Dear Dr. Abrão:

On behalf of the Petitioners in the above-referenced matter, and as requested by the Inter-American Commission on Human Rights (“the Commission”) in correspondence dated November 21, 2018 (attached), we submit the following response to the observations of the United States on Petition No. P-1638-11: Abou Elkassim Britel, Binyam Mohamed, Bisher Al-Rawi, Mohamed Farag Ahmad Bashmilah, United States, dated May 4, 2016 (“U.S. Response”).

The Commission should admit the Petition of Abou Elkassim Britel, Binyam Mohamed, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah against the United States, Petition No. P-1638-11 (“the Petition”), dated November 14, 2011, because it satisfies all admissibility requirements under the Commission’s Rules of Procedure and its admission is unopposed. The United States does not seriously contest the Petition’s admissibility. The observations make no explicit arguments opposing admissibility and any implicit such arguments are groundless. If a petition alleges facts that establish a colorable violation of the American Declaration on the Rights and Duties of Man (“the American Declaration” or “the Declaration”), is not “manifestly groundless” or “obviously out of order,” and the other admissibility requirements are met, the Commission should declare the Petition admissible and proceed to consider the merits. See John Doe et al. v. Canada, Petition 554-04, Inter-Am. Comm’n H.R., Admissibility, Report No. 121/06, OEA/Ser.L/V/II.127 Doc. 4 rev. 1, ¶ 68 (2007);

1 Counsel for Mohamed Farag Ahmad Bashmilah take this opportunity to inform the Commission that they recently received definitive news that Mr. Bashmilah was killed in the conflict in Yemen in 2015. Counsel continue this case in Mr. Bashmilah’s name, as representatives of his widow, Yali Yasir Yehya Bashumailah, who is the successor to his claims. Permitting a successor to inherit a petitioner’s claims and continue ongoing litigation is both in the interest of justice and consistent with the past practice of the Inter-American Court of Human Rights upon the death of a complainant during the pendency of an action. See, e.g., Garrido and Baigorria v. Argentina, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 39, ¶ 50 (1998) (“The Court has stated, and now reiterates, that the right to compensation for damages suffered by the victims up the time of their death, is transmitted to their heirs by succession.”); Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 15, ¶ 54 (1993) (same).

Petitioners incorporate by reference their arguments on admissibility in the Petition. Petition at 21-38. In sum, the Commission is competent to adjudicate the violations alleged in the Petition; Petitioners exhausted domestic remedies before filing the Petition or, in the alternative, should be exempted from doing so; and that the grounds for the Petition subsist, as the United States has failed to investigate, prosecute, or remedy the violations suffered by Petitioners.

I. The Commission is competent to adjudicate the violations alleged in the Petition


The United States also argues that the Commission is not competent to “issue a binding decision vis-à-vis the United States on matters … arising under other international human rights treaties (whether or not the United States is a party)” or under customary international law.” U.S. Response at 2. But, in assessing violations of the Declaration, the Commission routinely looks to other human rights treaties and customary international law to interpret the articles of the Declaration. See Report on Terrorism and Human Rights, ¶¶ 41, 45-46 (collecting cases); Gonzales v. United States, Case 12.626, Inter-Am. Comm’n H.R., Merits, Report No. 80/11, OEA/Ser.L./II.142, ¶ 118 & n.198 (2011) (collecting cases). “[A]lthough [the Commission] does not have the competence to declare that a state is internationally responsible for violating international treaties that do not give it capacity, it does have competence to interpret and apply the American Declaration in light of all the obligations applicable to the State in question,” to ensure that its decisions comport with current day human rights protections. Galindo v. United States, Case 10.573, Inter-Am. Comm’n H.R., Merits, Report No. 121/18, OEA/Ser.L/V/II.169 Doc. 138, ¶¶ 330, 332 & nn.608-610 (2018) ((citing “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R., (ser. A) No. 1 (1982)).
In sum, the American Declaration imposes binding international obligations on the United States and the Commission has the necessary authority and competence to adjudicate the violations of the Declaration alleged in the Petition by reference to other sources of international law.

II. Petitioners have satisfied the admissibility requirements under the Commission’s Rules of Procedure

a. The U.S. Response does not contest the Petition’s admissibility

The Petition satisfies admissibility requirements under Articles 30-34 of the Commission’s Rules of Procedure. Petitioners have exhausted domestic remedies or the Commission should exempt them from doing so on grounds of futility; submitted the Petition within six months of exhaustion; and have no other proceedings addressing these same rights violations pending before any other international tribunals. Petition at 29-38. Petitioners incorporate those arguments by reference.

The United States does not argue that the Petition fails to meet any of these requirements. In fact, the U.S. Response does not even mention the word “admissibility.” The only implicit challenge that could possibly be read into the discussion of “domestic proceedings” included in the observations, U.S. Response at 2-3, is a challenge to Petitioners’ exhaustion of domestic remedies. However, that challenge, insofar as the U.S. even makes it, is baseless.

b. Petitioners have exhausted domestic remedies and pursuing further recourse in the United States would be futile

Once a petitioner claims to have properly exhausted domestic remedies, as Petitioners did here, Petition at 29-33, the burden is on the state “to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted…” Commission’s Rules of Procedure, Art. 31(3). To meet this burden, the state must “demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged.” Domenichetti v. Argentina, Case 11.819, Inter-Am. Comm’n H.R. Report No. 51/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, ¶ 43 (2003). See also Velásquez Rodriguez, Inter-Am. Ct. H. R., Preliminary Objections, Judgment of June 26, 1987, (Ser. C) No. 1, ¶ 88 (1987) (“[T]he State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.”); Corumbiara v. Brazil, Case 11.556, Inter-Am. Comm’n H. R., Report No. 77/98, OEA/Ser.L/V/II.95 Doc. 7 rev., at 62, ¶ 13 (1998) (same); Cárdenas v. Venezuela, Petition 667/01, Inter-Am. Comm’n H.R, Admissibility, Report No. 70/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 50 (2004) (same). The United States has not done so here. To the contrary, the procedural history of Mohamed v. Jeppesen Dataplan, Inc., the civil lawsuit filed by Petitioners before they submitted the Petition, makes plain that Petitioners sought relief through the U.S. federal courts to the highest level, but those courts denied them any redress because they upheld the U.S. government’s invocation of the so-called “state secrets” privilege to dismiss their lawsuit.2 This history, coupled with the experience of similarly situated plaintiffs underscores why any attempt to pursue further recourse in the United States would be futile.

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The principle of exhaustion of domestic remedies has been satisfied here because the United States had ample opportunity to remedy, within its own jurisdiction, the violations that gave rise to this Petition. See Cárdenas v. Venezuela, Petition 667/01, Inter-Am. Comm’n H.R, Admissibility, Report No. 70/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 52 (2004) (“[I]f the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept [of exhaustion of domestic remedies] is fulfilled.”). When Petitioners tried to sue Jeppesen Dataplan, Inc., a private flight services and logistics corporation, for colluding with the United States in their forced disappearance, refoulement and torture by facilitating Petitioners’ “torture flights,” the United States intervened. As a party to the lawsuit, the United States could have responded to the allegations in the complaint but instead opted to block any form of redress available to Petitioners by invoking the “state secrets” privilege to end the litigation before pretrial discovery, preventing the courts from considering and determining the merits of the Petitioners’ claims.3

In the alternative, Petitioners are exempt from the exhaustion requirement because remedies are “unavailable [to them] as a matter of fact or law.” Lares-Reyes et al v. United States, Petition 12.379, Inter-Am. Comm’n H.R, Report 19/02, OEA/Ser.L/V/II.117 Doc. 1 rev. 1, ¶ 49 (2002); Sahih v. Ecuador, Case 1/03, Inter-Am. Comm’n H.R., Report No. 9/05, OEA/Ser.L/V/II.124 Doc. 5 ¶ 30 (2005). Despite years of effort to obtain acknowledgment and redress for their treatment, Petitioners and other victims and survivors of the U.S. unlawful rendition and torture program have failed in their attempts to seek redress in the United States.4 U.S. federal courts have consistently refused to consider the merits of claims similar to those of Petitioners by upholding the government’s assertion of the “state secrets” privilege or acceding to claims of governmental immunity.5 Any further pursuit by Petitioners of remedies before U.S. courts would have met a similar fate. In light of such a systemic failure to consider cases seeking redress for abuses committed as part of the U.S. unlawful rendition and torture program, the Commission should exempt Petitioners from exhausting any arguably available domestic remedies in relation to those claims. See Petition at 34-36 & nn.78-79.

In sum, Petitioners have satisfied the exhaustion requirement of Article 31(1) of the Commission’s Rules of Procedure. The United States has not met its burden of proving that there are any other

3 See Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1076 (9th Cir. 2010) (“Before Jeppesen answered the complaint, the United States moved to intervene and to dismiss plaintiffs’ complaint under the state secrets doctrine.”). The U.S. government’s motion was granted, the case was dismissed, and that dismissal was affirmed on appeal, by an en banc court, id. Petitioners then sought review by the Supreme Court, but the Court denied their request. Mohamed v. Jeppesen Dataplan, Inc., 563 U.S. 1002 (2011).

4 The Petition refers to this same program as the “extraordinary rendition and secret detention program.” That phrase and the term “unlawful rendition and torture program” are used interchangeably to denote the systematic program of forced disappearance, secret detention, and torture designed and implemented by the United States of America following the attacks of September 11, 2001, of which Petitioners are survivors and victims.

5 There is one notable exception, Salim v. Mitchell, Case No. 2:15-cv-00286-JLQ (E.D. Wa. 2015), a civil lawsuit filed by three victims and survivors of the policy against two CIA-contracted psychologists, James Elmer Mitchell and John Bruce Jessen, who designed the torture methods and methodology for their application for the CIA, and aided in their implementation as part of the U.S. government’s unlawful rendition and torture program. That case survived a motion to dismiss and was poised to proceed to the merits had it not settled. The complaint in Salim v. Mitchell did not, however, address U.S. government responsibility for violations of rights protected in the American Declaration—the subject of this Petition.
domestic remedies available to Petitioners that would adequately and effectively vindicate the violations of the American Declaration that Petitioners allege in the Petition.

III. The grounds for the Petition subsist

The grounds for the Petition, which seeks to vindicate violations of Petitioners’ human rights guaranteed by the American Declaration and to obtain an acknowledgment, apology or other appropriate redress, subsist. Petitioners allege that they were subjected to forced disappearance, torture, other forms of inhumane treatment, arbitrary detention, and *refoulement* as part of the U.S. unlawful rendition and torture program. Petition at 6, 39-62. To date, the United States has not adequately investigated those rights violations, identified and prosecuted perpetrators, nor provided Petitioners or other victims and survivors of the program with any acknowledgment, apology or other form of redress. The state’s discussion of the declassified, redacted executive summary and findings and conclusions of the Senate Select Committee on Intelligence’s *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (“Senate Torture Report” or “the Report”)⁶, U.S. Response at 3-4, does not demonstrate the contrary.

It is unclear for what purpose the United States cites the Senate Torture Report in its observations. The United States makes no argument as to how the Report bears on the Petition’s admissibility. In fact, the Report supports a finding that the Petition is admissible. Key findings of the Senate Torture Report, published in December 2014, confirm that from August 2002 to December 2008, the CIA used unlawful rendition, arbitrary detention, forced disappearance and torture as a matter of policy and that individuals’ human rights were violated as a result. These findings corroborate the substance of Petitioners’ claims and underscore the inadequacy of the U.S. government’s actions to investigate, prosecute or remedy those harms.

The Senate Torture Report does not provide Petitioners with a remedy other than recognition of some instances of wrongdoing. As the United States notes in the observations, the Senate Torture Report discusses several of the Petitioners. In addition to the references to Mr. Binyam Mohamed, Detainee No. 95, Senate Torture Report at 45, 98, 185, 226, 228, 233, 236, 238-39, 428, 460 & nn.1301, 1306, 1310, 1317, 1338-39, 1342-43, and Mr. Bisher al-Rawi, Detainee No. 95, Senate Torture Report at 58, cited in the U.S. Response at 4, the Senate Torture Report also mentions Mr. Mohamed Farag Ahmad Bashmilah, Detainee No. 89, who is listed under two variations on the transliteration of his name; alternately Mohammed al-Shomaila and Mohd al-Shomaila, Senate Torture Report at 16 n.32, 460. Notably, the Report lists Mr. Bashmilah among those individuals wrongfully detained by the U.S. government. Senate Torture Report at 16 n.32.

The Senate Torture Report does not meet the “adequate and effective” investigation standard because of the delay in its initiation and its limited scope.⁷ The Senate did not initiate the “study” with a view to possible prosecution of those persons whom it found responsible for the rights violations.

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identified. Investigators did not interview any victims or survivors of the rights violations under examination nor their relatives; the Report does not identify every CIA official or other actor who participated in the rights violations detailed; and the Report excludes from its scope any victim or survivor who was not held and interrogated by the CIA (including those who were held by foreign governments at the behest of the CIA, as some of the Petitioners allege).

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 to be criminally or civilly responsible for their roles in the creation, authorization or implementation of the CIA’s unlawful rendition and torture program. Nor has the United States provided any victim or survivor with redress for the severe physical and psychological pain and suffering caused by the program and its constituent practices of forced disappearance, refoulement, arbitrary detention, torture, and other abuses. Although the U.S. Department of Justice opened a criminal investigation in 2009 into certain specific allegations of abuse connected with the forced disappearance and torture policy, that investigation did not comply with relevant international standards. Further, the Department of Justice closed the investigation three years later, without issuing any indictments.

For all of these reasons, the grounds for the Petition subsist.

IV. Conclusion

The Commission should find the Petition admissible. The American Declaration imposes international obligations on the United States and the Commission has the authority and competence to adjudicate the violations alleged in this case and issue recommendations to the United States. Petitioners allege facts sufficient to show prima facie violations of rights protected by the American Declaration, and to demonstrate that they have properly exhausted available and adequate domestic remedies for these alleged violations. The United States has not shown that any specific domestic remedies offering effective relief for the harms alleged remain to be exhausted. Nor has it shown that the United States has undertaken an adequate and effective investigation of the alleged harms, or otherwise furnished Petitioners with any apology or remedy for the violation of their rights. In sum, the U.S. observations provide no grounds for the Commission to deny the Petition’s admissibility. Accordingly, the Commission should find the Petition admissible and proceed to consider the merits.

Respectfully submitted,

Margaret Satterthwaite and Nikki Reisch
Global Justice Clinic
satterth@exchange.law.nyu.edu
nikki.reisch@nyu.edu

Steven M. Watt
American Civil Liberties Union
swatt@aclu.org