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REPORT No. 228/22
PETITION 2096-17
REPORT ON ADMISSIBILITY

MOHAMMED JAWAD (ALSO KNOWN AS SAKI BACHA)
UNITED STATES OF AMERICA

Approved electronically by the Commission on August 27, 2022.

Cite as: IACHR, Report No. 228/22, Petition 2096-17. Admissibility. Mohammed Jawad (also known as Saki Bacha). United States of America. August 27, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Mohammed Jawad (also known as Saki Bacha)
Alleged victim:	Mohammed Jawad (also known as Saki Bacha)
Respondent State:	United States of America ¹
Rights invoked:	Articles I, XVIII, XXV, XIX ² , and XXVI, of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	November 15, 2017
Notification of the petition to the State:	April 29, 2020
State's first response:	September 18, 2020

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration (ratification of the OAS Charter on June 19, 1951)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles I (liberty and personal security), VII (right to special protection of children) XVII (recognition of juridical personality and civil rights), XVIII (fair trial), and XXV (protection from arbitrary arrest) and XXVI (due process of law) of the American Declaration.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in accordance with section VI
Timeliness of the petition:	Yes, in accordance with section VI

V. ALLEGED FACTS

1. This petition principally concerns allegations of torture perpetrated against the alleged victim (a national of Afghanistan) mainly while he was in the custody of the State at the U.S. Naval Base in Guantanamo Bay, Cuba "Guantanamo Bay"). The petition also alleges that the alleged victim was subjected to unlawful detention by the State, and failure by the State to accord him due process in the courts.

2. According to the petition, the alleged victim was a minor⁵ when he was arrested, by Afghanistan authorities on December 17, 2002. This arrest followed a grenade attack on a United States military vehicle which led to the arrest of numerous individuals (including the alleged victim) by Afghan law

¹ Hereafter "United States", "U.S." or "the State".

² The petition mistakenly cites Article XIX regarding the right to special protection of children.

³ Hereafter "Declaration" or "American Declaration".

⁴ The observations submitted by each party were duly transmitted to the opposing party. On July 27, 2022, the petitioner express interest in the proceedings.

⁵ According to the record, it is believed that the alleged victim was born in 1987, but an exact date of birth is not available.

enforcement officials. The petition further states that the alleged victim was taken to a police station where he was interrogated and subjected to cruel and abusive treatment by Afghan law enforcement officials. This treatment included death threats against him and his family, beatings, and deprivation of food or drink for approximately six and a half hours while in the custody of the Afghan law enforcement officials. The petition further states these officials coerced the alleged victim into making a confession about his purported involvement in the grenade attack. In this respect, the petition asserts that the alleged victim was forced to place his thumbprint on the confession document as a form of attestation. According to the record, the alleged victim could neither read nor write.

3. According to the petition, on December 18, 2002, the Afghan law enforcement authorities transferred the alleged victim to the custody of the United States. The petition indicates that the alleged victim was detained at a US military base in Bagram, Afghanistan (known as Forward Operating Base 195). While under detention at the US military base, the petition asserts that alleged victim was subjected to cruel, abusive, and inhumane treatment including torture in the form of beatings, hooding, physical and linguistic isolation, sleep deprivation, death threats, forced stress positions, and being chained to the wall for prolonged periods forms. The petition further states that on or about February 6, 2003, the alleged victim was transferred to Guantanamo Bay. Prior to his transfer, the petition state that the alleged victim was intentionally starved for three days and given only sips of water.

4. The petition states that the alleged victim spent six and half years at Guantanamo Bay, during which time he was repeatedly subjected to various forms of torture and custodial mistreatment. In this regard, the petition mentions starvation, sleep deprivation, blindfolding, hooding, beatings, physical and linguistic isolation, shackling, and threats to his life by United States government officials. According to the petition, even though the alleged victim was a minor, he was housed with the adult population rather than in separate facilities for juveniles. The petition also indicates that on December 25, 2003, the alleged victim attempted suicide because of the custodial mistreatment and conditions of detention.

5. The petition also contends that during his detention, the alleged victim was subjected to what is known as the “*frequent flyer program*”. The petition explains that this consisted of repeatedly moving a detainee from one cell to another in quick intervals throughout the night to disrupt sleep cycles, on average every three hours. According to the petition, by March 2004, the alleged victim was deemed to be of no intelligence value to the United States. However, despite this determination, the petition states that the alleged victim was still subjected to over sixty interrogations up until the time of his release in 2009.

6. On October 9, 2007, more than four years after his arrival at Guantanamo, the petition states that the alleged victim was charged under the Military Commissions Act of 2006 with three counts each of “*attempted murder in violation of the law of war*” and “*intentionally causing serious bodily injury*”. According to the petition, defense counsel for the alleged victim filed a motion to suppress the confession (made in Afghanistan) as result of torture. The motion was granted following which the State appealed to the United States Court of Military Commission Review (“*Military Commission*”). The petition states that in November 2008, a Military Commission judge, Colonel Stephen R. Henley, ruled that the government could not use any statement (made on or about December 17, 2002) by the alleged victim to secure a conviction because such statement had been obtained through coercion. The judge also found that the alleged victim had been subjected to custodial mistreatment, including subjection to the “*frequent flyer program*”. In this regard, the judge noted that the alleged victim had been moved from cell to cell 112 times from 7 May 2004 to 20 May 2004. The judge also held that the application of the “*frequent flyer program*” to the alleged victim had no legitimate interrogation purpose given that it had been determined that he was of no intelligence value; and that in any event, the Military Commissions Act prohibits torture and cruel/inhuman treatment of detainees.

7. Following this ruling, the petition states that on January 13, 2009, the alleged victim filed an amended application for habeas corpus⁶, which was initially opposed by the State. However, the petition indicates that the State later abandoned its opposition to the application for habeas corpus, following which

⁶ According to the petition, an application for habeas corpus had initially been filed in 2005 but had languished pending the resolution of the proceedings under the Military Commissions Act.

the application was granted on July 30, 2009, granted by the U.S. District Court for the District of Columbia. Following this ruling, the petition states that the alleged victim was released from Guantanamo Bay and repatriated.

8. According to the petition on September 24, 2014, the alleged victim filed suit against the State for damages, arising out of the alleged torture and custodial mistreatment that he experienced while in the custody of the State. The suit was filed before the U.S. District Court for the District of Columbia. The District Court ultimately dismissed the suit, ruling that the Military Commissions Act barred federal courts from adjudicating claims by detainees at Guantanamo Bay (relating to conditions of confinement, detention, or treatment). The petition states that the alleged victim appealed to the United States Court of Appeals for the District of Columbia, which affirmed the dismissal of the District Court on December 21, 2015. Following this ruling, the alleged victim filed a petition for writ of certiorari with the United States Supreme Court, which was denied on May 15, 2017.

9. The petitioner asserts that the denial of the petition for writ of certiorari on May 15, 2017, signifies the exhaustion of domestic remedies in compliance with Article 31 (1) of the Commission's Rules of Procedure. Further, he indicates that the petition to the IACHR was filed on November 15, 2017, within the six-month deadline prescribed by Article 32 (2) of the Commission's Rules of Procedure.

10. The State submits that the claims of the petitioner fall beyond the competence *ratione materiae* of the IACHR and accordingly fail to meet the requirements of Article 34 (a) of the Commission's Rules of Procedure. In this regard, the State argues firstly, that while the United States has undertaken a political commitment to uphold the American Declaration, it is a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States. Accordingly, the State contends that the American Declaration does not create legal rights or impose legal obligations in respect of the United States.

11. The State further contends that even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to the petitioner's claims because during situations of armed conflict, the law of war is *lex specialis*. In this respect, the State submits that the (international) law of war has been developed with special consideration of the circumstances of war and the challenges inherent in its regulation by law; and as such, it is the controlling body of law regarding the conduct of hostilities and the protection of war victims. The State contends that in the absence of a specific intention to regulate armed conflict situations, the American Declaration should be presumed not to infringe upon the law of war by creating novel requirements or additional procedural mechanisms that could conflict with the procedures and mechanisms for addressing alleged violations that are already present in the law of war. The State further submits that the Commission has no competence *ratione materiae* under its Statute and Rules to consider matters arising under the law of war and may not incorporate the law of war into principles of the American Declaration.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

12. According to the petitioner, domestic remedies have been exhausted. The State has not contested the petitioner's claim that domestic remedies have been exhausted. According to the petitioner, exhaustion of domestic remedies took place with the dismissal of the application for a writ of certiorari before the U.S. Supreme Court on May 15, 2017. The Commission notes that, pursuant to Article 31 (3) of the Rules of Procedure, the State bears the burden of proof to demonstrate that the "*remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.*" Accordingly, where the State does not challenge the exhaustion of domestic remedies, it loses the chance to raise this defense and the Commission will "*assess compliance with the rule from the information already on file.*"⁷

⁷ See IACHR, Report No. 168/17, Petition 1502-07. Admissibility. Miguel Ángel Morales Morales. Peru. December 1, 2017, para. 18 and IACHR, Report No. 154/20. Petition 1638-11. Admissibility. Abou Elkassim Britel, Binyam Mohamed, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah. United States of America. June 9, 2020, para. 22.

13. Based on the record, the Commission considers that the petitioner exercised and exhausted the legal remedies available and considered suitable, namely, a lawsuit in the U.S. federal court system (which was ultimately dismissed). Further, the Commission therefore considers that the final decision was made on May 15, 2017, and that the petition to the IACHR was submitted on December 15, 2017. Accordingly, the Commission deems that the petition was submitted within the six-month deadline prescribed by Article 32 (1) of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

14. In the present case, the petitioners alleges that the State is responsible for the violation of Articles I, XVIII, XXV, XIX⁸, and XXVI of the American Declaration, fundamentally based on acts of physical and psychological torture and cruel, inhuman, and degrading treatment that the alleged victim allegedly suffered while in detention under the control of the United States and for the lack of adequate and effective judicial remedies for the violations he has allegedly suffered. The State has claimed that the American Declaration does not create legally binding obligations and that the Commission lacks competence to determine violations of the American Declaration (against the State); and that the Commission has no competence or authority to interpret and apply the (international) law of war (*lex specialis*) with respect to the claims of the petitioner. Ultimately, for these reasons the State contends that the claims of the petitioner are outside of the competence of the Commission *ratione materiae*.

15. According to the long-standing practice and jurisprudence of the Inter-American human rights system, the American Declaration of the Rights and Duties of Man is a source of international obligations for the United States and for the other member states of the OAS that are not parties to the American Convention on Human Rights. It is understood that these obligations derive from the commitments assumed by the member states in the area of human rights in the OAS Charter, that the member states agreed to be contained and defined in the American Declaration, and from the customary legal nature of the rights protected in the basic provisions of the Declaration, for which the Commission is empowered by Articles 18 and 20 of its Statute to receive and evaluate allegations of noncompliance with these commitments by the States. Therefore, it is pertinent to characterize the non-compliance by a member State of the guarantees of the rights enshrined in the American Declaration as a violation of the obligations imposed on it by international human rights law. Accordingly, the Commission rejects the State's assertion that the American Declaration does not create legal obligations for the OAS member States.

16. Additionally, the IACHR has consistently 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 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 State⁹. In this matter, there appears to be no dispute that the alleged victim was, at all material times, subject to the authority and control of the State.

17. In terms of the law applicable to the present case, the petitioner invoked the provisions of the American Declaration with respect to his claims. The State argued that the claims of the petitioner are governed wholly by the law of war (*lex specialis*), a body of law which the Commission lacks the jurisdiction or interpretative power to apply. In accordance with the normative framework of the system, when examining individual cases concerning non-parties to the American Convention, the Commission looks to the American Declaration as the primary source of international obligation and applicable law. This does not mean, that the Commission may not refer to other sources of law in effectuating its mandate, including the law of war. The

⁸ Article XIX of the American Declaration deals with the right to nationality. However, the petition mistakenly cites the text of Article 19 of the American Convention on Human Rights which deals with the protection of the rights of the child. Given that the State is not a signatory to the American Convention, the relevant/applicable provision in the American Declaration is Article VII (right to special protection of children).

⁹ See for example 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

Commission is mandated by its Statute to examine claims alleging the violation of a right protected under the American Declaration, the fact that the resolution of such a claim may require reference to other sources of law or international jurisprudence is no bar to jurisdiction¹⁰.

18. The Commission concludes that if the allegations made are true, then the petition is neither “manifestly groundless” nor “obviously out of order”. Based on the foregoing, the Commission considers that, if proved, the facts alleged could establish a possible violation of the rights protected by Articles I (liberty and personal security), VII (right to special protection of children) XVII (recognition of juridical personality and civil rights), XVIII (fair trial), and XXV (protection from arbitrary arrest) and XXVI (due process of law) of the American Declaration of Rights and Duties of Man, especially with regard to the right of the petitioner to obtain a proper reparation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, VII, XVII, XVIII, and XXV and XXVI of the American Declaration of the Rights and Duties of Man; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 27th day of the month of August, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarette May Macaulay, Second Vice President; Joel Hernández, and Roberta Clarke, Commissioners.

¹⁰ See IACHR Report No. 103/20, Petition 417-12. Admissibility. Thahe Mohammed Sabar, Et.Al. United States of America. April 24, 2020, para. 17.