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**REPORT No. 103/20**  
**PETITION 417-12**  
REPORT ON ADMISSIBILITY

THAHE MOHAMMED SABAR, ET AL.  
UNITED STATES OF AMERICA

Approved electronically by the Commission on April 24, 2020.

**Cite as:** IACHR, Report No. 103/20, Petition 417-12. Admissibility. Thahe Mohammed Sabar, Et.Al. United States of America. April 24, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	American Civil Liberties Union (ACLU)
<b>Alleged victim:</b>	Thahe Mohammed Sabar et al <sup>1</sup>
<b>Respondent State:</b>	United States of America <sup>2</sup>
<b>Rights invoked:</b>	Articles I (life, liberty and personal security), XVII (recognition of juridical personality and civil rights), XVIII (fair trial), and XXV (protection from arbitrary arrest) of the American Declaration of Rights and Duties of Man <sup>3</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Filing of the petition:</b>	March 19, 2012
<b>Additional information received at the stage of initial review:</b>	December 20, 2012
<b>Notification of the petition to the State:</b>	January 13, 2016
<b>State's first response:</b>	August 4, 2016
<b>Additional observations from the petitioner:</b>	November 6, 2017

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	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**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles I (life, liberty and personal security), 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
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes
<b>Timeliness of the petition:</b>	Yes

**V. FACTS ALLEGED**

1. The petitioner states that the alleged victims –Afghan and Iraqi citizens detained by US military forces in those countries were subjected to torture and other abusive treatment perpetrated by U.S. Officials at U.S. run detention facilities in Afghanistan and Iraq during the years of 2003 and 2004. Petitioner adduces that such treatment was widespread and systemic in such facilities and was a direct result of policies

<sup>1</sup> The following persons are alleged victims in this petition: Thahe Mohammed Sabar et al Sherzad Kamal Khalid, Mehboob Ahmad, Said Nabi Siddiqi and Haji Rahman

<sup>2</sup> Hereinafter "U.S." or "United States."

<sup>3</sup> Hereinafter "American Declaration".

<sup>4</sup> The observations submitted by each party were duly transmitted to the opposing party.

and practices promulgated and implemented by the U.S government. It is further alleged that the State failed to conduct any criminal investigation, failed to hold responsible parties accountable for such actions and failed to provide any form of redress to the presumed victims.

Allegations relating to Thahe Mohammed Sabbar

2. Sabbar was held at various locations in Iraq, including Camp Bucca and Abu Ghraib prison from July 2003 to January 2004. While in custody he was beaten and tortured by US military personnel using guns, wooden batons and electric shock devices. He was shackled to a fence for extended periods at temperatures that exceeded 120 degrees Fahrenheit. Sabbar was sexually assaulted by US military personnel: in one occasion one or more soldiers inserted their fingers into his anus and grabbed and fondled his buttocks while making moaning sounds and jeering at him in the presence of other soldiers, including females in order to degrade and demean him. Soldiers also staged mock executions with Sabbar and other detainees, forcing them to stand against a wall in front of a firing squad. Additionally, the alleged victim was threatened to be sent to Guantanamo detention facility where he would be killed. He was routinely deprived of food, and at times was given spoiled food which would make them sick. It is further alleged that he was denied access to a toilet. Petitioners indicate that because of the physical, sexual and psychological abuse, Sabbar suffers from incontinence, impotence and nightmares.

Allegations relating to Sherzad Kamal Khalid

3. Khalid was subjected to frequent and severe beatings, sexual abuse and other cruel treatment during his detention from July through September 2003. Physical abuse allegedly entailed severe beatings before interrogations; being repeatedly kicked and punched over a period of hours while hooded and shackled, seated on the ground; on one occasion, forced to run a gauntlet of 10 to 20 uniformed soldiers who beat him with batons; and was forced to stay in a "silent tent" for several days where he was severely beaten whenever he started falling asleep. Sexual abuse allegedly entailed assaults of grabbing his buttocks/behind; brandishing a long wooden pole threatening to sodomize him and do so every night of detention; and simulating rape by grabbing his behind and pressing a water bottle against the seat of his pants. It is claimed that Khalid's life was threatened throughout his detention; he was subjected to mock executions to coerce confessions, as soldiers would hold a gun to his head and place him before a mock firing squad with simulated gunfire. The alleged victim was routinely deprived of sleep, food and water; similar to Sabbar, it is alleged that he was given spoiled food making him sick and was deprived of access to a toilet; and on one occasion was shackled to a fence with his hands to his back, forced to stand for hours at temperatures exceeding 120 degrees Fahrenheit without water or food.

Allegations relating to Mehboob Ahmad

4. Ahmad was detained from June to November 2003 and held in various locations in Afghanistan including the Gardez firebase and the Bagram Air Base. Petitions claims that Ahmad have been tortured including being subjected to beatings while hanging chained to a ceiling upside-down. He was also sexually and psychologically traumatized, having been forced to strip and remain naked for long periods of time, probed anally, threatened to be injured by a dog and taunted by soldiers, including claims to rape his wife. He also claims sensory deprivation, being forced to wear sound-blocking headphones, black opaque goggles and prevented from speaking to others for the five months that he was in custody. He alleges similar threats to be transported to Guantanamo.

Allegations relating to Said Nabi Siddiqi

5. Siddiqui was detained by US military and held in various detention facilities in Kandahar and Bagram from July to August 2003. During his two-month detention he was similarly subjected to painful and abusive positions for long periods during interrogations, including cruel treatment such as holding an alleged 15-pound piece of wood in his cuffed hand and maintaining a push up position while being doused with water; being beaten for failure to maintain the position. He alleges that during a two-week span he was interrogated every night while handcuffed and blindfolded. He claims sexual humiliation being stripped naked, photograph

and anally probed and told repeatedly that his wife was a slut and his daughter a street beggar. He claims to have been insulted by the soldiers and stoned while using the toilet. Additionally, he claims being deprived of his asthma inhaler, deprived of sleep and exposed to extreme weather and environmental elements when detained outdoors without protection.

Allegations relating to Haji Abdul Rahman

6. Rahman was detained by US military and held in various locations in Afghanistan including Gardez firebase and Bagram Air Base from December 2003 to May 2004. The petitioner claims that the alleged victim suffered severe physical and psychological trauma; being forced to wear blackout goggles, endure painful restraints, wear sound-deadening headphones and kneel with his hands chained, subjected to jerking and pulling at the wrist and shoulders. He was placed in solitary confinement for 15 days; was subject to sleep deprivation, being detained in brightly lit area subjected to loud noises; and was similarly sexually abused having been made to strip naked and probed anally on multiple occasions. He was repeatedly photographed without his cloths.

Allegations related to the admissibility of the petition

7. Petitioners claim that they have exhausted domestic remedies, or should be exempted from doing so. They claim that several attempts were made at civil redress, by suing certain leaders of the U.S. military, under U.S. constitutional and international law for torture and other cruel, inhumane and degrading treatment. The alleged victims have sought redress in the U.S. federal court system by filing lawsuits in four separate jurisdictions, claiming that their torture had been ordered and condoned at the highest level of government as part of a systemic policy of detainee abuse at U.S. -run facilities in Afghanistan and Iraq. The lawsuits were consolidated and assigned to the District Court in Washington D.C. It is explained that the District Court acceded to the arguments by the Defendants that as non-resident aliens, the alleged victims were not protected by the U.S. Constitution; further the Defendants (government officials) were entitled to “qualified immunity” against alleged violations of rights that were not clearly established under U.S. law; and lastly, that the alleged unlawful conduct was “within the scope” of government officials’ employment. The petitioner explained that the lawsuit was dismissed by the District Court for the District of Colombia, with the dismissal affirmed by the Court of Appeal. A request to have the decision reconsidered was denied by the Court of Appeal on November 9, 2011 rendering the petitioners allegedly with no effective recourse before U.S. courts. Petitioners did not file a writ of certiorari to the US Supreme Court because it would have been futile. The petitioner claims that other administrative remedies available within the U.S. judicial system were not adequate or effective for the purpose of remedying the violations of such human rights. Specifically, the Federal Tort Claims Act (FTCA) precludes claims against the United States for “egregious” tortious conduct and the Foreign Claims Act (FCA) does not provide petitioners with any remedy for alleged violations of their rights. Additionally, they inform that the presumed victims Sabar, Khalid, Sidiqi and Rahman all filed claims under FCA, and that Sabar’s and Khalid’s claims were summarily rejected after the Foreign Claim Commission (FCC) “found no evidence to support the wrongful detention or mistreatment” during their detention. Sidiqi and Rahman claims remain unresolved and pending.

8. The petitioners claim that the alleged victims were at all relevant times, subject to the “authority and control” of the U.S. and their rights were protected under the American Declaration when violations occurred. It is further alleged that some of the violations are continuing as they involve the U.S. failure to provide effective remedies for injuries. The petitioner affirms territorial jurisdiction over the claims via extraterritorial application of rights protections and obligations as the State in question exercises “authority and control” as the rights protected by the Declaration and the concomitant obligation of the U.S. are not geographically limited. The petitioner refers to the U.S. -run military detention centers, giving each victim a detainee number issued by the U.S. military and the restricted access to detainees only with express permission of the U.S. military as evidence of such “authority and control”.

9. The petitioner alleges that no comprehensive criminal investigation into the policies and practices regarding the use of torture and inhuman treatment have occurred despite various government reports substantiating the claim. Further, that no senior member of the U.S. military has faced criminal charges

for their role in ordering or condoning such treatment and none of the major actors who authorized such treatment have faced administrative penalty. It is indicated that in order to seek redress for the torture and cruel, inhumane and degrading treatment suffered by the presumed victims, four separate lawsuits were filed in separate jurisdictions. In 2005 those four cases were consolidated and assigned to the District Court in Washington, DC. Petitioners sued the then-Secretary of State and high ranking official, claims brought under the US Constitution, customary international law as recognized under the Alien Tort Statute, 28 U.S.C. 1350 and the Geneva Convention (IV) Relative to the Treatment of Civilian Persons at Time of War. The petitioner states that U.S. courts have determined that those officials are immune from suit, and arguing as well that non-resident aliens were not protected by the US Constitution. The District Court acceded to these arguments and dismissed the suit without consideration of its merits. On appeal, the DC Circuit Court of Appeal affirmed the lower court's dismissal. Petitioners requested that the Court of Appeals reconsidered the decision requesting to have the case heard by all appellate judges of the Court, petition which was denied on September 19, 2011. Petitioner claims that victims and survivors neither have the opportunity to have cases heard, nor be granted any other form of redress for violation of rights. It is indicated that the failure of the U.S. Courts to consider the merits of the Petitioners' claim violated their right to judicial remedy guarantees.

10. On its part, the State argues that as the American Declaration is non-binding, an alleged violation means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The State claims that the Commission lacks competence to issue a binding decision vis-à-vis the United States, including on matters arising under the American Declaration; under international human rights treaties or under customary international law. It further claims that the Commission has no competence under its Statute or Rules of Procedure to consider matters arising under international humanitarian law and may not incorporate such principles into the American Declaration. The State alludes to international humanitarian law is the *lex specialis* during situations of armed conflict, and that the member States of the Organization of American States have not granted the Commission the competence or authority to interpret and apply international humanitarian law in commission proceedings.

11. The State also claims that the petitioners have failed to show exhaustion of any available administrative remedies, as required by Federal Tort Claims Act, before a judicial remedy can properly be sought in federal court. The State alludes to the remedy of settlement under the Foreign Claim Act (FCA), whereby the U.S. Department of Defense is empowered to settle claims through administrative process; specifically, the Secretary of Defense is authorized to settle claims of an inhabitant of a foreign country for damage to personal injury or death in an amount up to \$100,000 (or more if coordinated with the U.S. Treasury Department. The State explains that claims under the FCA may be based on either the negligent or wrongful acts or omissions of U.S. service members, or on the noncombat activities of U.S. forces. Additionally, the State provides that the U.S. Army Claims Service confirmed, in separate proceedings before the U.S. Court of Appeals for the D.C. Circuit, that it would compensate detainees who establish legitimate claims for relief under the FCA. Further, the State claims being unaware of any attempt to exhaust administrative remedies as required by law or any attempt to re-file the international law claims if they did exhaust the administrative remedies, as the international legal claims were dismissed without prejudice.

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

12. Petitioners claim that they have exhausted domestic remedies, or should be exempted from doing so. The alleged victims have sought redress in the U.S. federal court system by filing lawsuits in four separate jurisdictions. The lawsuits were consolidated and assigned to the District Court in Washington D.C. The lawsuit was dismissed by the District Court for the District of Columbia, with the dismissal affirmed by the Court of Appeal. A request to have the decision reconsidered was denied by the Court of Appeal on November 9, 2011. Petitioners claim that the State did not demonstrated how the FTCA and the FCA remedies were both adequate and effective to remedy for alleged violations of their rights. On its part, the State alleges that petitioners failed to pursue and exhaust available domestic administrative remedies, that is to say, a claim under the FTCA and the FCA for compensation for personal injuries and that petitioners declined to seek further review before the US Supreme Court.

13. As regards the administrative remedy to which the State refers, the IACHR has established in similar cases that in general, this proceeding does not constitute an adequate mechanism, on its own, for making reparation in cases of human rights violations, thus it need not be exhausted in a case such as this. In addition, the Commission reiterates that under international standards applicable to cases like this one, where serious human rights violations such as torture are alleged, the appropriate and effective remedy is the filing and undertaking of an effective criminal investigation *ex officio* by the State aimed at the clarification of the facts and, if necessary, individualize the persons responsible and attribute the corresponding responsibilities<sup>5</sup>.

14. The Commission observes that the petitioner exercised the legal remedies available and considered suitable, which included four civil actions. The Commission has previously observed that "the requirement of the exhaustion of domestic remedies does not mean that the alleged victims must exhaust all the remedies available to them," which implies that extraordinary remedies do not need to be exhausted. Accordingly, in relation to the decision by the Court of Appeal, the Commission considers that the alleged victims were not obliged to bring a writ of certiorari (an extraordinary remedy) in order to fulfil the requirements of Article 31.1 of the Commission's Rules of Procedure<sup>6</sup>. The Commission therefore considers that the final judicial decision was issued on November 9, 2011 and that the petition to the IACHR was submitted on March 19, 2012. 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

15. In the present case, the petitioners alleges that the State is responsible for the violation of Articles I, XVII, XVIII, XXV, and XXVI of the American Declaration, fundamentally on the basis of the acts of physical and psychological torture and cruel, inhuman, and degrading treatment that the presumed victims have 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 (a) the American Declaration does not create legally binding obligations and that the Commission lacks competence to determine violations of the Declaration (against the State); and (b) that the Commission has no competence or authority to interpret and apply international humanitarian law.

16. 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, with which the Commission rejects the State's assertion that the American Declaration does not create legal obligations for the OAS member States. Additionally, regarding the extraterritorial application of the American Declaration, 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 State.<sup>7</sup>

<sup>5</sup> IACHR, Report No. 156/17. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, para 13; IACHR, Report No. 38/18, Petition 140-09, Maria G and Family.

<sup>6</sup> IACHR, Report No. 18/12. Petition 161-06, Admissibility, Juvenile Offenders Sentenced to Life Imprisonment without Parole, United States, March 20, 2012, para. 58-59.

<sup>7</sup> 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.

17. In terms of the law applicable to the present case, the petitioners invoked the provisions of the American Declaration as governing their claims. The United States argued that the situation denounced was governed wholly by international humanitarian law, 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<sup>8</sup>. This does not mean, as the United States argued, that the Commission may not make reference to other sources of law in effectuating its mandate, including international humanitarian law. The Commission is mandated by its Statute to examine claims alleging the violation of a right protected under the Declaration, the fact that the resolution of such a claim may require reference to another treaty is no bar to jurisdiction.

18. The Commission concludes that if the allegations made are true, then the petition is neither “manifestly groundless” nor “obviously out of order”. On the basis of the foregoing, the Commission considers that, if proved, the facts alleged could establish a possible violation of the rights protected by Articles I (life, liberty and personal security), 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.

### VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, XVII, XVIII, XXV, and XXVI of the American Declaration; 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 24<sup>th</sup> day of the month of April, 2020. Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.

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<sup>8</sup> IACtHR, Advisory Opinion OC-10/89, July 14, 1989, “Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,” Ser. A N<sup>o</sup> 10, paras. 43 – 46. Also, The United States has been a member of the Organization of American States since 1951, when it deposited the instrument of ratification of the OAS Charter. The United States is therefore subject to the obligations derived from the OAS Charter, Article 20 of the Statute of the IACHR, the American Declaration of the Rights and Duties of Man, and Article 51 of its Rules of Procedure. In this regard, according to the mandate given by the States to the IACHR under Article 20 of its Statute, the Commission has the power, in relation to Member States that are not parties to the American Convention on Human Rights, to examine communications submitted to it, and to make recommendations to the States in order to bring about more effective observance of fundamental human rights. Further, given the basic human rights obligations set forth in the OAS Charter, and the Commission's mandate to monitor compliance with Member State obligations in the area of human rights which is also reflected in the Charter, OAS Member States must comply in good faith with Commission's recommendations.

The undersigned, Marisol Blanchard, Assistant Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

A handwritten signature in black ink, appearing to read 'MB', with a stylized flourish extending upwards and to the right.

Marisol Blanchard  
Assistant Executive Secretary