

OEA/Ser.L/V/II.
Doc. 164
9 June 2020
Original: English

Report No. 154/20
PETITION 1638-11
REPORT ON ADMISSIBILITY

ABOU ELKASSIM BRITEL, BINYAM MOHAMED, BISHER AL-RAWI,
AND MOHAMED FARAG AHMAD BASHMILAH

UNITED STATES OF AMERICA

Approved electronically by the Commission on June 9, 2020

Cite as: 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.



I. INFORMATION ABOUT THE PETITION

Petitioner:	American Civil Liberties Union Human Rights Security Projects (ACLU) and Global Justice Clinic
Alleged victim:	Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi
Respondent State:	United States ¹
Rights invoked:	Articles I (right to life, liberty, and personal security); Articles XVIII (right to a fair trial); XXV (protection from arbitrary); XXVI (due process), and XXVII (right to asylum), of the American Declaration on the Rights and Duties of Man ² .

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	November 18, 2011
Notification of the petition to the State:	February 18, 2016
State's first response:	May 5, 2016
Possible archive	November 21, 2018
Response to the possible archive	December 5, 2018
Additional observations from the petitioner:	December 26, 2018

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 res judicata:	No
Rights declared admissible:	Articles I (right to life, liberty, and personal security); XVIII (right to a fair trial); XXV (right of protection from arbitrary arrest); XXVI (right to due process of law) and XXVII (right to asylum), of the American Declaration.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in accordance to section VI
Timeliness of the petition:	Yes, in accordance to section VI

V. ALLEGED FACTS

1. The petitioners allege that after the terrorist attacks of 9/11 on the United States ("the U.S." or "the State"), this country put in place a network of secret prisons around the globe that were operated

¹ Hereinafter "U.S.A", "U.S.", or "United States."

² Hereinafter "the American Declaration."

³ The observations submitted by each party were duly transmitted to the opposing party.

covertly by its Central Intelligence Agency (C.I.A). The petition claims that the U.S. partnered with other nations and forcedly disappeared the alleged victims by abducting, transporting and torturing them as suspected terrorists. The petitioners argue that as part of a "rendition program," the C.I.A. used aircrafts, owned and operated by private corporations based in this country to detain and transport persons suspected by the U.S. government of links to terrorism to secret detention facilities, known as "black sites." Agents of the U.S. and its affiliates at those "black sites" then tortured those suspected of terrorism. The petitioners also allege that the U.S. has failed to act with "due diligence" to prevent similar violations from occurring because it has failed to conduct an adequate investigation.

2. This petition was filed on behalf of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi (hereinafter "alleged victims"). The petition alleges that each alleged victim was confronted by masked U.S. agents who beat them; forcibly stripped them by cutting off their clothes; photographed them while naked; dressed them in diapers; shackled them; aggressively forced them onto an aircraft; and immobilized them in painful positions for the duration of flight to various "black sites." In addition, some alleged victims report being forcibly drugged via an anal suppository. In all cases, each alleged victim was forbidden to speak or move, and attempts to do so resulted in more physical abuse.

3. The petitioners allege that the severe torture and abuse inflicted on the alleged victims by the U.S. was part of a wide-reaching and systemic state-sponsored, anti-terrorism program. The petitioners further submit that the State has publicly acknowledged its involvement in the secret detention program of terrorism suspects. Further, they allege that numerous U.S. Executive Branch memoranda have been released that detail the State's involvement in the abuse and torture of suspected terrorists. The petitioners also allege that despite this "credible evidence" showing U.S. involvement in the alleged victims forced disappearance and torture, the State has failed to conduct an adequate investigation into these allegations or hold accountable the many people who ordered and administered these abuses.

A. Facts claimed by Petitioners related to each alleged victim

Binyam Mohamed

4. Binyam Mohamed, a British citizen, was allegedly apprehended in Pakistan on April 2, 2002 by Pakistani officials and then turned over to C.I.A. agents, who interrogated him and denied his requests for access to counsel. It is claimed that after four months in detention in Pakistan, U.S. agents stripped Mr. Mohamed, dressed him in a tracksuit, blindfolded him, shackled his hands and feet, strapped him to the seat of an airplane, and transported him to Morocco.

5. The petitioners claim that for the next eighteen months, Mr. Mohamed was secretly detained, interrogated, and tortured by Moroccan intelligence agents. Specifically, they claim that the alleged victim was subjected to severe beatings that broke his bones and were so severe that they made him lose consciousness. They further argue that the interrogators used a scalpel to make incisions on Mr. Mohamed's body, including his penis, and that they poured a hot stinging liquid into his open wounds. Petitioners allege that Mr. Mohamed was threatened with rape, electrocution, and death. Mr. Mohamed was allegedly handcuffed, fitted with earphones, forced to listen to loud music day and night, and was (at times) deprived of sleep for 48-hour stretches. In addition, they submit that when he refused to eat food that he believed was drugged, Mr. Mohamed was forcibly connected to two different intravenous fluid lines, which induced painful withdrawal symptoms. The petitioners claim that the U.S. is responsible for Mr. Mohamed's torture because its agents delivered him to the Moroccan Intelligence agents, knowing that he would be tortured.

6. In January 2004, the petitioners allege that Mr. Mohamed was once more stripped, blindfolded, and shackled by C.I.A. agents, and flown in secret to a U.S. "black site" known as the "dark prison" in Afghanistan. There, under orders by U.S. Intelligence Agents, he was allegedly kept in complete darkness for extended periods, hung from a pole in his cell, constantly exposed to loud music, and deprived of sleep. The petitioners state that U.S. agents kept the alleged victim naked in very cold cells, denied him sanitary facilities, and fed him so little food that he lost between forty and sixty pounds over the span of four months. He was also allegedly kept in a damp, moldy room that contained open sewage. The petitioners submit that in September

2004 Mr. Mohamed was transferred by U.S. officials to the U.S. Naval Station at Guantanamo Bay, Cuba where he was detained for five additional years. In February 2009, the State dropped all charges against him, and he was released to the United Kingdom. The petitioners state that the U.S. denies being responsible for detaining him and abusing him in Morocco and that it has not provided him with any compensation.

Abou Elkassim Britel

7. Abou Elkassim Britel, an Italian citizen, was allegedly abducted by the police in Pakistan on March 10, 2002 at the behest of the U.S. The petitioners claim that the Pakistani police beat Mr. Britel severely and that his requests for counsel, or to speak with the Italian consulate, were denied. It is alleged that Mr. Britel falsely confessed in April 2002 to being a terrorist after weeks of torture by Pakistani officials, and was then turned over to the C.I.A. The petitioners state that Mr. Britel was blindfolded, shackled, and rendered to Morocco by U.S. agents. The petitioners further allege that for the duration of a nine-hour flight, Mr. Britel was immobilized, denied access to a toilet, and that when he asked to change positions, his mouth was taped shut by U.S. officials.

8. The petitioners state that for the next eight months, Mr. Britel was secretly detained, interrogated, and tortured by Moroccan intelligence agents. He was released without being charged in February 2003. However, in May 2003, the alleged victim was arrested again by Moroccan authorities when he attempted to return to Italy. The petitioners claim that Mr. Britel was forced to sign a confession that he was never allowed to read. He was sentenced to fifteen years in prison for terrorist-related activities and detained in a Moroccan jail. In April 2011, after eight years of detention, he was granted a pardon by the King of Morocco, and released. The petitioners claim that the State was complicit in this abuse because it delivered Mr. Britel to the Moroccan Intelligence agents knowing that he would be tortured.

9. The Petitioners further claim that, because of the alleged torture that Abou Elkassim Britel endured by U.S. officials and their affiliates, he continues to suffer from dizziness, chronic diarrhea, permanent damage to his left ear, and has permanent areas of black and blue discoloration on his skin.

Mohamed Farag Ahmad Bashmilah

10. Mohamed Farag Ahmad Bashmilah, a Yemeni citizen, was allegedly apprehended in Jordan on October 21, 2003 by Jordanian officials and handed over to U.S. agents. Petitioners state that while under U.S. custody, the alleged victim was beaten; all of his clothing was cut off; and U.S. officials took photographs of him naked. Mr. Bashmilah was allegedly subjected to a roughly administered anal cavity search by U.S. officials; and was beaten so badly that he lost consciousness. U.S. officials allegedly then dressed him in a diaper, shackled, blindfolded, hooded, and rendered him to Kabul, Afghanistan that same day.

11. Mr. Bashmilah was allegedly detained in secret at a U.S. "black site" for the next nineteen months and tortured for six of those months by U.S. officials. The petitioners further submit that Mr. Bashmilah was subjected to severe sleep deprivation and shackled in painful positions. Extremely loud music was played twenty-four hours per day, seven days per week, and U.S. guards woke him every half hour. It is alleged that while detained by U.S. officials, Mr. Bashmilah was chained to a wall and that his cell was either kept pitch black or that the light in his cell was left on at all times. The petitioners also claim that Mr. Bashmilah became so depressed that he tried to kill himself three times.

12. According to the petitioners, in April 2004, Mr. Bashmilah was again stripped, diapered, shackled, hooded, and transferred by U.S. agents to a secret prison in an unknown location where he was kept in complete isolation. Mr. Bashmilah was held there by U.S. officials for more than a year, and suffered more torture. He was allegedly subjected to sensory manipulation through alternating exposure to white noise and deafeningly loud music. He was allegedly monitored continually by video cameras, and denied any privacy. The petitioners hold that these acts of torture led Mr. Bashmilah to attempt suicide by using a piece of metal to slash his wrists. When Mr. Bashmilah went on a hunger strike, he was allegedly strapped down and force-fed by U.S. officials through a tube that was shoved up his nose.

13. On May 5, 2005, Mr. Bashmilah was allegedly flown to Yemen by the U.S. agents, after confessing to having used a forged passport in Indonesia. He was sentenced to two years in jail. The court sentenced him to time served.

Bisher al-Rawi

14. Bisher al-Rawi, an Iraqi citizen and a long-term permanent British resident, was allegedly apprehended by Gambian intelligence agents and turned over to U.S. agents on November 8, 2002. While in U.S. custody, he was stripped, dressed in a diaper and tracksuit, chained, shackled, blindfolded, and transported by airplane to Kabul, Afghanistan. Throughout the flight, while under U.S. control, he was unable to move. His captors allegedly denied Mr. al-Rawi access to food, water, and a toilet. The petitioners further state that he was detained for two weeks in a U.S. secret prison where he was held in complete darkness and isolation; that his legs were shackled twenty-four hours a day; and that he was constantly forced to listen to loud music.

15. According to the petitioners, after two weeks, Bisher al-Rawi was allegedly thrown into a truck with other prisoners piled on top of him, and was then severely beaten by his U.S. agents. As a result, he sustained cuts and bruises all over his body. The petitioners claim that he was rendered to the U.S.-controlled Bagram Air base in Afghanistan. There, he was allegedly subjected to two more months of interrogation and torture by U.S. officials. The petitioners allege that U.S. agents beat Mr. al-Rawi; dragged him along the floor; denied him access to a toilet, shower, and clean clothes; and held him in isolation. The petitioners also claim that U.S. agents deprived Mr. al-Rawi of sleep for prolonged periods and threatened him with more severe forms of torture. The Petitioners claim that that on February 7, 2003, Mr. al-Rawi was flown to the U.S. Guantanamo Bay detention facility in Cuba, and that after four years, without ever being charged, he was released and returned to the U.K. The petitioners claim that the State has failed to acknowledge that Mr. al-Rawi was illegally held, detained, and tortured; and that it has not provided him with any compensation.

B. General allegation of the parties on the admissibility requirements

16. In May 2007, the Petitioners filed a lawsuit in the Northern District of California, on behalf of the alleged victims, against Jeppesen Dataplan Inc., a private flight services and logistics corporation, for its part in facilitating the alleged victims' forced disappearance and torture. When the petitioners filed their lawsuit, *Mohamed v. Jeppesen Dataplan, Inc.*, Jeppesen was the only listed defendant.⁴ On October 19, 2007, the U.S., through its own actions, demonstrated its close relationship with Jeppesen Dataplan, Inc., by filing a "motion to intervene" in the aforementioned lawsuit. Pursuant to Rule 24(a) of the U.S. Federal Rules of Civil Procedure, the U.S. argued that it should be a party to the lawsuit "as of right," because it had "a significantly protectable interest relating to the subject matter of this action, i.e., the preservation of State secrets," and because "no other party in this lawsuit could adequately represent the United States' interest."⁵ On February 4, 2008, the U.S.'s motion to intervene was granted, and it subsequently became an active party in the lawsuit.

17. In February 2008, the District Court dismissed the case before pre-trial discovery, precluding it from ever considering the merits of the case. The court found that the U.S.'s asserted "state secrets privilege" was valid. The District Court held that it was barred from considering the case because "there is a reasonable danger that compulsion of the requested evidence will expose military matters which, in the interest of national security, should not be divulged."⁶ The petitioners then filed a timely appeal with the Ninth Circuit Court of Appeals to dispute the dismissal,⁷ to which the U.S. was a party. On September 8, 2010, the Ninth Circuit dismissed the case pursuant to the "state secrets privilege." The Court stated, "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging State secrets."⁸ The petitioners

⁴ *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *opinion amended and superseded*, 579 F.3d 943 (9th Cir. 2009), *on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010), and *rev'd*, 579 F.3d 943 (9th Cir. 2009), and *on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010), and *aff'd*, 614 F.3d 1070 (9th Cir. 2010).

⁵ Notice of Motion and Motion to Intervene, *Mohamed v. Jeppesen Dataplan, Inc.*, (No. C-07-02798-JW) 2007 WL 3194319 (N.D.Cal. 2007).

⁶ *Id.* at 1081.

⁷ *Id.*

⁸ *Id.* at 1087.

then sought review by the U.S. Supreme Court on December 13, 2010. Their request for review was denied in May 2011.⁹

18. On its part, the State does not contest the petitioners' claim that they have exhausted all domestic remedies. The U.S. opposes the admissibility of this petition, arguing that the American Declaration is a "non-binding" instrument, and that the Commission can only issue recommendations that the State is not obligated to follow. The State also refers the Commission to a 712-page report published in December 2014 by the Senate Select Committee on Intelligence ("S.S.C.I.") to demonstrate that the U.S. conducted a thorough investigation of the alleged abuses.¹⁰ The S.S.C.I. Report details the C.I.A. detention and interrogation program that the petitioners claim was the source of the human rights abuses they allege. The State indicates that the S.S.C.I. Report summary contains brief references to two alleged victims Binyam Mohamed and Bisher Al-Rawi.¹¹ The S.S.C.I. Report states clearly that Mr. Mohamed "was rendered by the C.I.A" in July of 2002 and held by an undisclosed government.¹² In January of 2004, he "was rendered to C.I.A Custody;"¹³ on September 21, 2004, he was transferred to Guantanamo Bay, Cuba; and he was ultimately released to the United Kingdom on February 23, 2009.¹⁴ With regard to Mr. Bishar al-Rawi, the Senate Report confirms that he was held in C.I.A custody in 2002, but does not reveal how long Mr. al-Rawi was detained nor does it specify when he was released.¹⁵ The State's response, however, says that the contents of the S.S.C.I. Report are the view of the Senate Committee and do not reflect the views of the Executive Branch of the United States.

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

Previous considerations on competence

19. After considering the information presented, the Inter-American Commission decides 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 victims are persons whose rights are protected insofar as the claims concern their alleged treatment at the hands of the U.S. agents. The State is bound to respect the provisions of the American Declaration and the Commission 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 Statute of the IACHR and article 49 of its Rules of Procedure.

20. Regarding jurisdiction *ratione loci* and 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 is based on 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.¹⁶

21. According to the petitioners, the apprehension and torture of the alleged victims required an exercise of physical power and control performed by agents of the U.S. This is the decisive element to establish

⁹ *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011).

¹⁰ See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program at 2, <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>.

¹¹ *Britel et. al. v. United States*, Petition No. P-1638-11, Response of the United States, May 4, 2016.

¹² Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, December 9, 2014, pp. 47, 98 and 238. Available at <http://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>

¹³ *Id.* at 238.

¹⁴ *Id.* at 238 and 460.

¹⁵ *Id.* at 458.

¹⁶ 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.

the jurisdiction of the State over those facts.¹⁷ The alleged victims were allegedly apprehended and tortured by U.S. agents. The petitioners allege that their unlawful detention and transfer was part a U.S. “rendition program” which was a systematic practice by the State to detain and transport persons suspect of having links to terrorism to secret detention facilities known as “black sites.” The agents of the State, even though operating outside its territory, brought the alleged victims under U.S. jurisdiction by physically taking control of them and moving them. In light of these considerations, the Commission considers that the petitioners’ allegations about the supposed involvements of the U.S. in the arrest and transfer of the alleged victims to countries where they were tortured, are sufficient to require an analysis at the merits stage of whether the U.S. exercised extraterritorial jurisdiction.¹⁸

22. With regard to exhaustion of domestic remedies, pursuant to Article 31.3 of the IACHR Rules, 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.”¹⁹ If 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.”²⁰ The U.S. response dated May 4, 2016, did not dispute that the petitioners have sufficiently exhausted their domestic remedies. As such, the U.S. has waived this defense for all future proceedings before the Commission.

23. The petitioners have shown that there are insurmountable obstacles within the U.S. legal system for adjudicating any cases related to the 9/11 terrorist attacks. All 9/11 related lawsuits that arose from the U.S. “rendition” program were immediately dismissed on grounds of national security, state secrets or governmental immunity, before the merits of the respective case were ever considered. As a result, alleged victims of these most serious of alleged abuses have not been able to seek redress within the U.S. judicial system. Even if the State had not waived its exhaustion defense, as discussed above, the record is clear that no effective remedy is available to the Petitioners in the U.S.

24. In the present matter, for analyzing admissibility, the petitioners have exhausted all the remedies available in the domestic legal framework, and consequently, the petition meets the requirements established in Article 31 of the IACHR’s Rules. They appropriately filed suit with the U.S. District Court and when the case was dismissed, they appealed in an adequate and timely fashion. Once again, upon dismissal by the appellate court, which also never considered the merits of the case, the petitioners appealed to the Supreme Court, the highest tribunal in the country, which refused to hear the matter. The Commission finds that domestic remedies were exhausted on May 16, 2011, when the Supreme Court denied a hearing of the matter, and notes that the petition was filed with the IACHR on November 14, 2011. In light of the foregoing, the Commission considers that the petition meets the six-month timeframe set forth in Article 32.1 of its Rules.

VII. ANALYSIS OF COLORABLE CLAIM

25. The Commission considers that the submissions concerning the alleged victims’ alleged torture, kidnapping, and arbitrary arrest at the hands of the United States, if proven, would constitute violations of several rights recognized under the American Declaration. These include the right to life, liberty, and personal security; the right to freedom from cruel or unusual punishment; the right to a fair trial; the right to protection from arbitrary arrest; and the right to due process of law; and the right to an adequate investigation.²¹ The IACHR considers that the petition is not manifestly unfounded. At the merits stage, the Commission will examine further all relevant law and judicial proceedings to determine whether the alleged facts, if proven, could constitute violations of the rights enshrined in Articles I (right to life, liberty, and personal

¹⁷ 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.

¹⁸ IACHR, Report No. 21/16, Petition 419-08. Admissibility. Khaled El-Masri. United States. April 15, 2016. Parr.25.

¹⁹ American Declaration, *supra* note 5, at Article 31.3.

²⁰ IACHR, Report No. 168/17, Petition 1502-07. Admissibility. Miguel Ángel Morales Morales. Peru. December 1, 2017, ¶ 18.

²¹ *González Pérez v. México*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser.L/V/II.III, doc. 20, rev. ¶¶ 84-88 (2001).

security); XVIII (right to a fair trial); XXV (right of protection from arbitrary arrest); and XXVI (right to due process of law) of the American Declaration.

26. As regards the right to *non-refoulement*, the petitioners presented evidence that the alleged victims were secretly transferred by the State to countries where they were tortured. Accordingly, the IACHR considers that there is a colorable claim that should be analyzed at the merits stage regarding Article XXVII of the American Declaration.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, XVIII, XXV, XXVI and XXVII 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 9th day of the month of June, 2020. Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.

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.



Marisol Blanchard
Assistant Executive Secretary