insult to injury, U.S. courts endorsed the government's position that any litigation of the case would be harmful to national security and summarily dismissed his case without any consideration of the merits of his claims. security and summa1 Tf0.0003 Tc -0.9004 Tw [(t99 0

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

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

The United States' direct involvement in and failure to protect against the torture, arbitrary detention, and forced disappearance suffered by Mr. El-Masri violated his fundamental right to life under Article I of the American Declaration (the right to life and personal security), as well as his rights to due process of the laws protected under Articles XXV, XXVI, and XVII. His transfer to torture in Afghanistan also violated his rights under Article XXVII (the right to seek and receive asylum and the right to non refoulement). And, the refusal of U.S. courts to provide Mr. El-Masri with a remedy for the violation of his rights under the U.S. Constitution and international law violated his right to resort to the courts under Article XVIII. The United Stat

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background[1]

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

Abduction and Detention in Macedonia

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

On the seventh day of his confinement, a ma

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

their subsequent transfer to detention facilities outside the United States for intelligence gathering purposes.[3]

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

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

Detention and Interrogation in Afghanistan

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

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

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

Mr. El-Masri was thirsty. Through the small, barred window of his cell, Mr. El-

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

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

In all, Mr. El-Masri was interrogated on three or four occasions, each time by the same man, and each time at night. His interrogations were acc 7hhhcrrinsuln(is)]TJ0.0001 Tj0.0006 -Tw 17.9

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

Media reports quoting unnamed U.S. officials, published after Mr. El-Masri's eventual return to Germany, note that CIA officials at the "Salt Pit" believed early on that they had detained the wrong person. According to those reports, in March, Mr. El-Masri's

interrogation room, sat him on a chair, and tied him to it. A feeding tube was then forced through his nose to his stomach and a liquid was poured through it. After this procedure, Mr. El-Masri was given some canned food as

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

In June, 2007, based on its examination of flight records, the Council of Europe confirmed that on May 28, 2004 at 7:04 a.m. Mr. El Masri "was flown out of Kabul […] on board a CIA-chartered Gulfstream aircraft with the tail

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

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

Return to Germany

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

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

asked after his wife and children. He was to

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

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

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

[14] Whitlock, *Id.*

[15] Declaration of Manfred Gnidjic, *supra* note 9, at ¶ 16.

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

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

Specifically, the Council of Europe found "credible his account of detention in Macedonia and Afghanistan for nearly five months."[18]

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

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

B. Domestic Legal Proceedings

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

[18] COUNCIL OF EUROPE, 2006, *supra* note 3, at ¶ 92.

of the United States.[19]

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

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

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

The roots of the current program can be traced to the Reagan administration, when rendition was employed to affect the transfer of terrorism suspects to stand trial in the United States. During the Clinton presidency this practice was expanded to affect the transfer of suspects from one country to another where they were expected to stand trial.[29] Testifying before a hearing of the Joint House/Senate Intelligence Committee in October 2002, George J. Tenet, then Director of Central Intelligence, describerd(ecectehament /Spun sus(ecec( )Tj0.0

significantly and are now aimed at the clandestine apprehension, transfer, detention, and interrogation of foreign nationals suspected of involvement in terrorism outside the United States.[30] Thus, it is the transfer of individuals to detention and interrogation outside the

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

Since October 2001, the media has reported on the existence of the program and many of its operational details. Following these initial reports, literally thousands of press reports and a handful of books about the "extraordinary rendition" program have been

The President also indicated that although no other suspects were then held by the CIA, the program itself would remain operative.[40]

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

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

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

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[44] Michael Duffy & Timothy J. Burger, *Ten Questions for John Negroponte*, TIME, Apr. 16, 2006, at 6, *available at*

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

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

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[50] Letter from William E. Moschella, Assistant Attorney General, to Richard Durbin, U.S. Senator (Jan. 17, 2005) *available at* http://www.aclu.org/images/asset_upload_file606_23910.pdf; Letter from Richard Durbin, U.S. Senator, to Alberto Gonzales, Attorney General (Nov. 3, 2005) *available at* http://www.aclu.org/images/asset_upload_file406_23912.pdf.

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

[52] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[53] *Id.* at § 8 (b).

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

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

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

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

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

[56] *Id.* at 281, 282.

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

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

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

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

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

[60] Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002).

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

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

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

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

[62] Detainees in Guantanamo Bay, *supra* note 60, at n.7.
[63] Cyprus v. Turkey, 18 Y.B. Eur. Conv. H.R. 83, at ¶ 118 (1975) (Eur. Comm'n on H.R.).
[64] Loizidou v. Turkey, Eur. Comm. H.R., Preliminary Objections, Judgment, Series A No. 310, ¶¶ 59-64 (1995).
[65] Banković and Others v. Belgium and 16 Other Contracting States (Admissibility), App. No. 52207/99, Eur. Ct.H.R. (2001).

Court found that it did not apply to govern the actions of Belgium and the other Member States.[66] By omitting reference to *Banković,* the Commission has indicated that it does not consider that similar territorial restrictions apply in regards to the scope of the protections afforded by the American Declaration. Moreover, in the European Court's most recent

United States’ actions in areas outside the western hemisphere, including the

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

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

In this matter, it is particularly important that the Commission exercise jurisdiction, as the United States apprehended and held Mr

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

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

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

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

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

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

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

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

the OAS has repeatedly recognized the American Declaration as a source of international

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL ARGUMENT

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

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

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

[85]

detention, and forced disappearance because its agents were directly involved in the violations or, alternatively, because the United States has failed to investigate and

moral integrity.[87] The Commission has also noted that "the Inter-American Court of Human Rights has consistently ruled that 'every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to. . . humane treatment.'"[88]

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*."[89] The Commission has also held the prohibition to be a *jus cogens* norm,[90] and has emphasized that the prohibitions on torture and other inhumane treatment apply equally in time of war and peace.[91] As evidenced by their incorporation in universal and regional human rights treaties as well as the Geneva Conventions, the prohibitions of torture and crue

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

Consistent with its interpretative mandate, the Commission and the Inter-American Court have drawn on other international instruments, customary and international humanitarian law, as well as the decisions of other international bodies interpreting these legal standards, to define the content of the norm. When analyzing allegations of violations of Article 5 of the American Convention, for example, the Commission has considered decisions of the European Commission on Human Rights, according to which "inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable."

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

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

A State violates the prohibition against torture not only when it uses torture directly, but also when it is complicit in torture committed by another State or when it transfers a person to a State where it is likely that the person will be tortured or otherwise mistreated.[96] The prohibition against rendering persons to countries that practice torture is incorporated in Articles I and XXVII of the American Declaration. The Commission has held that a State that expels, returns, or extradites a person to another State where there are

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

The Inter-American Court has held that the prohibition of torture proscribes the transfer of anyone to a country where that person is likely to be tortured, even if the individual is suspected of terrorist activities.[103]

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

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

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[107] *Luis Lizardo Cabrera v. Dominican Republic*, *supra* note 93, at ¶ 79, citing *The Greek Case*, at ¶ 186.
[108] *Id*. at ¶ 80, citing *Ireland v. United Kingdom*, Eur. Ct. H.R, at ¶ 167. *See also*

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

The Commission and the Inter-American Court have considered violative of Article 5 of the American Convention circumstances in

The Commission and the Inter-American Court have been particularly critical of circumstances, like Mr. El-Masri's, in wh

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

to establish sharp distinctions between the different kinds of

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

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

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

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

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

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

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

[133] *See, e.g.*, *Id*. at ¶ 58 (finding Guatemalan military responsible for actions designed to "intimidate" and "panic" among community members).

[134] Gallardo Rodríguez v. Mexico, Case 11.430, Inter-Am. C.H.R., Report No. 43/96, OEA/Ser.L/V/II.95

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

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

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

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

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

The Committee Against Torture has similarly condemned the United States' practice of extraordinary rendition as violating the CAT's prohibition on *refoulement*

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

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

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

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[150] Human Rights Committee, Gen. Cmt. 8: Right to liberty and security of persons (Art. 9), A/37/40, ¶ 4 (1982).
[151] *See* Office of the High Commissioner for Human Rights, The Working Group on Arbitrary Detention *Fact Sheet No. 26*; *see also* Jailton Neri da Fonseca v. Brazil,, Case 11.634, Inter-Am. C.H.R., Report No. 33/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 845, ¶ 54 (2004); Pinheiro & Dos Santos v. Paraguay, Case 11.506, Inter. Am. Comm. H.R., Report No. 77/02, OEA/Ser.L/V/II.111 doc. 20 rev., ¶ 50 (2001).
[152] *See* Working Group on Arbitrary Detention, Opinion No. 3/2004, Israel, concerning Abla Sa'adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba'neh. E/CN.4/2005/6/Add.1, 19 November 2004.
[153] *Id*.

The Working Group determined that the proceedings that Israel instituted were not sufficient to render the women's detention legitimate.[154]

1. Mr. El-Masri was arbitrarily detained

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

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

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[154] *Id.*

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

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

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

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

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

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

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[157] *See, e.g.*, Annual Report of the Inter-Am. C.H.R. 1985-6, OEA/Ser.L/V/II.68, doc. 8 rev. 1, pp. 40-41 (1986); Annual Report of the Inter-Am. C.H.R. 1982-83, OEA/Ser.L/V/II.61, doc. 22, rev. 1, pp. 48-50 (1983); Annual Report of the Inter-Am. C.H.R. 1980-81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, pp. 113-14 (1981); Luis Gustavo Morroquín v. Guatemala, Ca

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

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

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

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

[166] *Velásquez Rodríguez Case*, *supra* note 115, at ¶¶ 151-52.

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

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

[169] *Id.* at ¶ 155.

[170] *Id.* ¶¶ 155-157.

Honduras violated Godínez Cruz's Article 4, 5, and 7 protections.[171] In so doing, the

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

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."[178]

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

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

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

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

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

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

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

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

Apprehension in Macedonia

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

- The United States is known to operate detention facilities in Afghanistan. More specifically, investigative journalists have identified the facility where Mr. El-Masri alleges that he was detained for over four months.

the Court, State responsibility is implicated when violations occur and "the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."[189]

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

The European Court has likewise held that in certain circumstances States assume

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

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

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

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[193] Human Rights Committee, Gen. Cmt. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 8 (2004).
[194] *Id.*
[195] *Pueblo Bello Massacre*, *supra* note 191, at ¶¶ 123-24 (citing and quoting the European Court of Human Rights' decision in Kiliç, Eur. Ct.H.R. Application No. 22492/93); Case 0322/2001, *Sawhoyamaxa Indigenous Community*, *supra* note 191.
[196] *Osman v. United Kingdom*, *supra* note 192; *Id.* at ¶ 116; *see also Id.* at ¶ 118-121. Cf. Younger v. United Kingdom, Eur. Ct.H.R. 22 (2000) (decision on admissibility) (finding no violation of positive obligation to protect against prison suicide when authorities had no knowledge of mental health problems or suicidal tendencies); *Osman*, *supra* note 192, at ¶ 118-121 (finding no violation of positive obligation when police had no knowledge that killer was mentally ill or prone to violence, and no proof that killer was responsible for prior non-violent incidents of harassment).

Two years after *Osman*, the European Court applied this same standard in the case of *Kiliç v. Turkey*.[197] In *Kiliç*, the Court held that Turkish authorities failed to take

Coulter cases, the Commission affirmed that under the Declaration, the State was obligated to take appropriate measures to protect indigenous communities from environmental harm caused by miners and prospect

ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals."[204]

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

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

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

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

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

evidence to prove that an agent of the State actually carried out the killing.[216] 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.[217]

Likewise, the European Court found that under the European Convention, the obligation on States to ensure human rights protection "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. . . ."[218] 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.[219]

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.[220] Similarly, in *Tshitenge Muteba v. Zaïre*, the Committee found that in response to allegations of torture, Zaïre was "under a duty to . . . conduct an inquiry into

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[216] *Id.* at ¶¶ 47-48.
[217] *Id.* at ¶ 103.
[218] Avsar v. Turkey, App. No. 25657/94, Eur. Ct.H.R. at ¶ 393 (2001).
[219] *Id.*
[220] *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 109, ¶ 13.3 (1985); *see also Alberto Grille Motta v. Uruguay*, Communication No. 11/1977, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 54, ¶ 14 (1984).

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

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

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

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

In the *Bulacio* case, the Court elaborated on the components of the duty to investigate in its examination of the Argentine Federal Police's arrest and assault on a seventeen-year old boy that eventuated in his death. At issue was a prolonged and

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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."[223]

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.[224] As a result, the Court required the State "to continue and conclude the investigation of the facts and to punish those responsible for them."[225] The Court also awarded compensation to the next-of-kin for non-pecuniary damages.[226]

In *Avsar v. Turkey*,[227] the European Court set forth a similar standard for the scope and nature of investigations that must be conducted by the state into alleged human rights violations. First, the Court determined that the investigation must be "official" and "independent from those implicated in the events."[228] 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."[229] 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

[223] Bulacio Case, Judgment, Inter-Am. Ct.H.R., (ser. C) No. 100, ¶ 112 (Sept. 18, 2003).
[224] *Id.* at ¶ 119-120.
[225] *Id.* at ¶ 121.
[226] *Id.* at ¶¶ 101, 102.
[227] *Avsar v. Turkey*, App. No. 25657/94, at ¶¶ 393-395.
[228] *Id.* at ¶ 394.
[229] *Id.* at ¶ 393.

complete and accurate record of injury and an objective analysis of clinical findings,

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

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

Article XVIII guarantees every person the right to resort to the courts to ensure

case on the merits. The petitioner was a judge removed from office in 1976 by the military government of Argentina. He sought a judicial remedy but was denied access to domestic courts on the grounds that his dismissal constituted a political question.[239] 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.[240]

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

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

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[239] Under this doctrine domestic courts had abstained from reviewing acts that presuppose a political or discretionary judgment reserved exclusively for another branch of government.
[240] *Carranza v. Argentina*, *supra* note 244, at ¶ 73.
[241] Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm. H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 147 (1999). *See also*, Alfonso René Chanfeau Orayce et al. v. Chile, Cases 11.505; 11.532; 11.541; 11.546; 11.449; 11.569; 11.573; 11.583; 11.585; 11.595; 11.652; 11.655; 11.657; 11.675 and 11.705, Inter-Am. C.H.R., Report No. 25/98, OEA/Ser.L/V/II.95. (ser. C).

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

42 certificates were conclusive on the issue of national security.[245] In other words, there was no "independent judicial scrutiny of the facts grounding" the judge's determination.[246]

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

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

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

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[245] *Id.*
[246] *Id.* at ¶ 77.
[247] *Id.* at ¶ 77.

procedural justice."[248] Ultimately, the Court was not persuaded that alternative measures could not have been introduced that might have accommodated both of these interests.[249]

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

CONCLUSION AND PETITION

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

1. Declare this Petition admissible;

2. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;

3. Declare that the United States of America is responsible for the violation of the Petitioner's rights under the American Declaration of the Rights and Duties of Man, including, *inter alia*, his rights to be free from torture, arbitrary detention and forced disappearance guaranteed under Articles I, XVII, XXV, XXVI, and XXVII, and his right to a remedy protected under Article XXVIII;

4. Declare that the continued operation of the U.S. "Extraordinary Rendition" Program violates the American Declaration on the Rights and Duties of Man and international law generally;

5. Recommend such remedies as the Commission considers adequate and effective for addressing the violation of Petitioner's fundamental human rights, including, *inter alia*, requesting that the United States government and those

[251] *Id.* at 20.
[252] *Id.* at 21.

directly responsible for Mr. El-Masri's "extraordinary rendition" publicly