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REPORT No. 21/16
PETITION 419-08
REPORT ON ADMISSIBILITY

KHALED EL-MASRI
UNITED STATES

Approved by the Commission at its session No. 2065 held on April 15, 2016.
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I. SUMMARY

1. On April 9, 2008 a petition was presented to the Inter-American Commission on Human Rights (the "Inter-American Commission", or the "IACHR") by the American Civil Liberties Union (the "petitioner") against the United States of America (the "State" or the "U.S."). The petition was presented on behalf of Khaled El-Masri (hereinafter "Mr. El-Masri" or the "alleged victim"), a German citizen subjected to the so called extraordinary rendition program.

2. The petitioner complains that Mr. El-Masri was captured at the border between the Former Yugoslav Republic of Macedonia ("Macedonia") and Serbia by Macedonian intelligence agents acting at the behest of the U.S. Government. After being held incommunicado in Macedonia for three weeks, he was allegedly transported to a prison in Afghanistan, where he was placed in solitary confinement for four months prior to being released without charges. The petitioner maintains that this treatment, known as "extraordinary rendition" is a systematic practice employed by the U.S. Government as part of its strategy to combat terrorism. The petition alleges that during his detention, Mr. El-Masri was subjected to repeated acts of torture and cruel and degrading treatment. When Mr. El-Masri sought reparations in U.S. courts, his suits were dismissed on the basis that the evidence presented would reveal confidential information necessary to protect national security. The petitioner alleges that, consequently, the State is responsible for violating Mr. El-Masri's rights under Articles I, VI, VIII, XVII, XVIII, XXIV, XXV, and XXVI of the American Declaration of the Rights and Duties of Man. As of the approval of this report, the State has not submitted any written response in this matter.

3. The State indicates that Mr. El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia in 2005 and that the U.S. Government filed a request to dismiss based on the state secrets privilege. The State further indicates that the Government's motion to dismiss was granted on May 12, 2006; that the dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit and the U.S. Supreme Court denied Mr. El-Masri's petition for review.

4. Without prejudging the merits of the complaint, after examining the position of the parties, and pursuant to the requirements set out in Articles 31 to 34 of its Rules of Procedure, the Inter-American Commission decides to declare the petition admissible for the purpose of examining the alleged violation of the rights set forth in Articles I (Right to life, liberty and personal security), II (Right to equality before law), VIII (Right to residence and movement), XVII (Right to recognition of juridical personality and civil rights), XVIII (Right to a fair trial), XXIV (Right of petition), XXV (Right of protection from arbitrary arrest), and XXVI (Right to due process of law) of the American Declaration of the Rights and Duties of Man ("the American Declaration"). The IACHR also decides to notify the parties of its decision and to continue with its analysis of the merits, publish this report and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE IACHR

5. The petition was submitted on April 9, 2008, and the IACHR registered it as P-419-08. Subsequently, on April 2, 2009, the organization The Redress Trust presented an *amicus curiae* brief in support of the petition.

¹ Commissioner James L. Cavallaro did not take part in the discussion or voting on this petition, pursuant to Article 17(2) of the Inter-American Commission's Rules of Procedure.

6. On August 19, 2009 the IACHR transmitted the pertinent parts of the petition to the State, with a request for its observations within two months as provided for in Article 30(3) of the Commission's Rules of Proceeding, and informed the petitioner accordingly. The State acknowledged receipt of the petition on August 21, 2009 via email, but did not respond to the request for observations. On August 5, 2010, the IACHR reiterated the request to the State. On April 11, 2016, the IACHR received the response from the State.

7. The Commission received additional information from the petitioner on July 27, 2010 and December 20, 2012. Those communications were duly forwarded to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

8. The petition indicates that Khaled El-Masri was born in Kuwait and raised in Lebanon, and he became a German citizen in 1995. In December 2003, he was living in Germany when he allegedly traveled to Macedonia on vacation. The petitioner claims that he was stopped at the border between Macedonia and Serbia on December 31 and taken to a hotel in Skopje by Macedonian intelligence agents. There he was held incommunicado for 23 days and interrogated in English, despite his limited proficiency in that language. The questions focused on a meeting that Mr. El-Masri supposedly attended in Afghanistan and on contacts that he had made in Norway, and Mr. El-Masri denied that any of this had taken place. The petitioner states that Mr. El-Masri's requests to contact an attorney, a consular representative, and his family were repeatedly denied. When his captors pressured Mr. El-Masri to confess his association with Al Qaeda, he commenced a hunger strike that lasted for ten days.

9. On January 23, 2004, Mr. El-Masri was purportedly handcuffed and blindfolded and driven to a place where he was beaten, his clothes were removed, and an object was forced into his anus. At this point, he was bound to the floor of an aircraft and given two injections. The plane took him to Kabul, Afghanistan after stopping briefly in Majorca, Spain.

10. According to the petitioner, Mr. El-Masri was taken to a secret U.S. Central Intelligence Agency (CIA) prison, an abandoned brick factory north of Kabul known as the "Salt Pit," where he was beaten and placed in a small, dirty, concrete cell. The cell contained no bed, and Mr. El-Masri was given putrid drinking water. He also received a brief medical examination. For four months, Mr. El-Masri remained in solitary confinement in the "Salt Pit" without access to fresh air or reading and writing materials. During this time, the petitioner claims that he was interrogated about alleged links to terrorist groups. The interrogations were always carried out by the same man, and two men who identified themselves as Americans participated. His requests to meet with a representative of the German Government were denied.

11. Beginning in March of 2004, the alleged victim began a hunger strike that lasted for thirty-seven days, causing him to lose 60 pounds. He received no medical attention until the last day, when liquid was forced through a feeding tube placed in his nose.

12. On May 27, 2004, a German intelligence officer whom the alleged victim had met on a few prior occasions informed him that the Americans would release him to a third country in order to cover up their involvement in his detention, and that later he would be returned to Germany. This officer warned Mr. El-Masri not to reveal the events that had transpired. The following day, Mr. El-Masri was placed on a CIA-chartered plane and transported to Albania, where he was blindfolded and driven to a site near the country's borders with Macedonia and Serbia. There he was found by Albanian officials who took his money and his passport and placed him on a flight to Germany. When Mr. El-Masri returned to his home, he found that his family had returned to Lebanon.

13. With regard to the exhaustion of domestic remedies, the petitioner indicates that on December 6, 2005, Mr. El-Masri filed a claim in the U.S. District Court for the Eastern District of Virginia against former Director of Central Intelligence, George Tenet, several U.S. Government officials and three U.S.

aviation companies that were purportedly responsible for transporting him at different stages of his detention, seeking compensatory and punitive damages for unlawful abduction, arbitrary detention, cruel, inhuman or degrading treatment and torture; the former enforceable in U.S. Courts pursuant to the Alien Torts Statute (ATS). The U.S. Government sought the dismissal of the suit pursuant to the evidentiary state secrets privilege, on the basis of two declarations signed by the then CIA Director, Porter Goss, indicating that the United States could neither confirm nor deny the allegations.

14. The federal court of first instance dismissed his claim, on May 12, 2006, on the basis of the State secrets privilege, concluding that "while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claim, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets." The federal court of appeals for the Fourth Circuit upheld this ruling on March 2, 2007, concluding that confidential matters of national security were central aspects of both the claims and the defenses that would be presented. Finally, the U.S. Supreme Court declined to review the case on October 9, 2007.

15. According to the petitioner, extraordinary rendition is part of a practice that the United States has employed since the 1980s, and its victims number between 80 and 150. Those who have attempted to challenge the treatment they received in U.S. courts have seen their claims dismissed without consideration of the merits. Furthermore, laws such as the Military Commissions Act of 2006 provide immunity to government officials who authorized or ordered acts of torture dating back to 1997, and federal prosecutors have declined to investigate the cases of detainee abuse that have been referred to them. Thus, according to the petitioner, there is no way for Mr. El-Masri and other victims of rendition to compel an investigation into the facts surrounding their abduction or to seek reparations for the violations of their rights.

16. Finally, the petitioner indicates that Mr. El-Masri's inability to obtain an official acknowledgement and apology for his enforced disappearance, arbitrary detention and torture, or any other form of redress for his injuries, have had a significant toll on his psychological well-being.² The petitioner states that before his "extraordinary rendition" and torture, Mr. El-Masri was a peaceable German citizen, married with five young children and no criminal record. After his ordeal, following his return to Germany in May 2004, this situation changed dramatically due to deterioration in Mr. El-Masri's mental health, which culminated in a number of uncharacteristic and troubling violent outbursts that have resulted in his conviction, on March 30, 2010, and incarceration for two years. Psychiatrists who have examined and treated Mr. El Masri have concluded that these violent outbursts, typical among survivors of human rights abuses, are directly attributable to the trauma he experienced as a consequence of his "extraordinary rendition" and torture.

B. Position of the State

17. The United States argues that the American Declaration is a non-binding instrument and that it does not create legal rights or imposes legal obligations on Member States of the Organization of American States. It also refers to Article 20 of the Statute of the IACHR and to the power of the Commission to examine communications and make recommendations to the Member States that are not parties to the American Convention. In this regard, the United States affirm that it takes its American Declaration commitments and the Commission's recommendations very seriously.

18. With regard to the petition, the State indicates that Mr. El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia in December 2005, against the former Director of the CIA, three private companies, and several unnamed defendants, seeking damages for his alleged unlawful abduction, detention, and torture. It points out that the U.S. Government filed a request to dismiss based on the state secrets privilege, which is an evidentiary privilege that may be invoked by the U.S. Government in litigation

² See, Declaration of Dr. Katherine Porterfield (Jan. 5, 2009) attached to Amicus Curiae Brief Presented to the Inter-American Commission on Human Rights by the Redress Trust In the Case of Khaled El-Masri v. United States (Mar. 2009).

when it is necessary to protect information when its unauthorized disclosure could reasonably be expected to cause significant harm to the national defense or foreign relations of the United States. The State's response further indicates that the Government's motion to dismiss was granted on May 12, 2006. The dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit and the U.S. Supreme Court denied Mr. El-Masri's petition for review.

19. Finally, the United States informs that the declassified summary of the report prepared by the U.S. Senate Select Committee on Intelligence on the CIA's former detention and interrogation program published in December 2014 contains a brief discussion of Mr. El-Masri's situation. According to the report, Mr. El-Masri's rendition was based on the determination by CIA office³rs that he knew key information that could assist in the capture of al-Qaeda operatives but the cable that was the source of the information did not state that Mr. El-Masri himself posed a serious threat. The report also describes the disagreements within the CIA on the process for his release. In this regard, it indicates that "[a]s later described by the CIA inspector general, officers in ALEC Station continued to think that releasing Khalid al-Masri would pose a threat to U.S. interests and that monitoring should be required, while in the CIA's (redacted text) Division did not want to notify the German government about the rendition of a German citizen. Because of the significance of the dispute, the National Security Council settled the matter, concluding that al-Masri should be repatriated and that the Germans should be told about al-Masri's rendition."

IV. ANALYSIS OF ADMISSIBILITY

A. Competence

20. Upon considering the record before it, the Inter-American Commission finds that it is competent *ratione personae* to analyze the claims in the present petition. Under Article 23 of the IACHR Rules of Procedure, the petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration. The alleged victim is a person whose rights are protected insofar as the claims concern his alleged treatment at the hands of U.S. agents. The State is bound to respect the provisions of the American Declaration, and the IACHR is competent to receive petitions alleging violations of that instrument by the State by virtue of its ratification of the OAS Charter on June 19, 1951 and in conformity with Article 20 of the IACHR's Statute and Article 49 of its Rules of Procedure.⁴

21. The IACHR is also competent *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Declaration was already in effect for the United States on the date on which the facts alleged in the petition were said to have occurred. Finally, the Inter-American Commission is competent *ratione materiae* because the petitioner alleges possible violations of human rights protected by the American Declaration.

22. Regarding jurisdiction *ratione loci*, the IACHR observes two different moments that should be assessed: the alleged apprehension and detention of Mr. El-Masri in Macedonia by Macedonian officials for 23 days; and his alleged detention for more than four months at the "Salt Pit" in Afghanistan by agents of the U.S. CIA.

23. Regarding the extraterritorial application of the American Declaration, the IACHR has held that even though a State's duty to protect the rights of any person applies to all within its territory, that duty may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned

³ Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, December 9, 2014, pp. 128 and 129. Available at: <http://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>

⁴ Article 20(b) of the IACHR's Statute; Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; IACHR's Rules of Procedure, Arts. 49, 50; I/A Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," Jul.14, 1989, Ser.A n°10 (1989), paras.35-45; and IACHR, James Terry Roach and Jay Pinkerton (United States) Case 9647, Res.3/87, Sept.22, 1987, Annual Report 1986-87, paras.46-49.

is present in the territory of one State, but subject to the control of another State, usually through the acts of the latter's agents abroad. In these cases, the inquiry turns on whether the alleged victim was subject to the authority and control of the acting State.⁵

24. In regard to the apprehension of Mr. El-Masri, the IACHR observes that those actions implied an exercise of physical power and control over the person in question. The alleged victim was purportedly kept in the hotel under constant guard by agents of the Macedonian security forces, and those agents were allegedly acting under the direction and control of the U.S. Government, which is the decisive element to establish the jurisdiction of the State over those facts.⁶ The Commission considers that the indications about the supposed involvement of the U.S. government in the unlawful arrest of Mr. El-Masri are sufficient to require an analysis at the merits stage of whether the U.S. exercised extraterritorial jurisdiction.

25. With regard to the alleged acts committed against Mr. El-Masri during his transfer and detention at the "Salt Pit" prison in Afghanistan, the Commission notes that, as the petitioner informed, reports compiled by the Council of Europe support the claim that the unlawful detention and transfer of Mr. El-Masri was part of a systematic practice of the U.S. government during the administration of President George W. Bush.⁷ According to this and other sources, the alleged victim's detention was a result of a CIA error regarding his identity.⁸ Therefore the IACHR considers that, during this period, the alleged victim fell within the jurisdiction of the United States, since the U.S. allegedly exercised total and exclusive *de facto* control over the "Salt Pit" prison and the individuals detained there. Further, his claims concerning the refusal of U.S. courts to examine the merits of the case he presented fall within U.S. jurisdiction.

26. In light of these considerations, as the alleged detention of Mr. El-Masri both in Macedonia and in Afghanistan was allegedly executed under the authority and control of the U.S. government, the Inter-American Commission is competent *ratione loci* to take cognizance of the petition inasmuch as it alleges violations of rights protected by the American Declaration said to have occurred within the jurisdiction of the United States.

B. Admissibility requirements

1. Exhaustion of domestic remedies

27. In accordance with Article 31(1) of the Rules of Procedure of the Inter-American Commission, for a petition to be admissible, domestic remedies must have been pursued and exhausted pursuant to generally recognized principles of international law. This requirement is aimed at enabling national authorities to take cognizance of the alleged violation of the protected right and, if appropriate, resolve the matter before it is heard by an international body.

28. According to the information provided, on December 6, 2005, the American Civil Liberties Union filed a claim on behalf of the alleged victim in the US District Court for the Eastern District of Virginia against a number of defendants, including the former CIA Director George Tenet and certain unknown CIA agents. The claim alleged that the applicant had been deprived of his liberty in the absence of legal process and included a claim under the ATS for violations of international legal norms prohibiting prolonged

⁵ IACHR, Report 17/12, Petition 900-08, Djamel Ameziane (United States), March 20, 2012, para. 30; IACHR, Report No. 109/99, Case 10.951 Coard et al., United States, Merits, September 29, 1999, para. 37; IACHR, Report No. 86/99, Case 11.589 Armando Alejandro Jr., Carlos Costa, Mario de la Peña y Pablo Morales, Cuba, September 29, 1999, para. 23.

⁶ ECHR, Grand Chamber, Case of Al-Skeini and Others v. The United Kingdom (Application n. 5572/07), Judgment of July 7, 2011, paras. 136-137.

⁷ See, e.g., Council of Europe, Parliamentary Assembly Committee on Legal Affairs and Human Rights, Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States, Doc. 10957, pp. 12, 15-24 (June 12, 2006) (hereinafter "Council of Europe report"); see also, Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, THE WASHINGTON POST, p. A 1, Dec. 4, 2005.

⁸ Council of Europe Report, p. 31.

arbitrary detention and cruel, inhuman or degrading treatment. In May 2006 the District Court dismissed the applicant's claim, finding that the US government had validly asserted the State secrets privilege. The District Court held that the State's interest in preserving State secrets outweighed the applicant's individual interest in justice. That decision was confirmed on appeal by the US Court of Appeals for the Fourth Circuit. In October 2007 the Supreme Court refused to review the case.

29. Hence, the IACHR concludes that the remedies under domestic law have been pursued and exhausted in accordance with Article 31(1) of its Rules of Procedure.

2. Timeliness of the petition

30. Article 32(1) of the Rules of Procedure requires that for a petition or communication to be admitted, it must be lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment.

31. In the present case, the United States Supreme Court denied certiorari on October 9, 2007, and the petition was filed on April 9, 2008. Therefore, the IACHR concludes that the requirement of Article 32(1) of the Rules of Procedure has been fulfilled.

3. Duplication of proceedings and international *res judicata*

32. Article 33(1) of the IACHR's Rules of Procedure provides that the admissibility of a petition before the Inter-American Commission requires that the subject of the petition is not pending in another international proceeding for settlement, or essentially duplicates a petition already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.

33. The Commission notes that Mr. El-Masri filed a case against Macedonia with the European Court of Human Rights (ECHR) on July 20, 2009, *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, and the ECHR delivered its opinion on December 13, 2012. While the basis for the claim before the ECHR is very similar, and concerns the same complainant party (the alleged victim), the defendant party (the State) is not the same since before the ECHR it was Macedonia, and before the Inter-American Commission on Human Rights, the United States of America.

34. Furthermore, the ECHR has no jurisdiction against the United States, which is not a party to the European Convention on Human Rights. Accordingly, the Commission considers that the ECHR's decision provides no bar to the admissibility of the present petition.

4. Colorable claim

35. Under Article 34(2) of its Rules of Procedure, the Commission must declare any petition or case inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 thereof, in which case the petition is to be dismissed by virtue of the fact that it is "manifestly groundless" or "out of order", as provided in Article 34(b). The criterion for analyzing a petition's admissibility differs from the one used to analyze its merits, since in the admissibility phase the Inter-American Commission does only a *prima facie* analysis to determine whether a petition establishes the apparent or possible violation of a right guaranteed by the American Declaration. It is a preliminary analysis that does not imply any prejudgment or a preliminary opinion on the merits of the case.

36. The Inter-American Commission's Rules of Procedure do not require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the IACHR, based on the inter-American system's jurisprudence, to determine in its admissibility report which provisions of the relevant instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements.

37. In the present case, the petitioner alleges that the State is responsible for violations of Mr. El-Masri's rights under Articles I, VI, VIII, XVII, XVIII, XXIV, XXV and XXVI of the American Declaration, fundamentally on the basis of Mr. El-Masri's unlawful arrest and arbitrary detention, his deprivation of liberty in solitary confinement during five months without charge or judicial review; the acts of physical and psychological torture and cruel, inhuman, and degrading treatment he has allegedly suffered while in Macedonia and Afghanistan; and the lack of adequate and effective judicial remedies for the violations he has allegedly suffered. The State acknowledges that Mr. El-Masri filed suit in the U.S. District Court for the Eastern District and that the request to dismiss filed by the U.S. Government, based on the state secrets privilege, was granted.

38. In the instant case, the IACHR will also consider at the merits stage the possible violation of Article II of the American Declaration, in light of the potential discrimination based *inter alia* on Mr. El-Masri's ethnic origin, culture and religion.

39. Lastly, the IACHR finds that the petitioner has not sufficiently substantiated allegations so as to permit the Inter-American Commission to determine, for the purposes of the admissibility of this petition, that the facts tend to establish *prima facie* violations of Article VI of the American Declaration.

40. Based on the foregoing, the IACHR considers that the petition is not manifestly groundless or out of order and concludes, pursuant to Article 34 of its Rules of Procedure, that it should be declared admissible with regard to alleged violations of Articles I, II, VIII, XVII, XVIII, XXIV, XXV and XXVI of the American Declaration.

V. CONCLUSIONS

41. The Inter-American Commission concludes that it is competent to take cognizance of the present matter and that the petition is admissible under Articles 31 to 34 of its Rules of Procedure. Based on the arguments of fact and of law set forth herein and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible with respect to Articles I, II, VIII, XVII, XVIII, XXIV, XXV and XXVI of the American Declaration of the Rights and Duties of Man;
2. To declare the present petition inadmissible with respect to Article VI of the American Declaration;
3. To notify the parties of this decision;
4. To proceed to the analysis of the merits of the case; and
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 15th day of the month of April, 2016. (Signed): Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.