



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

May 4, 2016

Mr. Emilio Alvarez Icaza L.
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Abou Elkassim Britel, et al.
Petition No. P-1638-11
Response of the United States of America**

Dear Mr. Icaza:

On behalf of the United States Government, we take this opportunity to provide certain observations on the Petition in the above-referenced matter dated November 14, 2011. Your office forwarded the petition to the United States on February 18, 2016, via a letter dated February 10, 2016. Among other things, we wish once again, as we did in our submission to the Commission concerning the petition of Khalid El-Masri,¹ to draw the Commission's attention to reporting made publicly available by the U.S. Senate Select Committee on Intelligence (SSCI).²

Competence of the Commission

We note that the Petitioners in this matter, Mr. Abou Elkassim Britel, Mr. Binyam Mohamed, Mr. Mohamed Farag Ahmad Bashmilah, and Mr. Bisher Al-recognized in the American Declaration of the Rights and Duties of Man ("American Declaration"). The United States has undertaken a political

¹ El-Masri v. United States, Petition No. P-419-08, Response of the United States, Apr. 8, 2016.

² The SSCI is a Committee of 15 Senators that was created by the Senate in 1976 to oversee and make continuing studies of the intelligence activities and programs of the United States Government, to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs, and to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.

commitment to uphold the American Declaration, and strongly supports the indispensable role the Commission plays in promoting the Declaration, not only in the United States but throughout the Hemisphere. We acknowledge the great impact this work has had on the laws and practices in many countries and the lives of innumerable individuals.

As the American Declaration is a non-binding instrument, however, it does not create legal rights or impose legal obligations on Member States of the Organization of American States (OAS), and the United States understands the Petitioners' allegations in that context. Further, Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS Member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such matters domestic legal remedies have been pursued and exhausted. The United States takes its American Declaration commitments and the Commission's recommendations very seriously, but notes once again that the Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under the American Declaration,³ and also on matters arising under other international human rights treaties (whether or not the United States is a party) or under customary international law.⁴

Domestic Proceedings

In 2007, the Petitioners filed a lawsuit against Jeppesen Dataplan, Inc., in the U.S. federal District Court for the Northern District of California, alleging that the company participated in a U.S. government program that resulted in the torture of

³ The United States has for decades consistently maintained that the American Declaration remains a nonbinding instrument notwithstanding assertions by the Commission and the Inter-American Court of Human Rights to the contrary. For an elaboration of the U.S. reasoning, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

⁴ *See, e.g.,* Disabled Peoples' International & International Disability Law, Inc., v. United States ("Grenada Hospital case"), Case No. 9.213, Letter to Dr. Edmundo Vargas Carreno, Executive Secretary, Inter-American Commission on Human Rights, from Amb. Richard T. McCormack, Permanent Representative, U.S. Mission to the OAS, Aug. 26, 1985, at 2 (quoting Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Argentina, OEA/Ser. L/V/II.49 doc. 19 corr. 1, Apr. 11, 1980, p. 25).

the Petitioners and seeking damages.⁵ The U.S. government intervened in the suit, filing a motion to dismiss based on the state secrets privilege, which is a common law privilege that may be invoked by the U.S. government in litigation when it is necessary to protect information the disclosure of which would harm the national defense or foreign relations of the United States.⁶ The district court granted the U.S. government's motion to dismiss in February 2008.⁷ The Petitioners appealed to a panel of the U.S. Court of Appeals for the Ninth Circuit, which held that the district court had erred in dismissing the suit, and remanded the case to the district court.⁸ However, in 2010 the Ninth Circuit hearing the case *en banc* reversed the panel's remand and upheld the district court's dismissal on state secrets grounds.⁹ The Petitioners filed a petition for *certiorari* before the U.S. Supreme Court in 2011, but the Court denied that request in May 2011.¹⁰

The SSCI Report

As we have previously noted to the Commission, the SSCI conducted a review of the U.S. Central Intelligence Agency's former detention and interrogation program, culminating in the production of a lengthy report. The SSCI asked President Obama to declassify the report's executive summary and findings and conclusions. After these sections were declassified with appropriate redactions necessary to protect national security, the SSCI released them to the public in December 2014. The declassified executive summary and the findings and conclusions of the SSCI report are now available on the Committee's website at <http://www.intelligence.senate.gov/publications/reports>. The factual findings and conclusions in the SSCI Report are the views of the Committee and do not necessarily reflect the views or positions of the Executive Branch of the U.S. government.

⁵ Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D. Cal. 2008).

⁶ In 2009, then-Attorney General Eric Holder issued a public document setting out the U.S. Department of Justice's policies and procedures relating to the invocation of the state secrets privilege in litigation. This document can be viewed at <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf>.

⁷ Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp. 1128 (N.D. Cal. 2008).

⁸ Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009).

⁹ Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

¹⁰ Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 563 U.S. at 10 (U.S. May 16, 2011) (No. 10-778).

The declassified summary of the report contains a brief discussion of some of the Petitioners. Mr. Mohamed is mentioned at pages 47, 98, 185, 228, 233, 236, 238–239, 428, and 460, and also in footnotes 1124, 1306, 1317, 1338–1339, and 1342–1343. Mr. Al-Rawi is mentioned at page 458. For more information about the declassified summary of the SSCI Report, we would refer you to the information the United States provided to the Commission at its thematic hearing on this topic on October 23, 2015.

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The United States trusts that this information is useful to the Commission. Please accept renewed assurances of my highest consideration.

Sincerely,



Michael J. Fitzpatrick
Interim Permanent Representative