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

PETITIONER'S FINAL OBSERVATIONS ON THE MERITS
PETITION No 13.027, KHALED EL-MASRI v.UNITED STATES OF AMERICA

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

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INTRODUCTION

In his Final Observations on the Merits, Mr. El-Masri provides the Commission with an update on the factual history of this case and legal arguments made in support of his Petition No. 13.027 filed with the Commission on April 28, 2008, and which the Commission found admissible on April 15, 2016. *El-Masri v. United States*, Case Petition 419-08, Inter-Am. Comm. H.R., Report No. 21/16, OEA/Ser.L/V/II.157 doc. 25 (2016).

In early 2004, agents of the United States abducted Khaled El-Masri, a German citizen, and subjected him to over four months of arbitrary detention and abuse in a secret U.S.-run prison in Afghanistan. The U.S. Central Intelligence Agency ("CIA") orchestrated Mr. El-Masri's abduction, in Macedonia, by collaborating with Macedonian intelligence officials to seize him and to detain and interrogate him in Skopje, Macedonia for over three weeks. Mr. El-Masri's Macedonian captors then handed him over to the custody of contractors and agents of the CIA, who stripped him of his clothing, photographed, beat and drugged him, and chained him to the floor of an aircraft. The CIA flew Mr. El-Masri to Afghanistan where they held him incommunicado in solitary confinement in a CIA prison known as the "Salt Pit." Almost immediately after capturing Mr. El-Masri, the United States realized that they had captured and detained an innocent man, but continued to hold him for over four more months. In the Salt Pit prison, CIA officers coercively interrogated Mr. El-Masri by subjecting him to prolonged sleep deprivation, beatings, threats, and forcibly feeding him. They denied Mr. El-Masri's repeated requests to speak with a lawyer, consular official, or his wife and subjected Mr. El-Masri to inhumane conditions; holding him in a dungeon-like cell and depriving him of adequate food and water. In May 2004, the CIA released Mr. El-Masri without charging him with a crime and unlawfully rendered him to Albania, where CIA agents dumped him on a hilltop in the dead of

night. From Albania, Mr. El-Masri found his way home to Germany only to find his family gone: his wife had taken their children to her parents' home in Lebanon, fearing that her husband had disappeared forever.

In official reports, the United States has acknowledged its role in Mr. El-Masri's unlawful rendition and detention, and in 2012, the European Court of Human Rights found Mr. El-Masri's account of his entire ordeal, including the United States' role in it its abusive treatment of him, highly credible. In compliance with the Court's ruling, the Macedonian government publicly apologized to Mr. El-Masri and paid him compensation of 60,000 Euros for violating his rights. Yet, for the past fourteen years, the United States has refused to take any responsibility for its illegal conduct. When Mr. El-Masri sought recourse before U.S. courts, they shut their doors to him, denying him even the opportunity to present evidence to hold his torturers accountable. To this day, Mr. El-Masri suffers the severe physical and psychological effects of his abduction, arbitrary detention, forced disappearance and torture, and the pain of the United States' failure to acknowledge and remedy these rights violations.

The CIA's abuse of Mr. El-Masri was not aberrational. As the United States' own documents and reports confirm, it was committed as part of U.S. policy that resulted in the abusive treatment of at least 119 other foreign nationals. And, as with its abuse of Mr. El-Masri, the United States has provided none of these individuals with effective remedies for violating their rights..

The United States' direct involvement in and its failure to protect Mr. El-Masri from unlawful rendition, arbitrary detention, forced disappearance and torture violated Mr. El-Masri's right to life protected by Article I of the American Declaration of the Rights and Duties of Man ("American Declaration"), his right to free residence and movement protected by Article VIII,

and his rights to due process of law guaranteed by Articles XVII, XXV, and XXVI. And, because the United States' subjected Mr. El-Masri to these rights violations as a matter of a U.S. policy that only targeted non-U.S. citizens, the United States violated Mr. El-Masri's right to equality protected by Article II. Finally, U.S. courts failure to provide Mr. El-Masri with any redress violated – and continues to violate - his right to petition and to resort to the courts under Articles XVIII and XXIV.

In his petition, Mr. El-Masri asks the Commission for the following relief:

- Issue a merits report, finding violations of Articles I, II, VIII, XVII, XVIII, XXIV, XXV and XXVI of the American Declaration.
- Declare that the United States' rendition, detention, and interrogation program violates the American Declaration.
- Request that the U.S. government and others responsible for violating Mr. El-Masri's rights publicly acknowledge their involvement, publicly apologize to Mr. El-Masri and his family for their violation, and provide Mr. El-Masri and his family with the proper compensation necessary for their full rehabilitation, including therapeutic counselling and such other redress as the Commission considers appropriate to and necessary for their restitution.
- Request that the United States provide effective guarantees of non-repetition of the human rights violations the Commission finds were committed in this case.

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FACTUAL BACKGROUND

A. Mr. El-Masri's Abduction, Detention and Torture[1]

Khaled El-Masri was born in Kuwait in 1963 and raised in Lebanon. He fled Lebanon in 1985 to escape the civil war there, and settled in Germany, where he became a citizen in 1995. He attended high school for three years before leaving to become a carpenter. Mr. El-Masri has since been employed as a truck driver and a car salesman. He is married with six children and is currently a self-employed businessman living in Austria.

B. Abduction and Detention in Macedonia

On December 31, 2003, Mr. El-Masri boarded a bus in Ulm, Germany, intending to visit Skopje, Macedonia for a brief holiday. Mr. El-Masri's journey was uneventful, passing through several European border inspections without incident, until the bus crossed the Serbian border into Macedonia. There, at the behest of the United States, Macedonian law enforcement officials confiscated Mr. El-Masri's passport and detained him for several hours. Armed plainclothes officers then transported Mr. El-Masri to the Skopski Merak, a hotel in the Macedonian capital of Skopje. *See* Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States, AS/Jur,* Comm. L. Aff. & Human Rights, Eur. Parl. Assembly, Doc. 10957 (2006), ¶ 116 ["Marty Report 2006"].

For twenty-three days, Mr. El-Masri was confined in a hotel room at the Skopski Merak, guarded at all hours by rotating shifts of armed Macedonian officers. The curtains were closed day and night, and Mr. El-Masri was never permitted to leave the room. His frequent requests to

[1] Unless otherwise indicated, this account relies on Mr. El-Masri's sworn declaration that was filed in U.S. federal court in April, 2006. *See Declaration of Khaled El-Masri in support of Plaintiff's Opposition to the United States' Motion to Dismiss, El-Masri v. Tenet,* No. 1:05cv1417 (E.D. Va. 2005). The European Court of Human Rights relied on this declaration in *El-Masri v. Macedonia*, finding "credible his account of detention." *El-Masri v. Macedonia,* App No. 39630/09, ¶ 4,5 E.C.H.R (2012) (citing *Marty Report 2006,* ¶ 92).

see a lawyer, translator, German consular official, or to contact his wife, were denied. When he once moved toward the door and stated his intention to leave, three of his captors pointed pistols at his head and threatened to shoot him.

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

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

C. Transfer to Skopje Airport and to the Exclusive "Authority Control" of the United States

On January 23, 2004, seven or eight Macedonian men entered the hotel room. They were dressed in civilian clothes, and Mr. El-Masri did not recognize any of them. They recorded a fifteen-minute video of Mr. El-Masri, instructing him to say that he had been treated well, had not been harmed in any way, and that he was on his way back to Germany. The men then handcuffed and blindfolded him and forced him inside a car.

After a drive of approximately one hour, the car came to a halt, and Mr. El-Masri could hear the sound of aircraft. He was removed from the vehicle, still handcuffed and blindfolded, and was led to a building. Inside, Mr. El-Masri was beaten severely from all sides with fists and what felt like a thick stick. The men sliced his clothes from his body with scissors or a knife, leaving him in his underwear. When Mr. El-Masri refused to take off his underwear, the men forcibly removed them. *El-Masri v. Macedonia*, ¶21. They threw him to the floor, pulled his hands behind his back and put a boot on his back. Mr. El-Masri then felt a firm object – which the CIA Inspector General would later confirm was a suppository – being forced into his anus. *See* Central Intelligence Agency, *Report of Investigation: The Rendition and Detention of German Citizen Khalid Al-Masri* (2007) ["CIA OIG El-Masri Report"].

Mr. El-Masri was pulled from the floor and dragged to a corner of the room. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in a diaper. He was then dressed in a dark blue short-sleeved tracksuit and placed in a belt with chains that attached to his wrists and ankles. Also pursuant to CIA rendition procedures, the men put earmuffs and eye pads on Mr. El-Masri, blindfolded him, and hooded him. *See* Central Intelligence Agency, *Background Paper on CIA's Combined Use of Interrogation Techniques* 3, ¶A (2004), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOJOLC001126.pdf (describing CIA rendition procedures) ["Memo on CIA's RDI Procedures"].

D. Unlawful Rendition to Afghanistan

Mr. El-Masri was marched to a waiting aircraft, with the shackles cutting into his ankles. Once inside, he was thrown to the floor face down. His legs and arms were then forcibly spread-

eagled and secured to the sides of the aircraft. He felt an injection in his shoulder, and quickly became lightheaded. He felt a second injection that rendered him nearly unconscious.

The men dressed in black clothing and ski masks were members of a CIA "black renditions" team, who were operating pursuant to directives given to them by senior officials in the CIA, including then-Director of Central Intelligence, George Tenet, as part of its unlawful rendition and torture program. The CIA and its contractors designed the program to capture foreign nationals suspected of involvement in terrorist activity and to transport them to detention facilities outside the United States for interrogation. *See* Central Intelligence Agency, *CIA Rendition, Detention and Interrogation Program Overview* (2007), https://www.thetorturedatabase.org/files/foia_subsite/15_0.pdf (explaining basic framework of the CIA's unlawful rendition and torture program) ["Memo on CIA's RDI Overview"]; *see also* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post (Dec. 4, 2005) http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html.

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 at Guantánamo Bay, or possibly in Iraq. He learned later that he was in Afghanistan.

Flight records show that a Boeing 737 business plane owned by a U.S.-based corporation, Premier Executive Transportation Services, Inc., and operated by another U.S.-based corporation, Aero Contractors Limited—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 de Mallorca, Spain on January 23, 2004, and landed at the

Skopje airport at 8:51 p.m. that evening. The plane left Skopje more than three hours later, flying to Baghdad and then on to Kabul. On Sunday, January 25, the jet left Kabul, flying to Timisoara, Romania. *See* Marty Report 2006 at ¶ 103; *El-Masri v. Macedonia* at ¶ 157.

E. Arbitrary Detention, Interrogation and Abuse in Afghanistan

After landing in Afghanistan, CIA agents removed Mr. El-Masri from the aircraft and shoved him into the back of a waiting vehicle. The car drove for about ten minutes. When the car stopped, agents dragged Mr. El-Masri from the vehicle toward the "Salt Pit"—an abandoned brick factory in which the CIA secretly detained, interrogated, and tortured terror suspects. Agents pushed Mr. El-Masri into a cell, threw him to the floors, and kicked and beat him on the head and the small of his back. *El-Masri v. Macedonia* at ¶ 24.

Agents finally removed Mr. El-Masri's blindfold and left him in a small, dirty, concrete cell. When his eyes adjusted to the light, he saw that the walls were covered in crude Arabic, Urdu, and Farsi writing. The cell did not contain a bed. It was cold, but agents provided Mr. El-Masri 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 the sun setting and realized that he had been traveling for twenty-four hours.

Mr. El-Masri was thirsty. Through the small, barred window of his cell, Mr. El-Masri saw a man dressed in Afghan clothing. He shouted to the man for water, and the man pointed to a bottle of putrid water in the corner of the cell. Mr. El-Masri asked for fresh water, but was told his options were to drink from the bottle or go thirsty. That night, Mr. El-Masri was removed from his cell and transferred to an interrogation room. There were six or eight men dressed in the same black clothing and ski masks as the men in the Macedonian airport, as well as another masked man who spoke American-accented English and a translator who spoke Arabic with a Palestinian accent. Mr. El-Masri was stripped naked, photographed, and medically examined by

one of the masked men. Blood and urine samples were taken. Mr. El-Masri complained to the man who seemed to be a doctor about the unhygienic water and poor conditions in his cell. The man responded that the Afghans were responsible for the conditions of his confinement. Then Mr. El-Masri was returned to his cell, where he would be detained in a single-person cell, with no reading or writing materials, and without once being permitted outside to breathe fresh air, for more than four months.

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 another 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.

The interrogator demanded to know whether Mr. El-Masri 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 bin al-Shibh; and whether he associated with alleged extremists in a multicultural center and the Islamic Information Center in Ulm, Germany. Mr. El-Masri answered these questions truthfully and denied any association with terrorist suspects and organizations, just as he had in Macedonia. Mr. El-Masri asked why he, a German citizen, had been transported to Afghanistan, a country with which he had no ties. His interrogator did not answer.

In all, Mr. El-Masri was interrogated on three or four occasions, each time by the same man, and each time at night. His interrogations were accompanied by threats, insults, pushing, and shoving. These interrogation sessions included two men who identified themselves as

Americans. During and after, Mr. El-Masri repeatedly demanded and pleaded that he be permitted to meet with a representative of the German government, but his interrogators ignored all of these requests.

In March 2004, Mr. El-Masri and several other detainees with whom he communicated through cell walls commenced a hunger strike to protest their continued confinement without charges. Mr. El-Masri became convinced that it was necessary to resort to a hunger strike to protest his continued incommunicado and inhumane conditions of confinement. *El-Masri v. Macedonia* at ¶ 26.

After twenty-seven days without food, Mr. El-Masri was given an audience with two unmasked Americans, one of whom identified himself as the prison director and a second whom other detainees referred to as "the Boss." The American prison director spoke to Mr. El-Masri with the help of an Arabic translator. 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 prison director agreed that there was no basis to detain Mr. El-Masri, but said he could not release Mr. El-Masri without permission from Washington. Mr. El-Masri was returned to his cell, where he continued his hunger strike. Because 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.

F. CIA Knowledge of Mr. El-Masri's Unlawful Rendition and Arbitrary Detention

A partially declassified CIA report on Mr. El-Masri's rendition and detention confirms that U.S. officials knew almost immediately after detaining him that they had detained the wrong man and that they had no basis for doing so. *See* CIA OIG El-Masri Report at ¶6. The report confirms that CIA officials did not verify the veracity of Mr. El-Masri's passport and that when CIA officials in Langley, Virginia eventually examined it in March of 2004—well over a month

into Mr. El-Masri's incommunicado detention in the Salt Pit and over two months since the United States directed Macedonian intelligence to seize Mr. El-Masri—the CIA quickly determined its validity. *Id*. The report also confirms that by as early as January 2004 CIA officers doubted that they had the right man. *Id*.

Senior officials in the U.S. government also knew that the CIA was holding an innocent man. CIA officers informed George Tenet, then-Director of Central Intelligence, of this in April, 2004, and then-National Security Adviser, Condoleezza Rice, in early May. Yet, the CIA only released Mr. El-Masri from the Salt Pit on May 28, 2004. *See* CIA OIG El-Masri report at 10 ("Al-Masri (sic) was released and clandestinely returned to Germany."); Lisa Myers, Aram Roston & the NBC Investigative Unit, *CIA Accused of Detaining an Innocent Man*, MSNBC (Apr. 21, 2005); *see also Merkel Government Stands by Masri Mistake Comments*, Reuters, (Dec. 7, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/07/AR2005120700469.html; Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee's Lawsuit*, The Wash. Post (May 13, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051202008.html ("[i]n December [2005] during a joint news conference with Secretary of State Condoleezza Rice, German Chancellor Angela Merkel said Rice had admitted the mistake.")

G. Torture and Other Inhumane Treatment in the Salt Pit Prison

CIA agents were aware of a significant deterioration in Mr. El-Masri's mental health during his unlawful detention in the Salt Pit. Two reports filed by CIA psychologists noted that Mr. El-Masri was suffering from "depression, loneliness, hopelessness, and anger," and periodic severe bouts of mental anguish. *See* CIA OIG El-Masri Report at 46. At times, Mr. El-Masri was "openly tearful and speechless." One psychologist noted that Mr. El-Masri "strongly considered himself to be falsely detained," and that "the lack of interaction . . . ha[d] 'prevented him from

developing a context, time line, or understanding of his detention.'" *Id*. Another psychologist concluded that Mr. El-Masri was in such a fragile mental state that "any undue delay in his release could send him into another downward spiral." *Id.*

Mr. El-Masri's prolonged hunger strike resulted in further severe physical and mental pain and suffering. On the thirty-seventh day of his hunger strike, hooded men entered Mr. El-Masri's cell, dragged him from his bed, and bound his hands and feet. They dragged him into the 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. Following his force-feeding, Mr. El-Masri became extremely ill and suffered severe pain. A doctor visited Mr. El-Masri's cell in the middle of the night and administered medication, but Mr. El-Masri remained bedridden for several days. Since his capture in December 31, 2003, Mr. El-Masri claims he lost nearly sixty pounds. *Id*. at 50.

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

Shortly thereafter, Mr. El-Masri was visited by a man who spoke German; he identified himself only as "Sam." Sam was accompanied by the American prison director and an American translator. Mr. El-Masri asked Sam whether he was a representative of the German government, and whether the German government knew that Mr. El-Masri was being held in Afghanistan, but Sam, after consulting with the Americans, declined to answer. He asked Sam whether his wife knew where he was; Sam replied that she did not and then proceeded to ask Mr. El-Masri many

of the same questions he had previously been asked regarding his alleged associations with extremists in Neu-Ulm, Germany.

Sam visited Mr. El-Masri three more times. In late May 2004, Mr. El-Masri received a visit from Sam, the American prison director, and an American doctor. He was informed that he would be released in eight days. Sam warned him that, as a condition of his release, he was never to mention what had happened to him, because the Americans were determined to keep the affair a secret.

H. Release from the Salt Pit Prison and Unlawful Rendition to Albania

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

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

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

Germany. Mr. El-Masri feared that he would not be returned home, but rather taken to another country and executed. *See* Don Van Natta Jr., *Germany Weighs If It Played Role in Seizure by U.S.*, N.Y. Times (Feb. 21, 2006), http://www.nytimes.com/2006/02/21/world/europe/germany-weighs-if-it-played-role-in-seizure-by-us.html. (Mr. El-Masri later identified "Sam" in a photograph and police line-up as Gerhard Lehmann, a German intelligence officer)

In June 2007, based on its examination of flight records, the Council of Europe confirmed that on May 28, 2004 at 7:04 a.m. Mr. El-Masri "was flown out of Kabul . . . on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome," arriving there at 11.34 a.m. local time. These records also show that U.S.-based corporation, Richmor Aviation owned and operated the aircraft. *See* Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, Comm. L. Aff. & Human Rights, Eur. Parl. Assembly, Doc. 11302 (2007) [hereinafter "Marty Report 2007"] (emphasis omitted).

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

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

I. Return to Germany

Mr. El-Masri was driven to the Mother Theresa International Airport in Tirana, Albania, arriving at about 6:00 a.m. One of the Albanian guards took his passport and cash 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 8:40 a.m. Mr. El-Masri claimed he was about sixty pounds lighter than when he had left Germany in December 2003, his hair was long and unkempt, and he had not shaved since his arrival in Macedonia. From Frankfurt he traveled to Ulm, and from there to his home outside the city. His house was empty and clearly had been so for some time. He proceeded to the Cultural Center in Neu-Ulm and asked after his wife and children. He was told that they had relocated to Lebanon when he failed to return from his holiday in Macedonia.

J. U.S. Courts Deny Mr. El-Masri Civil Redress for his Torture and Inhumane Treatment

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 CIA officials, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture. *See* Complaint, *El-Masri v. Tenet*, No. 1:05cv1417 (E.D. Va. 2005).

Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution, as well as customary international law prohibiting prolonged arbitrary detention, torture and other cruel, inhuman, or degrading treatment enforceable under the Alien Tort Statute, 28 U.S.C. 1350. Although not named as a defendant, the U.S. government intervened before the named defendants answered the complaint, and before discovery had commenced, seeking dismissal of the suit pursuant to a common-law evidentiary privilege, known as the "state secrets" privilege. In support, the government filed two declarations: one public and one for the judge's consideration only. Then-CIA director Porter Goss had signed both. In his public declaration, Goss stated, "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and urged immediate dismissal of Mr. El-Masri's claims. *See* Declaration of State Secrets Privilege by Porter J. Goss, at ¶ 7, *El-Masri v. Tenet*, No. 1:05cv1417 (E.D. Va. 2005).

On May 12, 2006, the district court held oral argument on the United States' motion to dismiss and, in an order dated that same day, the district court granted the motion. Order, in *El-Masri v. Tenet*, No. 1:05cv1417 (E.D. Va. 2005). Mr. El-Masri appealed the dismissal to the Court of Appeals for the Fourth Circuit. The Court of Appeals held oral argument on November 28, 2006. On March 2, 2007, the Court of Appeals, without considering the merits of Mr. El-

Masri's claims, upheld the dismissal. And, on October 9, 2007, the United States Supreme Court, without comment, denied Mr. El-Masri's petition to review the lower courts' decisions. *See El-Masri v. Tenet,* 128 S.Ct. 373 (2007).

K. The Continuing Harm to Mr. El-Masri from his Unlawful Rendition, Arbitrary Detention, Forced Disappearance and Torture and Lack of Redress

For the past fourteen years, Mr. El-Masri has unsuccessfully sought redress for the severe physical and psychological pain and suffering that resulted from his unlawful rendition, arbitrary detention, forced disappearance, and torture. The United States' refusal to provide Mr. El-Masri such redress has compounded this pain and suffering and in particular has manifested in self-destructive behaviors stemming from traumatic stress. Brief of Redress Trust as Amicus Curiae Supporting Petitioner, El-Masri v. U.S, P. 419-08 (2009).

A psychologist who interviewed Mr. El-Masri highlighted the severe psychological impact of Mr. El-Masri's traumas, including the United States' failure to remedy them. Indeed, Dr. Katherine Porterfield traced much of Mr. El-Masri's acute psychological trauma directly to the United States' failure to acknowledge wrongdoing. Decl. of Dr. Katherine Porterfield, *Id*. The Council of Europe agreed with this assessment, linking Mr. El-Masri's rendition-related trauma to the United States' failure to apologize to him. Marty Report 2007, at ¶¶ 296 – 297.

L. Mr. El-Masri's Testimony About his Abduction, Unlawful Rendition, Arbitrary Detention, Forced Disappearance and Torture Has Been Corroborated by the United States and European Human Rights Bodies

The United States, Council of Europe, the European Court of Human Rights, and the government of Macedonia, have corroborated much of Mr. El-Masri's detailed account of his abduction, unlawful rendition, arbitrary detention, forced disappearance and torture. The Macedonian government has even acknowledged its role in violating Mr. El-Masri's rights,

providing him with compensation, and apologizing for its role in compliance with a European Court of Human Rights judgement.

1. Corroboration by the United States

The United States' own official documents and reports corroborate much of Mr. El-Masri's account of his unlawful detention and abusive treatment. They confirm the United States' role in his unlawful rendition and arbitrary detention. Specifically, a partially declassified report by the CIA's Inspector General issued in July 2003 on his investigation into the CIA's rendition and detention of Mr. El-Masri, confirms that the CIA authorized Mr. El-Masri's seizure, rendition, and detention on January 1, 2004. CIA OIG El-Masri Report at 26. This report also confirms that the CIA took custody of him in January 2004, transported him to a foreign country, and held him there, incommunicado until May 2004, without any legal justification. *Id*. at 7-9. The report concludes that "[a]vailable intelligence information did not provide a sufficient basis to render and detain Khalid al-Masri (sic)," and that the "Agency's prolonged detention of al-Masri (sic) was unjustified." *Id*. at 83. Notably, the report finds that the grounds for capturing and detaining El-Masri did not meet the "standard prescribed" in CIA Presidential covert action authority. *Id*. at 86.

The CIA confirmed the Inspector General's findings in statements made to the U.S. Senate Select Committee on Intelligence during its study of the CIA's detention and interrogation program and in the CIA's July 2013 Response to that study. *See* Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 129, S. Report 113-228 (2012) ["Senate Torture Report"]; Comments on the Senate Select Committee on Intelligence Report on the Detention and Interrogation Program, 2-3 (June 27, 2013) ["2013 CIA Response"].

2. Corroboration from European Sources

In June 2004, the Office of the Prosecuting Magistrate in Munich, Germany opened an investigation into Mr. El-Masri's allegations. *See* Declaration of Manfred Gnidjic in support of Plaintiff's Opposition to the United States' Motion to Dismiss at ¶ 6-15, *El-Masri v. Tenet*, No. 1:05cv1417 ["Declaration of Manfred Gnidjic], *available at* https://www.aclu.org/sites/default/files/pdfs/safefree/gnjidic_decl_exh.pdf. The Office corroborated much of Mr. El-Masri's account of his abduction, rendition and detention. Eye-witnesses confirmed that Mr. El-Masri had traveled by bus from Ulm to Macedonia at the end of 2003, and that Macedonian authorities detained him at the Serbian-Macedonian border. Using radioactive isotope analysis of Mr. El-Masri's hair, the Prosecutor's office also concluded that Mr. El-Masri had spent time in a South Asian country and that he had been deprived of food for an extended period. *Id.* at 13.

On January 31, 2007, the German Prosecutor filed indictments against thirteen CIA agents for their involvement in Mr. El-Masri's rendition. Craig Whitlock, *Travel Log Aids Germans' Kidnap Probe*, WASH. POST (Feb. 2, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020101779.html. A Spanish Investigating Magistrate had given their names to the German Prosecutor following an investigation the Spanish Magistrate had conducted into the alleged use of Spanish airports by the CIA to facilitate its unlawful rendition and torture program. *Id*. However, the German government decided not to pursue the extradition request further, concerned that doing so would cause "an open conflict with the American authorities." *Germany 'Drops CIA Extradition'*, BBC (Sept. 23, 2007), http://news.bbc.co.uk/2/hi/europe/7008909.stm.

The Council of Europe, European Parliament and European Court of Human Rights have also corroborated Mr. El-Masri's account of his unlawful rendition from Macedonia to

Afghanistan and from Afghanistan to Albania by the CIA. *See* Marty Report 2006 at ¶¶ 39-50; Marty Report 2007 ¶¶ 274-298; Giovanni Claudio Fava, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, Temp. Comm., Eur. Parl. Assembly, Doc. No. 2006/2200(INI) (2007) ["Eur. Parl. Report 2007"]; *see also El-Masri v. Macedonia*, App. 39630/09 at §§ 43-53, 55-61, 156-61 (detailing reports, statements, and conclusions from multiple European countries, European regional bodies, and U.N. bodies).

Significantly, the Council of Europe found "credible his account of detention in Macedonia and Afghanistan for nearly five months," Marty Report 2006 at ¶ 92, and confirmed that Macedonian officials had detained Mr. El-Masri at the behest of the United States. *Id*. at ¶ 116. And based on Mr. El-Masri's testimony and other evidence, in December 2012, the Grand Chamber of the European Court of Human Rights ("ECHR") held Macedonia responsible for violations of Mr. El-Masri's rights to be free from inhuman and degrading treatment, arbitrary detention, family life, and to an effective remedy. *El-Masri v. Macedonia*, App. No. 39630/09 at 66-67. The Court found Mr. El-Masri's testimony "coherent throughout the international and other foreign inquiries and the domestic proceedings and involved consistent information regarding the place, time and duration" of his alleged detention, treatment, and transfer. *Id* at ¶156. The Court concluded that Mr. El-Masri's account was "sufficiently convincing and established beyond reasonable doubt." *Id*. at ¶ 167.

In compliance with the Court's ruling, the Macedonian government paid Mr. El-Masri 60,000 Euros and issued him with a formal apology for violating his rights. *See* Exhibit A, Letter from the government of Macedonia to Mr. Khaled El-Masri dated March 27, 2018.

M. The CIA Used Unlawful Rendition, Arbitrary Detention, Forced Disappearances and Torture as a Matter of Policy

The United States' violations of Mr. El-Masri's rights were not aberrational; the CIA committed them as part of a policy of unlawful rendition, arbitrary detention, forced disappearances and torture authorized and approved at the highest levels of the U.S. government. The United States' implementation of that policy resulted in the abusive treatment of Mr. El-Masri and at least 119 other foreign nationals by the CIA.

The United States has documented the CIA policy in reports and U.S. Congressional testimony. Inter-governmental organizations, including the United Nations, Council of Europe, the European Parliament and the International Criminal Court have relied on these reports and other evidence to conclude that the United States had a policy of unlawful rendition, arbitrary detention and torture.[2] And since 2002, investigative reports by the media and non-governmental organizations have documented the policy.[3]

U.S. government documentation of the policy includes:

- CIA Office of Inspector General Special Review of Counterterrorism Detention and Interrogation Activities (Sept. 2001 – Oct. 2003) (May 7, 2004) ("2003 CIA OIG Report").
- Senate Committee on Armed Services' Inquiry into the Treatment of Detainees in U.S. Custody (Nov. 20, 2008) ("2009 SASC Report").

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[2] *See e.g.*,U.N. Human Rights Council, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, U.N. Doc. A/HRC/13/42, (Feb. 19, 2010); Marty Reports 2006 and 2007; Eur. Parl. Report 2007; Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan, International Criminal Court, No. ICC-02/17-7-Conf-Exp, pp. 106-07, 111-21 (2017) https://www.icc-cpi.int/courtrecords/cr2017_06891.pdf ["2017 ICC Prosecutor Request"].

[3] *See e.g*. Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash Post. (Dec. 26, 2002) http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html; Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (2008); The Constitution Project, *The Report of the Constitution Project's Task Force on Detainee Treatment*, https://detaineetaskforce.org/; Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf; Human Rights Watch, *No More Excuses*, https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture

- Report of the Department of Justice's Office of Professional Responsibility Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 2009) ("2009 OPR report").
- Senate Select Committee on Intelligence's Executive Summary to *The Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program* ("Senate Torture Report").

The Senate Torture Report, which was publicly released on December 9, 2014 is the 600-page executive summary of a 6,000 page report, which remains classified. It details the CIA's central role in devising, developing and implementing the CIA's policy. The report "is the most comprehensive review ever conducted" of the detention and interrogation components of its unlawful rendition and torture program, and is based on six million pages of material, including CIA operational cables, reports, memoranda, intelligence products, and numerous interviews conducted of CIA personnel by various entities within the CIA "… as well as internal email and other communications." Senate Torture Report at 9.

The United States produced many of these documents during discovery in *Salim v. Mitchell*, a civil lawsuit by three victims and survivors of the policy against two CIA-contracted psychologists, Mitchell and Jessen, who designed the torture methods and methodology for their application for the CIA and helped the agency implement the U.S. policy. *Salim v. Mitchell*, Case No. 2:15-cv-00286-JLQ (E.D. Wa., 2015). During discovery two senior CIA officials, Jose Rodriguez, head of the CIA's Counter Terrorism Center and John Rizzo, Acting General

Counsel for the Agency, when the CIA, its agents and contractors devised and implemented the policy, gave deposition testimony on the policy's creation, authorization and implementation. [4]

Key findings of the Senate Torture Report confirm that from August 2002 to December 2008, the CIA used unlawful rendition, arbitrary detention, forced disappearance and torture as a matter of policy.

Although the Senate Torture Report notes that Senate investigators did not have a mandate to examine the rendition component of the CIA's unlawful rendition and torture program, and that "[t]here are […] few CIA records detailing the rendition process for detainees and their transportation to or between detention sites," it confirms that the CIA unlawfully rendered at least 119 men pursuant to the U.S. policy. Senate Torture Report at 9 n.5, 64 n. 318. *See id.* at 11 (describing Presidential Memorandum of Notification ("MON") authorizing CIA to capture persons suspected of being members of or associated with the Al-Qaeda terrorist organization and the CIA's establishment of a network of secret prisons to detain captured suspects), 15 n. 29 (CIA forms the "Rendition, Detention, and Interrogation Group" to conduct and oversee renditions), 64 n. 318 (collecting and summarizing CIA detainees description of CIA rendition process), 14 n.26, 28, Appendix 2 at 458 (listing names of 119 men who the CIA unlawfully rendered, forcibly disappeared, secretly detained, interrogated and tortured in CIA 'black site' prisons). *See also* Memo on CIA RDI Procedures at 2-3 (describing the CIA rendition process as a key component of the CIA's unlawful rendition and torture program); Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, 30-60 (2012) https://www.opensocietyfoundations.org/sites/default/files/globalizing-

[4] These documents and depositions are publicly available at www.torturedatabase.org.

torture-20120205.pdf (listing 136 individuals captured and unlawfully rendered by the CIA) [hereinafter "2012 OSI report"].

The Senate Torture Report also documents the CIA's use of arbitrary detention, forced disappearances and torture as policy. Pursuant to the MON authority, the CIA subjected persons it suspected of terrorism to prolonged secret detention in CIA-run 'black site' prisons or prisons run by foreign governments. *See e.g.,* Senate Torture Report at 11-14, 49-50, 96-97. The CIA did not obtain prior judicial authorization to capture and detain these men; nor afford them judicial review of their detention or any due process protections during their detention. Indeed, the Senate Torture Report acknowledges that the CIA detained many men, including Mr. El-Masri, without any lawful basis under human rights standards, the law of armed conflict, or even the CIA's own MON authority. *See e.g.*, Senate Torture Report at ¶¶ 17 n.34 ("personnel responsible for the extended detention of individuals determined by the CIA to have been wrongfully detained"). *See also* U.N. Secret Detention Report 2010 at ¶¶ 98-164 (documenting CIA's prolonged secret detention policy).

The Senate Torture Report also documents the CIA's use of torture and other forms of cruel, inhuman or degrading treatment on foreign nationals that it arbitrarily detained as a matter of policy. The report identifies twelve specific torture methods, which the CIA referred to as "enhanced interrogation techniques" that were used on captured detainees:

> "(1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers,(11) use of insects, and (12) mock burial." *See* Senate Torture report at 37, 32.

Two CIA contractors designed these torture methods for the agency and the United States authorized and approved their use as well as other torture methods on men it held and interrogated. *See e.g.*, Senate Torture Report at 32, 37-40; *see also* 2009 OPR report at 30-69. The CIA and its agents and contractors used many of these methods until the Bush Administration ended the CIA's unlawful rendition and torture program in 2008. *See e.g.*, Senate Torture Report at 49-93. The report acknowledges that the CIA tortured at least 119 men held in secret CIA-run prisons. *See* Senate Torture report at 458, Appendix 2. *See also id*. at 49-62 (describing interrogations and conditions of detention at CIA facilities). Other official sources put the number of men who the CIA tortured in its unlawful rendition and torture program much higher. *See e.g.*, Marty Report 2006, ¶ 1; Marty Report 2007 ¶ 53. And the Senate Torture Report acknowledges this, noting also that the record-keeping for the program was poor. Senate Torture Report at 9 n.5, 64 n. 318 (Appendix 2 does not include individuals who the CIA rendered to foreign governments for detention, interrogation and torture); *id*. at xxi, 50. Finally, the Senate Torture Report documents that the CIA's use of its tortuous detention and interrogation methods caused many of the men severe physical and mental pain and suffering. *See e.g.*, *Id*. at 16 n.32, 33, 109-10, 132.

In sum, key findings in the Senate Torture Report – and other U.S. government sources – confirm that from 2002 to 2008, the CIA used unlawful rendition, forced disappearance, arbitrary, torture and other cruel, inhuman and degrading treatment as a matter of policy. *See also* 2017 ICC Request at 106-07, 111-21 (examining U.S. government and other sources to conclude that the CIA used torture and cruel treatment in Afghanistan and elsewhere as a matter of policy.)

N. The United States Does Not Provide Redress to Victims and Survivors of its Unlawful Rendition, Forced Disappearance, Arbitrary Detention, and Torture Policy

Despite the public record of egregious human rights violations committed by the United States, its agents and contractors, to date the United States has not held any senior government official involved criminally or civilly responsible for their roles in the CIA's unlawful rendition, arbitrary detention, forced disappearance and torture policy. Nor has the United States provided any victim or survivor with redress for the severe physical and psychological pain and suffering the policy and these constituent practices caused them. Although the U.S. Department of Justice opened a criminal investigation in 2009 into certain specific allegations of abuse connected with the policy, that investigation did not comply with relevant international standards. The Department of Justice closed the investigation three years later—no indictments were issued, and victims' and survivors' efforts to obtain redress in U.S. courts have all met similar fates: United States' intervention to block lawsuits and to legislatively limit redress. Accordingly, the United States has not held any senior U.S. official criminally or civilly accountable for their involvement in the creation, authorization or implementation of the United States' policy of unlawful rendition, arbitrary detention, forced disappearance and torture, nor has it provided any other form of redress to victims and survivors of these egregious practices.

O. The United States Has Not Held Any Senior U.S. Official Criminally Responsible

In 2009, the U.S. Department of Justice began a very limited criminal investigation into specific abuses committed against specific individuals once held in CIA custody. *See* Eric Holder, Att'y Gen., *Regarding a Preliminary Review into the Interrogation of Certain Detainees*, Dep't of Justice News (Aug. 24, 2009) (*available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees). Then Attorney General Holder appointed a special prosecutor, Assistant U.S. Attorney John Durham of the District of Connecticut, to conduct an investigation into whether any U.S. official had violated any federal laws. In June 2011, Holder limited the scope of the investigation even

further: to the circumstances surrounding deaths of two terrorism suspects in CIA custody and whether the United States had authorized the methods used against them. *See* Eric Holder, Att'y Gen., *Regarding Investigation into the Interrogation of Certain Detainees*, Dep't of Justice News (June 30, 2011). Holder placed other significant limitations on the scope of the investigation, excluding, for example, any inquiry into the use of methods that the Office of Legal Counsel had authorized for use, including the CIA's so-called "enhanced interrogation techniques," provided their use complied with that authorization. *Id*. Holder also excluded senior U.S. officials from the investigation and investigators did not interview any alleged victims or survivors or members of their families or any other witness. Holder also shielded from eventual prosecution anyone who, "acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees." *Id.*

In August 2012, Holder ended the investigation because, "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt." The Department of Justice consequently declined to prosecute anyone for the two deaths and the United States has not held anyone accountable for them. Eric Holder, Att'y Gen., *Closure of Investigation into the Interrogation of Certain Detainees*, Dep't of Justice News (Aug. 30, 2012).

P. U.S. Courts Have Repeatedly Denied Civil Redress to Victims and Survivors the Policy

The United States has also repeatedly denied civil redress to victims and survivors of the CIA's policy.[5] No U.S. court has even considered the merits of their claims of unlawful rendition,

[5] In 2017, three victims of CIA torture settled a civil case brought by the ACLU on their behalf against two CIA contractors who had designed and helped implement the CIA's unlawful rendition and torture program *See* Larry Siems, *CIA Torture: Lawsuit Settled Against Psychologists Who Designed Techniques*, The Guardian (Aug. 17, 2017), https://www.theguardian.com/us-news/2017/aug/17/cia-torture-lawsuit-settled-against-psychologists-who-designed-techniques.

arbitrary detention, forced disappearance and torture. Instead, courts have largely acceded to the government requests to have the cases summarily dismissed on the bases of governmental immunities or the state secrets doctrine before courts even had an opportunity to consider any of the evidence supporting victims and survivors' claims. *See e.g.*, Appendix C, *Denial of Justice: The United States' Failure to Prosecute Senior Officials for Torture*, (Harvard Law School, Int'l Hum. Rts. Clinic 2015) (submitted to the Inter-American Commission on Human Rights during 156th Ord. Period of Sessions, Oct. 23, 2015) (analyzing cases) (*available at* https://www.aclu.org/other/human-rights-program-harvard-law-school-denial-justice-united-states-failure-prosecute-senior) ["Harvard Report 2015"]. As a result, the United States has not provided any form of civil redress to any victim or survivor of the CIA's policy.

Q. The United States Congress has Granted Immunity to U.S. Officials Involved in Torture and Other Human Rights Violations

The United States Congress has also acted to limit redress to victims and survivors of unlawful rendition, arbitrary detention, forced disappearance and torture by passing legislation that effectively immunizes them from prosecution or civil liability. The Detainee Treatment Act ("DTA") provides a defense to U.S. officials allegedly involved in these practices where they "did not know that the practices were unlawful and [that] a person of ordinary sense and understanding would not [have known] the practices were unlawful." The DTA also provides that "good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful." Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680, 2740 § 1004(a) (2005). The Military Commissions Act, enacted the following year, made this defense available retroactively. Military Commissions Act, Pub. L. 109-366, 120 Stat. 2600, 2636 § 8(b) (2006) [hereinafter "MCA"].

The MCA seeks to limit civil liability by prohibiting U.S. courts from considering any civil claims brought "against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States" as an "enemy combatant or is awaiting such determination." MCA, 119 Stat. 2636, § 7(a)(2). The U.S. Department of Justice has successfully raised this statutory defense to defeat claims brought by torture victims and survivors. *See e.g., Janko v. Gates*, 741 F. 3d. 136 (D.C. Cir. 2014). *See generally*, Harvard Report 2015, 14-15.

R. The United States Has Not Provided Any Guarantees of Non-Repetition

The United States has not provided Mr. El-Masri or any other victims or survivors of the CIA's unlawful rendition and torture program with any effective guarantees that the United States will not repeat the violations it committed as part of that program. The obligation to provide such guarantees stems from the United States' obligation to protect victims and survivors of egregious human rights violations committed by it or its agents, and in particular to provide them with adequate and effective remedies. *See e.g.*, U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. G.A. Res., 6-9, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) ["U.N. Right to Remedy Guidelines"; U.N. Convention Against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, § III, V (Feb. 9, 2018) (available at https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf). *See also* Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) 1 § III(H)(4) ["Report on Terrorism and Human Rights"].

Although the Obama Administration adopted certain measures aimed at ending the United States' use of torture and other ill-treatment, none of them provides a sufficient guarantee

that the United States will not repeat these human rights violations. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) ["E.O. 13491"] and President Obama's order to withdraw Bush Administration White House legal opinions authorizing torture and cruel, inhuman or degrading treatment (Memorandum on Withdrawal of Office of Legal Counsel CIA Interrogation Opinions from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Counsel, for Eric H. Holder, Jr., Att'y Gen., (April 15, 2009)), which effectively ended the CIA's unlawful rendition and torture program can easily be rescinded by future administrations.

Indeed, President Trump has reportedly considered overriding E.O. 13491, even going so far as drafting another order to reinstate the "enhanced interrogation" program, including CIA-run "black site" prisons. Charlie Savage, *Trump Poised to Lift Ban on C.I.A. 'Black Site" Prisons*, N.Y. Times (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html. Additionally, in May 2017, President Trump nominated, Gina Haspel, who once advocated for and covered up the CIA's use of torture to serve as the next director of Central Intelligence. The U.S. Senate voted to confirm Haspel's nomination despite her admitted and integral role in the CIA's unlawful rendition and torture program, including running the Agency's first secret prison in Thailand and destroying video-recordings of CIA torture. During her confirmation, Haspel refused to acknowledge that CIA detainees were tortured, insisting only that the CIA would never revive such a program under her leadership.

Most recently, the Trump administration signaled its intent to prevent any further public disclosure of the United States' past human rights violations committed as part of the program. *See* Mark Mazzetti, Matthew Rosenberg & Charlie Savage, Trump Administration Returns Copies of Report on C.I.A. Torture to Congress, N.Y. Times (June 2, 2017), https://www.nytimes.com/2017/06/02/us/politics/cia-torture-report-trump.html.

VIOLATIONS OF THE AMERICAN DECLARATION

Mr. El-Masri suffered numerous violations of rights guaranteed by the American Declaration, including his rights to life and humane treatment, to be free from arbitrary detention, forced disappearance and, relatedly, his freedom of movement. And, because the CIA targeted Mr. El-Masri for inclusion in a program in part because he was not a U.S. citizen, the United States violated his right to equality. Finally, the United States' ongoing failure to provide Mr. El-Masri with any form of redress violates his right to a remedy and to truth that the American Declaration also guarantees.

A. Rights to Life and Humane Treatment

1. The American Declaration Prohibits Torture and Other Forms of Cruel, Inhuman or Degrading Treatment

For more than four months, the CIA, its agents and contractors tortured Mr. El-Masri and subjected him to other forms of cruel, inhuman and degrading treatment in violation of Articles I, XXV and XXVI of the American Declaration. These Articles guarantee the right to life and to humane treatment, which prohibit states from inflicting three broad categories of ill-treatment: (1) torture; (2) other cruel, inhuman, or degrading treatment; and (3) other methods that affect an individual's physical, mental or moral integrity. *See* Report on Terrorism and Human Rights, at ¶¶ 149-50; *see also Victor Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. C.H.R., Report No. 63/99, OEA/Ser.L/V/II.95, doc. 7 rev. at 475, ¶ 48 (1998); *Castillo Petruzzi v. Peru*.., Judgement, Inter-Am. Ct. H.R., (ser. C) No. 52, ¶ 195 (May 30, 1999).

The prohibition of torture extends to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes including "obtaining from him or a third person information" or for other unlawful purpose U.N Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December

1984, 1465 U.N.T.S., art. 1(1) ["CAT"]*; see also* Report on Terrorism and Human Rights, at ¶¶ 149-50. Cruel, inhuman or degrading treatment differs from torture principally in the intensity of the suffering inflicted. *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm.. H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 821, ¶ 80 (1997). Torture is an aggravated form of inhuman treatment inflicted to obtain information or a confession or for some other unlawful purpose. *Id*. But cruel, inhuman or degrading treatment must also result in a minimum threshold of physical or mental pain or suffering. *Id*. at ¶ 79. When evaluating claims of torture and cruel, inhuman or degrading treatment, the Commission examines the totality of the treatment, rather than analyzing isolated incidents of abusive treatment, to determine if it collectively satisfies the required physical or psychological pain threshold. *See e.g.*, *Id.*, at ¶ 78.

Based on these standards, the Commission has compiled a non-exhaustive list of conduct that constitutes torture, including: prolonged incommunicado detention (especially in poor conditions); beatings; prolonged solitary confinement and other egregious methods of sensory deprivation (e.g. hooding and shackling); administration of drugs while detained; prolonged sleep deprivation; prolonged denial of food, medical assistance and hygienic facilities; and death threats. *See* Report on Terrorism and Human Rights at ¶ 162 (citing international authorities) According to the Commission, these acts amount to torture because they could only have been intentionally inflicted for some unlawful purpose, such as to obtain a confession or information. *Id*. at ¶ 159. *See also Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, ¶ 64 (finding torture when "treatment" of prisoner – hanging by the arms – "could only have been deliberately inflicted" and was "administered with the aim of obtaining admissions or information"). Agents and contractors of the United States intentionally subjected Mr. El-Masri to all these forms of ill-treatment; they did so to render him unlawfully and to obtain information or admissions from

him, and the acts caused Mr. El-Masri severe physical and psychological pain from which he suffers to this day.

The Commission has also found that the right to humane treatment prohibits states from rendering anyone to a country where there is a substantial risk of their being tortured or otherwise mistreated there. *See e.g*., *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-.Am..Comm..H.R., OEA/Ser.L/V/11.108 doc.40 rev., at ¶ 140, 154. (2000); *see also* CAT, art. 3, 4. Significantly, both the U.N. Committee Against Torture and Human Rights Committee have found that United States' post-September 11 rendition practices violate the absolute prohibition of *non-refoulement* protected by CAT and the ICCPR. *See* Committee Against Torture, Concluding Observations, United States, CAT/C/USA/CO/2, ¶ 20 (2006); Human Rights Committee, Concluding Observations, United States, CCPR/C/USA/CO/3, ¶ 16 (2006). In rendering Mr. El-Masri from Macedonia to Afghanistan, the United States knew that the CIA would subject Mr. El-Masri to abusive treatment during the rendition process and that the Agency would arbitrarily detain and interrogate him there. *See e.g.* Memo on CIA RDI Procedures at 2-4 (describing CIA capture, rendition, detention and interrogation practices and procedures).

2. Officials of the United States, the CIA, U.S. contractors and others tortured Mr. El-Masri

As discussed over a four-month period, U.S. officials, CIA agents, the Agency's contractors and agents of the Macedonian government subjected Mr. El-Masri to the following abusive methods. *See supra* at 8-14. These state and non-state actors applied some of these methods in isolation and others repeatedly and/or in combination over prolonged periods:

- Severe beatings with fists, boots, and a stick
- Other excessive use of force, including being forcibly thrown to the ground
- Forced anal penetration with an object

- Unlawful rendition from Macedonia to secret detention, interrogation and torture in a CIA-run prison in Afghanistan
- Sensory deprivation during his rendition, including hooding and blindfolding
- Forcible injection with an unknown drug
- Shackling of his hands and feet
- Denial of adequate food and water
- Denial of requested medical treatment
- Forced nudity
- Forced feeding
- Threats of imminent death and other serious harm
- Incommunicado detention for more than four months
- Exposure to cold while in detention

The United States, its agents, and contractors designed and authorized the use of these methods on persons it suspected were involved in terrorism and the CIA approved their use on Mr. El-Masri specifically. *See supra* at 22, 26. CIA agents, the Agency's contractors, and Macedonian agents, with the United States' consent or acquiescence, subjected Mr. El-Masri to these methods with the intent of inflicting severe physical and mental pain and suffering to unlawfully render him from Macedonia to Afghanistan, and to unlawfully detain and interrogate him in Macedonia for twenty-three days and thereafter in a secret CIA-run prison in Afghanistan for over three more months. *Id*. at 22-23. Mr. El-Masri suffered and continues to suffer severe physical and psychological pain because of his mistreatment including severe post-traumatic stress disorder (PTSD) and major depression. *Id*. at 21-22.

Accordingly, the CIA's treatment of Mr. El-Masri amounted to torture in violation of Articles I and XXVI of the American Declaration.

B. The Right to Personal Liberty and Security

1. Articles XXV and XXVI Prohibit Arbitrary Arrest and Detention

The United States, its agents, contractors, and Macedonian agents who the United States directed and controlled, captured and then arbitrarily detained Mr. El-Masri for over four months without due process in Skopjke, Macedonia and in the Salt Pit prison in Afghanistan. Article

XXV, which guarantees the right to personal liberty and security prohibits states from depriving persons of their liberty except in accordance with established law and due process. *See, e.g.*, *Fifth Report on the Situation of Human Rights in Guatemala*, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.111 doc. 21 rev., Ch. VII, ¶ 37 (2001), *citing Jorge Alberto Giménez v. Argentina*, Case 11.245, Inter-Am. Comm. H.R., Report Nº 12/96, OEA/Ser.L/V/II.91, doc. 7 rev. (1996); *Suárez Rosero* v. *Ecuador*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 35, ¶ (4)3 (1997). More specifically, Article XXV requires that: any deprivation of liberty be carried out in accordance with pre-established law; that a detainee be informed of the reasons for the detention and promptly notified of any charges against them; that any person deprived of liberty is entitled to juridical recourse, to obtain, without delay, a determination of the legality of the detention; and that the person be tried within a reasonable time or released pending the continuation of proceedings.

The Commission has long recognized judicial review of arrest and detention as a critical safeguard against arbitrary arrest and detention and other related rights violations such as forced disappearance, torture and other ill-treatment. There is also a need for "prompt and effective judicial oversight of instances of detention, in order to protect the well-being of detainees at a time when they are wholly within the control of the state and therefore particularly vulnerable to abuses of authority." Report on Terrorism and Human Rights, at ¶ 121; *see also* Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1), and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, ¶ 35 (January 30, 1987); Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct.H.R. (ser. A) No. 9, ¶ 31 (1987); *Jorge Luis Bronstein and ors. v. Argentina*, Case 11.205, Inter-Am. Comm. H.R., Report No. 2/97, ¶ 11 (1997); *Damion Thomas v. Jamaica*, Case 12.069, Inter-Am. Comm. H.R.,

Report Nº 50/01, OEA/Ser.L/V/II.111, doc. 20, rev. ¶¶ 37, 38 (2000); *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct.H.R, Judgment (Merits), ¶ 155 (July 29, 1988) ("the 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").

In addition to judicial review of arrest and detention, states must "ensure[] against arbitrary arrest and detention by strictly regulating the grounds and procedures for arrest and detention under law." *Michael Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm. H.R., Report No. 92/05, OEA/Ser.L/V/II.124, doc. 5 ¶ 73 (2005). *See also* American Declaration, art. XXVI (Right to due process of law). Likewise, in *Maritza Urrutia v. Guatemala*, the Court held that a warrantless arrest followed by eight days of incommunicado detention violated Article 7 of the Convention. Judgment, Inter-Am. Ct. H.R, (ser. C) No. 103, §VIII (Nov. 27, 2003). And in *Oscar Elías Biscet*, et al. *v. Cuba*, the Commission established that any period of detention must be ordered by a competent authority, except where an individual is caught in the act of committing a crime. Case 12.476, Inter-Am. Comm. H.R., Report No. 67/06, ¶ 143 (2006). *See also Velasquez-Rodriguez* at ¶¶155, 186 (a competent, impartial tribunal must determine the legality of detention immediately and any period of preventative detention without such a hearing is unlawful).

The Human Rights Committee also has elaborated on the scope of the international prohibition in circumstances factually and legally similar to those at issue in Mr. El-Masri's petition. In *Lilian Celiberti de Casariego v. Uruguay*, the Committee found that the apprehension and trans-border abduction of the applicants by agents of the Uruguayan security forces in Brazil and their subsequent four-month incommunicado detention in Uruguay amounted to arbitrary

arrest and detention under the International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), art. 9(1) (Dec. 16, 1966) ["ICCPR"]. *Lilian Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92 (1984). And in its General Comment No. 8 (right to liberty and security), the Committee, like the Commission, highlighted the absolute nature of judicial review of detention, even preventive detention, for claimed national security purposes. U.N. Human Rights Committee, *CCPR Gen. Comment 8: Article 9 (Right to liberty and security of persons)*, U.N. Doc. A/37/40, ¶ 4 (June 30, 1982).

The U.N. Working Group on Arbitrary Detention too has provided extensive guidance on the prohibition of arbitrary detention, finding rights violations in the following situations: (1) when there is no legal basis for the deprivation of liberty; (2) when the deprivation of liberty results in other human rights violations such as the prohibitions of torture and other cruel, inhuman or degrading treatment; or (3) when the nature of the detention otherwise violates internationally accepted fair trial guarantees. *See* Office of the High Commissioner for Human Rights, The Working Group on Arbitrary Detention *Fact Sheet No. 26* (*available at* https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf). Human Rights Committee, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2005/6/Add.1, Opinion No. 3/2004 (Israel), at 30 (Nov. 19, 2004) (concerning Abla Sa'adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba'neh and finding Israel's "administrative detention" of several women for four to six months on alleged national security grounds arbitrary because Israel did not inform the women of the charges against them on the stated grounds that doing so would have disclosed state secrets). *See also* U.N. Secret Detention Report 2010 at ¶¶ 17-35. (finding that secret detention amounts to a "manifold human rights violation that cannot be justified under

any circumstances, including during states of emergency" including the right to liberty and due process).

In sum, Articles XXV and XXVI prohibit arbitrary arrest and detention, including specifically secret detention. To safeguard the right, states must ensure that an independent and impartial tribunal authorizes any arrest in accordance with pre-established law – unless the individual is caught while committing a crime - and provide detainees with effective judicial review and oversight of their arrest and detention as well as other due process protections while they are detained.

2. The United States Arbitrarily Arrested and Detained Mr. El-Masri

As discussed, the United States' arbitrary arrest and detention of Mr. El-Masri deprived him of his liberty and denied him due process of law. Specifically, the CIA, its agents and contractors, and Macedonian agents who the United States directed and controlled:

- Did not obtain or even seek prior judicial approval for Mr. El-Masri's abduction or arrest, detention and coercive interrogation by Macedonian and CIA agents in Macedonia.
- Failed to charge Mr. El-Masri or advise him of the nature of the crimes he had allegedly committed.
- Held Mr. El-Masri in secret incommunicado detention in Macedonia for 23 days without access to an attorney, German consular representative, or a family member and without prior judicial approval.
- Detained and interrogated Mr. El-Masri in inhumane, torturous conditions in Macedonia and a secret CIA-run prison in Afghanistan without judicial review of

that detention or interrogation sessions by an independent and impartial tribunal or any other due process protections.

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Accordingly, the United States' abduction, arrest, detention and interrogation of Mr. El-Masri in Macedonia and Afghanistan were arbitrary and violated Articles XXV and XXVI of the American Declaration.

C. The Right not to be Forcibly Disappeared

Articles I, XVIII, XXV, and XXVI of the American Declaration prohibit a State or its agents from forcibly disappearing anyone for any reason. *See e.g., Britton v. Guyana,* Case 12.264, Inter-Am. Comm. H.R., Report No. 01/06, OEA/Ser./L/V/II.114 doc. 5 rev. ¶¶ 28, 33, 40(a) (2001). "[T]he essential element is the deprivation of an individual's liberty by agents of the State ostensibly under law, followed by the refusal or incapacity of the State to explain what occurred to the victim or to provide information regarding his whereabouts." *Id*. at 19. *See also* Inter-American Convention on Forced Disappearance of Persons art. 2, June 9, 1994, 33 I.L.M. 1429 ["Forced Disappearance Convention"] International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, December 20, 2006, 2718 U.N.T.S. 48088

Forced disappearances are complex and particularly egregious violations of several human rights protections: "[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," *Velásquez-Rodríguez*, at ¶¶ 155-57 (holding that forced disappearances violate the rights to humane treatment; personal liberty and security; the right to be presumed innocent until proven guilty; and where victims are proven dead, the right to life).

The Commission has found that forced disappearances also violate the right to recognition of juridical personality guaranteed by Article XVII of the American Declaration.

Medina v. Colombia, Case 11.221, Inter-Am. Comm. H.R., Report No. 3/98, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 64 (1998), (finding that "when Mr. Medina was disappeared by agents of the State he was necessarily placed outside of and excluded from the juridical and institutional order of the State. This exclusion had the effect of denying recognition of the very existence of Mr. Medina as a human being entitled to be recognized as such before the law"); *see also Britton*, at ¶¶ 28, 33, 40(a). Forced disappearances also may violate the rights of victims' relatives. *See Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 66, 97 (Jan. 24, 1998).

In *El Masri v. Macedonia*, the European Court concluded that the circumstances of Mr. El-Masri's "abduction and detention amounted to 'enforced disappearance'" under international law because "although temporary [it was] characterized by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity." *Id*. at ¶ 240.

The United States, its agents, and contractors forcibly disappeared Mr. El-Masri. As discussed, CIA officials authorized, directed and personally participated in Mr. El-Masri's abduction and prolonged secret detention without prior judicial approval. The United States refused to notify Mr. El-Masri of any charges or reasons for his detention and continued to hold him in secret in tortuous conditions, without access to a lawyer, consular officials, or his family for four months. The CIA's abduction, unlawful rendition, secret detention and torture of Mr. El- Masri amounted to a forced disappearance in violation of Articles I, XVII, XVIII, XXV, and XXVI of the American Declaration.

D. The Right to Residence and Movement

Article VIII of the Declaration guarantees the right to residence and movement: "[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will." Article

VII is a fundamental right "recognized in all international instruments related to the protection of human rights Inter-Am. Comm. H.R., *Ten Years of Activities 1971-1981*, at 327 (General Secretariat, Organization of American States, 1982). This encompasses an individual's right to return to their country of nationality; the right to voluntarily leave any country (including one's own); the right not to be internally displaced; and prohibits states from expelling anyone from their country of origin. *See generally, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, Inter-Am. Comm. H.R., OEA/Ser.L/V/II. doc. 46/15, ¶¶ 228-83 (Dec. 31, 2015). States can only restrict these rights in certain very limited circumstances. *Id*. at ¶ 258 (any restriction must be in accordance with law, necessary and proportionate). Therefore, states may not arbitrarily exile a national of one country to a third country, even on national security grounds, where there is no basis in law for doing so and where it was not shown that exiling them was strictly necessary to further its national security interests. *Id* at 270-73.

As a German citizen, Mr. El-Masri had a right to return to Germany, even as a tourist visiting Macedonia. The CIA's unlawful rendition of Mr. El-Masri from Macedonia to Afghanistan and the Agency's forced disappearance and prolonged arbitrary detention of him in Afghanistan, violated Mr. El-Masri's Article VIII right to freedom of movement.

E. The United States Violated Mr. El-Masri's Right to Truth

Articles XVIII and XXIV of the American Declaration guarantee victims and survivors of human rights violations, their families, and society as a whole a right to the truth about the circumstances of the violations and the persons responsible. *The Right to Truth in the Americas*, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.152, ¶ 69 (Aug. 13, 2014); *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report No. 37/00, ¶ 148, (Apr. 13, 2000).

The United States violated Mr. El-Masri's right to truth in two main ways: by failing to fully disclose information about the CIA's violations of Mr. El-Masri's rights and by failing to conduct an adequate and effective investigation into them.

The right to truth imposes "an obligation upon States to clarify and investigate the facts, prosecute and punish those responsible for cases of serious human rights violations;" and to guarantee access to "information available in State facilities and files concerning serious human rights violations." *The Right to Truth in the Americas* at ¶ 70. The right to truth is owed to individual victims and survivors, their families and "society as a whole . . . to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed in order to prevent reoccurrence of such acts in the future." *Id*. at ¶ 71. *See also Report of the Office of the United Nations High Commissioner for Human Rights*, U.N., Econ. & Soc. Council, Comm. On Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth*, Report of the Off. of the U.N. High Commissioner for Human Rights, U.N. Doc. E/CN.4/2006/91, ¶ 8 (2006); Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/9/11 (Sep. 18, 2008); Human Rights Council Res. 12/12, U.N. Doc. A/HRC/RES/12/12 (Oct. 12, 2009); Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, *El-Masri v Macedonia*, App. No. 39630/09, ¶¶ 5-10.

In *El-Masri v. Macedonia*, the European Court held that Mr. El-Masri's and the public's right to truth had been violated principally because of the failure of state authorities to conduct an adequate and effective investigation into Mr. El-Masri's credible allegations: "[t]he inadequate investigation in [Mr. El-Masri's] case deprived [Mr. El-Masri] of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal." *Id*., ¶ 192.

The United States violated Mr. El-Masri's right to truth by failing to provide Mr. El-Masri, his family and the public with a full account of the circumstances surrounding the violations of his rights arising from his abduction, arbitrary detention, forced disappearance and torture. When Mr. El-Masri sought redress before U.S. courts, the courts acquiesced in the government's claim of "state secrets" and summarily dismissed Mr. El-Masri's civil lawsuit without considering any of the evidence substantiating his claims that the CIA, its agents, and contractors arbitrarily detained, forcibly disappeared and tortured him.

None of the United States' investigations into the CIA's rendition, detention and interrogation policy—including investigations into the specific circumstances of Mr. El-Masri's rendition and detention—satisfy Mr. El-Masri's substantive right to the truth. All the reports on these investigations are heavily-redacted and do not therefore provide a complete account of the United States' violations of Mr. El-Masri's rights. For example, none of the reports disclose why the CIA subjected him to its unlawful rendition and torture program nor do they reveal the names of those involved. Such limited information prevents Mr. El-Masri, his family, and the public from knowing "the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them." *The Right to Truth in the Americas*, ¶ 71. Nor do the government's reports provide a full and accurate account of Mr. El-Masri's suffering and abuse at the hands of the CIA. By failing to provide such an account of the circumstances surrounding the CIA's violations of Mr. El-Masri's rights, the United States has violated Mr. El-Masri's substantive right to the truth about these violations, as well as his family's and the public's right to truth.

F. The United States Violated Mr. El-Masri's Right to Equality

The CIA's unlawful rendition and torture program disproportionately affected men like Mr. El-Masri: Non-U.S. citizens of Muslim faith or perceived by the United States to be Muslim.

Because the CIA subjected Mr. El-Masri and others to violations of their fundamental rights, the Agency's differential treatment of these groups violated Mr. El-Masri and other similarly situated victims' Article II right to equality before the law.

Equality before the law and non-discrimination are bedrock human rights principles. *See e.g.*, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810, art. 2, 7 (1948); ICCPR (Articles 22 and 26); International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 660 U.N.T.S. 195 (1969) ["ICERD"]. They are *jus cogens* norms "because the whole legal structure of national and international public order rests on [them] and [they are] fundamental principle[s] that permeate[] all laws" and apply equally in times of armed conflict or other national emergency and peace. . Inter-Am. Ct. H. R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, Inter-Am. Ct. H.R.(ser. A) No. 18, ¶ 101 (Sept. 17, 2003); *see also*., *The situation of people of African descent in the Americas*, Inter-Am. Comm. H.R, OEA/Ser.L/V/II., doc.62, ¶ 94 (Dec. 5, 2011); *Towards the Closure of Guantanamo*, Inter-Am. Comm. H.R., OAS/Ser.L/V/II. doc. 20/15, ¶ 226 (June 3, 2015); *see also* Report on Terrorism and Human Rights, ¶ 343.

Article II prohibits deliberate discrimination, as well as discriminatory impact "against a certain category of persons, even when discriminatory intent cannot be shown." *Report on Immigration in the United States: Detention and Due Process*, Inter-Am. Comm. H.R., OEA/Ser.L/V/II. doc. 78/10, ¶. 95, (Dec. 30, 2010). Any distinction in treatment under Article II must be demonstrably reasonable and objective and used only when strictly necessary to achieve a particular goal and as the least harmful means to achieve that goal. National security on its own does not suffice to justify a discriminatory distinction. *Towards the Closure of Guantanamo*, ¶¶122, 222.

Article II protects against discrimination on the basis of "race, sex, language, creed or any other factor." Citizenship is encompassed by "any other factor" and any differential treatment based on citizenship or nationality is strictly prohibited with respect to fundamental rights, "including the rights to life, personal integrity, equal protection of and before the law, and due process." *Towards the Closure of Guantanamo*, ¶ 223.

In its report, *Towards the Closure of Guantanamo,* the Commission dismissed the United States' attempted justification of "indefinite detention, limited or no access to judicial protection, and trial absent basic elements of due process" for foreign Muslim men based on "the exigencies of the war on terror" as inadequate. *Id.* at 224. As the Commission explained, the creation and application of a separate "severe detention regime and severely restrictive justice system" applied exclusively to foreign Muslim men "constitutes a violation of the nondiscrimination clause in the American Declaration." *Id*. at 226.

Other international bodies have also found that the CIA's operation of its unlawful rendition and torture program violated anti-discrimination provisions of their governing instruments. In 2008, the U.N. Committee on the Elimination of Racial Discrimination found that the Agency's conduct violated the anti-discrimination provisions of the ICERD by exposing "non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or refoulement to third countries where there are substantial reasons to believe that they will be subjected to such treatment." Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States*, ¶24, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

The United States violated Mr. El-Masri's right to equality before the law. The CIA used its policy of unlawful rendition, arbitrary detention, forced disappearance and torture exclusively to capture, arbitrarily detain, forcibly disappear and torture him and other individuals like him - non-citizen Muslim men. Such disparate treatment of groups based on citizenship, nationality or religion violates Article II of the American Declaration.

THE UNITED STATES IS DIRECTLY RESPONSIBLE FOR VIOLATING MR. EL-MASRI'S RIGHTS.

The United States is responsible for the violations of Mr. El-Masri's rights because the CIA, its agents and contractors, and Macedonian government agents—whom the United States directed and controlled—directly participated in these violations. Additionally, the United States was responsible for failing to protect Mr. El-Masri when it failed to conduct an effective investigation into the violations; hold those responsible accountable, or provide Mr. El-Masri with an effective remedy, including reparations and effective guarantees of non-repetition.

"[A]ny violation of rights…carried out by an act of public authority or by persons who use their position of authority is imputable to the State." *Velasquez-Rodriguez* at ¶ 172. Agents of a state include government officials, employees and any organ of the state as well as any individual or organization that acts under the "direction and control" of a state. *See* Int'l Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 4, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001); *El-Masri v. United States*, Case Petition 419-08, Inter-Am. Comm. H.R., Report No. 21/16, Admissibility, OEA/Ser.L/V/II.157 doc. 25, ¶ 25 (2016) (citing *Al-Skeini & Others v. U.K*).

States also incur responsibility for their failure to take affirmative measures to protect rights. *Jessica (Lenahan) Gonzales v. U.S.*, Case 12.626, Inter-Am. Comm. H.R., Report No. 80/11,at ¶ 118 (finding that states must "adopt affirmative measures to guarantee that the

individuals subject to their jurisdiction can exercise and enjoy the rights contained in the American Declaration"). Affirmative measures include "organiz[ing] 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." *Velasquez-Rodriguez* at ¶ 166. State responsibility is incurred when States fail "to prevent, investigate and punish any violation" or "restore the right violated and provide compensation as warranted for damages resulting from the violation" *Id*. And because in these circumstances states are deemed to support, tolerate or to have acquiesced in human rights violations, states may also be held responsible for failing to properly respond with due diligence to violations committed by non-state actors. *Lenahan Gonzales,* at ¶ 116; *Velasquez-Rodriguez,* at ¶ 172

A. State Responsibility for Violations of the American Declaration

The United States is directly responsible for violations of Mr. El-Masri's rights that were committed in Macedonia and Afghanistan between December 31, 2003 and late May 2004. The United States authorized, approved, and directed these violations while CIA agents, contractors and others under U.S. supervision and control personally participated in them.

Specifically, U.S. government agencies and their contractors, including the CIA, designed and implemented the CIA's unlawful rendition and torture program. *See supra e.g.*, Senate Torture Report at 31, 125. U.S agents, including lawyers with the U.S. Department of Justice, Office of Legal Counsel, and the CIA provided legal authorization and approvals for the torture methods and methodologies used in the program. *Id*. at 37; *see also* 2009 OPR Report at 30-69. This U.S. policy, approved and directed for use against Mr. El-Masri and other predominantly Muslim, non-U.S. citizens, led to Mr. El-Masri's unlawful rendition, arbitrary detention, forced disappearance, and torture and the violations of his rights under the American Declaration.

The United States is also directly responsible for the violations of Mr. El-Masri's rights that agents of the CIA and its contractors personally committed against him pursuant to that policy when Mr. El-Masri was under their exclusive "authority and control" in Macedonia, Afghanistan and elsewhere.

Finally, the United States is directly responsible for the violations of Mr. El-Masri's rights committed by Macedonian agents in Macedonia because the United States orchestrated, directed, and controlled Mr. El-Masri's abduction, detention, and interrogation by these agents. *See e.g. El-Masri v. Macedonia*, App. No. 39630/09, §§ 74, 158, 167; *see generally* CIA OIG Report on Mr. El-Masri.

B. The United States has not conducted an adequate and effective investigation into the violations of Mr. El-Masri's rights.

The United States is also responsible for the continuing violation of Mr. El-Masri's rights because of its failure to take affirmative measures to protect him by not conducting an effective investigation into the violations, not prosecuting and holding those responsible accountable, and not providing Mr. El-Masri with an effective remedy for the violations. These affirmative measures should include reparations and effective guarantees of non-repetition.

To meet its affirmative obligation to protect individuals from human rights violations, states must conduct an investigation into alleged violations that is both adequate and effective. Because the United States failed to conduct such an investigation, the Commission may find the United States responsible for the violations of Mr. El-Masri's rights arising from his unlawful rendition, arbitrary detention, forced disappearance, and torture because it failed to act with due diligence to protect him from these violations. *Lenahan Gonzales,* at ¶ 122; *Velasquez-Rodriguez*, ¶176

In *Velásquez Rodríguez*, the Inter-American Court elaborated on the key elements of an adequate and effective investigation:

> [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.

Velasquez-Rodriguez, ¶ 177 (emphasis added).

State responsibility is incurred when an investigation into human rights violations does not comply with these standards because the state will be found not to have acted with due diligence to safeguard rights. *Velásquez –Rodriguez*, ¶¶ 172, 173. *See also Valle Jaramillo v. Colombia*, Judgment, Inter-Am. Ct. H.R., ¶ 102, (Nov. 27, 2008) (holding duty to conduct an effective investigation arose out of Columbia's obligation to combat impunity)

To meet international standards, a state must conduct an investigation "by all lawful means available in order to determine the truth and to ensure the pursuit, capture, trial, and eventual punishment, if applicable, of all the authors of the facts, especially when State agents are or may be involved." *Valle Jaramillo*, ¶ 101. An investigation that fails to provide the most complete historical truth possible is inadequate, increases the anguish of victims and their next of kin, and impedes on their rights to truth. *Id*. at ¶ 102. Finally, international standards require that an investigation pursue all logical lines of inquiry, especially inquiries into larger and connected systems of violations, to uncover the full truth of the circumstances surrounding the violations and their perpetrators. *Rochela Massacre v. Colombia*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. ¶¶. 163-16, (May 11, 2007); *see also Bulacio v. Argentina*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 100, ¶ 112 (Sept. 18, 2003).

Although the United States has made three separate inquiries into the circumstances of the rights violations committed against Mr. El-Masri, none were adequate or effective.

First, the internal investigation of the CIA's Office of the Inspector General was both inadequate and ineffective. Because it was conducted by the Agency's own Inspector General it was neither independent nor objective. Moreover, it was limited in its scope, addressing only the actions of a few CIA agents and whether they adhered to internal policy, management responsibility, and then-prevailing legal opinions. *See* CIA OIG Mr. El-Masri Report, 2-6 (summarizing findings). Therefore, the review did not investigate the full extent of the violations committed against Mr. El-Masri nor violations committed by senior officials involved in the design and implementation of the unlawful rendition and torture program. Further, the Inspector General did not pursue all logical lines of inquiry which is clear given that he neglected to interview Mr. El-Masri or any other survivors of the program. Finally, the review does not uncover the circumstances surrounding the violations committed against Mr. El-Masri. Only two of the report's 109 pages are without significant redactions. Accordingly, the CIA's investigation was neither adequate nor effective.

Likewise, the Durham criminal investigation fails to meet the required standards principally, because of the delay in the investigation and also because of its extremely limited subject-matter and prosecutorial scope. The Durham investigation began in 2009, many years after the violations it sought to investigate. Although its original scope was to investigate whether any federal laws had been violated in connection with the CIA's unlawful rendition and torture program, Attorney General Holder limited the scope of the investigation in the following ways:

- Only conducting an examination into the deaths of two terrorism suspects in CIA custody and whether their torture had been authorized.

- Excluding from possible prosecution any torture method used that had been previously authorized for use and by shielding those who "acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees" from prosecution.
- Excluding senior governmental officials from the investigation.

See Eric Holder, Att'y Gen., *Investigation into the Interrogation of Certain Detainees*, Dep't of Justice News (June 30, 2011).

In addition, investigators did not interview any victims or survivors of the program or their family members before Attorney General Holder closed the investigation in 2012 without seeking a single prosecution. This severely delayed investigation, and its limited scope rendered it ineffective, as it could not provide the full truth of the perpetrators nor the circumstances giving rise to the violations.

Both the Committee Against Torture and the Prosecutor for the International Criminal Court have found the U.S. investigation inadequate and ineffective. *See* Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of the United States of America*, ¶¶ 9-10, 12, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014); 2017 ICC Prosecutor Request at pp. 142-44, 151-61. *See also* Harvard Report 2015, 16-19 (documenting the U.S. failure to prosecute and the inadequacy of the criminal investigations into U.S. torture). And contrary to the United States' position that there is insufficient evidence to hold anyone accountable for violations of U.S. laws prohibiting torture, Human Rights Watch has concluded the opposite: there is in fact ample evidence in the public record, in particular, the Senate Torture Report to prosecute individuals, to hold senior U.S. officials accountable. HRW, No More Excuses Report; *see also*, 2017 ICC Prosecutor Request (concluding that there is sufficient evidence to prosecute members of the CIA and U.S. military for the war crimes of torture and cruel treatment committed in Afghanistan).

Finally, the SSCI's inquiry (summarized in the Senate Torture Report) also does not meet the "adequate and effective" investigation-standard for broadly similar reasons. The "study", like the Durham investigation, was many-years delayed. It too did not begin until 2009 and investigators did not interview any victims or survivors of the rights violations under examination nor their relatives. But most notably, the study was conducted by an organ of the state—a Senate committee— and was not initiated with a view to possible prosecution of those persons who it found responsible for the rights-violations identified. Indeed the study does not reveal the names of any CIA officials or other actors who personally participated in acts of torture and other cruel, inhuman or degrading treatment, and explicitly excludes from its scope any victim or survivor who was not held and interrogated by the CIA. Therefore, the Senate Committee excluded an examination of cases of victims and survivors of unlawful renditions by the CIA to foreign governments from the study's remit. Given the United States' delay in initiating the study and its limited scope, the Senate study is also inadequate and ineffective.

1. The United States has not held anyone criminally responsible for violating Mr. El-Masri's rights.

A state's affirmative obligation to protect rights also requires that states prosecute and punish perpetrators in appropriate cases. *Lenahan Gonzales*, ¶ 122 , *See also Gelman v. Uruguay*, Judgment (Merits and Reparations), Inter-Am. Ct. H. R., ¶¶ 189-91 (Feb. 24, 2011) (explaining that states must punish rights-violations as an affirmative measure to protect rights and as part of their obligation to organize governmental structures to guarantee rights and to combat impunity). States must employ all legal means available to prosecute individuals. *Valle Jaramillo* at ¶ 101; *See also Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 187, (January 31, 2006) (a state cannot justify failure to prosecute when it does not use all reasonable and legally available means). Further, states cannot

escape their responsibility to prosecute perpetrators by enacting procedural or substantive barriers to prosecutions, such as amnesty laws or statutes of limitations, *Gelman*, at ¶¶ 225-229. And administrative sanctions are not a substitute for criminal investigations and prosecutions. *Id*.

Thus, the Commission may find the United States responsible for violating Mr. El-Masri's rights because of its continuing failure to conduct an adequate and effective investigation into Mr. El-Masri's credible allegations and to thereafter prosecute those responsible and punish them for their violation. *See e.g.*, CIA OIG El-Masri Report, ¶ 14; Harvard Report 2015, 16-19 (documenting the United States' failure to hold U.S. officials criminally responsible).

2. The United States has not provided reparations for violating Mr. El-Masri's rights.

A state's affirmative obligation to protect rights also requires that states provide victims and survivors with reparations for rights violations for which the state and –in certain circumstances – non-state actors are responsible. For survivors of arbitrary detention, forced disappearance, torture, and other egregious human rights violations, reparations include restitution, compensation, rehabilitation, public acknowledgement of wrong-doing, and apologies. *See* Right to a Remedy, at 7-9. U.N. Convention Against Torture, *General Comment No. 3 (2017) Implementation of article 14 by States parties*, ¶¶6-18 (Dec. 13, 2012). Because the United States has refused to provide Mr. El-Masri with any form of civil or other redress for his injuries, the Commission may find the United States responsible for violating Mr. El-Masri's rights because of its continuing failure to take reasonable measures to protect him by providing him with any reparation for the violations of his rights..

THE UNITED STATES IS RESPONSIBLE FOR VIOLATING MR. EL-MASRI'S SUBSTANTIVE RIGHT TO A REMEDY.

As discussed, the United States has an obligation to provide Mr. El-Masri with a civil remedy or reparations for violations of his rights as part of its affirmative obligation to protect him. *See supra* Factual Background, at § R. In addition, Articles XVIII and XXIV of the American Declaration guarantee Mr. El-Masri a substantive right to a remedy, including reparations, for these rights violations. In 2005, Mr. El-Masri sought to vindicate his rights by filing a civil lawsuit in federal court. But despite credible allegations in support of his claims that the United States and its agents and contractors were responsible, U.S. courts refused to consider the merits of his claims or to provide him with reparations for the violation of his rights. Accordingly, the United States violated and continues to violate Articles XVIII and XXIV of the American Declaration.

A. Articles XVIII and XXIV Guarantee 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 any conduct that violates any fundamental rights. Article XXIV guarantees everyone the right to petition any competent authority, and to obtain a prompt decision from it.

The Commission interprets Article XVIII in light of the more specific but analogous provisions of Articles 8 and 25 of the American Convention. *See Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. Comm. H.R., Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20, rev. ¶ 174 (2000); *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm. H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev, ¶ 37 (2000). Article 25 guarantees 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 . . . ." Together with Articles 1(1) and 2 of the Convention, Article 25 encompasses three separate but related rights: 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. *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am.Comm. H.R., Report No. 5/96, OEA/Ser.L/V/II.91 doc. 7, §2(b) (1996). 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 laws).

States must provide a judicial forum for anyone who alleges violations of their fundamental rights and that forum must be capable of granting a remedy that effectively and adequately addresses any violation of the right alleged. *See, e.g., Velásquez-Rodríquez*, ¶ 64; *see also* Report on Terrorism and Human Rights, ¶ 334.

Importantly, the right to a remedy requires that states 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. *See, e.g.*, *Mayagna Awas Tingni Community v. Nicaragua*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 113-114 (Feb. 1, 2000); *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 136-137 (Feb. 6, 2001). In the *Constitutional Court Case*, for example, 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.

See "Five Pensioners", Judgment, Inter-Am. Ct. H.R, (ser. C) No. 98, ¶ 136 (Feb. 28, 2003); *See also Durand & Ugarte v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 68, at 118, ¶ 62 (Aug. 16, 2001); *Cantoral-Benavides v. Peru* , Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 164 (Dec. 3, 2001).

The Commission has analyzed the requirements of a full and fair remedy under Articles 8 and 25 in cases, such as Mr. El-Masri's, where incomplete access to facts and judicial doctrines coalesce to hinder the realization of these rights. Significantly, the Commission found:

> [T]he existence of factual or legal impediments—like amnesty laws—that obstruct access to information about the facts and circumstances surrounding a violation of a fundamental right, and that stand in the way of instituting judicial remedies in domestic jurisdiction, are incompatible with the right to judicial protection recognized in Article 25 of the American Convention.

Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, Inter-Am. Comm. H.R., OEA/Ser.L/V/II, doc. 49/13 ¶ 205 (2013).

Additionally in *Gustavo Carranza v. Argentina*, 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. Case 10.087, Inter-Am. Comm. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. (1997). The petitioner was a judge removed from office in 1976 by the military government of Argentina. He sought a judicial remedy but a domestic law prevented him from accessing domestic courts because his dismissal was considered a matter for the political branches to decide, not the courts. In finding a violation of both Articles 8 and 25, the Commission, highlighting the need for "effective" judicial protection, elaborated on the nature of Article 25's right to a remedy:

> [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.

Id. at ¶ 73.

Applying this same analysis, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms has found that the U.S. state secrets doctrine likewise violates victims' rights of access to a remedy:

> The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence (under the policy of 'originator control' ...) prevents effective investigation and renders the right to a remedy illusory. This is incompatible with Article 2 of the International Covenant on Civil and Political Rights. It could also amount to a violation of the obligation of States to provide judicial assistance to investigations that deal with gross human rights violations and serious violations of international humanitarian law.

U.N. Special Rapporteur, Human Rights Council, *Promotion and Protection of All Human Rights, Civil. Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 60, UN Doc. A/HRC/10/3 (4 February 2009)

Finally, the Commission has noted the "fundamental" importance of the protections afforded by Article 25:

> [S]tates 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 measures adopted by the executive body due to the state of emergency.'

Carranza at ¶ 80 (citation omitted).

Among the rights "not subject to derogation" recognized by the Convention are some of the rights at issue here: the right to life, judicial review of detention and the right to be free from torture and other inhumane treatment.

The European Court also has recognized the importance of the right to a remedy and its importance in safeguarding other rights, even when a state raises national security concerns. In

Tinnelly and McElduff v. United Kingdom, the applicants, Catholics based in Northern Ireland, lodged complaints under the Fair Employment (Northern Ireland) Act 1976, alleging that the U.K government had unlawfully discriminated against them in tendering for government contracts. Judgment, App. No. 20390/92, E.C.H.R. (1998)

The Secretary of State for Northern Ireland issued certificates under section 42 of the 1976 Act stating that the refusal to offer contracts was "an act done for the purpose of protecting national security or the protection of public safety or order." Under section 42(2) of the Act, the English court deemed these certificates conclusive evidence of the facts asserted. In an application for judicial review of the certification process, the domestic court stated 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. 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. In other words, there was no "independent judicial scrutiny of the facts grounding" the judge's determination. *Id*. at ¶ 77.

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. *Id.* at ¶¶ 72-79. Although the European Court accepted that the right to a remedy 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. *Id*. The European 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.

Id. at ¶ 77 (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." *Id*. Ultimately, the Court was not persuaded that alternative measures could not have been introduced that might have accommodated both of these interests. *Id.*; *see also Devenney v. U.K.*, Judgment, App. No. 24265/94, 35 E.C.H.R. 643 (2002); *Al-Nashif and Others v. Bulgaria*, App. No. 50963/99, 36 E.C.H.R. 655, (2002).

B. The United States has Denied Mr. El-Masri his Right to a Remedy

The United States denied Mr. El-Masri's access to judicial remedies. First, as discussed, the United States failed to conduct an effective and adequate investigation into his allegations and to prosecute and hold accountable those responsible for violating his rights. Second, the United States denied Mr. El-Masri civil remedies in U.S. federal court.

In regards to civil redress, shortly after Mr. El-Masri filed his federal lawsuit, the United States intervened and sought its immediate dismissal based on an evidentiary "states secrets" privilege, arguing that any further litigation of Mr. El-Masri's allegations would cause harm to U.S. national security interests. In support, the United States produced two declarations, one of which the government made public and the other which it provided to the judge alone. The U.S.

Court of Appeals for the Fourth Circuit, affirming the district court's earlier dismissal, upheld invocation of the privilege, and dismissed Mr. El-Masri's case on the pleadings.

In applying the state secrets privilege, the court of appeals did not independently consider whether the evidence that the government sought to have removed from the case was genuinely secret; whether disclosure of particular information would reasonably have caused harm to national security; and whether, even if state secrets were legitimately implicated, dismissal of Mr. El-Masri's entire suit at the pleading stage was warranted. Moreover, the Court failed to consider adequately possible alternatives to dismissal of the case, including admission of state secrets evidence in camera or under seal, the appointment of a Special Master, the establishment of Protective Orders, and the possibility of holding an in camera trial. *See* Opening Brief for Plaintiff-Appellant, *El-Masri v. Tenet*, No. 1:05cv1417, at 52-57 (*available at* http://www.aclu.org/pdfs/safefree/20060724elmasriplsopeningbrief.pdf).

Thus, the court of appeals did not even address the truth or falsity of Mr. El-Masri's claims of torture, arbitrary detention, or forced disappearance. It made no attempt to elucidate the "truth as to the events that transpired, their specific circumstances, and who participated in" the violation of his rights. Finally, 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. *Id*. at 20. The Court simply held that Mr. El-Masri's right to redress must be "subordinated to the collective interest in national security." *Id*. at 21.

In so doing, the United States violated Mr. El-Masri's substantive right to a remedy, including his right to reparations, guaranteed by Articles XVIII and XXIV.

CONCLUSION AND REQUEST FOR RELIEF

The facts alleged in his original petition and above establish that the United States is responsible for violating Mr. El-Masri's rights guaranteed by Articles I, II, VIII, XVII, XVIII, XXIV, XXV and XXVI of the American Declaration. Thus, Petitioner Khaled El-Masri requests that the Commission:

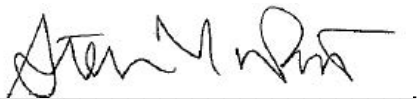
1. Investigate, with hearings and witnesses as necessary, the facts alleged in his Petition and Final Observations on the Merits.

2. Declare that the United States is responsible for violating his rights to be free from torture, arbitrary detention and forced disappearance guaranteed under Articles I, VIII, XVII, XXV, XXVI, and XXVI, his Article II right to equal protection and his right to a remedy protected under Articles XXIV and XVIII.

3. Declare that the U.S. unlawful rendition and torture program violates the American Declaration and provide Mr. El-Masri and other victims and survivors of program with effective guarantees that the United States will not revive the program or any of its constituent parts; nor repeat the human rights violations that they gave rise to.

4. Recommend reparations that the Commission considers adequate and effective to redress the United States' violations of Mr. El-Masri's rights, including: requesting that the U.S. government and others responsible for violating Mr. El-Masri's rights publicly acknowledge their responsibility; publicly apologize to Mr. El-Masri and his family for violating their rights; and providing Mr. El-Masri with compensation, rehabilitation, and effective guarantees of non-repetition.

Respectfully submitted:



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