



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

April 24, 2019

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Saeid Jamali,
P-1407-13
Response of the United States**

Dear Dr. Abrão:

The U.S. Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us on December 10, 2018. The Petition, with exhibits, was submitted on behalf of Saeid Jamali and forwarded to the United States as Petition No. P-1407-13. The Petition was apparently submitted to the Commission on August 26, 2013. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'CT' followed by a stylized 'JL'.

Carlos Trujillo
Ambassador

SAEID JAMALI
P-1407-13
RESPONSE OF THE UNITED STATES

The United States appreciates the opportunity to submit these observations on the documents submitted by the Petitioner to the Inter-American Commission on Human Rights (“Commission”) and forwarded to the United States as Petition No. P-1407-13 (“Petition”). The Petition was received by the Commission in August 2013 and forwarded to the United States in December 2018.

The Petition is inadmissible and must be dismissed because it fails to meet the Commission’s established criteria in Articles 31, 32, and 34 of the Rules of Procedure (“Rules”). The Petition is inadmissible and must be dismissed under Article 34(a) of the Rules because Petitioner’s claims are beyond the *ratione materiae* competence of the Commission; in the alternative, the Petition is inadmissible under Article 34 of the Rules because the Petition fails under Article 34(a) to state facts that tend to establish violations¹ of rights set forth in the

¹ The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the OAS. U.S. Federal Courts of Appeals have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.*, *Garza v. Lapin* 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493-94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* the language of the Commission’s Statute, art. 20 (setting forth recommendatory but not binding powers). As the American Declaration of the Rights and Duties of Man is a non-binding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For a further discussion of the U.S. position regarding the nonbinding nature of the

American Declaration of the Rights and Duties of Man (“American Declaration”) and is manifestly groundless under Article 34(b). The Petition also fails to meet the Commission’s established criteria in Articles 31 and 32 of the Rules. The Petition is inadmissible under Article 31 of the Rules because Petitioner has failed to pursue and exhaust any domestic remedies in the United States. The Petition is further inadmissible because Petitioner has failed to present the Petition within the statute of limitations set out by Article 32 of the Rules.

Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioners’ request for relief, as the Petition is without merit.

I. BACKGROUND

The Mujaheddin-e Khalq (MeK) was founded by students in Tehran in 1965. It originally espoused Marxist and Islamist ideologies and sought the violent overthrow of the then-leader of Iran, Shah Mohammed Reza Pahlavi, whose government was supported by the United States. During the 1970s, the MeK used terrorist tactics against the Shah’s government and those whom they associated with it. MeK actions included the assassination of six U.S. citizens, including three U.S. Army officers, and the bombing of U.S. companies in Iran.

The Shah’s government fell in 1979. The seizure of, and hostage-taking at, the U.S. Embassy in Tehran, which was supported by the MeK, took place later that year. Shortly after the Iranian revolution, the MeK shifted its violent tactics towards the new regime in Iran. By 1980, Iraq dictator Saddam Hussein had established a relationship with the MeK, cooperating with it to advance his efforts to undermine the Iranian government. In 1986, Hussein invited the MeK to relocate formally to Iraq. MeK leadership accepted and, as a result, approximately 7,000 MeK members resettled in camps in Iraq, including Camp Ashraf. Saddam Hussein’s government provided funding, training, and military equipment to the MeK and, in exchange, the MeK served as a private paramilitary group for Hussein during the Iran-Iraq war. In April 1992,

American Declaration, *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.

the MeK became one of the few groups to attempt an attack on U.S. soil when it launched near-simultaneous attacks in thirteen countries, including against the Iranian mission to the United Nations in New York.²

Petitioner joined the MeK in 1971 and remained an active member until 1994, when he obtained asylum in the United Kingdom. However, in 1998, Petitioner returned to Camp Ashraf, where he was allegedly held against his will and under harsh conditions by the MeK until 2004.³

In 2003, U.S. military forces operating in Iraq as part of Operation Iraqi Freedom negotiated a cease-fire and disarmament arrangement with MeK leadership in Iraq. Under the terms of the cease-fire, the various MeK camps and bases were consolidated to Camp Ashraf, and residents were required to stay within the boundaries of the camp. In turn, the United States agreed to protect the MeK from possible violence from Iraqis. In June 2004, then-Secretary of Defense Donald Rumsfeld approved the designation of the MeK personnel at Camp Ashraf that qualify under Article 4 of the Fourth Geneva Convention as protected persons in order to assist in expediting efforts of the International Committee of the Red Cross (ICRC) and United Nations High Commissioner for Refugees (UNHCR) in the disposition of these individuals in accordance with applicable international law. After the United States' occupation of Iraq ended, the U.S. military continued to treat the residents of Camp Ashraf as protected persons until January 2009, when the Government of Iraq assumed full security responsibility over Camp Ashraf. At its peak, approximately 3,900 people resided in Camp Ashraf.

The U.S. military devoted significant resources to the protection of Camp Ashraf and the welfare of its residents. A U.S. Army Military Police Battalion and Marine Corps rifle company were stationed at Forward Operating Base (FOB) Grizzly to conduct security patrols around Camp Ashraf. Coalition forces also escorted MeK members to Baghdad and other cities to procure the necessary supplies for the Camp residents. According to a 2009 report by the RAND

² The United States designated MeK as a foreign terrorist organization (FTO) on October 8, 1997, and it was not removed from that list until September 28, 2012. *See* U.S. Department of State, Designated Foreign Terrorist Organizations (available at <https://www.state.gov/j/ct/rls/other/des/123085.htm>).

³ Petition at 1.

Corporation, 14 U.S. soldiers were killed during these escort missions, and at least another 60 were injured.⁴

In 2004, the United States created a temporary internment and protection facility (“TIPF”) at Camp Ashraf for MeK members who wanted to leave the group. In 2006, the United States replaced the TIPF with a more permanent facility that was renamed the Ashraf Refugee Camp in 2007. The new TIPF had air-conditioned tents; exercise, sports, and library facilities; a barber shop; and a coffeehouse tent. Residents were permitted to work at the TIPF or on the U.S. base and were provided with meals from the soldiers’ dining facility. Over the years, hundreds of Ashraf residents chose to leave the Camp, some receiving refugee status from the office of the UNHCR and finding their own solution inside or outside Iraq, and others voluntarily returning to Iran. Many residents of the TIPF agreed to return to Iran through a process managed by the ICRC. Others, however, refused repatriation for various reasons, including concerns of persecution or mistreatment if they returned to Iran. The U.S. military worked with the office of the UNHCR to secure refugee designations for former MeK members who did not want to return to Iran and to facilitate their resettlement in third countries.

In mid-2004, Petitioner elected to leave the MeK and reside at the TIPF, while seeking refugee status and relocation to a third State because he apparently did not feel it was safe to return to Iran. While living at the TIPF, Petitioner was protected, not detained, by the United States. Petitioner was free at any time to leave the camp and return to Iran. As Jeffery T. Bergner, then-Assistant Secretary of State for Legislative Affairs, explained in a letter to Representative Eleanor Holmes Norton dated January 20, 2006, “[Petitioner] is living at the TIPF at Camp Ashraf because we are not aware of any other country willing to accept him, except possibly Iran, his country of nationality Mr. Jamail is one of a number of TIPF residents who have expressed a fear of returning to Iran and are hoping for third-country resettlement.”⁵

⁴ Jeremiah Goulka et al., *The Mujahedin-e Khalq in Iraq: A Policy Conundrum* 46 (2009).

⁵ Petition, Appendix B (Declaration of Hamid Afshar Savojvolaghi), Exhibit E (Letter from Jeffery T. Bergner, Assistant Secretary of State for Legislative Affairs, to Representative Eleanor Holmes Norton, dated Jan. 20, 2006).

As of January 20, 2006, more than three hundred Iranians and former members of MeK had safely returned to Iran through the ICRC process.⁶ However, Petitioner did not want to return to Iran, so instead he remained in the TIPF until a third-party country willing to accept Petitioner could be located.⁷

II. DISCUSSION

A. LACK OF COMPETENCE

Petitioners' claims are inadmissible under Article 34(a) as outside the Commission's competence. Petitioner alleges that the United States has "violated" certain specific rights recognized in the American Declaration. As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).⁸ 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 ("American Convention"). Article 20 states that the Commission shall have the power to pay particular attention to the observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make nonbinding recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. Moreover, the Commission lacks competence to review U.S. practice on matters arising under any other international instruments, including other international human rights treaties, whether or not the United States is a party, or under customary international law.⁹

⁶ *Id.*

⁷ *Id.*

⁸ *See supra*, n. 1.

⁹ Although Petitioner anchors his claims in specific provisions of the American Declaration, in every instance, he attempts to expand the competence of the Commission by invoking an array of other international instruments to substantiate his claims that international legal obligations have been violated. Such recourse to international instruments and authorities beyond the American Declaration reflects the reality that Petitioner's claims do not implicate provisions of the American Declaration, leaving him to look to other instruments in his attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition.

Even if the Commission considered the American Declaration to be binding on the United States, it could not apply it to Petitioner's claims because during situations of armed conflict, the law of war is *lex specialis*. "The law of war has been developed with special consideration of the circumstances of war and the challenges inherent in its regulation by law."¹⁰ As such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.¹¹ The United States is deeply committed to compliance with the law of war, and the U.S. military has regulations, procedures, and other mechanisms for implementing its requirements, including with respect to the Petitioner's claims.

However, as the Commission has observed in reference to the American Convention, "the American Convention and other universal and regional human rights instruments were not designed specifically to regulate armed conflict situations."¹² Petitioner concedes that this same conclusion applies with equal force to the American Declaration.¹³ However, it cannot follow as a matter of law or reason that this limitation of the American Declaration somehow operates to *expand* the competence of the Commission to the law of war (also called international humanitarian law (IHL)) or other sources of international law.¹⁴ 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.¹⁵

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. Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged

¹⁰ U.S. Department of Defense (DoD) Law of War Manual § 1.3.2.1 (June 2015, Updated Dec. 2016), available at http://ogc.osd.mil/images/law_war_manual_december_16.pdf.

¹¹ See Submission of the United States Concerning IACHR, Draft Report: "Towards the Closure of Guantanamo," OEA/Ser.L/V/II. Doc. 30 (Jan. 2015), Mar. 30, 2015 (attached as annex).

¹² IACHR, Report on Terrorism and Human Rights, at para. 61.

¹³ Petition at 38.

¹⁴ See *contra* IACHR, Report on Terrorism and Human Rights, at para. 61.

¹⁵ For example, article 149 of the Fourth Geneva Convention provides for an enquiry procedure in the case of any alleged violation of the Convention.

violations of the human rights enshrined in the American Convention . . . and other applicable instruments” Article 20 of the Commission’s Statute and Article 23 of the Rules identify the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and, in any event, Article 23 does not list the various instruments and bodies the Petitioner relies on to articulate his claims.¹⁶ Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.¹⁷

To be sure, IHL and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing. And a situation of armed conflict does not automatically suspend, nor does IHL automatically displace, the application of all international human rights obligations; international human rights instruments, according to their terms, may also be applicable in armed conflict. However, the Commission may not import and apply treaties and customary international law through the nonbinding American Declaration. As such, Petitioners’ claims are inadmissible under Article 34(a) as outside the Commission’s competence.

B. FAILURE TO EXHAUST DOMESTIC REMEDIES

The Commission should declare the Petition inadmissible because the Petitioner has not satisfied his duty to demonstrate that he has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, this provision of the Rules is based on the

¹⁶ These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the 1949 Geneva Conventions, and the Convention Relating to the Status of Refugees.

¹⁷ See, e.g., U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 (“*Ameziane* U.S. Hearing Presentation”), available at <https://www.youtube.com/watch?v=sbN4tBcBbtQ> (U.S. delegation providing legal reasons for Commission’s lack of competence over extraneous instruments).

general requirement of exhaustion of domestic remedies reflected in customary international law, as a means of ensuring that international proceedings respect State sovereignty. The requirement of exhaustion ensures that the State having jurisdiction over an alleged human rights violation has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.¹⁸ A State conducting domestic proceedings within its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before there is resort to an international body.¹⁹ The Inter-American Court of Human Rights (“IACtHR”) has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”²⁰

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies.²¹ Although remedies may be considered ineffective when a claim has “no reasonable prospect of success” before domestic courts, “for example because the State’s highest court has recently rejected proceedings in which the issue posed in a petitioner had been raised[,] [m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”²²

As an initial matter, Petitioner attempts to excuse himself from the requirement of Article 31(1) altogether by asserting that he has no “burden to show exhaustion of domestic remedies.”²³ Petitioner cites to an IACtHR decision, *Velásquez v. Rodríguez*, for the proposition that “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be

¹⁸ See, e.g., *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., Ser. A/B, No. 76.

¹⁹ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

²⁰ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

²¹ See, e.g., *Paez Garcia v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) and Conclusion ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

²² *Sanchez et al. v. United States*, Petition 65/99, Report No. 104/05, Oct. 27, 2005, ¶ 67. See also *Kenneth Walker v. United States*, Case No. 12.049, Report No. 62/03, Admissibility, Oct. 10, 2003 (finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

²³ *Id.* at 23 n. 158.

exhausted and that they are effective.”²⁴ However, Petitioner’s reliance on *Velásquez* is misplaced, as the IACtHR passage cited refers to the timeliness of a State’s raising an objection of non-exhaustion, *not* whether a petitioner bears the initial burden of demonstrating he has exhausted domestic remedies (which he certainly does).²⁵ Even though the United States is not a party to the IACtHR, it bears emphasizing here that Petitioner’s attempt to escape the burden of Article 31(1) by relying on the jurisprudence of the IACtHR is unavailing. In order for the Petition to be admissible, Petitioner must demonstrate that he has pursued and exhausted domestic remedies.

The Rules enumerate in Article 31(2) that the exhaustion requirement could be excused by absence of due process, denial of access to remedies, and unwarranted delay. Petitioner alleges that Article 31(1) does not apply to him because he does not have access to domestic remedies in the United States. Specifically, Petitioner cites to an IACtHR advisory opinion that explains that the exhaustion requirement does not apply “to situations in which domestic law does provide remedies, but such remedies are either *denied* the affected individual or he is *otherwise prevented* from exhausting them.”²⁶ Although this advisory opinion was provided by the IACtHR in reference to the Inter-American Convention—neither of which the United States is party to—it bears noting that Petitioner has failed to meet the standard set out therein. Petitioner has not been denied or otherwise prevented from exhausting domestic remedies, but rather, he guesses that pursuing certain remedies might fail. However, “mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”²⁷

²⁴ *Id.*

²⁵ See *Velasquez Rodriguez Case*, Preliminary Objections, Judgment of June 26, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 1 (1994) ¶ 88 (“Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (*see Viviana Gallardo et al.*, Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.”).

²⁶ Petition at 22 (emphasis added) (citing *Exceptions to the Exhaustion of Domestic Remedies* (Art.46(1), 46(2)(a) and 46(2)(b) *American Convention on Human Rights*), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11, ¶ 17 (Aug. 10, 1990)).

²⁷ *Sanchez et al. v. United States*, Petition 65/99, Report No. 104/05, Oct. 27, 2005, ¶ 67. See also *Kenneth Walker v. United States*, Case No. 12.049, Report No. 62/03, Admissibility, Oct. 10, 2003

There is no indication that Petitioner pursued remedies from U.S. authorities while he resided at Camp Ashraf. He must have pursued and exhausted his available remedies from U.S. authorities as an initial matter in order to demonstrate exhaustion of those remedies.

When dealing with claims for monetary damages, and torts that occur within the territorial United States, three types of monetary liability claims sounding in tort are typically asserted against federal employees in their individual capacity. First, there are personal liability claims premised upon an alleged violation of the Constitution.²⁸ Second, there are personal liability claims premised upon a violation of a federal statute.²⁹ Finally, there are personal liability claims premised upon a violation of state tort law, either against the United States for torts occurring within the scope of federal employment or against the individual federal employee for torts occurring outside of the scope of employment.³⁰ Because Petitioner's claims arise abroad and in the context of military and national security operations, he is right that neither a *Bivens* action nor suit against the United States under the Federal Tort Claims Act ("FTCA") is available to him in these circumstances.³¹ However, he is wrong about the blanket unavailability of the second and third avenues of relief. Indeed, Petitioner may pursue domestic remedies against federal employees under the Alien Tort Statute (for certain international law

(finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

²⁸ See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment).

²⁹ See, e.g., *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999) (Racketeer Influenced and Corrupt Organizations Act (RICO)).

³⁰ See, e.g., *United States v. Smith*, 499 U.S. 163 (1991) (medical malpractice).

³¹ Petitioner acknowledges that his alleged injuries arose "in the specific context of an armed conflict combating terrorist violence." Petition at 36. In such circumstances, courts "must refrain" from implying a *Bivens* remedy because there are alternative remedies or other well-recognized, "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017); see *id.* at 1860 (holding *Bivens* relief not available to "challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of" the September 11, 2001 terrorist attacks); cf. *United States v. Stanley*, 483 U.S. 669, 684, 107 (1987) ("We hold that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to [military] service.") (internal quotation marks and citation omitted). Indeed, "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Hernandez v. Mesa*, 885 F.3d 811, 818–19 (5th Cir. 2018) (en banc) (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012)).

violations).³² In addition to suing federal officials for either injunctive relief or money damages, Petitioner may also seek non-judicial relief from the government such as by filing an administrative claim for compensation under the Foreign Claims Act (“FCA”), 10 U.S.C.A. § 2734,³³ or petitioning Congress for a private bill of redress.³⁴ Indeed, administrative avenues like the FCA are statutorily favored by Congress as the avenue to seek a remedy for alleged extra-territorial activities.

Petitioner’s assertion that he would probably not succeed in obtaining redress (without even considering any injunctive or non-judicial or administrative alternatives) is not only speculative but also insufficient to bypass his obligation to exhaust domestic remedies before pressing his claims before the Commission.³⁵ Importantly, the claims raised by Petitioner remain

³² Petitioner contends that such claims would be futile because: (1) federal officers would be entitled to Westfall Act Immunity, 28 U.S.C. § 2679(b)(1), and (2) any restyled FTCA claim against the United States would be barred by the foreign-country exception, *id.* § 2680(k). Petition at 27 (discussing futility of state law claims); *id.* at 32-32 (ATS claims). But Petitioner’s futility argument assumes that the Attorney General, in his discretion, would make the requisite scope-of-employment determination triggering Westfall Act substitution. *See* 28 U.S.C. § 2679(d) (requiring scope-of-employment certification). Certification should not be assumed. And absent certification, any ATS or state law claim could proceed against the individual provided other applicable requirements are met. Even assuming that the Attorney General files a scope certification, Petitioner wrongly contends that a challenge to that determination would be automatically upheld. Petition at 27-30. While some courts have interpreted scope of employment for Westfall purposes to encompass criminal conduct or even violations of *jus cogens* norms (*e.g.*, torture), such conduct may “fall outside the scope of employment” where it is “*solely* motivated” by the employee’s “own purposes.” *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1333 (D.C. Cir. 2014).

³³ *See Vance v. Rumsfeld*, 701 F.3d 193, 201 (7th Cir. 2012) (en banc) (“The Foreign Claims Act provides that a claims commission may award up to \$100,000 of public money to a person injured by the U.S. military in a foreign nation.”); *see also Saleh v. Titan Corp.*, 580 F.3d 1, 13 (D.C. Cir. 2009) (identifying Foreign Claims Act as part of the “extensive body of law” Congress has enacted “with respect to allegations of torture”).

³⁴ *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990) (“Congress continues to employ private legislation to provide remedies in individual cases of hardship.”); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (9th Cir. 2010) (“When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate alternative remedy.”).

³⁵ For example, Petitioner states that he cannot pursue an Alien Tort Statute (“ATS”) claim because “nothing in its text rebuts the presumption that it does not apply extraterritorially.” Petition at 32 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)). While Petitioner correctly notes the *presumption*, the Supreme Court in *Kiobel* did not hold that the ATS can never apply abroad. Rather, the Court observed that in some circumstances, claims under the ATS might “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.” *Kiobel*, 569 U.S. at 124–25. The Court left “for another day the determination of just when the presumption against extraterritoriality might be overcome.” *Id.* at 131-32 (internal quotation marks and citations omitted) (Breyer, J., concurring). And in the wake of

untested in the domestic arena: Petitioner does not cite a single case that directly addresses his claims or his unique position as a person under the protection of the United States in the TIPF camp.

The exhaustion requirement grants the State the opportunity to resolve claims through its domestic process before recourse may be sought with the Commission. And, even if Petitioner were to pursue and exhaust his domestic remedies, and fail to prevail, such lack of success in litigation does not mean Petitioner “would not be afforded due process of law” as he baldly asserts.³⁶ Petitioner would be afforded all of the process due to him. Petitioner’s mere pessimism is not sufficient to excuse him from his requirement to exhaust domestic avenues.

C. STATUTE OF LIMITATIONS

Article 32 of the Rules imposes a statute of limitations for petitioners, with which the Petitioner has failed to comply.

Under Article 32 of the Rules, the “Commission shall consider petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.” Where the exhaustion requirement is inapplicable, “the petition shall be presented within a reasonable period of time”

Although Petitioner has failed to pursue or exhaust his domestic remedies, even if the Commission finds that Petitioner is exempted from the requirement to do so, Petitioner must still comply with the temporal requirements of Article 32(2), which Petitioner has failed to do. Article 32(2) requires the petition to “be presented within a reasonable period of time.” In determining whether the Petition has been presented in “a reasonable period of time,” the

Kiobel, some courts have held that the ATS can apply abroad in certain circumstances. *E.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 529 (4th Cir. 2014) (holding that ATS jurisdiction extended to case where an American military contractor, and its American employees, allegedly tortured plaintiff at the Abu Ghraib prison in Iraq); *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018) (holding that ATS jurisdiction extended to allegations that multinational companies, with headquarters in the United States, were responsible for aiding and abetting child slavery in the Ivory Coast). As the Fourth Circuit has observed, “[i]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the [ATS] claims do not touch and concern United States territory.” *Al Shimari*, 758 F.3d at 528.

³⁶ Petition at 34.

Commission may consider “the date which the alleged violations of rights occurred and the circumstances of each case.”³⁷

The Petition cannot be construed as presented in a reasonable period of time in light of the date which the alleged violations occurred because it was presented more than six years after the last alleged violation. Petitioner claims he was subjected to the alleged violations when he was at the TIPF between 2004 and 2007.³⁸ However, it took Petitioner a further *six years* from the date of the last alleged violation to present this Petition to the Commission. Taking into consideration the date on which the alleged violations occurred, presentation of the Petition to the Commission more than six years after the last such alleged violation cannot be construed to constitute a reasonable period of time.

Nor can the Petition be construed as presented in a reasonable period of time under the circumstances of this particular case. Petitioner attempts to excuse this delay by explaining that, from 2004-2007, he “was already exploring legal and other options, albeit focused on securing his release from TIPF rather than redress for the violations committed.”³⁹ Even if Petitioner’s focus at that time was elsewhere as he claims, he fails to account for a *six-year* delay following his departure from the TIPF. Petitioner alludes to his travel prior to being granted asylum by Switzerland in June 2008 but, even if his focus at the time was to obtain asylum rather than redress alleged violations of his rights, the extreme delay—*more than five years*—between receiving asylum in Switzerland in June 2008 and lodging the Petition in August 2013 remains unexplained. Although Petitioner refers to his inability to afford certain counsel in Turkey prior to 2008, he evidences no difficulty obtaining counsel from this point forward: he simply states that two NGOs were working on his case before it was transferred to American University’s International Human Rights Law Clinic in 2012.⁴⁰ The extreme delay in presenting the Petition remains inexplicable and cannot be construed as a “reasonable period of time” under the circumstances.

³⁷ Rules of Procedure, Art. 32(2).

³⁸ Petition at 20.

³⁹ Petition at 35.

⁴⁰ *Id.* Petitioner alleges that, in Turkey, “he contacted three lawyers, but could not afford their fees.” Petitioner does not explain how his inability to pay these lawyers is responsible for the subsequent six-year delay in presenting the Petition.

Not only do the date on which the alleged violation of rights occurred and the circumstances of the case militate strongly against construing a six-year delay as reasonable, but the other provisions of Article 32 also counsel against such a finding. Although Article 32(2) does not define “a reasonable period of time,” the United States encourages the Commission to consider in this context the period of time delineated at Article 32(1) as a term of reference. Under Article 32(1), a Petition must be presented within a period of six months following the date on which the petitioner has been notified of the decision that exhausted the domestic remedies. When read alongside Article 32(1), Article 32(2) cannot be treated as an invitation to dispose of timeliness altogether where a petitioner has not exhausted domestic remedies. Six years is orders of magnitude greater than the only time period delineated in Article 32 and cannot, by any reasonable canon of construction, be construed to constitute a reasonable period of time.

The ability of the United States to respond to the Petition is significantly impeded by the fact that the Petition was received more than a decade after the alleged events at issue. This delay was due in large part to the Petitioner’s untimely presentation of the Petition to the Commission more than six years after those alleged events. Petitioner has failed to substantiate his claim that this extreme lapse constitutes “a reasonable period of time.” Accordingly, the Commission should find the Petition inadmissible under Article 32 of the Rules because it was presented outside “a reasonable period of time” under the Commission’s statute of limitations.

D. INADMISSIBILITY

As established above, the law of war is the *lex specialis* and controlling body of law with regard to the claims in the Petition. 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. Under Article 34(a), therefore, the Petition is inadmissible. In the alternative, however, even if the American Declaration applied to the allegations in the Petition, the Petition remains inadmissible because it fails to state facts that tend to establish violations of Petitioner’s rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules.

- a. The Petition is inadmissible under Article 34(a) for failing to state facts that tend to establish a violation of Petitioner’s rights.**

Petitioner makes numerous claims that the United States has violated Petitioner's rights; however, several of the alleged violations refer to facts that do not establish a violation of Petitioner's rights under the Declaration or, instead, refer to rights under instruments beyond the *ratione materiae* competence of the Commission. Therefore, the Petition should be dismissed with respect to these claims.

Petitioner alleges various conduct that he claims to be inconsistent with his right to life, liberty, and personal security under Article I of the American Declaration. Petitioner's allegations related to the conditions of the TIPF camp fail to evidence violations of the American Declaration. Specifically, Petitioner alleges that he and others at the TIPF "were housed in crowded tents with limited food and water," "electricity and the use of showers were a rare luxury," and he had to stand "in the hot sun or cold night."⁴¹ However, the depicted capacity of the TIPF and access to electricity and plumbing at the TIPF are not facts that establish violations of Petitioner's rights under the Declaration.

With respect to his individualized allegations of mistreatment, certain claims by Petitioner also fail to evidence violations of Article I of the American Declaration. For example, living in a single-occupancy space rather than a multiple-occupancy tent does not evidence a violation of Article I. Moreover, various aspects of the Petition call into question whether Petitioner's allegations are attributable to the United States and the circumstances of such allegations. For example, Exhibit B of the Petition, titled "The message from my friend," reads "Mr. Jamali . . . is also a troublemaker. Starts fist-fights with other TIPFsters [*sic*], including nice ones, incites hunger strikes . . . , abuses guards verbally. Lives in a segregated area at his and others' request."⁴² Even if Petitioner had included documentary evidence to substantiate his claims, which he claims to possess but did not include with the Petition,⁴³ it is unclear whether such evidence would reflect conduct attributable to the United States.

⁴¹ Petition at 43.

⁴² See Petition, Appendix B (Declaration of Hamid Afshar Savojvolaghi, Exhibit B (Email dated Dec. 15, 2005)).

⁴³ See Petition, Appendix A (Declaration of Saeid Jamali), para. 118 ("One of the soldiers felt bad for me because I was treated so poorly. He gave me a CD with pictures of me, so I could have evidence that I had suffered abuse.").

Therefore, these claims should be dismissed under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of Petitioner's rights.

b. The Petition is manifestly groundless under Article 34(b) of the Rules of Procedure and should be dismissed.

i. Right to Protection from Arbitrary Arrest

Petitioner alleges that he was arbitrarily deprived of liberty in violation of his Article I right to life, liberty, and personal security and his Article XXV right of protection from arbitrary arrest. However, based on facts presented by the Petitioner himself, this allegation is manifestly groundless and should be dismissed under Article 34(b).

Petitioner was not arbitrarily deprived of his liberty. As an initial matter, Petitioner voluntarily sought residence at the TIPF *after* being held against his will by the People's Mujahedin of Iran ("PMOI"),⁴⁴ and these circumstances must not be conflated. Petitioner elected to reside under the protection of the United States while seeking refugee status and relocation to a third State because he apparently did not feel safe to return to Iran (though he was free to do so). In other words, while Petitioner was at the TIPF, he was being protected, not detained, by the United States. As Jeffery T. Bergner, then-Assistant Secretary of State for Legislative Affairs, explained in a letter to Representative Eleanor Holmes Norton dated January 20, 2006, "[Petitioner] is living at the TIPF at Camp Ashraf because we are not aware of any other country willing to accept him, except possibly Iran, his country of nationalityMr. Jamail is one of a number of TIPF residents who have expressed a fear of returning to Iran and are hoping for third-country resettlement."⁴⁵

Additionally, based on the "Agreement for the Individuals of the PMOI,"⁴⁶ which Petitioner was required to sign before entering the TIPF, Petitioner agreed to certain conditions

⁴⁴ Petition at 1.

⁴⁵ Petition at Appendix B (Declaration of Hamid Afshar Savojvolaghi, Exhibit E (Letter from Jeffery T. Bergner, Assistant Secretary of State for Legislative Affairs, to Representative Eleanor Holmes Norton, dated Jan. 20, 2006).

⁴⁶ Petition at Appendix O (Agreement for the Individuals of the PMOI) (note that this document was provided by Petitioner with the handwritten note "this document is as example – I lost my own).

in exchange for the protection of the United States. Petitioner concedes that he concluded such an agreement, which stated:

I understand that I will be free to leave and to return home when viable disposition options become available. I understand that some of these disposition options include: return to my nation of origin; admission to a third country; application to the Ministry of Displacement and Migration for continued residency in Iraq, or application to international organizations such as the United Nations High Commissioner for Refugees I agree to remain under the protection of Multi-National Forces-Iraq at Camp Ashraf until these options are completed. If I violate any terms of this Agreement, I may be subject to prosecution or internment, and administrative sanctions.⁴⁷

Petitioner voluntarily agreed to these terms and was free to leave the TIPF at any time to return to Iran.⁴⁸ In 2006, more than 300 Iranians who had renounced their membership in the MeK terrorist organization had left the TIPF and safely returned to Iran with the assistance of the ICRC.⁴⁹ Instead, Petitioner chose to remain and wait for one of the other disposition options outlined in the Agreement. It is disingenuous and, indeed, contrary to the documentary evidence contained in the Petition for Petitioner now to claim that he and other residents at the TIPF had been “arbitrarily arrested and confined” by the United States. In this regard, Petitioner’s alleged violations of Articles I and XXV of the American Declaration are manifestly groundless and should be dismissed under Article 34(b) for being manifestly groundless.

ii. Right to recognition of juridical personality and civil rights and right of petition

Petitioner alleges that his rights under Articles XVII and XXIV of the American Declaration were violated. Article XVII provides that “[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.” Article XXIV of the American Declaration provides that “[e]very person has the right to submit respectful petitions to any competent authority, for reasons of

⁴⁷ *Id.*

⁴⁸ Petition at Appendix B (Declaration of Hamid Afshar Savojvolaghi, Exhibit E (Letter from Jeffery T. Bergner, Assistant Secretary of State for Legislative Affairs, to Representative Eleanor Holmes Norton, dated Jan. 20, 2006).

⁴⁹ Petition at Exhibit E.

either general or private interest, and the right to obtain prompt decision thereon.”

Petitioner has failed to substantiate his claims that the United States has not recognized his juridical personality. Moreover, as discussed above, Petitioner concedes that he has declined to pursue domestic remedies with respect to the claims contained in the Petition because he doubts that such remedies would produce a favorable result. However, Petitioner’s voluntary decision not to pursue his remedies with U.S. authorities cannot be construed as a denial of his right to submit respectful petitions, much less a denial of recognition of his juridical personality. Petitioner’s invocation of the Fourth Geneva Convention and the ICCPR are unavailing as those instruments are outside the competence of the Commission. Accordingly, Petitioner’s claim under Articles XVII and XXIV of the American Declaration are manifestly baseless and must be declared inadmissible under Article 34(b) of the Rules.

iii. Right to religious freedom and worship

Petitioner alleges that his rights under Article III of the American Declaration were violated. Article III provides that “[e]very person has the right freely to profess a religious faith, and to manifest and practice it in public and in private.” Petitioner has failed to substantiate his allegation that the United States has denied his right to profess a religious faith freely or to manifest and practice it. Tellingly, Petitioner does not even attempt to evidence a violation of this provision but, instead, invokes as authorities a 2002 communication by the U.N. Human Rights Committee, the Fourth Geneva Convention and Additional Protocol I, and the Convention Relating to the Status of Refugees.⁵⁰ Such recourse to international instruments and authorities beyond the American Declaration, including instruments to which the United States is not a party, reflects the reality that Petitioner’s claims do not implicate provisions of the American Declaration, leaving him to look to other instruments in his attempt to construe cognizable claims. Petitioner’s strategy in this regard is insufficient to substantiate allegations that the United States has violated Article III of the American Declaration.

⁵⁰ See Petition at 49-50.

Accordingly, Petitioner's claim in this regard is manifestly baseless and must be declared inadmissible under Article 34(b) of the Rules.

III. CONCLUSION

In sum, Petitioner has failed to exhaust domestic remedies as required by Article 31 of the Rules of Procedure and failed to submit this Petition within a reasonable time as required by Article 32 of the Rules. Moreover, the Commission lacks the competence to consider matters arising under the law of war, rendering the Petition inadmissible under Article 34(a); in the alternative, the Petition is inadmissible because it fails to state facts that tend to establish violations of Petitioner's rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules. Therefore, the Commission should declare the Petition inadmissible and, in line with its own practice, close this matter. Should the Commission nevertheless declare the Petition admissible and proceed to examine its merits, the United States reserves the right to submit further observations should this Petition reach the merit stage.