

# Towards the Closure of Guantanamo





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# Towards the Closure of Guantanamo

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Approved by the Inter-American Commission on Human Rights on June 3, 2015

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# EXECUTIVE SUMMARY





## EXECUTIVE SUMMARY

1. This report addresses the human rights situation of detainees held at the U.S. Naval Base in Guantanamo Bay, Cuba, a facility that has become a symbol of abuse around the world. The Inter-American Commission on Human Rights (“IACHR”) was the first international instance to call upon the United States to take urgent steps to respect the basic rights of the detainees. Just two months after the arrival of the first prisoners in January of 2002, the IACHR called upon the State to ensure that their legal status would be determined by a competent authority, so as to clarify the applicable legal regime and corresponding rights.
2. Since then, the IACHR has closely followed the situation through different mechanisms and has repeatedly called for the immediate closure of the detention facility. As a further and hopefully final step in the monitoring of the situation, the IACHR issues this report in which it provides an assessment of the current situation from a human rights perspective as the basis to issue recommendations designed to assist the State in taking the steps necessary to close the facility.
3. The report, following a rights-based approach, focuses on three main areas of concern. First, it addresses the major issues surrounding the detainees’ right to personal integrity, from the authorized use of torture in the early years of the Guantanamo detentions to more current issues such as prison conditions at Camp 7 and the U.S. Government’s response to the hunger strikes. The IACHR reiterates its finding that the continuing and indefinite detention of individuals in Guantanamo, without the right to due process, is arbitrary and constitutes a clear violation of international law; reasons of public security cannot serve as a pretext for the indefinite detention of individuals without charge or trial.
4. The report then examines the detainees’ access to justice and whether the judicial remedies available are adequate and effective. It analyses important questions that were left unresolved by the landmark decision of the U.S. Supreme Court in *Boumediene v. Bush*, such as the scope of the executive’s authority to detain individuals under the Authorization for the Use of Military Force (AUMF) as well as various substantive and procedural questions. The Commission outlines concerns with respect to the operation of presumptions and burdens of proof and their impact on access to effective remedies.
5. This chapter also assesses how military commissions operate in practice and the important challenges faced by detainees when exercising their right to legal representation. It further addresses the exclusive application of a separate regime to foreign Muslim men, an issue that presents an apparent targeting of individuals in relation to nationality, ethnicity and religion. In addition, this chapter analyses the functioning of the Periodic Review Board process established in 2011 as well as

the lack of judicial review of claims relating to conditions of detention at Guantanamo.

6. Finally, the report looks at the various legal and political aspects involved in taking steps toward the closure of the detention facility and acknowledges some recent steps taken by the Executive. This chapter assesses the current situation of the three categories of detainees currently held at Guantanamo: detainees cleared for transfer; detainees facing criminal charges before military commissions; and detainees designated for continued detention. The IACHR analyzes the situation of the detainees from Yemen separately, an issue which is of key importance in the closure of the facility. It further elaborates on how transfers should be carried out in order to comply with international legal obligations and the principle of *non-refoulement*. This chapter then analyzes the current state of proceedings before military commissions, a system that has proven to be slow, inefficient and out of line with due process guarantees.
7. The report concludes with some data that speaks for itself. According to official information, only 8% of Guantanamo detainees were characterized as “fighters” for Al-Qaeda or the Taliban; 93% were not captured by U.S. forces; and most were turned over to U.S. custody at a time in which the United States offered bounties for the capture of suspected terrorists. Only 1% of all prisoners ever held at Guantanamo have so far been convicted by a military commission; in two of those eight cases the material support conviction was overturned on appeal by federal courts. As of January 2015, the handful of ongoing prosecutions before military commissions remained stagnant at the pre-trial stage, having been in that stage for several years.
8. Based on its close analysis of the human rights situation of detainees held at Guantanamo Bay, in this report the IACHR issues a series of recommendations in order to encourage the United States to properly fulfill its international human rights commitments in taking the steps necessary to close Guantanamo. The Inter-American Commission also reiterates its call upon OAS Member States to consider receiving Guantanamo detainees in an effort to achieve the goal of closing the prison and to reaffirm the longstanding tradition of asylum and protection of refugees in the region. The recommendations are grouped following the same rights-based approach used in the analysis of the report.
9. With regard to the **conditions of detention**, the Inter-American Commission recommends that the United States ensure that detainees are held in accordance with international human rights standards; that conditions of detention are subject to accessible and effective judicial review; that detainees are provided with adequate medical, psychiatric and psychological care; and that their right to freedom of conscience and religion is respected. The Commission further recommends that the U.S. declassify all evidence of torture and ill-treatment; comply with the recommendations issued by the Committee Against Torture regarding the investigation of detainee abuse, redress for victims, and the end of the force-feeding of detainees; and establish an independent monitoring body to investigate the conditions of detention at Guantanamo Bay.

10. Concerning **access to justice**, the IACHR requests the United States to try detainees facing prosecution before military commissions in federal courts; ensure detainees' access to a proper judicial review of the legality of their detention; provide detainees and their counsel with all evidence used to justify the detention; and guarantee that attorney-client privilege is respected. The Commission also asks that Courts hearing such cases undertake a rigorous examination of the Government's evidence to ensure that any detention in this context is based on clear and convincing evidence.
  
11. Finally, the Inter-American Commission reiterates its call for the **closure of Guantanamo**. In order to fulfill this goal, the Commission recommends repealing the National Defense Authorization Act (NDAA) provisions that prohibit the transfer of Guantanamo detainees to the United States for prosecution, incarceration, and medical treatment; expediting the Periodic Review Board process; and accelerating detainees' transfers to their countries of origin or third countries in accordance with the principle of *non-refoulement*. The Commission further calls upon the United States Government to review the situation of the Yemeni detainees on an individual case-by-case basis; transfer detainees facing prosecution to the United States to be tried in federal courts; and transfer convicted detainees to federal prisons to serve the remainder of their sentences.



CHAPTER 1  
INTRODUCTION



## INTRODUCTION

1. In the aftermath of the terrorist attacks of September 11, 2001, the United States Government decided to open a detention center at the U.S. Naval Base in Guantanamo Bay, Cuba, to hold individuals captured in Afghanistan and other countries in the context of the “war against terrorism.” The United States administration considered that holding detainees outside of the territory of the United States would deprive federal courts of jurisdiction over detainees’ claims; a premise that was found unconstitutional seven years later.
2. The first prisoners arrived on January 11, 2002. Since that day, the Inter-American Commission on Human Rights (IACHR) has been looking at the situation of Guantanamo detainees from different perspectives. The initial perspective was the issuance, two months after the opening of the facility, of precautionary measures of a general nature to require the definition of the legal status of the detainees. Whereas the precautionary measures have evolved over time and have concerned many specific issues, such as allegations of abuse and torture of detainees, they are now oriented towards the objective of definitively closing the prison.
3. This report examines the situation of detainees at Guantanamo from an overall perspective. It addresses the major issues surrounding the detainees’ right to personal integrity and looks at how domestic remedies are functioning in the U.S. legal system. It further assesses the question of access to legal defense; the functioning of the military commissions and of the periodic review boards; and it looks at the manner in which transfers of detainees are being conducted. While the IACHR addresses these and other legal issues from a human rights perspective, it also takes into consideration other layers of legal interpretation and application, notably that of international humanitarian law.

### **A. Background**

4. On December 12, 2001, the Inter-American Commission issued a Resolution on terrorism and human rights condemning the attacks of September 11, 2001.<sup>1</sup> The resolution affirmed that “States have the right and indeed the duty to defend themselves against th[e] international crime [of terrorism] within the framework of

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<sup>1</sup> IACHR, Resolution, Terrorism and Human Rights, December 12, 2001. Available at: <http://www.cidh.org/Terrorism/Eng/part.t.htm>



international instruments that require domestic laws and regulations to conform with international commitments.” The IACHR further referred to the debate over the adoption of anti-terrorist initiatives that included military commissions and other measures.

5. Also as a response to the terrorist attacks, on June 3, 2002, the OAS General Assembly adopted the Inter-American Convention Against Terrorism, in which OAS Member States reaffirmed the “need to adopt effective steps in the inter-American system to prevent, punish and eliminate terrorism through the broadest cooperation.” The Convention explicitly recognized the requirement that anti-terrorist initiatives must be undertaken in full compliance with member states’ existing obligations under international law, including international human rights law.
6. As a follow up to its resolution, in 2002 the IACHR issued a Report on Terrorism and Human Rights elaborating upon the manner in which international human rights requirements regulate state conduct in responding to terrorist threats.<sup>2</sup> In this report, the IACHR examined counter-terrorism initiatives in relation to several core international human rights. It addressed the minimum requirements of international human rights and humanitarian law in respect of those rights and evaluated the manner in which these requirements may impact upon a variety of anti-terrorism practices.

## ***B. Methodology***

7. As part of the preparation of this report, the Inter-American Commission organized an expert meeting on the situation of detainees held at Guantanamo Bay to receive specialized input on the different areas covered by the report. The meeting was attended by eleven experts from different backgrounds. The participants included Clifford M. Sloan, at the time Special Envoy for Guantanamo Closure at the U.S. Department of State, officials in the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel for the Military Commissions, habeas counsel representing Guantanamo detainees before federal courts, a psychiatric and medical expert in numerous cases involving detainees at Guantanamo, civil society organizations, scholars, as well as members of the office of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>3</sup> The information gathered in this high profile meeting enabled the

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<sup>2</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002. Available at: <http://www.cidh.org/Terrorism/Eng/toc.htm>

<sup>3</sup> The expert meeting took place at the IACHR’s headquarters in Washington D.C. on October 3, 2013. The participants included Prof. David D. Cole (Professor of constitutional law, national security and criminal justice at Georgetown University Law Center), J. Wells Dixon (senior staff attorney at the Center for Constitutional Rights and representative of Guantanamo detainees in federal courts and before military commissions), Prof. Marc Falkoff (Associate Professor of criminal law at Northern Illinois University College of Law and principal lawyer in the habeas representation of seventeen Guantanamo prisoners), Prof. Jonathan Hafetz (Associate Continues...

Commission to view the matter under consideration from multiple perspectives. The Commission would like to express its gratitude for the generous participation and the invaluable input on the part of the experts who attended the meeting.

8. In the drafting of this report, the IACHR considered information received in the context of public hearings and working meetings held before the Commission and materials submitted in the processing of precautionary measures and individual petitions. The report also relies on official public information obtained from governmental sources, reports issued by UN bodies, academic research studies and information published by non-governmental organizations and media outlets.
9. The IACHR regrets that it was not allowed to visit the detention center at Guantanamo Bay, which would have permitted it to collect firsthand information for the preparation of the report. In fulfilling the mandate given by the OAS Member States, the IACHR conducts working visits to prisons and other places of detention throughout the region, through its Rapporteurship on the Rights of Persons Deprived of Liberty. These visits have the purpose of verifying the general situation of the prison systems and issuing concrete recommendations to the States. The IACHR requested the consent of the United States to conduct a visit to the detention facility at Guantanamo. The U.S. Government responded that it would allow the visit with the condition that the Commission did not communicate with the detainees, a limitation that is contrary to the IACHR's Rules of Procedure and the necessary independence and autonomy with which the IACHR must work.

### ***C. Structure of the report***

10. The present report follows a rights-based approach in which the IACHR examines three main areas of concern within the established framework of several core international human rights, in particular the rights to personal liberty and security, to humane treatment, to a fair trial and to judicial protection. The Commission starts with a brief overview of its initiatives regarding the human rights situation at Guantanamo and how it has addressed the issue through the use of its different mechanisms. Next, it assesses the conditions of detention, access to justice and the initiatives towards the closure of the detention center.

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Professor at Seton Hall Law School and member of the legal teams in *Boumediene v. Bush* and *Rasul v. Rumsfeld*), Stephanie Selg (Assistant to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Rita Siemion (staff attorney at Human Rights First, advocacy counsel in the Law and Security Program), Ashika Singh (Attorney Adviser at the Office of Political Military Affairs, Department of State's Office of the Legal Adviser), Clifford M. Sloan (Special Envoy for Guantanamo Closure at the U.S. Department of State), Captain Edward S. White (Chief of Litigation at the Office of the Chief Prosecutor for Military Commissions), Major Jason Wright (Office of the Chief Defense Counsel for Military Commissions), and Brigadier General (Ret) Stephen N. Xenakis, M.D. (retired medical corps officer in the U.S. Army and psychiatric and medical expert in numerous cases involving detainees at Guantanamo).

11. Chapter 3 begins by focusing on the legal status of prisoners and on how human rights law and international humanitarian law should be applied to afford individuals the most favorable standards of protection available under applicable law. The report further elaborates on the requirements that must be met in order to ensure that detention that takes place in the context of an armed conflict is not unjust and does not become arbitrary. This chapter also addresses the major issues surrounding the detainees' right to personal integrity, in particular the authorized use of torture in interrogations during the early years of the Guantanamo detention facility, and the role and responsibility of health professionals who participated or condoned those acts. The IACHR also looks at how the U.S. Government has dealt with the hunger strikes, which have become the main form of protest at Guantanamo.
12. Access to justice for Guantanamo detainees has been one of the main concerns of the IACHR. Chapter 4 starts by assessing some of the challenges brought before courts regarding issues left unresolved in *Boumediene v. Bush*, such as the legality of detention and evidentiary issues. It moves next to examine how the proceedings before military commissions at Guantanamo have evolved over time and, in particular, the reform introduced by the Military Commissions Act (MCA) of 2009. Special attention is given to significant improvements included in the 2009 MCA, as well as to several structural defects and practical limitations in the implementation of the military commissions. The IACHR also expresses some concerns regarding the rights to equal protection before the law and non-discrimination. This chapter also addresses the right to legal representation and the important challenges that Guantanamo detainees still face when trying to exercise their right to defense. Further, in assessing the right to periodic review of detention, the IACHR turns to the Periodic Review Board process established in 2011 and analyzes whether it meets international human rights and humanitarian law standards. This chapter also explains the IACHR's concerns regarding the lack of judicial review of claims relating to conditions of confinement at Guantanamo.
13. The Inter-American Commission has repeatedly called for the immediate closure of the detention center at Guantanamo Bay. Although there is national and international consensus on the need to close the facility, there appears to be no clear exit strategy. Chapter 5 looks at the steps taken by the Executive in recent years to accomplish its goal of closing Guantanamo, and makes an assessment of the current situation of the three categories of prisoners currently held: detainees cleared for transfer; detainees facing criminal charges before military commissions; and detainees designated for continued detention (or who had been charged but are currently not considered for prosecution). The IACHR reviews the challenges to detainees' transfers, particularly the restrictions imposed by Congress, and the need to explore all potential avenues in order to accelerate the transfers. Any avenue, however, should respect the principle of *non-refoulement*, an aspect that is developed in this chapter. The IACHR also considers the situation of detainees from Yemen, which, if resolved, could be the key to the closure of Guantanamo.
14. Finally, the Inter-American Commission's report concludes with a series of specific recommendations that are intended to guide the United States in closing the detention facility at Guantanamo in full compliance with its international human rights obligations.

## ***D. Preparation and approval of the report***

15. The IACHR considered and approved the draft version of this report on January 30, 2015. Pursuant to Article 60(a) of its Rules of Procedure, the Commission forwarded the draft report to the Government of the United States on February 9, 2015, and requested it to present its observations within 30 days. On February 19, 2015, the United States requested an extension until March 27, 2015. By letter dated February 27, 2015, the IACHR informed the State that the requested extension had been granted. The United State filed its observations on March 30, 2015. In keeping with its Rules of Procedure, the Commission has analyzed the State's observations and has included those that it deemed pertinent in this final version of the report.



CHAPTER 2  
EVOLUTION OF THE IACHR  
INITIATIVES ON GUANTANAMO



## EVOLUTION OF THE IACHR INITIATIVES ON GUANTANAMO

### A. *The IACHR's mandate*

16. 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.<sup>4</sup> 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.
17. The Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the universal and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to Member States.<sup>5</sup>
18. In its response to this report, the Government of the United States holds that, although it has undertaken a political commitment to uphold the American Declaration, this is a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory States.<sup>6</sup> According to the well-established and long-standing jurisprudence and practice of the inter-American system, however, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including in particular those States that are not

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<sup>4</sup> Organization of American States, Department of International Law, Charter of the Organization of American States, Signatories and Ratifications. Available at: [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States\\_sign.htm#United States](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm#United States)

<sup>5</sup> See, generally, IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al., United States, July 21, 2011, para. 118; IACHR, Report N° 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz, et al.*, United States, July 12, 2010; IACHR, Report N° 63/08, Case 12.534, *Andrea Mortlock, United States*, July 25, 2008; IACHR, Report N° 40/04, Case 12.053, *Maya Indigenous Community, Belize*, October 12, 2004; IACHR, Report N° 75/02, Case 11.140, *Mary and Carrie Dann*, United States, December 27, 2002; IACHR, Report N° 62/02, Case 12.285, *Michael Domingues*, United States, October 22, 2002.

<sup>6</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 2.



parties to the American Convention on Human Rights.<sup>7</sup> These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter.<sup>8</sup> Articles 106 and 150 of the Charter authorize the Inter-American Commission to protect those human rights enunciated and defined in the American Declaration. This competence is expressly set forth in Article 1 of the Commission's Statute, approved in 1979 by OAS General Assembly Resolution No. 447.<sup>9</sup>

19. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration,<sup>10</sup> as well as the customary legal status of the rights protected under many of the Declaration's core provisions. Therefore, as a source of law and legal obligation, the United States must implement the rights established in the American Declaration in practice within its jurisdiction.<sup>11</sup>
20. 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.<sup>12</sup> Therefore, in its decisions on individual cases, the Commission has repeatedly interpreted the American Declaration as requiring States to adopt measures to give legal effect to the rights contained in the American Declaration.<sup>13</sup>
21. 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 the Commission's precautionary measures and with its recommendations more generally.

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<sup>7</sup> See I/A Court H.R., *Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights"*, July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45.

<sup>8</sup> Charter of the Organization of American States, Articles 3, 16, 51.

<sup>9</sup> I/A Court H.R., *Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights"*, July 14, 1989, Ser. A Nº 10 (1989), para. 41.

<sup>10</sup> See e.g. OAS General Assembly Resolution 314, AG/RES. 314 (VII-O/77), June 22, 1977 (entrusting the Inter-American Commission with the preparation of a study to "set forth their obligations to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 371, AG/RES (VIII-O/78), July 1, 1978 (reaffirming its commitment to "promote the observance of the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 370, AG/RES. 370 (VIII-O/78), July 1, 1978 (referring to the "international commitments" of OAS member states to respect the rights recognized in the American Declaration of the Rights and Duties of Man).

<sup>11</sup> See IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al., United States, July 21, 2011, paras. 115 and 117.

<sup>12</sup> Statue of the Inter-American Commission on Human Rights, Article 20(b).

<sup>13</sup> IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al., United States, July 21, 2011, para. 118.

22. In the framework of this mandate given by the States, the Inter-American Commission has closely monitored the human rights situation of persons detained at the U.S. Naval Base in Guantanamo Bay since the opening of the detention center on January 11, 2002. According to inter-American human rights standards, the United States is not only obligated to respect the rights of all persons within its territory, but also of those present in the territory of another State but subject to the effective authority and control of its agents.<sup>14</sup> Therefore, the IACHR is competent to monitor the international human rights obligations of the United States vis-à-vis the persons detained in Guantanamo.
23. The IACHR has been the only international body to use all its mechanisms to address this issue. It has granted precautionary measures, adopted resolutions, issued an admissibility report in an individual case, held public hearings and working meetings, requested that the U.S. Government accept a visit to the detention facility, published press releases, and organized an expert meeting.<sup>15</sup>

## ***B. Precautionary measures***

24. In serious and urgent situations, the Inter-American Commission may request that a State adopt precautionary measures to prevent irreparable harm to persons under its jurisdiction.<sup>16</sup> This has been one of the main mechanisms used by the IACHR to address the human rights situation of the persons detained in Guantanamo.
25. The Inter-American Commission granted four precautionary measures in favor of detainees held at Guantanamo Bay. The first request received was presented on behalf of all the detainees who were being held at Guantanamo in 2002 (PM 259-02). The Commission later received three additional requests for precautionary measures presented in favor of three detainees, Omar Khadr in 2006 (PM 8-06), Djamel Ameziane in 2008 (PM 211-08), and Moath al-Alwi en 2015 (PM 46-15).

### *Precautionary Measure 259/02 - Persons detained by the United States in Guantanamo Bay*

26. The scope of this precautionary measure has evolved through three different stages. First, the IACHR focused exclusively on the legal status of the detainees, with the

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<sup>14</sup> IACHR Report No. 112/10, Inter-State Petition IP-02, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, October 21, 2010.

<sup>15</sup> IACHR, Precautionary Measure 259/02 – Detainees held by the United States in Guantanamo Bay, March 12, 2002; Precautionary Measure 8/06 – Omar Khadr, United States, March 21, 2006; Precautionary Measure 211/08 Djamel Ameziane, August 20, 2008; Resolution No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006; Resolution No. 2/11, Regarding the Situation of the Detainees at Guantanamo Bay, Precautionary Measure 259-02, July 22, 2011; Report No. 17/12, Djamel Ameziane, P-900-08, United States, March 20, 2012. A list of the public hearings and working meetings, press releases, and requests to conduct a visit is available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Resol>.

<sup>16</sup> Rules of Procedure of the Inter-American Commission on Human Rights, Article 25.

requirement that the Government provide a definition of that status for each person held. In a second stage, the Commission requested the United States to investigate and punish all instances of torture and other ill-treatment. Finally, given the failure of the State to comply with the precautionary measures, the IACHR requested, among other steps, that the detention facility be immediately closed.

27. On February 25, 2002, the IACHR received a request for precautionary measures in favor of the 254 detainees who were being held at Guantanamo at that time. The request indicated that these detainees were transported by the United States to Guantanamo Bay beginning on or about January 11, 2002 following their capture in Afghanistan in connection with a military operation led by the United States against the former Taliban regime in that country and against Al Qaeda. The request claimed that the detainees at Guantanamo Bay were at risk of irreparable harm because the United States refused to treat them as prisoners of war until a competent tribunal determined otherwise in accordance with the Third Geneva Convention of 1949. The request also alleged that the detainees had been held arbitrarily, incommunicado, and for a prolonged period; and that they had been interrogated without access to legal counsel. Further, according to the request, certain detainees were at risk of trial and possible death sentences before military commissions that failed to comply with established principles of international law.
28. On March 12, 2002, the IACHR granted precautionary measures requesting that the United States take the “urgent measures necessary to have the legal status of the detainees determined by a competent tribunal.”<sup>17</sup> The Commission considered that, without this determination, the fundamental and non-derogable rights of the detainees might not be recognized and guaranteed by the United States. As indicated above, in the course of monitoring these measures, the Inter-American Commission extended the scope of the precautionary measures on two subsequent occasions.
29. On October 28, 2005, the IACHR required the United States to thoroughly and impartially investigate and to prosecute and punish all instances of torture and other ill-treatment that could have been perpetrated against detainees at Guantanamo. It also requested that the United States fully respect the *non-refoulement* principle, which prohibits the transfer and deportation of individuals to countries where they may run the risk of being tortured, and indicated that diplomatic assurances should not be used to avoid this obligation.
30. Following the hunger strike initiated in February 2013 by various detainees to protest their state of indefinite detention, and taking into account the allegations of widespread abuse and mistreatment and the failure of the United States to comply with the precautionary measures, on July 23, 2013 the Inter-American Commission decided to extend once again, this time on its own initiative, the scope of the measures. The IACHR requested that the Government of the United States proceed

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<sup>17</sup> IACHR, Precautionary Measure 259/02 – Detainees held by the United States in Guantanamo Bay, March 12, 2002.

to immediately close the detention facility; transfer the detainees to their home country or third countries in observance of the obligation of *non-refoulement*; expedite the release of those already cleared for transfer; and house any detainees subject to trial in appropriate conditions and accord them applicable due process rights.

### *Precautionary Measure 8/06 – Omar Khadr, United States*

31. On January 17, 2006, the IACHR received a request for precautionary measures in favor of Omar Khadr, a 19-year-old Canadian citizen detained in Guantanamo.<sup>18</sup> According to the information received during a hearing held on March 13, 2006, in the context of the IACHR's 124<sup>th</sup> period of sessions, Khadr was on trial before a military commission in Guantanamo for a crime allegedly committed in Afghanistan when he was 15 years old. During his detention and interrogation by military personnel, he was allegedly denied medical attention; his feet and hands were handcuffed for long periods of time, and he was kept in a cell with fierce dogs; he was threatened with sexual abuse; and his head was covered with a plastic bag. The petitioners alleged that the statements taken from him under these circumstances might be admitted as evidence and used against him. During the hearing, the State indicated that the military court could admit all reasonable evidence without clarifying whether statements obtained by torture or cruel, inhumane or degrading treatment may be used in the trial.
32. On March 21, 2006, the IACHR granted precautionary measures in favor of Omar Khadr. The Commission requested that the State, *inter alia*, adopt the measures necessary to ensure that the beneficiary would not be subjected to torture or cruel, inhumane, or degrading treatment and to protect his right to physical, mental, and moral integrity, including measures to prevent him from being held incommunicado for long periods or subjected to forms of interrogation that infringe international standards of humane treatment. The IACHR also requested that the State respect the prohibition on the use of any statement obtained by means of torture or cruel, inhumane, or degrading treatment against the beneficiary, and investigate the events and bring to justice those responsible, including those implicated when the doctrine of "management accountability" is applied.
33. In October 2010 Mr. Khadr pleaded guilty to five war crimes and agreed to a sentence of eight years, with no credit for time served, with the first year spent in U.S. custody. In exchange for that plea, he was promised he would be transferred to Canada to serve out the rest of his sentence. Mr. Khadr was finally transferred to a maximum security facility in Edmonton, Alberta, Canada, in September 2012.<sup>19</sup> In February 2014 he was moved to a medium-security prison in the same province.<sup>20</sup>

<sup>18</sup> IACHR, Precautionary Measure 8/06 – Omar Khadr, United States, March 21, 2006. Available at: <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#MC806>

<sup>19</sup> See CBC News Canada: Omar Khadr returns to Canada, September 29, 2012. Available at: <http://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754>.

<sup>20</sup> See CBC News Canada: Omar Khadr moves to medium-security prison. Available at: <http://www.cbc.ca/news/canada/toronto/omar-khadr-moves-to-medium-security-prison-1.2532793>

In view of these circumstances, on July 30, 2013, the Inter-American Commission lifted the precautionary measures granted on behalf of Omar Khadr, in accordance with Article 25(6) of the Rules of Procedure in force at the time.<sup>21</sup>

#### *Precautionary Measure 211/08 – Djamel Ameziane, United States*

34. On August 20, 2008, the IACHR granted precautionary measures on behalf of Djamel Ameziane.<sup>22</sup> The request alleged that Ameziane was detained by United States agents in Kandahar, Afghanistan, in January 2001 and taken to Guantanamo, where he was subjected to torture. According to the information provided at that time, Ameziane was in danger of being deported to his native country, Algeria, where he could be subjected to cruel, inhumane and degrading treatment. The Commission requested the United States to immediately take the measures necessary to ensure that Ameziane would not be subject to torture or to cruel, inhumane or degrading treatment while in its custody and to make certain that he would not be deported to any country where he might be subjected to torture or other mistreatment.
35. Djamel Ameziane was transferred from Guantanamo to Algeria on December 5, 2013, and reportedly imprisoned in secret by the Algerian authorities from the time he arrived in the country until December 16, 2013. According to the information provided to the IACHR by Djamel Ameziane's representatives, he was awaiting a reply from the government of Canada to his request to resettle in that country. They also indicated that in 2010 Luxembourg had offered to receive him, and that more recently other countries had also extended offers for Djamel Ameziane to settle in their respective territories. The Inter-American Commission issued a press release condemning the forced transfer of Djamel Ameziane from Guantanamo to Algeria, in violation of the principle of *non-refoulement*, which prohibits transfers and deportations of individuals to countries where they may run the risk of being tortured.<sup>23</sup>

#### *Precautionary Measure 46/15 – Moath al-Alwi, United States*

36. On March 31, 2015, the IACHR adopted Resolution 10/2015 in which it requested the Government of the United States to adopt precautionary measures on behalf of Moath al-Alwi.<sup>24</sup> The request alleged that the beneficiary, a 35 year-old Yemeni, has suffered from threats and acts of violence against his life and personal integrity since his detention in Guantanamo more than 12 years ago. The information submitted by the applicants suggests that the beneficiary is detained in severe

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<sup>21</sup> Article 25(6) of the IACHR's Rules of Procedure approved in 2009 and modified on September 2, 2011: "Precautionary Measures: [...] The Commission shall evaluate periodically whether it is pertinent to maintain any precautionary measures granted."

<sup>22</sup> IACHR, Precautionary Measure 211/08 – Djamel Ameziane, United States, August 20, 2008. Available at: <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#MC21108>

<sup>23</sup> Press Release 103/13: IACHR Condemns Forced Transfer of Djamel Ameziane from Guantanamo to Algeria, December 19, 2013. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/103.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/103.asp)

<sup>24</sup> IACHR, Resolution 10/2015, Precautionary Measure No. 46-15, Matter of Moath al-Alwi regarding the United States of America, March 31, 2015.

circumstances which include a wide range of measures such as alleged threats, humiliation, sexual abuse, physical and psychological attacks, as well as lack of adequate medical care.

37. The Commission requested the United States to adopt the necessary measures to protect the life and personal integrity of Mr. al-Alwi; to guarantee that the detention conditions are adequate in accordance with applicable international standards; to ensure access to medical care and treatment; and to report on the actions taken to investigate the presumed facts that led to the adoption of this precautionary measure to avoid the repetition of the alleged circumstances.

### **C. Resolutions**

38. In keeping with its mandate to monitor the human rights situation in the hemisphere, the Inter-American Commission has published two resolutions regarding the situation of the detainees held at Guantanamo Bay.
39. On July 28, 2006, the Commission issued Resolution No. 2/06 on the Guantanamo Bay Precautionary Measures indicating that the United States' failure to give effect to the precautionary measures had resulted in irreparable harm to the fundamental rights of the detainees and urging the State, for the first time, to close the detention facility and to remove the detainees through a process that complied with its obligations under international law.<sup>25</sup>
40. The IACHR stated that "over four years after the Commission's measures were issued, the legal status of the detainees remain[ed] unclear, and it [was] uncertain whether or to what extent independent investigations into allegations of mistreatment at Guantanamo Bay ha[d] been undertaken or what measures ha[d] been taken to ensure that detainees [were] not removed to jurisdictions where they may be subjected to torture or other cruel, inhuman or degrading treatment or punishment."<sup>26</sup>
41. The Inter-American Commission took note of the June 29, 2006, decision of the U.S. Supreme Court in *Hamdan v. Rumsfeld* in which the Court struck down the military commissions that the United States proposed to use to try the detainees at Guantanamo Bay, based in part upon concerns that the commissions did not satisfy the minimum protections under Common Article 3 to the Geneva Conventions.

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<sup>25</sup> IACHR, Resolution No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006. Available at: <http://www.cidh.oas.org/resolutions/resolution2.06.htm>

<sup>26</sup> IACHR, Resolution No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006, para. 3.

42. In its recommendation the IACHR resolved to:

1. INDICATE that the failure of the United States to give effect to the Commission's precautionary measures has resulted in irreparable prejudice to the fundamental rights of the detainees at Guantanamo Bay including their rights to liberty and to humane treatment.
2. URGE the United States to close the Guantanamo Bay facility without delay.
3. URGE the United States to remove the detainees from Guantanamo Bay through a process undertaken in full accordance with applicable forms of international human rights and humanitarian law.
4. URGE the United States to take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment or punishment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Further, where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation.
5. URGE the United States to comply with its obligation to investigate, prosecute and punish any instances of torture or other cruel, inhuman or degrading treatment or punishment that may have occurred at the facility, even in the event that Guantanamo Bay facility is closed.

43. On July 22, 2011, the Inter-American Commission issued Resolution No. 2/11 Regarding the Situation of the Detainees at Guantanamo Bay, United States, MC 259-02.<sup>27</sup> In this second resolution, the IACHR addressed the U.S. position on the detainees' right to judicial review of the bases for their ongoing deprivation of liberty. In this respect, the Commission stated that the fact that the U.S. courts consistently deferred to the Executive rendered this right illusory.

44. The Inter-American Commission also referred to the 78 detainees who, according to the Executive, could be held indefinitely without criminal charges in light of the alleged threat that they presented to U.S. national security but against whom there was insufficient evidence to secure a conviction in the courts of justice. The

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<sup>27</sup> IACHR, Resolution No. 2/11 Regarding the Situation of the Detainees at Guantanamo Bay, United States, MC 259-02, July 22, 2011. Available at: <http://www.cidh.oas.org/pdf%20files/Resolution%202-11%20Guantanamo.pdf>

Commission considered that, under these circumstances, the detention of these individuals constituted a violation of their fundamental rights.

45. The IACHR further reiterated its profound concern with respect to the detention of children at Guantanamo Bay and the transfers of detainees that do not respect the *non-refoulement* principle. The Commission also reminded the United States that, in situations of armed conflict, both international human rights law and international humanitarian law apply, and that it is required to conduct independent, impartial investigations into alleged acts of torture by virtue of its international obligations.
46. The Commission concluded by urging the United States to:

[...] close the Guantanamo Bay facility without delay and arrange for the trial or release of the detainees. These trials must be conducted expeditiously, while respecting the defendants' rights to due process and to all of the judicial guarantees. The Commission further urges the United States to reveal the identities of those detainees who have been cleared for transfer and to ensure that they and all similarly-situated detainees are afforded an adequate, individualized examination of the factual basis for their transfer to a particular country before an independent and impartial decision-making.

## **D. Public hearings**

47. In the framework of the ordinary periods of sessions held in March and October each year, the Inter-American Commission conducts public hearings at its headquarters in Washington D.C. These hearings are one of the main mechanisms used by the IACHR to monitor the current human rights situation in the Americas and offer an opportunity for victims, civil society and States to have a meaningful exchange on critical issues.
48. As part of its ongoing efforts to monitor the human rights situation at Guantanamo Bay, the Commission conducted eleven hearings between 2002 and March 2015 to address various aspects of the human rights situation of the detainees. Six of those hearings were convened to follow up on the precautionary measures issued on behalf of the persons detained in Guantanamo (PM 259-02).<sup>28</sup> One of these six hearings also followed up on the precautionary measure issued by the IACHR on behalf of Djamel Ameziane (PM 211/08).<sup>29</sup>

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<sup>28</sup> IACHR's hearings on Precautionary Measure 259/02 in favor of detainees being held by the United States in Guantanamo Bay: 116 Period of Sessions, October 16, 2002; 118 Period of Sessions, October 20, 2003; 122 Period of Sessions, March 3, 2005; 123 Period of Sessions, October 20, 2005; 128 Period of Sessions, July 20, 2007; 133 Period of Sessions, October 28, 2008. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Audiencias>

<sup>29</sup> IACHR's hearing, Precautionary Measure 259/02 in favor of detainees being held by the United States in Guantanamo Bay, and PM 211/08, Djamel Ameziane, 133 Period of Sessions, October 28, 2008. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Audiencias>



49. Also, on October 29, 2010, the Commission held a hearing on the admissibility of Petition 900-08 presented on behalf of Ameziane in which it received allegations from the petitioners and the State.<sup>30</sup> On March 13, 2013, the IACHR held a hearing on the request for a precautionary measure presented on behalf of Omar Khadr, which was later granted (See PM 8-06 *supra*).<sup>31</sup>
50. The three most recent hearings on Guantanamo were held on March 12, 2013, October 28, 2013, and March 16, 2015.<sup>32</sup> The Inter-American Commission received information on the latest developments regarding the human rights situation of the detainees in Guantanamo, in particular with respect to the obstacles to the transfer of detainees, the hunger strike that started in February 2013 as a measure to protest the indefinite detention, the forced feedings, the increased segregation and isolation of detainees, and the use of classification laws by the U.S. Government to restrict investigation of and redress for acts of torture and other cruel, inhuman, and degrading treatment.

## ***E. Individual petition system***

51. The Inter-American Commission has also addressed the human rights situation in Guantanamo through the individual case system, which is used by victims and civil society in the Americas to hold governments accountable for human rights violations.
52. In 2012 the IACHR declared admissible the case of Djamel Ameziane, an Algerian national who was detained in Guantanamo without charge since 2002 and who had been cleared for release in 2008. The petitioners alleged that Ameziane was tortured at Guantanamo and that the legality of his detention had not been determined by a competent court. They further claimed that Ameziane was at risk of being transferred to Algeria, where he feared persecution.
53. Despite the petitioners' concerns and the IACHR's request to the State, Ameziane was forcibly repatriated to Algeria on December 5, 2013, in violation of the principle

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<sup>30</sup> IACHR's hearing, Petition 900-08, Djamel Ameziane, United States, 140 Period of Sessions, October 29, 2010. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Audiencias>

<sup>31</sup> IACHR's hearing, Precautionary Measure 8/06, Omar Khadr, United States, 124 Period of Sessions of the IACHR, March 13, 2006. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Audiencias>

<sup>32</sup> IACHR's hearing, Situation of the detainees in Guantanamo, 147 Period of Sessions, Human Rights Situation of Detainees at Guantanamo Naval Base, United States, 149 Period of Sessions, and Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 Period of Sessions. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Audiencias>

of *non-refoulement*. As indicated above, the Inter-American Commission publicly condemned this forced repatriation.<sup>33</sup>

54. The IACHR concluded that the case is admissible regarding claims concerning the alleged violation of Articles I, II, III, V, VI, XI, XVIII, XXV and XXVI of the American Declaration.<sup>34</sup> This decision on admissibility marks the first time the Inter-American Commission accepted jurisdiction over the case of an individual detained in Guantanamo. In this initial stage, the IACHR ruled that the United States was exercising its jurisdiction with respect to the detention at the U.S. airbase in Kandahar, Afghanistan, as well as his detention in Guantanamo for more than a decade. Although these acts have taken place outside the territory of the United States, based on its previous jurisprudence, the IACHR concluded that extraterritorial actions can be brought within its competence when the victim is subject to the effective authority and control of the agents of the State denounced. The case is pending a decision on the merits.

## ***F. Requests to visit the detention facility***

55. In fulfilling its mandate, the IACHR, through its Rapporteurship on the Rights of Persons Deprived of Liberty, conducts working visits to jails and all other places where persons are deprived of their liberty throughout the region. These visits have the purpose of verifying the general situation of the prison systems and issuing concrete recommendations to the States. In the last decade, the Rapporteurship has visited detention facilities in 16 Member States.<sup>35</sup>
56. The Inter-American Commission carries out visits to prison facilities on the condition that it will have direct and private access to those being detained. According to Article 57 of its Rules of Procedure, “[...] any on-site observation agreed upon by the IACHR shall be carried out in accordance with the following standards:
- a. The Special Commission or any of its members shall be able to interview any persons, groups, entities or institutions freely and in private;
  - b. The State shall grant the necessary guarantees to those who provide the Special Commission with information, testimony or evidence of any kind; [...]

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<sup>33</sup> Press Release 103/13: IACHR Condemns Forced Transfer of Djamel Ameziane from Guantanamo to Algeria, December 19, 2013. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/103.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/103.asp)

<sup>34</sup> IACHR, Report No. 17/12, Djamel Ameziane, P-900-08, United States, March 20, 2012.

<sup>35</sup> Argentina (December 2004, December 2006, April 2009 and June 2010); Bolivia (November 2006); Brazil (June 2005 and September 2006); Chile (August 2008); Colombia (November 2005); Dominican Republic (August 2006); Ecuador (May 2010); El Salvador (October 2010); Guatemala (November 2004); Haiti (June 2007); Honduras (December 2004 and April 2012); Mexico (August 2007); Paraguay (September 2008); Suriname (May 2011); United States (July 2009 and April 2014); and Uruguay (May 2009 and July 2011).

e. the members of the Special Commission shall have access to the jails and all other detention and interrogations sites and shall be able to interview in private those persons imprisoned or detained;”

57. In 2007 the IACHR requested the United States’ consent to conduct a visit to the detention facility at the U.S. Naval Base in Guantanamo. Representatives of the U.S. government communicated to the Commission that the visit could take place, but that the delegation would not be allowed to communicate freely with the detainees, a limitation the IACHR considered unacceptable. On March 4, 2008, the President of the IACHR reported the following to the Committee on Juridical and Political Affairs of the OAS Permanent Council:<sup>36</sup>

The Commission also sought permission during 2007 to carry out an on-site visit to Guantanamo Bay, Cuba, to monitor conditions of detention there for the hundreds of nationals of various countries who have been held there for extended periods. While representatives of the U.S. Government did indicate that the Commission could visit the base at Guantanamo, they informed the Commission that it would not be permitted to freely interview detainees. The Commission declined to conduct a visit under such limitations.

58. In 2011, the IACHR reiterated its request for the United States’ consent to conduct a visit. The Commission received an answer from the United States on August 26, 2011, that indicates that permission was granted under the same “terms and conditions” as communicated to the Commission in 2007. One of these conditions indicates that the United States only recognizes the International Committee of the Red Cross (ICRC) as the protecting body with respect to the detainees held at Guantanamo, and that, accordingly, it provides only the ICRC direct access to the detainees.
59. On July 24, 2013, the Inter-American Commission reiterated its request to carry out a visit to the U.S. detention facility at Guantanamo, a visit that would include direct and private access to the detainees and would have no other preconditions. The IACHR received the same reply from the U.S. Government.

## ***G. Press releases***

60. Since 2006 the Inter-American Commission has issued nine press releases regarding the human rights situation of the persons detained in Guantanamo, in which the IACHR has focused its attention on three main areas of concern: the need

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<sup>36</sup> IACHR, Requests of Permission to Conduct a Visit. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Visita>

to immediately close the detention facility, the conditions of detention, and the forced transfer of Guantanamo detainees.<sup>37</sup>

61. Press Release 29/13 on the indefinite detention of individuals at Guantanamo was the first statement ever made by the IACHR with four United Nations mandate holders. This joint statement calling on the U.S. Government to respect and guarantee the life, health and personal integrity of detainees was issued as a response to the human rights crisis caused by the hunger strike initiated in February 2013 by a group of detainees.<sup>38</sup>

## ***H. Expert meeting***

62. As noted in paragraph 7, on October 3, 2013, the Inter-American Commission organized an expert meeting on the situation of detainees held at Guantanamo Bay in order to receive specialized input for the preparation of the present report. This high level meeting, held at the Commission's headquarters in Washington D.C., was attended by eleven experts from different backgrounds, including Clifford M. Sloan, at the time Special Envoy for Guantanao Closure at the U.S. Department of State. The meeting provided the Commission with valuable information and allowed it to view the matter under consideration from multiple perspectives.

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<sup>37</sup> See IACHR, Decisions regarding the U.S. Detention Center in Guantanamo, Press Releases. Available at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp#Comunicados>

<sup>38</sup> Press Release 29/13: IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantanamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/029.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/029.asp)



CHAPTER 3  
CONDITIONS OF DETENTION



## CONDITIONS OF DETENTION

63. One of the mandates of the Inter-American Commission on Human Rights, fulfilled with the support of its Rapporteurship on the Rights of Persons Deprived of Liberty, is to monitor conditions of confinement in detention facilities throughout the hemisphere. As part of this mandate, the IACHR has closely followed the conditions of detention at the U.S. Naval Base in Guantanamo Bay. In 2005, the Commission extended the scope of precautionary measures 259-02 to request the United States to investigate, prosecute and punish all instances of torture and other ill-treatment that could have been perpetrated at Guantanamo. Since then, the IACHR has monitored the situation through the precautionary measures, public hearings and working meetings.
64. This chapter will focus first on the evolution of the legal status of prisoners at Guantanamo and the changes in the position of the U.S. Government since 2009. It will also address how inter-American human rights standards should be applied in times of armed conflict, in particular how any deprivation of liberty should be conducted in the context of armed conflicts. The chapter will then address the major issues surrounding the detainees' right to personal integrity, in particular the authorized use of torture in interrogations during the early years of the Guantanamo detentions and the role and responsibility of health professionals who participated or condoned those acts. Further, the IACHR will identify some other areas of concern such as prison conditions at Camp 7, problems in the provision of health care adapted to the needs of the detainees, and religious and cultural competence issues. Finally, this chapter will assess how the U.S. Government has dealt with the hunger strikes, which have become the main form of protest at Guantanamo, in light of the State's obligations vis-à-vis persons deprived of liberty.

### ***A. Right to personal liberty and indefinite detention***

65. The right to personal liberty and security and to be free from arbitrary arrest is provided for in Articles I and XXV of the American Declaration as follows:

Article I. Every human being has the right to life, liberty and the security of his person.

Article XXV. No person may be deprived of liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the



legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

66. The IACHR notes that the American Declaration must be interpreted in such a way that its provisions have a useful effect: in other words, they must effectively serve the protective purpose for which they were created.<sup>39</sup> The terms of the American Declaration must, therefore, be interpreted so as to guarantee that the rights it establishes are practical and effective and not theoretical or illusory, and this also applies to the right to personal liberty (Article I) and to be free from arbitrary arrest (Article XXV).
67. Among the numerous guarantees aimed at protecting persons from unlawful or arbitrary interference with their liberty by the State are “the requirements that any deprivation of liberty be carried out in accordance with pre-established law, that a detainee be informed of the reasons for the detention and promptly notified of any charges against them, that any person deprived of liberty is entitled to juridical recourse, to obtain, without delay, a determination of the legality of the detention, and that the person be tried within a reasonable time or released pending the continuation of proceedings.”<sup>40</sup>
68. The American Declaration and other universal and regional human rights instruments were not designed specifically to regulate situations of armed conflict and, thus, they do not contain specific rules governing the use of force and the means and methods of warfare. Consequently, the IACHR looks to and applies definitional standards and relevant rules of international humanitarian law as sources of authoritative guidance when assessing alleged violations of the American Declaration and American Convention in combat situations.<sup>41</sup>
69. In analyzing individual petitions involving alleged abuses by State agents and their proxies in the context of armed conflicts, the Commission invokes the norms provided by both human rights law and international humanitarian law. The Commission proceeds in this manner because both sets of norms apply during armed conflicts, although in many cases international humanitarian law may serve as *lex specialis*, providing more specific standards for analysis. It should be noted, though, that in those cases involving alleged abuses by State agents which do not occur in the context of the hostilities, the IACHR applies human rights norms alone.<sup>42</sup>

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<sup>39</sup> See, *mutatis mutandi*, IACHR, *Report on the use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13, December 30, 2013, para. 133.

<sup>40</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 120.

<sup>41</sup> See, *mutatis mutandi*, IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, February 26, 1999, paras. 10-12.

<sup>42</sup> See, *mutatis mutandi*, IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, February 26, 1999, paras. 10-12.

70. For the same reasons which frequently require the Commission to refer to international humanitarian law in resolving individual cases, “the Commission also finds it necessary to utilize humanitarian law along with human rights law, in general reports [...], for the purpose of analyzing a State’s international responsibility relating to violence, where much of that violence occurs in the context of an armed conflict.”<sup>43</sup>

## 1. The legal status of detainees held at Guantanamo Bay

71. The United States Government holds the position that it has the authority to continuously detain prisoners at the Guantanamo Bay detention facility without charge or trial.<sup>44</sup> In this regard, it has indicated that “[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States.”<sup>45</sup> In its response to this report, the United States claimed that “[t]he detainees who remain at the Guantanamo Bay detention facility continue to be detained lawfully, both as a matter of international law and under U.S. domestic law.”<sup>46</sup> In this regard, the State indicated that, as part of the “ongoing armed conflict with al-Qaida, the Taliban, and associated forces,” the United States has captured and detained enemy belligerents, and is permitted under the law of war to hold them until the end of hostilities.
72. Two months after the United States began transferring individuals to Guantanamo Bay, the Inter-American Commission granted precautionary measures in favor of the detainees held in that facility and requested that the United States take the urgent measures necessary to have the legal status of the detainees determined by a competent tribunal. In its first Resolution on this issue, the Commission asserted that, “without this determination, the fundamental and non-derogable rights of the detainees may not be recognized and guaranteed by the United States.”<sup>47</sup>
73. To understand the question of the indefinite detention of prisoners at Guantanamo Bay, it is important to have a brief overview of the evolution of the legal status of

<sup>43</sup> IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, February 26, 1999, Chapter III, para. 13.

<sup>44</sup> Written submission of the United States Government following the IACHR’s thematic hearing on the “Situation of Human Rights of the Persons Detained at the U.S. Naval Base at Guantanamo Bay” held on October 28, 2013, p. 2.

<sup>45</sup> Response of the United States of America dated October 21, 2005, to Inquiry of the UN Special rapporteurs dated August 8, 2005, Pertaining to Detainees at Guantanamo, p. 3, *cited in* U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Situation of detainees at Guantanamo Bay*, E/CN.4/2006/120, February 27, 2006, para. 19. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>

<sup>46</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 1.

<sup>47</sup> IACHR, Resolution No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006.

these prisoners. In the aftermath of the attacks of September 11, 2001, the United States Congress passed a joint resolution called the Authorization for the Use of Military Force (“AUMF”) that broadly authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [...] in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>48</sup> Therefore, detention and trial of such alleged terrorists is undertaken pursuant to the President’s Commander in Chief and foreign affairs powers.

74. On November 13, 2001, President George W. Bush signed Executive Order No. 66 authorizing the “detention, treatment, and trial of certain non-citizens in the war against terrorism.”<sup>49</sup> The order defines the individuals subject to it as members of the organization known as Al-Qaeda, individuals who have engaged in, aided, or abetted acts of international terrorism or individuals who have knowingly harbored such international terrorists. The order further provides that the President alone would determine which individuals fit within that definition. It also establishes that these individuals shall be tried by military commissions and that they “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”<sup>50</sup>
75. Pursuant to the AUMF and the above-mentioned executive order, hundreds of individuals were captured in Afghanistan and other countries during the months following the attacks of September 11, 2001. The United States Government chose to detain these prisoners in Guantanamo Bay considering that federal courts were unlikely to exercise jurisdiction to consider legal challenges by detainees held without charge or trial. On December 28, 2001, following proposals to detain Al-Qaeda and Taliban members at Guantanamo Bay, Deputy Assistant Attorneys General Patrick Philbin and John Yoo sent a memorandum to the Department of Defense addressing the question as to whether federal courts would have jurisdiction to entertain a petition for a writ of habeas corpus filed by an alien detained at Guantanamo.<sup>51</sup> The memorandum concludes that “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo].” It further notes that the agreement between the United States and Cuba for the lease of Guantanamo Bay expressly provides that “the United States recognizes the continuance of the

<sup>48</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>

<sup>49</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Available at: <http://fas.org/irp/offdocs/eo/mo-111301.htm>

<sup>50</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 7(b)(2).

<sup>51</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense, re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, U.S. Department of Justice, December 28, 2001. Available at: <http://www.torturingdemocracy.org/documents/20011228.pdf>

ultimate sovereignty of the Republic of Cuba over the lands and waters subject to the lease.”<sup>52</sup> Therefore, according to this understanding, Guantanamo Bay was considered to be a law-free zone where officials could detain non-citizens outside the sovereign territory of the United States and without interference from federal courts.

76. With regard to the legal status of prisoners held at Guantanamo, on January 9, 2002, Deputy Assistant Attorney General John Yoo addressed a memorandum to the Department of Defense on “the application of treaties and laws to Al Qaeda and Taliban Detainees.”<sup>53</sup> The memorandum concludes that the Third Geneva Convention applicable to prisoners of war “do[es] not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war” and that “these treaties do not apply to the Taliban militia.”<sup>54</sup> Following the endorsement of this legal opinion by White House counsel Alberto R. Gonzales, President George W. Bush decided that Al-Qaeda and Taliban detainees were not prisoners of war under the Third Geneva Convention.<sup>55</sup> The IACHR notes that Secretary of State Colin L. Powell requested the President to reconsider that decision given that it would “undermine public support among critical allies” and “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops.”<sup>56</sup>
77. It is in this context that the first prisoners arrived at Guantanamo Bay on January 11, 2002, where they were held in indefinite detention. The United States Government justified the indefinite detention and the denial of the prisoners’ right to challenge the legality of their detention and to any internationally recognized status under the laws of war by classifying them as “enemy combatants,” a distinct category not recognized under international law.
78. The IACHR notes that since President Obama took office in 2009 there have been some changes in the position of the United States Government regarding the legal status of the detainees at Guantanamo Bay. The United States has recognized that the laws of war govern the detention and treatment of the detainees and has

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<sup>52</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense, re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, U.S. Department of Justice, December 28, 2001, p.3.

<sup>53</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense, re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees, from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Department of Justice, January 9, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>

<sup>54</sup> Memorandum for William J. Haynes, II, General Counsel, Department of Defense, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Department of Justice, January 9, 2002, p. 1.

<sup>55</sup> Memorandum for the President, re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R. Gonzales, January 25, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>

<sup>56</sup> Statement of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, IACHR’s Hearing on the human rights situation of detainees at Guantanamo Naval Base, United States, Washington D.C., October 28, 2013.

abandoned the classification of “enemy combatants.” On March 13, 2009, in the face of increased litigation after the Supreme Court’s decision in *Boumediene*,<sup>57</sup> the Government filed a memorandum in every detainee *habeas* case regarding its detention authority relative to the detainees at Guantanamo Bay.<sup>58</sup> This memorandum submitted a new standard for the government’s authority to hold detainees at Guantanamo.

79. In the filing with the federal District Court for the District of Columbia, the Department of Justice, referring to the Supreme Court’s decisions in Hamdi and Hamdan,<sup>59</sup> submitted that the detention authority conferred by the AUMF does not rely on the President’s authority as Commander-in-Chief and that the scope of his authority under this statute relies on the international laws of war (Geneva Conventions and customary international law). The memorandum also provided that individuals who supported Al-Qaeda or the Taliban were detainable only if the support was “substantial.” Therefore, the new standard did not claim authority to hold persons based on insignificant or insubstantial support.
80. In addition, the new administration also carried out a first review process in 2009 to determine the legal status of each detainee held at Guantanamo. The review concluded that of the 240 persons who were detained at that time, 48 “were determined to be too dangerous to transfer but not feasible for prosecution.”<sup>60</sup> Accordingly, these detainees would remain in indefinite detention without criminal charges pursuant to the Government’s authority under the AUMF. As will be developed in the section assessing the right to periodic review of detention, the U.S. Government initiated a second review process in 2013.
81. The Inter-American Commission welcomes the steps taken by the United States since 2009 in refining the Government’s position on its detention authority and the legal status of detainees held at Guantanamo. However, the IACHR notes that despite these changes in the Government’s position, prisoners are still held at Guantanamo indefinitely without charge, 13 years after the opening of the facility. The National Defense Authorization Act (NDAA) has reaffirmed the authority of the AUMF to detain persons suspected of having participated in the September 11 attacks, or who substantially supported Al-Qaeda, the Taliban, or associated forces, without trial until the end of hostilities.<sup>61</sup> As the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated, the NDAA

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<sup>57</sup> *Boumediene v. Bush*, 553 U.S. 723, 769 (2008).

<sup>58</sup> Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re: Guantanamo Bay Detainee Litig., No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009). Available at: <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>. See also, Press Release, Department of Justice, Office of Public Affairs: Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees, March 13, 2009. Available at: <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>

<sup>59</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557, 603-04 (2006).

<sup>60</sup> Final Report of the Guantanamo Review Task Force, January 22, 2010, at 25-26. Available at: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>

<sup>61</sup> National Defense Authorization Act for Fiscal Year 2012, Sec. 1023. Available at: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>.

allows “the US government to indefinitely detain persons suspected of terrorist activities, without establishing their individual culpability in any crime or their actual participation in hostilities.”<sup>62</sup>

82. Although the NDAA for fiscal year 2014 includes some improvements in terms of transfer of detainees held in Guantanamo, the 2012 provision that permits the detention of individuals indefinitely without trial remains in place. In addition, the concern raised by the Inter-American Commission in its 2011 Resolution about the lack of clarity regarding the circumstances that will justify the release of the detainees persists.<sup>63</sup> The AUMF authorized the United States Armed Forces to detain suspected terrorists without trial “until the end of hostilities.” However, given the unconventional nature of this ongoing global conflict, it is not clear when the hostilities would be declared over. Finally, the IACHR notes with concern that, despite the above-mentioned improvements, throughout these years there has been a normalization of the indefinite executive detention regime in Guantanamo.

## 2. The right to personal liberty in the context of non-international armed conflicts

83. It is not clear to what extent the U.S. Government considers the “war on terrorism” to be an international or non-international armed conflict; the distinction is important in order to define the protections guaranteed under international humanitarian law. As indicated *supra*, in 2009 the U.S. Government established that “principles derived from law-of-war rules governing international armed conflicts [...] must *inform the interpretation* of the detention authority” (emphasis added) under the AUMF. However, it contended that this body of law “is less well-codified with respect to our current, novel type of armed conflict against armed groups” than with armed conflicts between States.<sup>64</sup> Therefore, according to the U.S. Government, many of the features of traditional international armed conflict do not apply.
84. Whereas international armed conflicts (armed conflicts between two or more States) are covered by the four Geneva Conventions of 1949 and their First Additional Protocol of 1977, non-international armed conflicts (armed conflicts between a State and an organized non-State armed group or between two or more such groups in a State’s territory) are covered by common Article 3 of the Geneva Conventions and the Second Additional Protocol where applicable; under certain conditions, custom and general principles of law may apply. Since the overthrow of the Taliban government in December 2001 by the American-led invasion of Afghanistan, the “war on terrorism” has been a conflict opposing one or more States,

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<sup>62</sup> Statement of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>63</sup> IACHR, Resolution No. 2/11 Regarding the Situation of the Detainees at Guantanamo Bay, United States, MC 259-02, July 22, 2011.

<sup>64</sup> Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re: Guantanamo Bay Detainee Litig., No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009).

on one side, and armed groups, on the other, in the territory of different States, mainly Afghanistan and Pakistan. Therefore, when assessing the human rights situation of the detainees at Guantanamo Bay, the Inter-American Commission may be required to interpret and apply international human rights law in light of the *lex specialis* of international humanitarian law governing non-international armed conflicts. As the IACHR has previously stated, in this type of conflict, States' international obligations are governed by both the rules of international human rights law and those of IHL.<sup>65</sup> Both regimes of human rights protection must be interpreted and applied in an integral way within the applicable rules of international law to afford individuals the most favorable standards of protection available under applicable law.<sup>66</sup>

85. The Third Geneva Convention of 1949 clearly defines the protections afforded to prisoners of war in international armed conflicts. Although in non-international armed conflicts States and armed groups also detain individuals for security reasons, there is no explicit legal basis for this type of deprivation of liberty. Common Article 3 and the Second Additional Protocol provide certain minimum standards of treatment, but do not specify legal or procedural safeguards. The International Committee of the Red Cross (ICRC) has addressed the very specific issue of “security detention” or “internment” understood as the deprivation of liberty in a non-international armed conflict ordered by the executive for security reasons – i.e. outside criminal proceedings.
86. In an expert meeting organized by Chatham House and the ICRC on procedural safeguards for security detention in non-international armed conflicts,<sup>67</sup> the experts agreed that, although IHL does not provide an explicit legal basis for internment in non-international armed conflicts, “it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat.”<sup>68</sup> Therefore, given that this practice is not prohibited *per se*, the analysis should focus then on the requirements that must be met in order to ensure that the detention is not and does not become arbitrary.
87. In this regard, the experts agreed that security detentions must be “necessary” for “imperative reasons of security” (meaning directly related to the armed conflict); ordered on “permissible grounds” under international law; and there should be some form of review mechanism to initially and then periodically assess the lawfulness of internment (i.e. whether it is or remains necessary for security

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<sup>65</sup> IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II. Doc. 49/13, December 31, 2013, para. 232.

<sup>66</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 8.

<sup>67</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009. Available at: <http://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf>

<sup>68</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, p. 863.

reasons and whether there is a legal basis). According to the discussions, “necessity” gives expression to the fact that internment must be seen as an exceptional measure. It must “be necessary for security reasons, and not just convenient or useful for the interning power” and therefore “internment for the sole purpose of obtaining intelligence is impermissible.”

88. Given that it is a preventive measure, security detention cannot, for instance, be used as a “(disguised) alternative to criminal proceedings.” In this regard, the following two-tiered test can assess whether an individual presents a sufficient threat: (i) whether, on the basis of his or her activity (which as such is not necessarily subject to criminal prosecution), it is “highly likely” or “certain” that he or she will commit further acts that are harmful to the interning Power and/or those it is mandated to assist or protect; and (ii) whether it is necessary to neutralize the threat posed.<sup>69</sup>
89. Finally, the experts stressed the importance of the continuous updating and verification of the information used in the threat assessment leading to internment. Accordingly, what must be avoided is that initial information on the existence of a threat continues to serve as the basis for detention without being corroborated or further updated.<sup>70</sup> It should be noted that several experts argued that an explicit treaty basis for security detentions in IHL would be the most adequate response to the realities on the ground.
90. There are many points of convergence between international humanitarian law and the guarantees afforded by international human rights law with regard to the right to personal liberty in the context of armed conflict. The fundamental human rights protections for individuals apply at all times, in peace, during emergency situations, and in war. Nevertheless, in analyzing the duty of States to protect the security of their citizens, the Inter-American Commission has recognized that reasons of public security may justify restrictions on liberty or the extension of normal periods of preventive or administrative detention.<sup>71</sup>
91. The right to personal liberty and security may potentially be limited, subject to the rules and principles governing derogation as provided in Article 27 of the American Convention on Human Rights. While the American Declaration does not explicitly contemplate the possibility of restricting or suspending the rights prescribed thereunder, the Commission has considered that the derogation criteria derived from the American Convention and general principles of law are properly considered and applied in the context of the Declaration. In addition, the ability of States to take measures derogating from protections under the human rights

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<sup>69</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, p. 865.

<sup>70</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, p. 866.

<sup>71</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 25.



instruments to which they are bound is regulated by the generally recognized principles of proportionality, necessity and nondiscrimination.<sup>72</sup>

92. According to the Inter-American Commission, a State might “be justified in subjecting individuals to periods of preventative or administrative detention for a period longer than would be permissible under ordinary circumstances, where their extended detention is demonstrated to be strictly necessary by reason of the emergency situation.”<sup>73</sup> Any such detention may, however, continue for only that period necessary in light of the situation and must remain subject to non-derogable protections. These include “the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, prompt access to legal counsel, family and, where necessary or applicable, medical and consular assistance, prescribed limits upon the length of prolonged detention, and maintenance of a central registry of detainees.”<sup>74</sup> These protections are also considered to include appropriate judicial review mechanisms to supervise detentions, which must be promptly available upon arrest or detention and at reasonable intervals when detention is extended.
93. The IACHR, together with several United Nations’ mandate holders, has established that the continuing and indefinite detention of individuals without the right to due process in Guantanamo is arbitrary and constitutes a clear violation of international law.<sup>75</sup> This situation is particularly clear with respect to those prisoners who have been cleared for transfer by the Government of the United States of America. With regard to the situation of detainees at Guantanamo, the IACHR has also emphasized that reasons of public security “cannot serve as a pretext for the indefinite detention of individuals, without any charge whatsoever” and that when these security measures are extended beyond a reasonable time they become serious violations of the right to personal liberty.<sup>76</sup>
94. In this sense, the United Nations Committee against Torture has condemned prisoners’ treatment at Guantanamo, noting that indefinite detention constitutes *per se* a violation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>77</sup> In addition, a 2006 report adopted by the UN Economic and Social Council on the situation of detainees in Guantanamo Bay, regrettably still relevant, indicates that, “the objective of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States

<sup>72</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, paras. 50 and 51.

<sup>73</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 140.

<sup>74</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 139.

<sup>75</sup> IACHR, Press Release 29/13: IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantanamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013.

<sup>76</sup> IACHR, Resolution No. 2/11, Regarding the Situation of the Detainees at Guantanamo Bay, Precautionary Measure 259-02, July 22, 2011.

<sup>77</sup> UN Committee Against Torture (CAT), *UN Committee against Torture: Conclusions and Recommendations, United States of America*, 25 July 2006, CAT/C/USA/CO/2, para 22.

again, but to obtain information and gather intelligence on the Al-Qaida network.” In this regard, the report states that “the indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions.”<sup>78</sup>

95. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has reiterated that “all detentions that take place away from the field of battle should be covered by the international law of human rights -- which prohibits prolonged arbitrary detention-- even if they are carried out under a rhetorical “war on terror.””<sup>79</sup> The Special Rapporteur finds that the U.S. practice of holding detainees indefinitely if it is determined that they pose a significant threat to the security of the United States is a violation of the prohibition of torture and ill-treatment under Article 7 of the ICCPR and CAT Articles 1 and 16, as well as of relevant provisions of the American Declaration, as incorporated in the Charter of the Organization of American States.<sup>80</sup>
96. Therefore, based on the above mentioned standards set by both international human rights law and international humanitarian law, the indefinite detention of persons still held at Guantanamo without charge after more than a decade, mainly for the purpose of obtaining intelligence, constitutes a serious violation of their right to personal liberty guaranteed under Article I of the American Declaration. This persistence of prolonged and indefinite detention clearly goes beyond an exceptional and strictly necessary measure ordered for security reasons, and is arbitrary and unjust. Prisoners detained in the context of non-international armed conflicts may only be held for security reasons and they cannot, therefore, be held indefinitely for purposes of interrogation. In this regard, the Inter-American Commission emphatically reiterates the need to adopt concrete measures to end the indefinite detention of detainees at Guantanamo.

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<sup>78</sup> UN Economic and Social Council, E/CN.4/2006/120, February 27, 2006, para. 23. Available at: <http://www.refworld.org/docid/45377b0b0.html>

<sup>79</sup> Statement of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013, p. 4.

<sup>80</sup> Statement of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013, p. 5.

## **B. Right to personal integrity**

97. The right of persons deprived of liberty to humane treatment while under the custody of the State is a universally accepted norm in international law.<sup>81</sup> In its Report on Terrorism and Human Rights the IACHR stated:<sup>82</sup>

Perhaps in no other area is there greater convergence between international human rights law and international humanitarian law than in the standards of humane treatment. While governed by distinct instruments, both regimes provide for many of the same minimum and non-derogable requirements dealing with the humane treatment of all persons held under the authority and control of the state. Moreover, under both regimes the most egregious violations of humane treatment protections give rise not only to state responsibility, but also individual criminal responsibility on the part of the perpetrator and his or her superiors.

98. The American Declaration contains several provisions that concern humane treatment. First, the Commission has interpreted Article I of the Declaration (Right to life, liberty and personal security) as containing a prohibition on the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons under any circumstances, similar to that under Article 5 of the American Convention.<sup>83</sup> In addition, Articles XXV and XXVI of the Declaration refer to the right to humane treatment in the context of the rights to protection from arbitrary arrest and to due process of law, as follows:

Article XXV. [...] Every individual who has been deprived of his liberty [...] has the right to humane treatment during the time he is in custody.

Article XXVI. Every person accused of an offense has the right [...] not to receive cruel, infamous or unusual punishment.

99. Further, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas are grounded on the fundamental idea that:

All persons subject to the jurisdiction of any member State of the Organization of American States shall be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments.

In particular, and taking into account the special position of the States as guarantors regarding persons deprived of liberty, their life and personal

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<sup>81</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.Doc.64, December 31, 2011, para. 66.

<sup>82</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 11.

<sup>83</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 184.

integrity shall be respected and ensured, and they shall be afforded minimum conditions compatible with their dignity. (Principle I)

100. International humanitarian law also contains general humane treatment guarantees. Articles 13 and 14 of the Third Geneva Convention contain general right to humane treatment provisions for prisoners of war. Further, it is well established that Common Article 3 and corresponding prohibitions of torture, cruel treatment, and outrages upon personal dignity constitute norms of customary international law.<sup>84</sup>

## 1. Torture

101. There is ample information about the inhuman conditions of detention and the brutal interrogation techniques in Guantanamo, particularly during the early years. According to the testimony of a military police officer who was at Guantanamo when the first prisoners arrived at Camp X-Ray in January 2002, detainees arrived in full sensory-deprivation garb. They were the object of verbal abuse and brutal beatings by military personnel, in particular by the Immediate Reaction Force (IRF), a team of five military police officers in riot gear meant to respond when a prisoner was resistant or combative,<sup>85</sup> and the object of physical and sexual abuse by medical personnel.<sup>86</sup> Guantanamo became a “battle lab for new interrogation techniques,” as it was described in a 2009 Senate Armed Services Committee Report.<sup>87</sup>
102. In the wake of the September 11, 2001 attacks, the United States Government authorized the use of “enhanced interrogation techniques” in the context of the “war on terror.” In a set of three legal memoranda dated August 1, 2002, known as the “Torture Memos,” the Office of Legal Counsel of the United States Department of Justice concluded that the use of enhanced interrogation techniques such as waterboarding, prolonged sleep deprivation and binding in stress positions, were lawful<sup>88</sup> and stated that “even if an interrogation method might violate Section

<sup>84</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 185.

<sup>85</sup> Camp Delta Standard Operating Procedures (SOP), Joint Task Force – Guantanamo (JTF-GTMO), Guantanamo Bay, Cuba, March 28, 2003. Available at: [http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/camp\\_delta\\_sop.pdf](http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/camp_delta_sop.pdf)

<sup>86</sup> Testimony of Spc. Brandon Neely, The Guantánamo Testimonials Project, Center for the Study of Human Rights in the Americas, December 4, 2008. Available at: <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-military-guards/testimony-of-brandon-neely>

<sup>87</sup> Report of the Committee on Armed Services United States Senate, Inquiry into the Treatment of Detainees in U.S. Custody, 110<sup>th</sup> Congress, 2<sup>nd</sup> Session, November 20, 2008. Available at: [http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final\\_April-22-2009.pdf](http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf)

<sup>88</sup> Letter to Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, on whether interrogation methods used on captured al Qaeda operatives would violate the UN Torture Convention or create the basis for a prosecution under the Rome Statute, August 1, 2001. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>; Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002. Available at: [http://dspace.wrlc.org/doc/bitstream/2041/70964/00355\\_020801\\_001display.pdf](http://dspace.wrlc.org/doc/bitstream/2041/70964/00355_020801_001display.pdf);

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2340A, necessity or self-defense” could justify it.<sup>89</sup> In the second memorandum, issued in the course of interrogations of Abu Zubaydah, later transferred to Guantanamo, the U.S. Department of Justice concluded that the interrogation techniques used by the Central Intelligence Agency (CIA) did not constitute torture. According to several emails between the FBI agents at Guantanamo and their superiors in Washington D.C., which were disclosed in a military investigation, some agents refused to participate in this and other interrogations because the techniques were “borderline torture.”<sup>90</sup>

103. Among the ten techniques described are cramped confinement (“placement of the individual in a confined space [usually dark], the dimensions of which restrict the individual’s movement”); wall standing (the individual’s “arms are stretched out in front of him, with his fingers resting on the wall. His fingers support all of his body weight. The individual is not permitted to move or reposition his hands or feet”); stress positions (“designed to produce the physical discomfort associated with muscle fatigue”); sleep deprivation; and waterboarding.<sup>91</sup> In addition, other interrogation practices, such as sensory deprivation, severe beatings, electric shocks and induced hypothermia are alleged to have been authorized by the Director of the CIA in the “war on terror.”<sup>92</sup> Many of the techniques used against Al-Qaeda suspects by the CIA are based upon the military’s “Survival, Evasion, Resistance and Escape” (SERE) program, a training program previously used to train U.S. soldiers during the Cold War to withstand torture during interrogation.<sup>93</sup>
104. In addition, guards used the so called “frequent flyer” program, which consisted of moving detainees repeatedly from cell to cell to cause sleep deprivation and disorientation as punishment and to soften detainees for subsequent interrogation, according to military documents. One detainee was reportedly moved six times a

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Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002. Available at: [http://dspace.wrlc.org/doc/bitstream/2041/70967/00355\\_020801\\_004display.pdf](http://dspace.wrlc.org/doc/bitstream/2041/70967/00355_020801_004display.pdf).

<sup>89</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, p. 46. Section 2340A of the United States Code prohibits torture by public officials and implements the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

<sup>90</sup> The Report of The Constitution Project’s Task Force on Detainee Treatment, Abridged Version, The Constitution Project, Washington D.C., 2013, p.46 (p. 207 of the full report). Full report available at: <http://www.detaineeetaskforce.org/read/>

<sup>91</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, pp. 2-3.

<sup>92</sup> Stephen Lendman, Torture As Official US Policy, Global Research, July 18, 2008. Available at: <http://www.globalresearch.ca/torture-as-official-us-policy/9610>

<sup>93</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002

day for 12 days, with a four-hour interrogation session in the middle. The program was reportedly banned in March 2004.<sup>94</sup>

105. The CIA and the Department of Defense designated health professionals to monitor the use of enhanced interrogation techniques at Guantanamo. With respect to the sleep deprivation technique, the memorandum addressed to the CIA indicates that “personnel with medical training are available to and will intervene in the unlikely event of an abnormal reaction.”<sup>95</sup> A “Behavioral Science Consultation Team” (BSCT) that included behavioral psychologists, provided guidance for interrogators as to how to best obtain information from detainees. The psychologists were sometimes physically present during interrogations and made recommendations based on information found in detainees’ medical files.<sup>96</sup>
106. After a visit to Guantanamo conducted in June 2004, an inspection team of the ICRC found that the handling of prisoners amounted to torture and that some doctors and other medical workers were participating in planning for interrogations (in particular by conveying information about prisoners’ mental health and vulnerabilities to interrogators), in violation of medical ethics.<sup>97</sup> Further, medical research involving nine Guantanamo prisoners who alleged abusive interrogation methods concluded that “medical doctors and mental health personnel assigned to the [Department of Defense] neglected and/or concealed medical evidence of intentional harm.” The research asserted that “the medical personnel who treated the detainees at GTMO failed to inquire and/or document causes of the physical injuries and psychological symptoms they observed.”<sup>98</sup>
107. The Inter-American Commission notes that, before their arrival in Guantanamo, many of the detainees were held in secret prisons overseas under the CIA detention program. This is the case of the “high value detainees,” believed to have planned or participated in the September 11 attacks. According to a report issued by the ICRC, the fourteen high value detainees transferred to Guantanamo in September 2006 “were subjected to a process of ongoing transfers to places of detention in unknown locations and continuous solitary confinement and incommunicado detention throughout the entire period of detention.”<sup>99</sup> It further stated that they were

<sup>94</sup> Tactic Used After it Was Banned, The Washington Post, August 8, 2008. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/07/AR2008080703004.html>

<sup>95</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, p. 3.

<sup>96</sup> The Report of The Constitution Project’s Task Force on Detainee Treatment, The Constitution Project, Washington D.C., 2013, p. 204.

<sup>97</sup> The New York Times, Red Cross Finds Detainee Abuse in Guantánamo, November 30, 2004. Available at: <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?ex=1259470800&en=825f1aa04c65241f&ei=5088&partner=rssnyt>

<sup>98</sup> Iacopino V, Xenakis SN (2011) Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series. PLoS Med 8(4): e1001027. doi:10.1371/journal.pmed.1001027. Available at: <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001027#s2>

<sup>99</sup> International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody, February 2007, p. 26. Available at: [http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-red-cross/icrc\\_20070214.pdf](http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-red-cross/icrc_20070214.pdf)

subjected to systemic physical and/or psychological ill-treatment that amounted to torture. Among the different methods of ill-treatment described in the report are suffocation by water, prolonged stress standing positions (held naked with the arms extended and chained above the head), beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against the wall, confinement in a box, prolonged nudity for several weeks or months, and sleep deprivation. In this regard, Jason Wright, defense counsel for Khalid Sheikh Mohammed, one of the six “high value detainees” being prosecuted at Guantanamo, stated that his client in particular has faced a level of torture “beyond comprehension.” According to declassified information, he was waterboarded by the CIA 183 times, subjected to over a week of sleep deprivation, and threatened that his family would be killed.<sup>100</sup>

108. On December 3, 2014, the U.S. Senate Select Committee on Intelligence (SSCI) published a declassified version of the findings, conclusions and executive summary of a 6,700-page study documenting the program of indefinite secret detention and the use of brutal interrogation techniques by CIA personnel between late 2001 and early 2009.<sup>101</sup> The Committee, which during four years reviewed more than six million pages of CIA materials, revealed shocking details about the “enhanced interrogation techniques” some of them already known through the “Torture Memos” and other sources. Based on the “overwhelming and incontrovertible” evidence in the report, Senator Feinstein also concluded that “under any common meaning of the term, CIA detainees were tortured;” and that the conditions of confinement and interrogation techniques were “cruel, inhuman and degrading.” The study includes the description of the use of enhanced interrogation techniques regarding persons who were later transferred to Guantanamo. The IACHR has called on the United States to investigate and punish the acts of torture established in the report.<sup>102</sup>
109. In a hearing held on March 16, 2015, at the IACHR, military defense counsel alleged that U.S. Prosecutors take the position that the memories, impressions and experiences of torture victims are classified and belong to the U.S. Government.<sup>103</sup> The United States reportedly prohibits the detainees and their advocates from revealing information about their treatment to any organization other than a U.S. Department of Defense military commission, preventing torture victims from seeking rehabilitation, redress and accountability.

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<sup>100</sup> NPR, Guantanamo Defense Lawyer Resigns, Says U.S. Case Is “Stacked,” August 31, 2014. Available at: <http://www.npr.org/2014/08/31/344576895/guantanamo-defense-lawyer-resigns-says-u-s-case-is-stacked>

<sup>101</sup> U.S. Senate, Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Declassification Revisions December 3, 2014. Available at: <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>

<sup>102</sup> IACHR Calls on the United States to Investigate and Punish Acts of Torture Established in the Senate Intelligence Committee Report, Press Release No. 152/14, December 12, 2014.

<sup>103</sup> IACHR’s hearing, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 period of sessions, March 16, 2015.

110. In its response to this report, the U.S. Government indicated that President Obama determined “that the Executive Summary, Findings, and Conclusions of the SSCI Report should be declassified, with appropriate redactions necessary to protect national security, because public scrutiny, debate, and transparency will help to inform the public’s understanding of the program to ensure that the United States never resorts to these kinds of interrogation techniques again.”<sup>104</sup>
111. According to the IACHR, “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*” and has emphasized the prohibition of torture as a norm of *jus cogens*.<sup>105</sup> The IACHR understands that an act that constitutes torture exists when the ill-treatment is: (a) intentional; (b) causes severe physical or mental suffering, and (c) is committed with a purpose or objective, including the investigation of crimes. It should be noted that the definition of torture is subject to ongoing reassessment in light of present-day conditions and the changing values of democratic societies.<sup>106</sup>
112. Inter-American jurisprudence has clearly established that “the fact that a State is confronted with terrorism should not lead to restrictions on the protection of the physical integrity of the person.”<sup>107</sup> In this regard, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that “States cannot limit the application of this prohibition under their domestic law for reasons of public emergencies, anti-terrorism measures or in the context of armed conflicts.”<sup>108</sup>
113. In the context of interrogation and detention, inter-American jurisprudence has found certain acts such as beatings, death threats, slaps in the face, keeping detainees naked, “dry submarine” (placing a plastic bag over the head to prevent the victim from breathing, while simultaneously beating his or her ears repeatedly), to constitute torture.<sup>109</sup> In addition, according to inter-American jurisprudence, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering of the victim.<sup>110</sup>

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<sup>104</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II.Doc. 30 January 2015, March 30, 2015, p. 5.

<sup>105</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 155.

<sup>106</sup> *See in this regard*, IACHR, Report No. 5/96, Case 10.970, Peru, March 1, 1996.

<sup>107</sup> I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 96.

<sup>108</sup> Statement of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013, p. 7.

<sup>109</sup> IACHR, Report No. 117/09, Case 12.228, Merits (Publication), *Alfonso Martin del Campo Dodd*, Mexico, November 19, 2009; I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69; I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008, Series C No. 187).

<sup>110</sup> I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 100.



114. With regard to the role and responsibility of health professionals, the IACHR highlights that, according to the Istanbul Protocol, it is a gross contravention of health-care ethics to participate, actively or passively, in torture or condone it in any way.<sup>111</sup> The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, make clear that health professionals have a moral duty to protect the physical and mental health of detainees and that assessment of detainees' health in order to facilitate punishment or torture is clearly unethical.<sup>112</sup> In this regard, participation in torture includes "evaluating an individual's capacity to withstand ill-treatment; being present at, supervising or inflicting maltreatment; resuscitating individuals for the purpose of further maltreatment or providing medical treatment immediately before, during or after torture on the instructions of those likely to be responsible for it; providing professional knowledge or individuals' personal health information to torturers; and intentionally neglecting evidence and falsifying reports, such as autopsy reports and death certificates."<sup>113</sup>
115. The Inter-American Commission notes that conditions at Guantanamo today have improved since the days of Camp X-Ray. On his second day in office President Obama issued Executive Order 13491, Ensuring Lawful Interrogations, directing the U.S. military and other U.S. agencies to follow the Army Field Manual, which bans torture when interrogating detainees, "to promote the safe, lawful and humane treatment of individuals in United States custody" in accordance with Common Article 3 of the Geneva Conventions.<sup>114</sup> The Executive Order revoked all executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued by the CIA from September 11, 2001, to January 20, 2009. Further, in its response to this report, the United States claimed that the harsh interrogation techniques highlighted in the SSCI Report "are not representative of how the United States deals with the threat of terrorism today, and are not consistent with [U.S.] values."<sup>115</sup>

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<sup>111</sup> Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series No. 8/Rev.1, United Nations, New York and Geneva, 2004, para. 52. Available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

<sup>112</sup> Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 37/194 of 18 December 1982.

<sup>113</sup> Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series No. 8/Rev.1, United Nations, New York and Geneva, 2004, para. 53.

<sup>114</sup> Executive Order 13491, Ensuring Lawful Interrogations, January 22, 2009. Available at: <http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>

<sup>115</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 5.

116. In addition, the Department of Justice’s Office of Professional Responsibility conducted an investigation into the memoranda on the use of “enhanced interrogation techniques” dated August 1, 2002. In a report issued on July 29, 2009, it asserted that the memoranda consistently favored a permissive view of the torture statute and that its legal analysis was inconsistent with the professional standards applicable to Department of Justice Attorneys. The report concluded that former Deputy Assistant Attorney General John Yoo and former Assistant Attorney General Jay Bybee “committed professional misconduct when [they] violated [their] duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.”<sup>116</sup>
117. In its response to this report, the U.S. Government indicated that investigations on the conditions of detention in Guantanamo conducted by, among others, the Inspector General of the Army, Navy, and CIA; and by Major General Ryder, the General Officer appointed by the Commander, U.S. Southern Command, led to hundreds of recommendations on ways to improve detention and interrogation operations, and the Department of Defense and the CIA have allegedly instituted processes to address these recommendations. The State also claimed that the Department of Justice conducted preliminary reviews and criminal investigations into the treatment of individuals alleged to have been mistreated while in U.S. Government custody subsequent to the September 2011 terrorist attacks, brought criminal prosecutions in several cases, and obtained the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody.<sup>117</sup>
118. The Inter-American Commission notes with deep concern, however, that no criminal actions have been brought against the persons involved in acts of torture in Guantanamo. Through its precautionary measures granted on behalf of the detainees, the IACHR has called for the United States to “thoroughly and impartially investigate, prosecute, and punish all allegations of torture and other ill-treatment of detainees.”<sup>118</sup> The jurisprudence of the inter-American system is clear with respect to the obligation of authorities to initiate, *ex officio* and immediately, an efficient, impartial and effective investigation, which must be carried out by all available legal means, once they become aware of an alleged act of torture.<sup>119</sup> The IACHR has determined that the failure of the United States to give effect to the

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<sup>116</sup> Department of Justice, Office of Professional Responsibility, Report, Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists, July 29, 2009. Available at: [https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729\\_OPR\\_Final\\_Report\\_with\\_20100719\\_declassifications.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf)

<sup>117</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 6.

<sup>118</sup> IACHR, Precautionary Measure 259/02 – Detainees held by the United States in Guantanamo Bay, March 12, 2002 (extension granted on October 28, 2005).

<sup>119</sup> IACHR, Case No. 12.519, *García Lucero et al.*, Chile, Submission before the I/A Court HH.RR., September 20, 2011, para. 76. Available at: <http://www.cidh.oas.org/demandas/12.519Eng.pdf>

above-mentioned precautionary measures has resulted in irreparable harm to the fundamental rights of the detainees.<sup>120</sup>

119. The IACHR also reminds the United States that the right to reparation for victims of torture is a well-established principle of international law and, according to the ICRC, a rule that is applicable in any type of armed conflict.<sup>121</sup> The consequences of torture “reach far beyond the immediate pain.”<sup>122</sup> Many victims suffer from post-traumatic stress disorder (PTSD). The report issued by the U.S. Senate Intelligence Committee in December 2014 states in this regard that the effects of the use of enhanced interrogation techniques on the detainees included “hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.”<sup>123</sup> The IACHR notes that U.S. courts have dismissed claims for damages under the Fifth Amendment (so called “Bivens claims”) brought against federal officials by a former Guantanamo detainee. Federal courts have also rejected, based on national security concerns, civil suits brought by former Guantanamo detainees under the Alien Tort Statute against a Boeing subsidiary accused of arranging flights for the CIA in the context of the “extraordinary rendition program.”<sup>124</sup> The IACHR reiterates the call to the United States to provide integral reparations to the victims, including restitution, compensation, rehabilitation, satisfaction and measures of non-repetition, pursuant to international standards.

## 2. Cruel, inhuman or degrading treatment

120. Although progress has been made to improve conditions of detention at Guantanamo, there are still many areas of concern. The Inter-American Commission notes in this regard that detainees at Camp 7 do not enjoy the same treatment accorded to other prisoners; that health care faces many challenges, in particular given the ageing population at Guantanamo; and that religion is still a sensitive issue. Further, the IACHR is especially concerned with the suffering, fear and anguish caused by the situation of ongoing indefinite detention, which has led to several hunger strikes as a form of protest and, in some extreme cases, to the drastic decision by prisoners to end their lives.
121. As part of President Obama’s decision to close the facility, the Department of Defense selected Admiral Patrick M. Walsh in 2009 to lead a review of the conditions of detention at Guantanamo to ensure that they were in conformity with

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<sup>120</sup> IACHR, Resolution No. 2/11, Regarding the Situation of the Detainees at Guantanamo Bay, Precautionary Measure 259-02, July 22, 2011.

<sup>121</sup> ICRC, Customary IHL, Rule 150. Reparation. Available at: [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule150](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150)

<sup>122</sup> International Rehabilitation Council for Torture Victims, Effects of torture. Available at: <http://www.irct.org/what-is-torture/effects-of-torture.aspx>

<sup>123</sup> U.S. Senate, Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Declassification Revisions December 3, 2014.

<sup>124</sup> See *in this regard*, Center for Constitutional Rights, Hamad v. Gates (amicus brief). Available at: <http://ccrjustice.org/ourcases/current-cases/hamad-v.-gates-amicus>; and ACLU, Mohamed et al. v. Jeppesen Dataplan, Inc., November 15, 2011. Available at: <https://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc>

Common Article 3 of the Geneva Conventions.<sup>125</sup> After 13 days of onsite investigations, the team issued a report on February 23, 2009, concluding that the conditions of confinement met the requirements of Common Article 3.<sup>126</sup> The team found no “substantiated evidence of prohibited acts” in the course of the review. Military and civilian defense counsel have criticized the report claiming that the methodology of the Department of Defense “was flawed from the start” and that “it was merely an internal, executive level assessment that lacked any peer review [and] failed to solicit scrutiny or input directly from the detainees themselves, lawyers for detainees, and representatives of the International Committee of the Red Cross (ICRC), the U.N., the “Sending” states, and civil-society stakeholders.”

122. The Inter-American Commission has received troubling information regarding prison conditions at Camp 7, a single-cell facility currently used to house a small group of special detainees, known as “high-value detainees.” These detainees are reportedly held incommunicado and are not subject to the same treatment accorded to other prisoners. On May 20, 2013, a group of eighteen military and civilian defense counsel representing the “high-value detainees” sent a joint request to Secretary of Defense Charles Hagel to improve the conditions of confinement in Guantanamo.<sup>127</sup> They pointed out that these detainees are not permitted to contact their families by telephone or video; that their access to religious materials has been restricted (such as the sayings and descriptions of the life of the Prophet Mohammed); that they have limited recreational opportunities; and that they are not permitted to participate in group prayer, contrary to the entitlements of other detainees.
123. The request noted that, although the report issued by Admiral Walsh “was methodologically flawed,” he “did note his strenuous concerns about whether the confinement conditions at Camp 7 were humane.”<sup>128</sup> The report considered that “in certain camps, further socialization is essential to maintain humane treatment over time” and strongly recommended to “give detainees in Camp 7 opportunities for group prayer with three or more detainees, similar to practices in other camps.”<sup>129</sup> According to defense counsel, the recommendations outlined in the 2009 report have not been fulfilled. Defense counsel also stated that the JTF-Guantanamo’s guard force adopted procedures that could only be construed as intended to

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<sup>125</sup> U.S. Department of Defense, DoD News, Navy Admiral to Lead Review of Guantanamo Detention Facility, February 3, 2009. Available at: <http://www.defense.gov/news/newsarticle.aspx?id=52940>

<sup>126</sup> U.S. Department of Defense, Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, February 23, 2009. Available at: [http://www.defense.gov/pubs/pdfs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](http://www.defense.gov/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf)

<sup>127</sup> Joint letter to Secretary Hagel, Re: Requests to Improve the Conditions of Confinement in Guantanamo, from military and civilian counsel, May 20, 2013. Letter submitted during the IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>128</sup> Joint letter to Secretary Hagel, Re: Requests to Improve the Conditions of Confinement in Guantanamo, from military and civilian counsel, May 20, 2013. Letter submitted during the IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>129</sup> U.S. Department of Defense, Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, February 23, 2009, pp. 5 and 26.

purposely and systematically harass prisoners. In this regard, they claimed that these procedures “include daily cell shakedowns and tossing’s of prisoner’s cells” and that “prisoners are subjected to degrading bodily searches even when no rational basis exists for such procedures.”

124. Since the opening of the detention center, nine prisoners have died in the Guantanamo facility, some of whom reportedly committed suicide. Further, 23 detainees allegedly tried to hang or strangle themselves in a mass protest in 2003.<sup>130</sup> The last prisoner to commit suicide was Adnan Farhan Abdul Latif on September 8, 2012, a Yemeni who was among the first prisoners transferred to Guantanamo in 2002. He was captured at the Afghanistan-Pakistan border in December 2001 and, according to the military, had been recruited by Al-Qaeda. His defense counsel claims, however, that he traveled from Yemen to Pakistan to seek charitable medical treatment for problems stemming from a head injury he had suffered in a car accident in 1994, and later made his way to Afghanistan before trying to flee once the war began.<sup>131</sup>
125. According to medical records, Mr. Latif’s car accident caused a loss of vision in the left eye and loss of hearing. He also suffered from emotional instability and cognitive impairment as a consequence of the accident. During his internment at Guantanamo he reportedly manifested serious emotional instability and neuropsychiatric symptoms that caused significant management problems for the detention authorities.<sup>132</sup> On May 7, 2010, Amnesty International issued an urgent action on his behalf. Mr. Latif, who had been previously held in solitary confinement in a psychiatric ward at Guantanamo, was reportedly then being held in isolation; was repeatedly ill-treated by the IRF; and felt suicidal.<sup>133</sup> Mr. Latif had been cleared for release by the last two administrations on four different opportunities, and his release had been ordered by a Federal District Court judge in 2010. However, that ruling was overturned by the DC Circuit and the U.S. Supreme Court declined to hear an appeal. The information received by the IACHR indicates that he killed himself out of desperation.<sup>134</sup>
126. According to Dr. Stephen Xenakis, Brigadier General (Retired), psychiatric and medical expert in numerous cases involving detainees at Guantanamo, these

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<sup>130</sup> The New York Times, 23 Detainees Attempted Suicide in Protest at Base, Military Says, January 25, 2005. Available at:

<http://query.nytimes.com/gst/fullpage.html?res=9507E3DC1F38F936A15752C0A9639C8B63&sec=health>

<sup>131</sup> The New York Times, Military Identifies Guantanamo Detainee Who Died, September 11, 2012. Available at: [http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html?\\_r=0](http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html?_r=0)

<sup>132</sup> Senate Judiciary Committee: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications, Statement: Stephen N. Xenakis, M.D., Brigadier General (Retired), U.S. Army, July 24, 2013, pp. 5-6.

<sup>133</sup> Amnesty International, Urgent Action: Guantanamo detainee held in isolation. May 7, 2010. Available at: <http://www.amnesty.org/en/library/asset/AMR51/037/2010/en/a2f4f943-40c9-45ab-a344-a5741f4f3f03/amr510372010en.pdf>

<sup>134</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

prisoners often do not expect to be released, they have been traumatized and had their lives disrupted, and very commonly have sleep problems, anxiety attacks, and any number of physical ailments that are attributable to an aging population.<sup>135</sup> Detainees who are now in their 50s, 60s and 70s are reportedly developing chronic illnesses that arise during that stage of life. In this regard, Dr. Xenakis testified before the Senate Judiciary Committee that “the aging population at Guantanamo is vulnerable to developing debilitating neuropsychiatric disorders secondary to trauma and stress and suffering with dementia, serious depression, and increasing emotional instability.” Accordingly, senior officials at the Department of Defense reportedly recognized that Guantanamo is “turning into a nursing home.”<sup>136</sup>

127. Dr. Xenakis further states that, by participating in the interrogation teams, psychiatrists, psychologists and physicians, have fully disrupted the patient-doctor relationship. He indicates that this is further complicated by the fact that these patients have difficult problems that are not commonly seen in military medicine; that the front line clinicians rotate every 7 to 9 months; and that the clinic at Guantanamo does not have the facilities to evaluate people who have more serious illnesses (there is reportedly no MRI scanner, radiologist, or nuclear medicine doctor).<sup>137</sup> The U.S. Government claims, however, that the healthcare provided to the detainees is comparable to that received by service personnel at Guantanamo.<sup>138</sup> Among Dr. Xenakis’ patients at Guantanamo there was one who suffered with chronic schizophrenia for decades and was psychotic when apprehended and transferred to Guantanamo over ten years ago, and another who had gained hundreds of pounds during his detention (in 2013 he weighed over 450 pounds, 270 more than when captured) and suffered multiple medical conditions.<sup>139</sup>
128. The physician further points out that the symptoms of post-traumatic stress disorder require professional treatment to abate, and “there is no evidence that the detainees have received effective treatment for their conditions.” Accordingly, “the severe psychological trauma stemming from their experience in U.S. custody has often not been diagnosed nor addressed by the medical staff.” From his experience with prisoners in Guantanamo which includes over a dozen interviews of detainees, review of at least 50 files and a cumulative stay of three months at the facility, Dr.

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<sup>135</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>136</sup> Senate Judiciary Committee: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications, Statement: Stephen N. Xenakis, M.D., Brigadier General (Retired), U.S. Army, July 24, 2013. Available at: <http://www.judiciary.senate.gov/imo/media/doc/7-24-13XenakisTestimony.pdf>

<sup>137</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>138</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 7.

<sup>139</sup> Senate Judiciary Committee: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications, Statement: Stephen N. Xenakis, M.D., Brigadier General (Retired), U.S. Army, July 24, 2013, p. 3.

Xenakis concludes that “the vast majority of these men do not fit the picture of the “worst of the worst.””<sup>140</sup>

129. According to the U.S. Government, Department of Defense policy authorizes healthcare personnel qualified in behavioral sciences to provide consultative services to support authorized law enforcement or intelligence activities, including observation and advice on the interrogation of detainees when the interrogations are fully in accordance with applicable law and interrogation policy. These behavioral science consultants are not, according to the Government, involved in the medical treatment of detainees, and the Government maintains that they do not access medical records.<sup>141</sup>
130. The Inter-American Commission has also received information pertaining to religious and cultural competence issues that reportedly affect the detainees’ daily lives. Detainees have reportedly filed requests with the JT-Guantanamo staff for a Muslim Chaplain; however, the authorities have allegedly responded that there is a Muslim cultural advisor who could provide advice on different aspects of their lives. Further, detainees have allegedly raised some concerns with regard to the food, in particular whether all the food provided to them is halal (allowed by their religion).<sup>142</sup> The IACHR notes in this regard that, according to the report issued by Adm. Walsh in 2009, “three hot halal meals per day – with 4500-5000 cal/day – are served to detainees in each camp, with six menus for detainees to choose from.”<sup>143</sup> In 2012, the military denied reports that non-halal food was being provided to detainees at Camp 7.<sup>144</sup> In addition, as will be developed in the next section of this report, incidents involving the Koran, which is a very sensitive issue for Muslims, have caused several hunger strikes at Guantanamo. According to the U.S. Government, detainees at Guantanamo have the opportunity to pray five times each day.<sup>145</sup> The IACHR notes, however, that “high value detainees” at Camp 7 do not have the right to communal prayer, in contrast to other prisoners.
131. Neither the American Declaration nor the American Convention nor the Inter-American Convention to Prevent and Punish Torture establish what should be understood by “cruel, inhuman or degrading treatment,” nor how it is to be

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<sup>140</sup> Senate Judiciary Committee: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications, Statement: Stephen N. Xenakis, M.D., Brigadier General (Retired), U.S. Army, July 24, 2013, pp. 3-4.

<sup>141</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 7.

<sup>142</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>143</sup> U.S. Department of Defense, Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, February 23, 2009, p. 23.

<sup>144</sup> The Express Tribune, US commander denies non-Halal food given to Gitmo detainees, March 1, 2012. Available at: <http://tribune.com.pk/story/343989/us-commander-denies-non-halal-food-given-to-gitmo-detainees/>

<sup>145</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 8.

differentiated from torture. Nevertheless, the jurisprudence of the Inter-American Commission offers certain guiding principles to evaluate whether specific conduct may fall within these categories. The IACHR has taken into account European jurisprudence according to which “inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable” and that “treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience.”<sup>146</sup> The essential criterion to distinguish between the concept of “torture” and “inhuman or degrading treatment,” relates primarily to the intensity of the suffering inflicted.<sup>147</sup>

132. Given that the State acts as a guarantor vis-à-vis the persons in its custody, it has a special duty to guarantee the fundamental rights of persons deprived of liberty and to ensure that the conditions of their detention are consistent with the dignity inherent to all human beings.<sup>148</sup> Further, the international humanitarian law of non-international armed conflict –as reflected in Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions where applicable, and customary international humanitarian law– provide for rights of detainees in relation to treatment and conditions of detention, and may in some circumstances amount to torture.<sup>149</sup>
133. The IACHR’s Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas establish that “the prolonged, inappropriate or unnecessary use [of solitary confinement] would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment.”<sup>150</sup> In this regard, according to constant inter-American jurisprudence, prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment, harmful to the mental and moral integrity of the person and to the right of all detainees to have their inherent dignity respected.<sup>151</sup>
134. The IACHR has stressed that even in extraordinary circumstances, the indefinite detention of individuals, most of whom have not been charged, constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment. During its 147 sessions, the IACHR received specialized information on the severe and lasting physiological and psychological damage caused by the detainees’ high degree of uncertainty over

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<sup>146</sup> IACHR, Report Nº 35/96, Case 10.832, *Luis Lizardo Cabrera*, Dominican Republic, February 19, 1998, para. 77, citing Eur. Com. H.R., *The Greek Case*, 1969, 12 Y. B. Eur. Conv. on H.R. 12.

<sup>147</sup> IACHR, Report Nº 35/96, Case 10.832, *Luis Lizardo Cabrera*, Dominican Republic, February 19, 1998, para. 80, citing the European Human Rights Court case of Ireland against the United Kingdom, Series A No. 25.

<sup>148</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.Doc.64, December 31, 2011, para 241.

<sup>149</sup> ICRC, Resource Center, The relevance of IHL in the context of terrorism, January 1, 2011. Available at: <https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>

<sup>150</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII, March, 2008.

<sup>151</sup> I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 83.



basic aspects of their lives, such as not knowing whether or not they will be tried; whether they will be released and when; or whether they will see their family members again. This continuing state of suffering and uncertainty creates grave consequences such as stress, fear, depression, and anxiety, and affects the central nervous system as well as the cardiovascular and immunological systems.<sup>152</sup> The fate of Mr. Latif is an example of how indefinite detention, coupled with the application of solitary confinement, can lead to devastating consequences.

135. In relation to religion and the rights of persons deprived of liberty, the IACHR's Principles provide that detainees shall have the right "to participate in religious and spiritual activities and to practice traditional rites." Further, prisoners shall have the right to food "with due consideration to their cultural and religious concerns."<sup>153</sup>
136. The Inter-American Commission considers that the conditions of confinement described above constitute a violation of the right to humane treatment. Further, in order to guarantee that prisoners' rights are effectively protected in accordance with applicable international human rights standards, the State must ensure that all persons deprived of liberty have access to judicial remedies.<sup>154</sup> The IACHR notes with deep concern that prisoners at Guantanamo have been prevented from litigating any aspect of the conditions of their detention before federal courts, which constitutes *per se* a violation of one of their most fundamental human rights. This point, as well as some recent developments regarding this issue, will be assessed in the chapter on access to justice. Further, as it will be addressed below, detainees' lack of legal protection and the resulting anguish caused by the uncertainty regarding their future has led them to take the extreme step of hunger strikes to demand changes in their situation.

### 3. Hunger strikes and forced feedings

137. In February 2013 a large group of detainees at Guantanamo Bay initiated a hunger strike to protest their state of indefinite detention and the conditions of confinement. Although the hunger strike received much public attention, there have been periodic large-scale hunger strikes over the years. Engaging in hunger strikes as a means of protest has been a common practice among Guantanamo detainees since the early years of Camp X-Ray. The first hunger strike reportedly took place in the beginning of February of 2002. An incident involving a Koran that was thrown on the floor during a cell search prompted a widespread hunger strike that lasted for approximately one week. A military officer who was at Guantanamo at that time recalls "some of the detainees being so weak they could not move and

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<sup>152</sup> IACHR, Press Release 29/13: IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantanamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013.

<sup>153</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principles XI and XXV, March, 2008.

<sup>154</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.Doc.64, December 31, 2011, para. 242.

every hour or so [...] I would try and get a response out of them as some of them were so weak that they looked as if they were dead.”<sup>155</sup>

138. A series of hunger strikes, reportedly involving 150 to 200 detainees (more than a third of the camp), took place in 2005. The prisoners protested against their indefinite detention and the conditions of confinement, in particular with regard to some incidents involving the Koran and the alleged abuse of a prisoner when he returned to his cell after an interrogation session.<sup>156</sup> Tariq Ba Odah, a Yemeni-national detained at Guantanamo since February 2002, was one of the detainees who engaged in the hunger strike. Since February 2007 he has been on an uninterrupted hunger strike, he has not had any food, water or liquid by mouth and is, according to his defense counsel, force fed every day. At some point he reportedly weighed 78 pounds (35 kg). Because of the hunger strike, he is allegedly held in solitary confinement and has virtually no human contact. Mr. Ba Odah was captured in Pakistan at the age of 23 by local authorities and allegedly sold to the United States for bounty. He has been cleared for transfer since 2009 but remains deprived of liberty due to transfer restrictions on transfers to Yemen.<sup>157</sup>
139. The hunger strike that started in February 2013 is in many ways qualitatively different from those that occurred in the past, mainly because of the numbers. According to the Government, at the peak of the hunger strike the number of prisoners who participated reached 106 (120-130 according to civil society organizations), which represented around 70% of the total population at that time, including almost all the detainees held at Camps 5 and 6. This hunger strike took place after a period of about two years in which public attention had turned away from the situation in Guantanamo. The U.S. Government had closed the office of the Special Envoy for the closure of Guantanamo; transfers had been ceased in part because of restrictions imposed by the U.S. Congress; and federal courts, in particular the DC Circuit Court, ruled against the detainees in the great majority of cases. According to representatives of the detainees, this hunger strike came about with a very strong perception among the detainees that they were facing a dead end.
140. Further, according to defense counsel, since late January 2013 prison officials had been searching the prisoners’ cells in a punitive fashion, confiscating personal items, mats for sleeping, family photos and keepsakes, religious CDs, and letters, including mail from counsel. In addition, several prisoners had reported “that what ultimately triggered the hunger strike [was] the decision amongst prison officials to search the pages and binding of the men’s Qur’ans in ways that constitute desecration

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<sup>155</sup> Testimony of Spc. Brandon Neely, The Guantánamo Testimonials Project, Center for the Study of Human Rights in the Americas, December 4, 2008.

<sup>156</sup> The New York Times, Guantanamo Prisoners Go on Hunger Strike, September 18, 2005. Available at: [http://www.nytimes.com/2005/09/18/politics/18gitmo.html?pagewanted=1&\\_r=0&adxnnl=1&adxnnlx=1410447671-g/nbXpDJXz0Rd1k4dB9lw](http://www.nytimes.com/2005/09/18/politics/18gitmo.html?pagewanted=1&_r=0&adxnnl=1&adxnnlx=1410447671-g/nbXpDJXz0Rd1k4dB9lw)

<sup>157</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013. See also, Ba Odah v. Obama, Center for Constitutional Rights. Available at: <http://ccrjustice.org/BaOdah>

according to their religious beliefs, and that guards [had] been disrespectful during prayer times.”<sup>158</sup> The United States, however, believes that this was an organized act of asymmetrical warfare.<sup>159</sup>

141. According to information provided by the U.S. Government, on April 13, 2013, the commander of the JTF-GTMO ordered the transition of detainees from communal to single-cell living at Camp 6. This was reportedly done “to ensure the health, security, order, and safety of detainees, for which around the clock monitoring is necessary, in response to efforts by detainees to limit the guard force’s ability to observe the detainees by covering surveillance cameras, windows, and glass partitions.” The Government asserts that the vast majority of detainees complied with the guards’ instructions but some detainees resisted with improvised weapons and, in response, four non-lethal rounds were fired. There were reportedly no serious injuries to guards or detainees.<sup>160</sup>
142. The perspective of defense counsel, however, differs from that of the Government. They indicate that the response to the hunger strike was swift and severe and that a raid took place in Camps 5 and 6 in an effort by the military to regain control of the hunger strike. As a result, all the detainees in those camps, about three quarters of the detained population in Guantanamo, were reportedly put in single cell isolation with no human contact for 22 to 24 hours a day and force-fed. At the same time, all of their possessions, their legal and non-legal materials, were reportedly seized.<sup>161</sup> The military allegedly reinstated a policy of genital searches any time a detainee left the camp, so if a detainee was going to make a phone call, meet with the ICRC or with counsel, he would have his genital area searched. This, according to defense counsel, was a form of religious discrimination and humiliation for the detainees.<sup>162</sup>
143. Available information indicates that about 45 detainees were forcibly fed during the 2013 hunger strike. According to the United States Government, the Department of Defense supports “the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws and policies.” With regard to the forced feedings, the U.S. Government informed the IACHR that the overwhelming majority of detainees were cooperative throughout the procedure; that some individuals who were force-fed also consumed portions of their daily meals; and that the choice of solid food or supplement was always offered to the detainees.<sup>163</sup> In its response to this report, the U.S. Government pointed out that

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<sup>158</sup> Communication sent by the Center for Justice and International Law and the Center for Constitutional Rights in the context of precautionary measures 259-02 and 211-08, April 11, 2013, p. 3.

<sup>159</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>160</sup> Communication sent by the United States Government in the context of precautionary measures 259-02, July 11, 2013.

<sup>161</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>162</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>163</sup> Communication sent by the United States Government in the context of precautionary measures 259-02, July 11, 2013.

“involuntary feeding is used only as a last resort, if necessary to address significant health issues caused by malnutrition and/or dehydration.”<sup>164</sup>

144. According to revised standard operating procedures for hunger striking prisoners in Guantanamo, dated March 5, 2013, decisions to force-feed a detainee must be approved by the JTF-GTMO commander, who must notify the chain of command all the way to the Department of Defense. Further, according to these procedures “[i]n event of a mass hunger strike, isolating hunger striking patients from each other is vital to prevent them from achieving solidarity.”<sup>165</sup> Forced feedings, which in some cases may require restraints, are carried out through the insertion of nasogastric tubes into the patient’s stomach. The detainee may remain in a restraint chair for up to two hours.
145. In a public hearing before the IACHR, Omar Farah, an attorney with the Center for Constitutional Rights representing prisoner Tariq Ba Odah, stated “as we speak, it’s likely that he’s being removed from his cell, strapped to a restraint chair, and a rubber tube is being inserted into his nose to pump a liquid dietary supplement into his stomach. Tariq says this is the only way that he has to communicate to those of us who have our freedom what it means to be unjustly detained, to be put in a cell for a decade without charge.”<sup>166</sup> Forced feeding is considered a very painful procedure, in particular when it is not voluntary. Adnan Farhan Abdul Latif, who was on hunger strike during several months in 2006-2007, described the forced feeding as “having a dagger shoved down your throat.”<sup>167</sup>
146. The Inter-American Commission notes that hunger strikes are a well-known form of protest. The vast majority of the detainees who went on hunger strike in Guantanamo were protesting their state of indefinite detention and their conditions of confinement. Making a blanket determination that all the individuals on hunger strike have suicidal intentions and therefore must be force-fed is not in line with medical ethics requirements. The State has an obligation to make an individualized assessment to determine whether the individual detainee actually possesses the capacity to make a judgment about the physical consequences of refusing food. If the individual understands those consequences, the right to refuse food should be respected both under medical ethics and international law. According to Dr. Xenakis, conversations concerning end of life issues should be held upfront, with

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<sup>164</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 8.

<sup>165</sup> Joint Task Force Guantanamo Bay, Cuba, Joint Medical Group, Standard Operating Procedure: Medical Management of Detainees on Hunger Strike, SOP: JTF-JMG # 001, March 5, 2013. Available at: [http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/hungerstrike\\_sop\\_2013.pdf](http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/hungerstrike_sop_2013.pdf)

<sup>166</sup> IACHR’s hearing, Situation of the Detainees in Guantanamo, 147 Period of Sessions of the IACHR, March 12, 2013.

<sup>167</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013. See also, Poems from Guantanamo, Amnesty International Magazine, Fall 2007, by Mark Falcoff. Available at: <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/poems-from-guantanamo>

fully informed consent, about what a detainee wants and about the way to make decisions about their life if it were in danger. However, according to some experts, that did not occur during the 2013 hunger strike. What allegedly occurred were much more abbreviated conversations about what the detainees understood might happen, which were reportedly compromised by the lack of trust between the clinicians and the detainees.<sup>168</sup>

147. The force-feeding that has been taking place at Guantanamo is widely considered to be in violation of medical ethics and international law, which prohibits cruel, degrading and humiliating treatment. In an opinion issued on July 8, 2013, U.S. District Judge Gladys Kessler denied the request filed by Jihad Dhiab to end the forced feeding for lack of jurisdiction to rule on conditions of confinement at Guantanamo. However, Judge Kessler stated that “force-feeding is a painful, humiliating, and degrading process” and said President Obama has the authority to directly address this issue.<sup>169</sup> On May 16, 2014, the same federal judge ordered the U.S. Government to temporarily suspend the forced feeding of Mohammed Abu Wa’el Dhiab and preserve all videotapes of the forced feedings and forcible cell extractions of the detainee.<sup>170</sup> This was the first time such a suspension was ordered by a federal judge. However, on May 22, 2014, the temporary ban was lifted. The judge reportedly said that, faced with the very real probability that Mr. Dhiab will die, she had no choice but to “allow the medical personnel on the scene to take the medical actions to keep Mr. Dhiab alive, but at the possible cost of great pain and suffering.”<sup>171</sup>
148. The IACHR has stressed that, according to the World Medical Assembly’s Declaration of Malta, in cases involving people on hunger strikes, the duty of medical personnel to act ethically and the principle of respect for individuals’ autonomy, among other principles, must be respected.<sup>172</sup> Under these principles, it is unjustifiable to engage in forced feeding of individuals contrary to their informed and voluntary refusal of such a measure. Moreover, hunger strikers should be protected from all forms of coercion, even more so when this is done through force and in some cases through physical violence. Health care personnel may not apply undue pressure of any sort on individuals who have opted for the extreme recourse of a hunger strike. It is also not acceptable to use threats of forced feeding or other

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<sup>168</sup> IACHR’s Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>169</sup> *Jihad Dhiab v. Barack Obama*, No. 05-1457 (D.C. Cir. 2013). Available at: <http://legaltimes.typepad.com/files/gitmo-order.pdf>

<sup>170</sup> Reprieve, Press release, Judge orders US government to halt force-feeding of Guantanamo prisoner and preserve video evidence of his ordeal, May 16, 2014. Available at: <http://www.reprieve.org/judge-orders-us-government-to-halt-force-feeding-of-guantaacutenamo-prisoner-and-preserve-video-evidence-of-abuse.html>

<sup>171</sup> CNN, Justice allows forced feeding to resume on Guantanamo detainee, May 23, 2014. Available at: <http://www.cnn.com/2014/05/23/justice/guantanamo-detainee-forced-feeding/index.html>

<sup>172</sup> Article 21 of the 1991 Malta Declaration of the World Medical Association (as revised in 1992 and 2006) establishes: “Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.”

types of physical or psychological coercion against individuals who have voluntarily decided to go on a hunger strike.<sup>173</sup> In this regard, the IACHR welcomes the fact that a U.S. navy nurse at Guantanamo has refused to force-feed prisoners after reportedly deciding the practice was a criminal act. A spokesman for southern command, which oversees Guantanamo, indicated that it was the first time a nurse or doctor is known to have refused to tube-feed a prisoner.<sup>174</sup>

149. In a case of forced feeding of a detainee, the European Court of Human Rights held that Ukraine had violated the prohibition of torture (Article 3 of the European Convention) given that the Government had not demonstrated that there had been a medical necessity to force-feed the detainee. The Court concluded in the case that the authorities had not respected procedural safeguards in the face of the detainee's conscious refusal to take food and had not acted in his best interest. Further, the Court found that the use of force and the restraints applied – handcuffs, mouth-widener, a special tube inserted into the food channel – had constituted treatment of such a severe character that it warranted the characterization of torture.<sup>175</sup> In a more recent case against the Republic of Moldova, the European Court held that there had been a violation of the prohibition against torture given that there was no medical evidence that the detainee's life or health had been in serious danger and there were sufficient grounds to suggest that his force-feeding had in fact been aimed at discouraging him from continuing his protest. The Court also concluded that the manner in which the detainee had been repeatedly force-fed (mandatory handcuffing regardless of any resistance and severe pain caused by metal instruments to force him to open his mouth and pull out his tongue) had unnecessarily exposed him to great physical pain and humiliation, and accordingly, could only be considered as torture.<sup>176</sup>
150. On September 23, 2013, the military pronounced the end of the mass hunger strike. A spokesperson said the military would no longer issue daily updates on the number of inmates participating in the protest, eligible for force-feeding or hospitalized, as had been its practice over the previous months.<sup>177</sup> The IACHR notes that, although the widespread hunger strike is over, there are still some detainees currently on hunger strike at Guantanamo. At the beginning of 2014, 25 detainees were reportedly on hunger strike, 16 of whom were being force-fed.<sup>178</sup>

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<sup>173</sup> IACHR, Press Release 29/13: IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantanamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013.

<sup>174</sup> The Guardian, Guantanamo nurse refuses to force-feed prisoners, July 16, 2014. Available at: <http://www.theguardian.com/world/2014/jul/16/guantanamo-nurse-refuses-force-feed-prisoners>

<sup>175</sup> *Nevmerzhitsky v. Ukraine*, no. 54825/00, ECHR 2005.

<sup>176</sup> *Ciorap v. The Republic of Moldova*, no. 32896/07, ECHR 2012.

<sup>177</sup> The New York Times, Guantanamo Hunger Strike Is Largely Over, U.S. Says, September 23, 2013. Available at: <http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html? r=0>

<sup>178</sup> The New York Times, Appeals Court Allows Challenges by Detainees at Guantanamo Prison. February 11, 2014. Available at: <http://www.nytimes.com/2014/02/12/us/appeals-court-clears-way-for-guantanamo-challenges.html>

151. One of the causes attributed to the lifting of the mass hunger strike was the beginning of Ramadan and the prisoners' desire to be in a communal setting with other detainees. Another factor that reportedly led to the decision to lift the strike was what were described as the unsanitary conditions in which they were held during that period, in particular, that they were placed in isolation in cells allegedly covered in mold, which was viewed as part of the effort to pressure them to break the hunger strike.<sup>179</sup> The 2013 mass hunger strike achieved one of its purposes, which was to bring more public attention to the situation of indefinite detention at Guantanamo. It may have been a factor in President Obama's decision to reopen the office of the Special Envoy for the closure of Guantanamo. In addition, two detainees were voluntarily transferred to Algeria right before the end of the mass hunger strike.
152. Finally, the IACHR notes that the hunger strikes at Guantanamo are a symptom of the unsustainable situation of indefinite detention and that the underlying problem has not been resolved. Whereas the hunger strikes are an important issue in and of themselves, they are a symptom of this larger problem of continuing indefinite detention.

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<sup>179</sup> IACHR's Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

CHAPTER 4  
ACCESS TO JUSTICE





## ACCESS TO JUSTICE

153. The inter-American human rights system is based on the premise that *de jure* and *de facto* access to adequate and effective judicial remedies is the first line of defense in protecting basic rights. Access to justice is, therefore, not only a fundamental human right but also an essential pre-requisite for the protection and promotion of all other rights. The obligation to provide judicial remedies is not fulfilled simply by the existence of formal procedures. States must take affirmative steps to ensure that courts are truly effective in establishing whether there has been a violation of human rights and in providing redress. According to inter-American human rights standards, persons deprived of liberty should be provided access to a rapid and effective judicial remedy to secure protection of their rights. Further, the writ of habeas corpus has to remain in effect even during states of emergency.
154. This chapter will begin by assessing some of the challenges brought by Guantanamo detainees before federal courts regarding issues left unresolved in *Boumediene*, such as the legality of detention and evidentiary issues. It will next look at the evolution of the proceedings before military commissions at Guantanamo and, in particular, at the reform introduced by the Military Commissions Act (MCA) of 2009. Special attention will be given to significant improvements included in the 2009 MCA, as well as to several structural defects and practical limitations in the implementation of the military commissions.
155. The IACHR will then focus on the right to legal representation and the important challenges that Guantanamo detainees still face when trying to exercise their right to defense, in particular with regard to the attorney-client privilege. Further, in assessing the right to periodic review of detention, the IACHR will turn to the Periodic Review Board process established in 2011 and analyze whether it meets international human rights and humanitarian law standards. Finally, the IACHR will explain its concerns regarding the lack of judicial review of claims relating to conditions of confinement at Guantanamo.
156. Each of the key elements of the right to access to justice will be assessed in light of the international standards developed by the inter-American human rights system and, where applicable, the *lex specialis* of international humanitarian law.

## A. *Right to an effective remedy*

157. The right to judicial protection is reflected in Articles XVIII and XXIV of the American Declaration as follows:

Article XVIII. Every person may resort to the courts to ensure respect for his legal right. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

158. The State's duty to provide effective judicial remedies is not served merely by their formal existence; that recourse must also be adequate and effective in remedying the human rights violations denounced. Further, the existence of an armed conflict or of a state of emergency cannot entail the suppression or ineffectiveness of the judicial guarantees that a State is required to establish for the protection of the rights not subject to derogation or suspension, such as the right to life and to personal integrity.<sup>180</sup> The right to judicial protection when necessary to protect such interests as life or personal integrity is not subject to suspension.

### 1. Proceedings before federal courts

159. The first habeas corpus petition on behalf of a Guantanamo prisoner was filed in February 2002. The U.S. District Court for the District of Columbia (D.C. District Court) dismissed the petition for lack of jurisdiction, holding that non-citizens detained outside sovereign U.S. territory had no right to habeas proceedings. On June 28, 2004, the U.S. Supreme Court in *Rasul v. Bush* reversed that decision, holding that U.S. federal courts have jurisdiction to hear habeas petitions filed by Guantanamo detainees.<sup>181</sup> Almost two and a half years after the opening of the facility, detainees at Guantanamo had, for the first time, access to the courts.<sup>182</sup>
160. In December 2005 the United States Congress passed the Detainee Treatment Act of 2005 (DTA) establishing that no court "shall have jurisdiction to hear or consider an application for writ of habeas corpus filed by or on behalf of an alien detained [...] at Guantanamo [...] or any other action against the United States or its agents relating to any aspect of the detention."<sup>183</sup> Further, according to the DTA, any new habeas

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<sup>180</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 343.

<sup>181</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>182</sup> On that same day the U.S. Supreme Court ruled in *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) that the Fifth Amendment due process guarantees give a U.S. citizen detainee held as an enemy combatant the right to contest that detention before an impartial authority.

<sup>183</sup> Detainee Treatment Act of 2005, Sec. 1005 (e).

petition filed by Guantanamo detainees should be reviewed by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court), exclusively in order to examine whether the Combat Status Review Tribunals (CSRTs) were conducted in compliance with procedures established by the Secretary of Defense. Therefore, the DTA deprived federal courts of jurisdiction to consider habeas petitions and “any other action” concerning any aspect of detentions at Guantanamo. Further, after the U.S. Supreme Court decision in *Hamdan v. Rumsfeld*, which will be addressed below, the U.S. Congress enacted the Military Commissions Act of 2006 (2006 MCA) to authorize the President to convene military commissions and to amend the DTA to further reduce detainees’ access to federal courts, including in cases already pending.<sup>184</sup>

161. On June 12, 2008, in the landmark decision in *Boumediene v. Bush* the U.S. Supreme Court recognized that constitutional rights could extend to non-citizens abroad. The Court ruled in this regard that Guantanamo detainees had the right to file habeas corpus petitions before federal courts given that the United States maintains *de facto* sovereignty over the territory of the U.S. Naval Station at Guantanamo Bay. The Supreme Court concluded that “[w]ithin the Constitution’s separation-of-power structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”<sup>185</sup> The Court also found that the DTA review of the CSRT findings failed to provide an adequate and effective substitute for habeas corpus, and therefore detainees did not need to exhaust the review procedures in the D.C. Circuit Court before proceeding with their habeas actions in the D.C. District Court. This is the first time that the U.S. Supreme Court invalidated a statute because it violated the Suspension Clause,<sup>186</sup> foreclosing the type of explicit congressional repeal that followed the Court’s previous decisions in *Rasul v. Bush* and *Hamdan v. Rumsfeld*.<sup>187</sup>
162. Although *Boumediene* was a landmark decision, it left important questions unresolved. It did not “address the content of the law that governs petitioners’ detention,”<sup>188</sup> declining to decide the scope of the executive’s authority to detain individuals under the AUMF. It also left various substantive and procedural questions bearing on the legality of the detention of individuals at Guantanamo for the district courts to resolve on the merits, such as evidentiary and access-to-counsel issues.

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<sup>184</sup> Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, February 3, 2010, Summary. Available at: <http://fas.org/sgp/crs/natsec/RL33180.pdf>

<sup>185</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) at 69.

<sup>186</sup> U.S. Constitution, Article I, Section 9, Clause 2: “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

<sup>187</sup> See in this regard, Hafetz, Jonathan, *Calling the Government to Account: Habeas Corpus after Boumediene* (December 14, 2011). Available at SSRN: <http://ssrn.com/abstract=1972542> or <http://dx.doi.org/10.2139/ssrn.1972542>

<sup>188</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) at 69-70.

### a. Challenges to the legality of detention

163. Since *Boumediene*, federal courts have heard more than one hundred habeas petitions filed by Guantanamo detainees involving different categories of challenges. Legality of detention is at the heart of most of those challenges.<sup>189</sup> Between October 2008 and July 2010 the D.C. District Court examined 38 habeas petitions brought by Guantanamo detainees, and concluded that the Government had failed to establish that the prisoners were involved with Al-Qaeda or the Taliban. A number of those successful petitions, however, were reversed or vacated by the D.C. Circuit Court, particularly since mid-2010 when the appeals court in *Al-Adahi v. Obama* overturned a grant of habeas corpus and criticized the decision for “having tossed aside the government’s evidence, one piece at a time.”<sup>190</sup>
164. The decision in *Al-Adahi v. Obama* marked an important change in approach. A report issued by Seton Hall University Law School’s Center for Policy and Research examined the outcomes of habeas review for Guantanamo detainees before and after the July 2010 grant reversal in *Al-Adahi v. Obama*.<sup>191</sup> It examined 46 of the 63 cases that resulted in opinions between November 2008 and October 2011 (it excluded the Uighurs cases because the district court did not have to make factual findings given that the government conceded their case). According to the findings of the research, after *Al-Adahi* the practice of careful judicial fact-finding was replaced by judicial deference to the Government’s allegations. The report points out that before *Al-Adahi* detainees won 59% of the habeas petitions and courts rejected the government’s factual allegations 40% of the time. However, after that decision, detainees won 8% of the petitions and the courts rejected 14% of the government’s factual allegations. The report concludes that “the shifting patterns of lower court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions.”
165. In January 2010, a D.C. Circuit panel held in *Al-Bihani v. Obama* that the procedural protections afforded in habeas cases involving wartime detainees do not need to mirror those provided to persons in the traditional criminal law context. Accordingly, a lower procedural standard may exist as “national security interests are at their zenith and the rights of the alien petitioner [are] at their nadir.”<sup>192</sup> In a decision adopted on December 14, 2012, in *Khairkhwa v. Obama* the D.C. Circuit Court held that the AUMF did not require the Government to show that the detainee had engaged in hostilities or would pose a danger to the U.S. if released. Because

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<sup>189</sup> Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, February 3, 2010.

<sup>190</sup> *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010).

<sup>191</sup> Seton Hall University School of Law, Center for Policy & Research, *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review*, May 1, 2012. Available at: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf>

<sup>192</sup> Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, February 3, 2010, p. 47, citing *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 5245890, Order, at \*1 (D.D.C., December 16, 2008)(Hogan, J.).

the Government was able to prove his Taliban affiliation, the detention was ruled proper.<sup>193</sup>

166. Further, on June 18, 2013, the D.C. Circuit Court ruled in *Hussain v. Obama* that the AUMF does not contain a requirement that the detainee be part of the “command structure” or engage in active hostilities. It used a holistic test to determine if someone was part of an enemy group as defined by the AUMF. Ultimately, the court also found that the detention was proper.<sup>194</sup>

167. On June 18, 2013, in *Hussain v. Obama*, Senior Circuit Judge Harry T. Edwards criticized the way the D.C. Circuit Court handled legal cases of Guantanamo prisoners. He stated in his concurring opinion:

I am constrained by the law of the circuit to concur in the judgment of the court. [...] I have no authority to stray from precedent. However, when I review a record like the one presented in this case, I am disquieted by our jurisprudence. I think we have strained to make sense of the applicable law, apply the applicable standards of review, and adhere to the commands of the Supreme Court. The time has come for the President and Congress to give serious consideration to a different approach for the handling of the Guantanamo detainee cases.<sup>195</sup>

168. According to Judge Edwards, there was no evidence that Hussain ever engaged in any acts of war or terrorism. He asserts that “[t]he majority implicitly shifts the burden of proof from the Government to Hussain [...] [r]ather, the salient point is quite simple: the burden of proof was on the Government to make the case against Hussain by a preponderance of the evidence.”<sup>196</sup>

169. In addition to the legality of detention, other aspects that have been challenged before federal courts are access to counsel, detainees’ transfers, both of which will be addressed below, evidentiary issues, access to protected information, and the admissibility of statements made during torture.

### **b. Challenges to evidentiary issues**

170. In *Boumediene* the Supreme Court ruled that the “extent of the showing required of the Government in [the Guantanamo habeas] cases is a matter to be determined,”<sup>197</sup> expressly leaving unresolved many evidentiary issues. Therefore, questions such as the standard of proof and the admission of hearsay, that is, out-of-court statements introduced into evidence to prove the truth of the matter asserted, were left to the “expertise and competence” of lower courts.

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<sup>193</sup> *Khairkhwa v. Obama*, 703 F.3d 547 (D.C. Cir. 2012).

<sup>194</sup> *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013).

<sup>195</sup> *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), concurring opinion at 5.

<sup>196</sup> *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), concurring opinion at 4-5.

<sup>197</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) at 58.

171. In November 2008 the D.C. District Court issued a Case Management Order (CMO) in the handling of Guantanamo cases stating, among other things, that “the government should bear the burden of proving *by a preponderance of the evidence* that the petitioner’s detention is lawful” (emphasis added).<sup>198</sup> In *Al-Bihani v. Obama* the detainee alleged that application of the preponderance of the evidence standard in his habeas case was unconstitutional. He appealed the denial of the writ by the D.C. District Court.
172. Al-Bihani argued before the D.C. Circuit Court that “the prospect of indefinite detention in this unconventional war augurs for a reasonable doubt standard or, in the alternative, at least a clear and convincing standard.”<sup>199</sup> In the first D.C. Circuit case ruling on the merits of a Guantanamo detainee’s habeas petition post-*Boumediene*, the court rejected the appeal, finding no indication that a preponderance standard is unconstitutional. The court referred to the *Hamdi v. Rumsfeld* decision issued in 2004 in which the Supreme Court described as constitutionally adequate a “burden-shifting scheme” in which the Government needs only present “credible evidence that the habeas petitioner meets the enemy-combatant criteria” before “the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.”<sup>200</sup>
173. Another aspect related to the standard of proof that has been litigated before federal courts is the validity of intelligence reports on which the government relies for the detention of individuals at Guantanamo. On July 21, 2010, U.S. District Judge Henry H. Kennedy Jr. issued an opinion granting a writ of habeas corpus to Adnan Farhan Abd Al Latif, whose case was addressed in the previous chapter. Latif, along with several other Guantanamo detainees, had filed a petition for a writ of habeas corpus contending that he was being unlawfully detained. The opinion found that, because the government did not demonstrate that Latif was part of Al Qaeda or an associated force, his detention was unlawful under the AUMF and ordered his release.
174. On October 14, 2011, the D.C. Circuit Court overturned the district court opinion. Referring to the intelligence reports used by the Government as evidence in the case, the court concluded that the district court “failed to accord an official government record a presumption of regularity.”<sup>201</sup> Circuit Judge Tatel issued a dissenting opinion asserting that the court “now facing a finding that [the government’s report] is *unreliable*, moves the goal posts.” In this regard, the opinion indicated that:

[a]ccording to the court, because the Report is a government-produced document, the district court was required to presume it accurate unless Latif could rebut that presumption [...] In imposing this new presumption and then proceeding to *find* that it has not been rebutted, the court denies Latif the

<sup>198</sup> *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, CMO § II.A (Nov. 6, 2008).

<sup>199</sup> Brief for Petitioner-Appellant at 48, cited in *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010).

<sup>200</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010), citing *Hamdi v. Rumsfeld* 542 U.S. 507 (2004).

<sup>201</sup> *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012). Decided on October 14, 2011, reissued on April 27, 2012.

“meaningful opportunity” to contest the lawfulness of his detention guaranteed by *Boumediene v. Bush*.<sup>202</sup>

175. The dissenting opinion further found that, “[c]ompounding this error, the court undertakes a wholesale revision of the district court’s careful fact findings. Flaws in the Report the district court found serious, this court now *finds* minor [...] without ever concluding that the district court’s particular take on the evidence was clearly erroneous.”<sup>203</sup> In June 2012, the U.S. Supreme Court denied certiorari in this case and in multiple appeals examining whether suspected terrorists are being afforded a meaningful opportunity to challenge the legality of their detention.
176. Professor Hafetz has highlighted the division between district and circuit judges regarding the standard of proof in the following terms:<sup>204</sup>

The debate over the standard of proof reflects a larger divide between circuit and district judges over how to treat the government’s evidence. One area of division concerns the government’s “mosaic theory.” Originally employed in intelligence analysis, the mosaic theory is premised on the notion that pieces of evidence must be evaluated as a whole rather than examined independently. Several district judges have rejected the government’s reliance on this theory in detainee habeas proceedings. [...]

Circuit Judge Randolph has taken one of the most extreme positions on the issue, asserting that judges must undertake a conditional probability analysis in reviewing the evidence [...] [e]ven if a given fact does not prove the ultimate proposition (i.e., that the detainee is an enemy combatant), that fact makes it more likely that other facts establish this ultimate proposition and counsels in favor of a finding the petitioner detainable under the AUMF. Circuit Judge Silberman has advocated a similar approach, arguing that a D.C. Circuit judge should not order the release of a Guantánamo detainee if he or she believes it “somewhat likely that the petitioner is an al-Qaeda adherent or an active supporter.”<sup>205</sup>

177. Regarding requests for additional discovery, in *Abdulmalik v. Obama*, the detainee requested the D.C. District Court to compel the government to reveal the names of his interrogators and those present at his interrogations before his transport to Guantanamo; and to make these individuals available for deposition. He claimed that the depositions were necessary to establish that he was mistreated during interrogation and thus made statements that were not credible. Although the court did not rule on the merits, it held, on July 26, 2011, that the Government must reveal whatever evidence they had to rebut the detainee’s allegations of abuse in order to allow him to explain why the discovery requested would enable him to rebut the

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<sup>202</sup> Circuit Judge Tatel dissenting opinion at 2. *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012).

<sup>203</sup> Circuit Judge Tatel dissenting opinion at 2. *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012).

<sup>204</sup> Hafetz, Jonathan, *Calling the Government to Account: Habeas Corpus after Boumediene* (December 14, 2011), p. 12.

<sup>205</sup> Esmail, 639 F.3d at 1078 (Silberman, J. concurring).



factual basis for his detention. The Government must also search all databases for exculpatory evidence relating to his statements.<sup>206</sup>

178. The Government's use of hearsay evidence, inadmissible under Federal Rules of Evidence, has been the center of controversy. In *Hamdi v. Rumsfeld* the U.S. Supreme Court ruled that hearsay "may need to be accepted as the most reliable available evidence from the Government" at a time of ongoing military conflict.<sup>207</sup> In line with this decision, the CMO allows district judges to admit hearsay evidence that is "reliable" and "material and relevant to the legality of the petitioner's detention" when "the provision of non-hearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security."<sup>208</sup> District and circuit judges have generally admitted hearsay evidence, focusing on the question of how much weight to accord it. In *Al-Bihani v. Obama* the D.C. Circuit Court ruled that "Al-Bihani cannot make the traditional objection based on the Confrontation Clause of the Sixth Amendment [providing for the right of the accused to be confronted with the witnesses against him] [...] because the Confrontation Clause applies only in criminal prosecutions," and not in military detention habeas cases.<sup>209</sup>

### c. Other challenges

179. With regard to access to classified information for use in a habeas petition, on January 9, 2013, the D.C. District Court held in *Mousovi v. Obama* that the Government had to allow in-camera review by the court in order to determine whether a document was admissible or not. Though the Government was permitted to redact and edit classified documents before they were disclosed to the petitioner's counsel, the court had to be able to see documents in order to accurately assess the actions of the executive.<sup>210</sup>
180. Further, the D.C. District Court in *International Counsel Bureau v. U.S. Dep't of Defense* has rejected a request brought under the Freedom of Information Act (FOIA) for records, videos, and still images of four Guantanamo detainees. The court held that the Department of Defense did not have to disclose the information under the broad FOIA Exception 1.<sup>211</sup> According to this exception, the agency does not need to disclose information if it has been properly classified. In the instant case, a variety of executive orders had classified the information at issue.
181. Concerning sensitive but unclassified information in factual returns (documents the government has to file in response to habeas corpus petitions), the D.C. District Court in *In re Guantanamo Bay Detainee Litig.*, held that any information the Government wished to deem "protected" must comply with the *Parhat* two-step

<sup>206</sup> *Abdulmalik v. Obama*, 802 F. Supp. 2d 1 (D.D.C. 2011).

<sup>207</sup> *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) at 533.

<sup>208</sup> *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, CMO § II.A (Nov. 6, 2008).

<sup>209</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010) at 879.

<sup>210</sup> *Mousovi v. Obama*, 916 F. Supp. 2d 67 (D.D.C. 2013).

<sup>211</sup> *International Counsel Bureau v. U.S. Dep't of Defense*, 906 F. Supp. 2d 1 (D.D.C. 2012).

test. First, the Government must identify the categories of information it seeks to protect and provide a valid basis for withholding information in those categories. Second, the court must determine whether the specific information the Government has designated for protection properly falls within the category identified in the first step.<sup>212</sup>

182. When addressing issues related to the voluntariness of detainees' statements, the D.C. District Court has adopted a basic framework. The district court judges require voluntariness as a condition of admissibility, and when a detainee establishes coercion or the Government does not contest a coercion allegation, they import an attenuation analysis, a multi-factor test, to see how long the taint of that coercion continues to affect statements made later under non-coercive circumstances. The D.C. Circuit Court, however, has avoided addressing this issue.<sup>213</sup>
183. In *Al-Hajj v. Obama* the detainee alleged that inculpatory statements were obtained by coercion or under the influence of past coercion. On May 23, 2011, the D.C. District Court granted the detainee's motion to strike statements he made in custody at Guantanamo from the factual return because respondents failed to establish that the effects of coercion from his previous detention had dissipated.<sup>214</sup> The detainee stated, without refutation, that he had been subject to torture in Jordan and Afghanistan prior to his arrival at Guantanamo. The court applied the attenuation analysis with factors including the time passing between confessions, change in place of interrogations, change in identity of the interrogators, length of detention, repeated and prolonged nature of questioning, the use of physical punishment, and the continuing effects of prior coercive techniques on the voluntariness of any subsequent confession. The Government bore the burden of proving by a preponderance of the evidence that each confession was voluntary.
184. According to inter-American standards, no one can be deprived of their liberty without due process of law, and, regardless of their status, everyone has the non-derogable right to judicial review of their detention.<sup>215</sup> The Inter-American Commission has long recognized that the writ of habeas corpus is an essential guarantor of the right to be free from arbitrary detention. One fundamental principle established in the inter-American system is that for a remedy to be effective, "it must be truly effective in establishing whether there has been a violation of human rights and in providing redress." Further, judicial remedies "cannot be reduced to a mere formality" and "must examine the reasons invoked by the claimant" and make express findings in response.<sup>216</sup>

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<sup>212</sup> *In re Guantanamo Bay Detainee Litig.*, 787 F. Supp. 2d 5 (D.D.C. 2011).

<sup>213</sup> See *in this regard* Lawfare, An Additional Thought on Al-Hajj, by Benjamin Wittes, June 8, 2011. Available at: <http://www.lawfareblog.com/2011/06/an-additional-thought-on-al-hajj/>

<sup>214</sup> *Al-Hajj v. Obama*, 800 F. Supp. 2d 19 (D.C.C. 2011).

<sup>215</sup> See, *mutatis mutandi*, I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1978. Series A No. 9. Paras. 29-30.

<sup>216</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13, December 30, 2013, para. 197.

185. In analyzing the compatibility of the detention regime with the standards of the inter-American system, the operation of presumptions and burdens of proof may play a decisive role in whether access to judicial protection is effective in practice. Accordingly, having reviewed the evolution of the case law, the Commission must underline that the application of a “preponderance of the evidence” standard in these cases, with a presumption of “regularity” applied to government documents, following which the burden shifts to the detainee to prove that he does not fall within the criteria for detention, fails to offer the protection that access to the writ of habeas corpus is intended to provide.
186. The comment made by Circuit Judge Tatel in his dissenting opinion indicating that the ruling in *Latif v. Obama* “comes perilously close to suggesting that whatever the government says must be treated as true”<sup>217</sup> demonstrates the seriousness of this question. While fundamental human rights standards uniformly indicate that detention must be understood and applied as an exceptional measure, the standards being applied to the Guantanamo detainees clearly tilt the presumptions in favor of continued detention and against release. Moreover, this regime of presumptions and burden shifting places the detainee at a marked disadvantage in trying to present his claim and in being fully heard on its substance. Given the duration of the detention and severity of the regime, in some cases over more than a decade of indefinite detention, it is clear that a higher standard of review is required to bring standards into compatibility with human rights norms.
187. Further, although the CMO that governs Guantanamo detainee cases states that “[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful,”<sup>218</sup> federal courts have shifted this burden from the Government to the detainees. The federal courts use a holistic test to determine if someone was part of an enemy group as defined by the AUMF. The IACHR observes that the evidence is often circumstantial, turning on such elements as whether the individual stayed in a guest house that may allegedly have been associated with Al-Qaeda or the Taliban, or traveled to Afghanistan or Pakistan using a particular route.
188. The Inter-American Commission is concerned over this shifting pattern of fact-finding by district courts, particularly after the D.C. Circuit Court decision in *Al-Adahi v. Obama*, raising questions about the correct application of *Boumediene*. Article XXVI of the American Declaration encompasses the right to the presumption of innocence. The principle of presumption of innocence has been examined at length by the IACHR and the Inter-American Court; the latter has stated that “the principle of the presumption of innocence –inasmuch as it lays down that a person is innocent until proven guilty– is founded upon the existence of judicial guarantees.”<sup>219</sup> The State, therefore, bears the burden of proving the legality of the

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<sup>217</sup> *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012) (Tatel, J. dissenting).

<sup>218</sup> *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, CMO § II.A (Nov. 6, 2008).

<sup>219</sup> IACHR, Report No. 67/06, Case 12.476, Publication, *Oscar Elias Biscet et al.*, Cuba, October 21, 2006, para. 165.

detention. The right to the presumption of innocence implies that the detainee “does not have to prove that he or she did not commit the crime with which he or she is charged, since the accuser bears the *onus probandi*.”<sup>220</sup>

189. The IACHR reiterates, in this regard, that the United States has the international legal obligation to afford all persons detained under its jurisdiction, including those held in Guantanamo Bay, a proper judicial proceeding to challenge the legality of their detention. The writ of habeas corpus is among those judicial remedies that are essential for the protection of non-derogable rights and that serve to preserve legality in a democratic society.<sup>221</sup> In order to respect the detainees’ right to a meaningful review, judicial remedies to protect the right to personal liberty must be available, adequate and effective. The essential objective of the international protection of human rights is to safeguard persons from the arbitrary exercise of power by the State. Therefore, the non-existence of effective domestic remedies places persons detained at Guantanamo in a defenseless position.<sup>222</sup> The IACHR regrets in this regard that the U.S. Supreme Court has declined to examine whether Guantanamo detainees are being afforded a meaningful opportunity to challenge the legality of their detention.

## 2. Proceedings before the military commissions

190. On November 13, 2001, in response to the September 11, 2001 attacks, President Bush issued a Military Order on “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” According to this order, non-U.S. citizens suspected of terrorism would be tried by military commissions not governed by the “principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>223</sup> Under the United States Constitution, Congress has the power to declare war and “make rules concerning captures on land and water,” and to define and punish violations of the “Law of Nations.”<sup>224</sup> On March 21, 2002, the Department of Defense issued Military Commission Order No. 1, establishing the procedures for trials by the military commissions.<sup>225</sup>
191. Salim Ahmed Hamdan, a Guantanamo detainee who had been charged before a military commission, filed a petition for a writ of habeas corpus before the D.C. District Court challenging the constitutionality of the military commission. The

<sup>220</sup> I/A Court H.R., *Case of Suarez-Rosero v. Ecuador*, Judgment of November 12, 1977 (Merits), Series C No. 35, para. 77.

<sup>221</sup> See, *mutatis mutandi*, I/A Court H.R., *Habeas corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 42.

<sup>222</sup> See in this regard, IACHR, Application to the Inter-American Court of Human Rights in the case of Leopoldo Lopez Mendoza v. Venezuela, Case 12.668, December 14, 2009, paras. 70 and 80.

<sup>223</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Section 1 (f). Available at: <http://fas.org/irp/offdocs/eo/mo-111301.htm>

<sup>224</sup> United States Constitution, Art. I, Section 8.

<sup>225</sup> Department of Defense, Military Commission Order No. 1, March 21, 2002. Available at: <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>

petition was initially granted by the district court but then reversed by the D.C. Circuit Court. On June 29, 2006, in *Hamdan v. Rumsfeld*, the U.S. Supreme Court reversed the appeals court's decision and ruled that the structure and procedures of the military commissions violated the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions, which it found to be incorporated into the UCMJ. Thus, the Supreme Court invalidated the presidentially-created military commissions on separation of powers grounds. The decision states that "the procedures governing [military commissions] trials historically have been the same as those governing courts-martial" and that, in this case, nothing "demonstrates that it would be impractical to apply courts-martial rules." Accordingly, the President had no authority to set up these military commissions without the authorization of Congress.

192. The Supreme Court asserts that the phrase "regularly constituted court" defined in Common Article 3 means an "ordinary military cour[t]" that is "established and organized in accordance with the laws and procedures already in force in a country." According to the Supreme Court, these are the courts-martial established by congressional statute. Therefore, at a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from courts-martial practice. The Court concluded that no such need had been demonstrated in the *Hamdan* case.<sup>226</sup> The Supreme Court found, in this regard that the procedures adopted failed to afford Hamdan "the barest of the trial protections recognized in customary international law" such as the principle that an accused must be present for his trial and must be privy to the evidence against him.<sup>227</sup>
193. In response to *Hamdan v. Rumsfeld*, on October 17, 2006, Congress passed the Military Commissions Act of 2006 (2006 MCA), establishing the procedures governing the use of military commissions to try alien unlawful enemy combatants for offenses committed on or after September 11, 2001, made punishable by the MCA or the law of war. Section 7 deprived courts of jurisdiction to hear or consider habeas corpus petitions pending or filed after the enactment of the MCA by aliens determined to be enemy combatants, or awaiting determination regarding enemy combatant status, relating to the prosecution, trial or judgment of a military commission. Given this restriction, all pending habeas corpus petitions were stayed.
194. As indicated above, in *Boumediene v. Bush*, the U.S. Supreme Court ruled that Guantanamo detainees had the right to file habeas corpus petitions before federal courts and that Section 2241(e)(1) of the MCA of 2006 was, therefore, an unconstitutional suspension of the writ. To address the concern raised in *Boumediene*, on October 8, 2009, as part of the National Defense Authorization Act (NDAA) for fiscal year 2010, Congress passed the Military Commissions Act of 2009 (2009 MCA), replacing the 2006 MCA to provide for federal judicial review on a limited number of issues while still proscribing review of general conditions of confinement.

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<sup>226</sup> *Hamdan v. Rumsfeld*, 548 U.S. (2006) at 69-70.

<sup>227</sup> *Hamdan v. Rumsfeld*, 548 U.S. (2006) at 70-72.

### a. The Military Commissions Act of 2009

195. The military commissions and trial practice before the military commissions are governed by four principal sources: the Military Commissions Act of 2009, the Manual for Military Commissions of 2012, the Regulation for Trial by Military Commission of 2011, and the Military Commission Trial Judiciary Rules of Court of 2013.
196. The 2009 MCA gave rise to the reform of the military commissions, granting many of the basic procedural protections existing in courts-martial procedures.<sup>228</sup> It set jurisdiction over 32 enumerated offenses and over two articles under the UCMJ and traditional law of war violations to the extent they were codified in the statute. In addition, the 2009 MCA introduced new language to refer to the individuals subject to the military commissions substituting the term “unlawful enemy combatant” for “unprivileged enemy belligerent.”
197. The Chief Judge of the Military Commissions Trial Judiciary, who is appointed by the Secretary of Defense, details a military judge to each case referred to trial. Military judges are senior military officers and lawyers trained and certified to be military judges. Each military commission consists of a military judge and a panel of at least five “members,” who are active duty commissioned officers in the U.S. military and play a role similar to that of a juror in civilian trials. In capital cases a minimum of 12 members and unanimous agreement on conviction and sentence are required. In other cases, a guilty verdict and the imposition of a sentence must have the concurrence of at least two-thirds of the members, as required in courts-martial of U.S. service members. Sentences that include confinement for ten or more years must be agreed upon by at least three-fourths of the members.
198. Convictions issued by a military commission may have up to four levels of review. First, the Convening Authority for Military Commissions reviews the findings and the sentence, which may only be reduced. Then, the conviction will be automatically reviewed by the U.S. Court of Military Commission Review (CMCR). The accused can waive this appellate review, except in capital cases. It should be noted that the 2009 MCA expanded the scope of the Court’s jurisdiction to include factual sufficiency of the evidence, making the scope of review the same as the Service Courts of Criminal Appeals created in the UCMJ. Therefore, the CMCR has authority to review questions of law and questions of factual sufficiency. Either party can appeal the decision of the CMCR to the D.C. Circuit and then file a petition for writ of certiorari to the U.S. Supreme Court. Before a convicted individual may be put to death following exhaustion of the review process, the President must authorize the execution.

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<sup>228</sup> For more information on the military commissions and its rules of procedures, see official website of the Office of Military Commissions at [www.mc.mil](http://www.mc.mil)

199. The proceedings of the military commissions are open to the public. The Department of Defense and the Office of Military Commissions allocate a limited number of seats for news media aboard military chartered aircraft for travel from Andrews Air Force Base, Maryland, to Guantanamo Bay, to cover military commission proceedings. Hearings are televised via closed circuit television from a media work center in Fort George G. Meade, Maryland. Media desiring to travel to Guantanamo or to view the hearings must send a request to the Department of Defense.<sup>229</sup>
200. The change in the hearsay rules was one of the most substantive amendments. The 2009 MCA evidentiary rules allow the admission of hearsay evidence in trials if it would be admitted under the rules of evidence applicable in trial by general courts-martial.<sup>230</sup> In evaluating whether a hearsay statement would be admitted, the judge is instructed by the rules to consider “the degree to which the statement is corroborated, its indicia of reliability within the statement itself, and whether the will of the declarant was overborne,”<sup>231</sup> and whether the witness is available as a practical matter. Therefore, both the prosecution and the defense are allowed to use hearsay evidence as long as a military judge finds that the witness is not available to testify, and that the hearsay itself is reliable, material, probative, and that admission of the hearsay statement into evidence best serves “the general purposes of the rules of evidence and interest of justice.”<sup>232</sup> Thus, the burden for the introduction of hearsay was placed on the proponent of the evidence, contrary to the provision in the 2006 MCA.
201. Further, the 2009 MCA repealed an exception that existed concerning coerced statements of the accused, prohibiting the admission of statements obtained under torture or cruel, inhuman or degrading treatment. The rules provide, however, an exception to the voluntariness rule which applies when the statement was made “incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement.”<sup>233</sup> With regard to classified information, the 2009 MCA includes rules essentially similar to the ones that apply in the federal district courts under the Classified Information Procedures Act, except when they are “inconsistent with the specific requirements of [Subchapter V of the 2009 MCA].”<sup>234</sup>
202. Discovery of the information is regulated in Rule 701 of the Rules for Military Commissions. The defense has the right to be provided with any exculpatory, impeaching or mitigating evidence that the prosecution has, either in its possession

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<sup>229</sup> Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013. See also, U.S. Department of Defense, Press Advisory, Military Commissions Media Invitation Announced for United States v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri and United States v. Khalid Shaikh Mohammed et al., September 23, 2014. Available at: <http://www.defense.gov/advisories/advisory.aspx?advisoryid=3656>

<sup>230</sup> 2012 Manual for Military Commissions, Part II. Rules for Military Commissions, Rule 803(a).

<sup>231</sup> 2012 Manual for Military Commissions, Part II. Rules for Military Commissions, Rule 803(b)(2).

<sup>232</sup> MCA 2009, 10 U.S.C. § 949a(b)(3).

<sup>233</sup> MCA 2009, 10 U.S.C. § 948r(c), 49a(b)(3)(B).

<sup>234</sup> MCA 2009, 10 U.S.C. § 949p-1(d).

or of which it is aware. According to the rules, trial counsel must provide to the defense any paper which accompanied the charges, the convening order and any amending orders, any statement relating to an offense charged in the case, the names of the witnesses it intends to call, any prior criminal convictions of the accused which it may offer on the merits for any purpose, including impeachment, and the existence of exculpatory evidence. Upon request, the Government has to provide the defense access to any document within its control which is material to the preparation of the defense or intended for use by trial counsel as evidence in the prosecution. In addition, upon request of the defense, trial counsel has to provide the defense with information to be offered at sentencing.

203. Regarding the disclosure of classified information, the rules provide that “the military judge may issue a protective order to limit the distribution or disclosure to the defense of classified evidence, including the sources, methods or activities by which the United States acquired the evidence.”<sup>235</sup> In those cases, the military judge can authorize alternatives such as “(A) the deletion of specified items of classified information from documents made available to the defense; (B) the substitution of a portion or summary of the information for such classified documents; (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.”<sup>236</sup> According to the prosecution, this statute was designed to balance the competing interests of protecting national security and providing the defense the information they need, and essentially mirrors the rules and practice of the federal courts and military courts under the UCMJ.<sup>237</sup>

#### **b. The implementation of the military commissions**

204. At the expert meeting held by the Inter-American Commission on October 3, 2013, defense counsel raised several concerns regarding the implementation of the system of military commissions at Guantanamo, particularly concerning structural defects and practical limitations. One of the structural issues raised by military defense counsel was the question as to whether the U.S. Constitution applies in Guantanamo Bay, an aspect that was litigated in a round of pre-trial hearings. The military judge did not rule on this question and decided to hear it on an issue by issue basis, instead of delivering a blanket statement.
205. In this regard, defense counsel has raised the point that, notwithstanding the similarities to the trial procedures for courts-martial, Congress specifically deviated from various procedural guarantees in the MCA. Those constitutional guarantees are: the right to a speedy trial; the right to remain silent; the grand jury requirement or equivalent process for securing the right to indictment and presentment; the freedom from unreasonable search and seizure given that evidence obtained without a search warrant or other lawful authorization may reportedly be admitted;

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<sup>235</sup> 2012 Manual for Military Commissions, Part II. Rules for Military Commissions, Rule 701 (f).

<sup>236</sup> 2012 Manual for Military Commissions, Part II. Rules for Military Commissions, Rule 701 (f)(2).

<sup>237</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.



the prohibition against *ex post facto* laws; the admissibility of hearsay evidence; and the independency of the judiciary. In addition, military defense counsel claim that they are not entitled to “equal” access to witnesses and evidence as per courts-martial practice, but “reasonable” access. Further, Military Commission Rule 1(5) provides that “[a] Military Judge may modify, change, or determine that a certain Rule of Court or any portion thereof is not applicable to a given trial by Military Commission,” which makes the court rules a moving target allowing judges to deviate from the rules as he or she sees fit.<sup>238</sup>

206. Although there has been a change in the language of the 2009 MCA to the effect that no statement directly derived from torture will be used, the defense maintains certain concerns in this regard. In a public hearing held at the IACHR on March 16, 2015, military defense counsel alleged that current Military Commission Rules of Evidence continue to allow the admissibility of evidence derived from torture and coercion, contrary to what has been stated over the years.<sup>239</sup>
207. In order for the defense to convince the judge to reject a statement as the product of abuse, the defense has to know the conditions under which the statement was given. However, given that those circumstances can be subjected to classification restrictions, the defense may not obtain access to the information required to make that showing. Further, coerced, involuntary statements by witnesses other than the accused are admissible if the judge finds the statements are reliable and probative, and that it is in the “interest of justice” to allow them.<sup>240</sup> Another issue that is pending and may be litigated is the question of derivative evidence from torture. In Guantanamo military commissions an out-of-court admission by the defendant does not need to be corroborated, leaving open the prospect that a prisoner could be convicted based on a single, uncorroborated “confession” that may or may not have been the product of abuse or torture.
208. Military defense counsel also argues that extremely broad hearsay rules prevent lawyers from cross-examining witnesses. In federal courts a witness must be “unavailable,” whereas in Guantanamo military commissions, the Government can use hearsay evidence whenever it is not “practical” to bring the witness to Guantanamo. This, according to defense lawyers, means that they lose the ability to confront and cross-examine witnesses. They emphasize that, although hearsay has to meet some sort of reliability standards, it is still admissible. The judge decides whether to admit the evidence after considering the circumstances and whether “the interest of justice” would be served should the statement be admitted. As Justice Scalia expressed in more general terms, “[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”<sup>241</sup>

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<sup>238</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>239</sup> IACHR’s hearing, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 Period of Sessions, March 16, 2015.

<sup>240</sup> Military Commission Rules of Evidence, Rule 304(e)(3).

<sup>241</sup> *United States v. Rankin*, 64 M.J. 348, 351. (C.A.A.F. 2007), applying *Crawford v. Washington*, 541 U.S. 36, 61 (2004) to courts martial.

Defense attorneys also argue that they are not entitled to equal access to witnesses and evidence but in fact “reasonable” access subject to the control of the prosecution, which is a significant deviation from Article 46 of the UCMJ. They also claim that Article 13 of the UCMJ, the provision that prohibits unlawful pretrial punishment, does not apply to the military commissions.

209. The prohibition against *ex post facto* laws, a principle of legality under international law, is, according to military defense, rarely applied by the military commissions. Although the U.S. Government initially conceded that the war crimes specified by the 2006 MCA were not a violation of any law of war statute or law of war as defined by customary international law, it later argued the existence of a fourth body of criminal law known as “domestic law of war.” According to the Government, the 2006 MCA did not create new offenses but merely codified well established offenses that have long been tried by military commissions. This domestic law of war theory is presented by the Government as a non-codified common law notion.<sup>242</sup>
210. The question of the *ex post facto* laws has been litigated before the DC Circuit Court in *Hamdan v. United States*. Salim Ahmed Hamdan, whose case was referred to above, was convicted by a military commission on five charges of providing material support for terrorism, a war crime specified by the 2006 MCA, based on actions he took before the enactment of the MCA. After the conviction was affirmed by the Court of Military Commission Review, he appealed before the DC Circuit Court raising questions about the scope of the Executive’s authority to prosecute alleged war crimes that were not codified as such under U.S. law at the time of their commission. After Hamdan’s sentence expired, he was transferred to Yemen in 2008 and then released there. However, he continued to appeal his war crimes conviction after his release. On October 16, 2012, the DC Circuit Court concluded that the 2006 MCA did not authorize retroactive prosecutions of crimes that were not punishable as war crimes under U.S. law at the time they were committed, and that material support for terrorism was not a pre-existing war crime under the law of war. Therefore, the Court reversed the judgment and directed that the conviction for material support for terrorism be vacated.<sup>243</sup>
211. The issue of *ex post facto* laws was again addressed by the D.C. Circuit in the Bahlul case. Ahmad Suliman Al Bahlul was sentenced to life imprisonment by a military commission for three crimes: conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes, all of which are not recognized as war crimes under international law. The CMCR affirmed the conviction and sentence and Bahlul appealed before the DC Circuit Court. In July, 2014, the Court vacated the material support and solicitation convictions and affirmed the conspiracy conviction rejecting the *ex post facto* challenge.<sup>244</sup> The

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<sup>242</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>243</sup> *Hamdan v. U.S.*, 696 F.3d 1238 (2012).

<sup>244</sup> *Al Bahlul v. U.S.* (2014).

Circuit court remanded that conviction to the original panel of the Court for it to dispose of remaining issues.

212. The judges unanimously agreed that the charges for terrorism and solicitation must be vacated as *ex post facto* violations, given that the conduct in question occurred prior to the enactment of the 2006 Military Commissions Act. The decision in Bahlul does not, however, fully resolve the viability of charging conspiracy as a stand-alone offense because the majority reasoned that Bahlul had forfeited his *ex post facto* objection by failing to raise it on appeal, and accordingly decided the point on the lower standard of “plain error.” Thus, the eventual fate of conspiracy as a stand-alone offense, and the government’s domestic war crimes theory remain pending a full review. Further, the various opinions in the decision expressed different visions of the role of military commissions and the meaning of what the government presents as domestic war crimes.<sup>245</sup>

### c. Due process concerns

213. The Inter-American Commission welcomes the substantial amendments made to the MCA in 2009, removing some grave due process violations set out in the 2006 MCA and including important changes to the military commissions, in particular the granting of some basic procedural protections afforded in courts-martial proceedings. Despite these significant improvements, the IACHR is still deeply concerned with regard to, *inter alia*: the independence and impartiality of the military commissions; the uncertainty regarding the application of the U.S. Constitution; respect for the right to equality before the law, to confrontation and to a speedy trial; respect for the principle of legality, and the retroactive prosecution of crimes.
214. The IACHR has recognized that United States courts generally offer a range of due process protections to individuals who are the subject of criminal proceedings.<sup>246</sup> Federal courts in the U.S. have successfully dealt with high-profile cases of terrorism and have reportedly completed nearly 500 cases related to international terrorism since September 11, 2001.<sup>247</sup> Ahmed Ghailani, a participant in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, was transferred from Guantanamo in June 2009 and tried in the U.S. District Court for the Southern District of New York. On January 25, 2011, he was sentenced to life in prison and is now held at the ADX Supermax prison in Florence, Colorado. Sulaiman Abu Ghaith, Bin Laden’s son-in-law and spokesman for Al-Qaeda after the 2001 attacks, was the most senior Al-Qaeda member sentenced in federal courts. On September 23, 2014, the same

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<sup>245</sup> See in this regard, *Opinio Juris, Guest Post: The D.C. Circuit’s En Banc Ruling in Al Bahlul: Legal Innovation, Tradition, and America’s Domestic Common Law of War*, by Jonathan Hafetz. Available at: <http://opiniojuris.org/2014/07/22/guest-post-d-c-circuits-en-banc-ruling-al-bahlul-legal-innovation-tradition-america-domestic-common-law-war/>

<sup>246</sup> IACHR, Report No. 44/14, Case 12.873, Merits (Publication), Edgar Tamayo Arias, July 17, 2014, para. 150.

<sup>247</sup> National Constitution Center, *Constitution Check: Are the Guantanamo war crimes courts now doomed?* By Lyle Denniston, July 22, 2014. Available at: <http://blog.constitutioncenter.org/2014/07/constitution-check-are-the-guantanamo-war-crimes-courts-now-doomed/>

District Court sentenced him to life in prison for conspiracy to kill Americans, providing material support to terrorists, and conspiring to do so. In May 2014, Mostafa Kamel Mostafa, known as Abu Hamza Al-Masri, was convicted in the same court on 11 terrorism charges. Therefore, it has been demonstrated that federal courts have the expertise, capacity and resources to try high-profile cases of terrorism.

215. In the cases under analysis, however, the United States decided not to proceed through the established civilian criminal court system, but rather to create a new structure outside of U.S. territory to try aliens suspected of engaging in terrorism. This has been interpreted by many as a move to create a system to provide a veneer of legitimacy, while at the same time hiding complicity for war crimes allegedly committed by the United States Government.<sup>248</sup> According to the U.S. Government, military commissions are an appropriate venue to prosecute Guantanamo detainees given that they incorporate fundamental procedural fair trial safeguards, including the presumption of innocence and the prohibition of admission of any statement obtained by the use of torture or by cruel, inhuman or degrading treatment. With regard to the release of the declassified executive summary of the *Committee Study of the CIA's Detention and Interrogation Program* mentioned above as it relates to the military commissions, the Government has indicated that unredacted portions of the executive summary, which are the vast majority of the document, were declassified and the Office of the Prosecutor was reviewing the full report to see if there is any exculpatory evidence that would favor the detainees.<sup>249</sup>
216. For many, however, the military commissions at Guantanamo represent a poor substitute for a civilian criminal trial for cases in which the evidence is not sufficient to produce a conviction in a federal court. It is for these reasons that it is viewed by many as a controversial and discredited system. Military defense counsel before military commissions consider that the military commissions system at Guantanamo Bay is not competent, independent, or legitimate in that it was created for the express purpose of convicting and killing persons imprisoned at Guantanamo under the color of judicial authority. They argue that the military commissions system was designed to guarantee the permanent silence of victims of torture in an effort to suppress and conceal criminal conduct by U.S. Government agents. "A state crime cannot be a state secret," stated one of the attorneys in a public hearing held at the IACHR.<sup>250</sup> The American Civil Liberties Union has affirmed in this regard that "[t]he military commissions were created to circumvent the Constitution and result in quick convictions, not to achieve real justice."<sup>251</sup>

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<sup>248</sup> IAHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>249</sup> IACHR's hearing, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 Period of Sessions, March 16, 2015.

<sup>250</sup> IACHR's hearing, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 Period of Sessions, March 16, 2015.

<sup>251</sup> ACLU, House Passes Changes To Guantanamo Military Commissions, October 8, 2009. Available at: <https://www.aclu.org/national-security/house-passes-changes-guantanamo-military-commissions>

217. Further, the military commission system has proven to be slow and inefficient. As will be addressed in the following chapter, 13 years after the U.S. Government opened the detention facility at Guantanamo Bay, only eight detainees have been convicted by a military commission, and two of those convictions were overturned on appeal. In the case of Khalid Sheikh Mohammed, the alleged mastermind of the September 11, 2001 attacks, it took about 11 years for the prosecution to bring charges against him. In contrast, the proceedings against Sulaiman Abu Ghaith in federal court in New York took one year from extradition to sentencing. In addition, there is no certainty as to which cases the prosecution can and cannot bring before the military commissions, given that the courts have not yet resolved the viability of charging conspiracy as a stand-alone offense.
218. The American Declaration establishes that every person has the right to seek recourse before the courts, to protection from arbitrary arrest, and to due process.<sup>252</sup> These rights are part of the core due process guarantees, and constitute the minimum guarantees recognized for all human beings in any type of judicial proceeding.<sup>253</sup> In this regard, the jurisprudence of the IACHR has established that the principle of the “natural judge” is a fundamental guarantee of due process.<sup>254</sup>
219. The right to be tried by a competent, independent and impartial tribunal previously established by law has been interpreted by the Commission and the Inter-American Court as including certain conditions and standards that must be satisfied by tribunals charged with adjudicating any accusation of a criminal nature.<sup>255</sup> Further, the domestic guarantees must be in conformity with applicable international standards and cannot be suspended under either international human rights law or international humanitarian law. This protection applies to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in times of peace or times of national emergency, including armed conflict.<sup>256</sup>
220. When the military commissions at Guantanamo exercise jurisdiction over a matter that federal courts should and could hear, there is a violation of the individuals’ right to be tried by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, of their right to due process. The right to due process is, in turn, intimately linked to the very right of access to the courts.<sup>257</sup> In its concluding observations on the fourth periodic report of the United States, the Human Rights Committee requested the State to “ensure that any criminal cases against detainees held in Guantanamo [...] are dealt with through the criminal

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<sup>252</sup> American Declaration, Articles XVIII, XXV, and XXVI.

<sup>253</sup> IACHR, *2011 Annual Report*, Chapter IV, Cuba, para. 211.

<sup>254</sup> See in this regard, IACHR, Application to the Inter-American Court of Human Rights in the case of Baruch Ivcher Bronstein v. Peru, Case 11.762, March 31, 1999, p. 25.

<sup>255</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 228.

<sup>256</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 261.

<sup>257</sup> See, *mutatis mutandi*, I/A Court H.R., Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 128.

justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.”<sup>258</sup>

221. The IACHR is also seriously concerned by the fact that the detention facility and regime at Guantanamo were designed and have in fact been applied to a specific category of individuals: foreign Muslim men. The statutes governing detention at Guantanamo only cover aliens. According to Section 948c of the 2009 MCA, “[a]ny alien unprivileged enemy belligerent is subject to trial by military commission.” Section 948a specifies that the term “alien” means an individual who is not a citizen of the United States.” None of the 779 individuals who have reportedly been held at Guantanamo are either American citizens or non-Muslims.<sup>259</sup>
222. Neither the American Declaration nor the American Convention prohibit all distinctions in treatment. Distinctions that are reasonable and objective may be compatible with inter-American human rights instruments; conversely, those that are unjustified or arbitrary violate human rights. The IACHR and the Inter-American Court evaluate whether a distinction is reasonable and objective on a case by case basis using a standard test involving several elements. When distinctions are based on categories expressly referenced in the nondiscrimination clauses of international human rights treaties, the test used must be particularly strict. Therefore, the mere existence of a legitimate goal is not enough to justify a distinction based on a suspect category. Furthermore, the measure must be strictly necessary to attain the goal sought, meaning that no other less harmful alternative exists.<sup>260</sup>
223. According to Article II of the American Declaration, “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” The IACHR notes that national origin is not expressly referenced in the text of the nondiscrimination clause contained in the American Declaration, although it falls under “any other factor.” National origin is expressly defined as a prohibited ground in the nondiscrimination clauses of many international human rights treaties, including the International Covenant on Civil and Political Rights to which the United States is a party. As is clear from the object and purpose of the ICCPR, and as the Commission has express with respect to the American Declaration, one of the fundamental objectives of these instruments “was to assure in principle “the equal protection of the law to nationals and aliens alike in respect to the rights set

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<sup>258</sup> United Nations, International Covenant on Civil and Political Rights, Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, April 23, 2014, para. 21.

<sup>259</sup> It should be noted that Yasser Hamdi (*Hamdi v. Rumsfeld*), who was born in the United States and raised in Saudi Arabia, was sent to Guantanamo until authorities learned that he was an American citizen. He was released in October, 2004, and allowed to return to Saudi Arabia under an agreement requiring Hamdi to renounce his American citizenship.

<sup>260</sup> See in this regard, IACHR, Application to the Inter-American Court of Human Rights in the Case of Karen Atala and daughters v. Chile, Case 12.502, September 17, 2010, paras. 85-89.

forth.”<sup>261</sup> While international human rights standards recognize that there may be legitimate differences in treatment between citizens and non-citizens for such limited purposes as entry at borders and nationality, or for the purpose of residence or voting, these standards do not recognize or permit distinctions in respect for other fundamental rights, including the rights to life, personal integrity, equal protection of and before the law, and due process.

224. In the situation under analysis, the Government of the United States decided to set up a detention facility outside the territory of the United States for the exclusive purpose of detaining aliens suspected of terrorism, all of whom are Muslim. It also designed a special system of military commissions to try them, without the procedural guarantees available in federal courts. Therefore, it is a fact that the United States gives these prisoners a different treatment than that given to other prisoners under its custody, whether nationals or aliens. The United States has justified the creation of this separate regime, characterized by indefinite detention, limited or no access to judicial protection, and trial absent basic elements of due process, by invoking the exigencies of the war on terror. It has provided no clear justification for the exclusive application of this regime to foreign Muslim men, presenting the apparent targeting of individuals in relation to nationality, ethnicity and religion.

225. Considering that federal courts have proven to be capable in effectively dealing with high-profile cases of terrorism, some related to Al-Qaeda and the “war on terrorism,” and that federal prisons securely hold more than 300 individuals convicted of terrorism-related offenses,<sup>262</sup> a less restrictive alternative exists.

226. Having monitored the situation since its initiation, the IACHR concludes that the existence of a particularly severe detention regime and a severely restrictive justice system exclusively designed to hold and try aliens, all of them Muslim, constitutes a violation of the nondiscrimination clause in the American Declaration. Equal protection before the law and non-discrimination are among the most basic human rights. States are required to ensure that their laws, policies and practices respect those rights. The IACHR reiterates that “international human rights law not only prohibits policies and practices that are deliberately discriminatory in nature, but also those whose effect is to discriminate against a certain category of persons, even when discriminatory intent cannot be shown.”<sup>263</sup>

227. In this regard, the UN Human Rights Committee has stated that the right of access to the courts and to equality before them “is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status [...] who may find themselves in the territory

<sup>261</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc 40.rev (February 28, 2000), para. 96.

<sup>262</sup> See Human Rights First, Fact sheet, *Myth v. Fact: Trying Terror Suspects in Federal Courts*. Available at: [http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Federal\\_Court\\_Myth\\_vs\\_Fact.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Federal_Court_Myth_vs_Fact.pdf)

<sup>263</sup> IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II. Doc. 78/10, December 30, 2010, para. 95.

or subject to the jurisdiction of the State party.”<sup>264</sup> Accordingly, “the situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of [equality before the courts and tribunals].”

228. In the Case of *A. and Others v. the United Kingdom*, the European Court of Human Rights found that the indefinite detention of 11 foreigners suspected of involvement in terrorism in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals was a disproportionate measure that discriminated unjustifiably between nationals and non-nationals. The European Court of Human Rights considered that:

the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.<sup>265</sup>

229. The IACHR is also deeply concerned over the uncertainty regarding the application of the U.S. Constitution in Guantanamo Bay, and the fact that not all due process guarantees apply in the military commissions. Common Article 3 of the Geneva Conventions prohibits the passing of sentences without “previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees.” The right to be tried by a competent, independent and impartial tribunal, mentioned above, and the principle of legality are part of those basic requirements, which are not being met by the military commissions.
230. Although convictions issued by military commissions may have up to four levels of review, both the Trial Judiciary and the CMCR are not part of an independent judiciary but are subject to Executive appointment and control. The first opportunity for a case to be heard, on appeal, before an independent judiciary would be the appeal before the DC Circuit Court. According to inter-American standards, a criminal proceeding is a single proceeding in various stages, from first to last instance. The concept of an independent and impartial tribunal and the principle of due process apply throughout all those phases and must be observed in

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<sup>264</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>265</sup> ECHR, *A. and Others v. the United Kingdom*, no. 3455/05, 19 February 2009, § 186.



all the various procedural instances. Therefore, the right to appeal is not satisfied merely because there is a higher court.<sup>266</sup>

231. The IACHR is also concerned with regard to the scope of the military commissions. The 2009 MCA punishes offenses committed “before, on, or after September 11, 2001”<sup>267</sup> and defines an “unprivileged enemy belligerent” as an individual who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”<sup>268</sup> The MCA takes, therefore, a broad view of the “hostilities,” covering offenses committed before September 11, 2001, and includes a broad definition of the persons subject to the military commissions, extending the scope to individuals not engaged in hostilities.
232. The Inter-American Commission has interpreted the principle of legality as requiring crimes to be described in precise and unambiguous language that narrowly defines the punishable offense. This in turn requires a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties. The ambiguity in describing crimes creates doubts and the opportunity for abuse of power. As the IACHR has indicated in its Report on Terrorism and Human Rights, “these principles are particularly significant in the context of domestic laws that prescribe crimes relating to terrorism.”<sup>269</sup> The Commission and the Court have found certain anti-terrorism laws to violate the principle of legality because they attempted to prescribe a comprehensive definition of terrorism that is overbroad and imprecise.<sup>270</sup> The IACHR finds, in this regard, that the broad and imprecise definitions contained in the 2009 MCA do not satisfy the principle of legality.
233. The 2009 MCA also fails to expressly exempt from its jurisdiction persons who committed the offense when they were under the age of 18. Although there is no indication that persons in that situation are currently detained at Guantanamo, the IACHR notes that at least 22 juveniles between the ages of 13 and 17 at the time of capture, have been held at Guantanamo;<sup>271</sup> two of them, Omar Khadr and Mohamed Jawad, were tried by military commissions. According to information received by the IACHR in 2006, Omar Khadr, a Canadian citizen, was tried for a crime allegedly committed in Afghanistan when he was 15 years old. During his detention and interrogation by military personnel, he was allegedly denied medical attention; his

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<sup>266</sup> See in this regard, I/A Court H.R., Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 161.

<sup>267</sup> MCA 2009, 10 U.S.C. § 948(d).

<sup>268</sup> MCA 2009, 10 U.S.C. § 948(a)(7)

<sup>269</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 226.

<sup>270</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, paras. 225-226.

<sup>271</sup> See in this regard, Andy Worthington (Guantanamo expert), *The Pentagon Can't Count: 22 Juveniles Held at Guantanamo*, November 22, 2008. Available at: <http://www.andyworthington.co.uk/2008/11/22/the-pentagon-cant-count-22-juveniles-held-at-guantanamo/>

feet and hands were handcuffed for long periods of time; he was kept in a cell with fierce dogs; he was threatened with sexual abuse; and his head was covered with a plastic bag. On March 21, 2006, the IACHR granted precautionary measures in favor of Omar Khadr. In October 2010, Khadr pleaded guilty to five war crimes and agreed to a sentence of eight years. In exchange for that plea, he was transferred to a maximum security facility in Edmonton, Alberta, Canada.<sup>272</sup> In February 2014 he was moved to a medium-security prison in the same province.<sup>273</sup>

234. According to the *corpus juris* for the protection of the rights of children and adolescents, a juvenile justice system must be in place for children and adolescents who violate criminal laws. Corporal punishment, solitary confinement, and other cruel, inhuman and degrading treatment are strictly prohibited under the international law of human rights. Further, when in detention they must be separated from adults.<sup>274</sup> According to international law, children and adolescents who have been recruited or used in armed conflicts are understood to be in a special situation. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ratified by the United States in 2002, explicitly requires the rehabilitation of former child soldiers, including “all appropriate assistance for their physical and psychological recovery and their social reintegration.” The UN Committee on the Rights of the Child, which oversees compliance with the Optional Protocol, has criticized the United States’ treatment and military prosecutions of children held at Guantanamo, calling on the United States to treat children in its custody in accordance with international juvenile justice standards.<sup>275</sup>
235. The Inter-American Commission is also deeply concerned that military commissions can prosecute detainees for acts that are not defined as war crimes under international law, and that were not punishable at the time they were allegedly committed. The IACHR reiterates in this regard that States may not derogate from due process protections that are necessary to protect other fundamental, non-derogable human rights. Further, the IACHR had made clear that these protections “apply to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict.”<sup>276</sup> These protections include the right to respect for fundamental principles of criminal law, including the *non-bis-in-idem* principle, the *nullum crimen sine lege* and *nulla poena sine lege* principles, the presumption of innocence, and the right not to be convicted of an offense except on the basis of individual criminal responsibility.<sup>277</sup>

<sup>272</sup> See CBC News Canada: Omar Khadr returns to Canada, September 29, 2012. Available at: <http://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754>;

<sup>273</sup> See CBC News Canada: Omar Khadr moves to medium-security prison. Available at: <http://www.cbc.ca/news/canada/toronto/omar-khadr-moves-to-medium-security-prison-1.2532793>

<sup>274</sup> IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, paras. 2, 14 and 276.

<sup>275</sup> Committee on the Rights of the Child, Report on the forty-eight session, CRC/C/48/3, 19 May-6 June 2008.

<sup>276</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 261.

<sup>277</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, para. 261.

236. Another point of concern is the existence of hearsay rules that, despite the restrictions introduced by the 2009 MCA, continue to prevent lawyers from cross-examining witnesses. The IACHR notes in this regard that the adversarial principle and the right of confrontation are among the pillars of the right to defense. These are part of the principle of equality of arms, which has been recognized by the IACHR as one of the integral elements of the guarantee of due process and a fair trial.<sup>278</sup> In this regard, the IACHR has indicated that “all proceedings should contain the necessary elements for providing a balance between the parties for the due defense of their interests and rights. This implies, among other things, that the principle of the adversarial proceeding applies [...] and that each party must have a reasonable opportunity to present his or her case under conditions that do not place him or her at a disadvantage compared to the opponent.”<sup>279</sup> The protections afforded by the Confrontation Clause of the Sixth Amendment to the United States Constitution are indispensable for the provision of fair trials to Guantanamo detainees.<sup>280</sup>
237. Finally, the 2006 MCA expressly established the inapplicability of Article 10 of the UCMJ regarding the right to a speedy trial, which was maintained by the 2009 MCA under Section 948(b)(d). The right to a speedy trial is a basic due process guarantee and is crucial to protect the right to a fair trial. The IACHR has stressed that “while the complexity of the case and the diligence of the investigation may be taken into account to define a “reasonable time [...],” when prison is used as a precautionary measure that definition should be much stricter and limited because of the underlying burden on the right to liberty.<sup>281</sup> It is in light of this presumption of liberty and security of the person established in Article I of the American Declaration that detention must not exceed a reasonable time.<sup>282</sup> With the exception of a handful of trials before military commissions, Guantanamo detainees have been imprisoned for more than a decade without even being charged. This constitutes a clear violation “of the right to have the legality of [the] detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released” recognized in Article XXV of the American Declaration.

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<sup>278</sup> IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A review of the standards adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007, para. 185-186.

<sup>279</sup> IACHR, Report No. 66/12, Case 12.324, Merits (Publication), Ruben Luis Godoy, Argentina, March 29, 2012, para. 105.

<sup>280</sup> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right [...] to be confronted with the witnesses against him.”

<sup>281</sup> IACHR, Report No. 86/09, Case 12.553, Merits (Publication), Jorge, Jose and Dante Peirano Basso, Uruguay, August 6, 2009, para. 128.

<sup>282</sup> See, *mutatis mutandi*, IACHR, Report No. 12/96, Case 11.245, Merits (Publication), Jorge A. Gimenez, Argentina, March 1, 1996, para. 75.

### 3. Right to legal representation

238. The 2009 MCA guarantees detainees military lawyers at Government expense or gives them the option of hiring civilian lawyers who meet specific qualifications. When the detainee opts for a civilian counsel, the detailed military counsel serves as associate counsel.<sup>283</sup> The MCA also provides the right to self-representation, in which case the detailed counsel serves as “standby counsel” and may be required to be present during proceedings.
239. Among the improvements included in the 2009 MCA is the requirement of experienced capital defense attorneys in death penalty cases and more resources for defense counsel. Counsel is provided free of charge by the Office of the Chief Defense Counsel. The 2009 MCA includes the right to be represented “to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases,” when any of the charges are capital.<sup>284</sup> Therefore, detainees facing a possible death sentence would be entitled to two attorneys at Government expense. The IACHR notes that this right is not accorded to service members in the military justice.<sup>285</sup>
240. Further, an amendment introduced by the 2009 MCA provides the accused an opportunity to request a specific military lawyer to act as counsel, if the lawyer is reasonably available. The accused may also request a replacement counsel from the Chief Defense Counsel if he believes the detailed counsel has been ineffective or if he is otherwise dissatisfied with the assigned counsel.
241. Despite these positive developments, the IACHR notes that the Guantanamo detainees’ right to legal representation still faces many important challenges. In December 2011, the then Joint Task Force Commander at Guantanamo issued two orders establishing that any confidential writings between clients and attorneys had to go through a special privileged review team of law enforcement, intelligence, and security personnel that report to him. Since that date, defense counsel have allegedly not been able to engage in confidential communications with their clients at Guantanamo Bay. Reports indicate that these orders were intended to control what is known as information contraband. The orders directed counsel that certain topics were prohibited in conversation with their clients, such as historical perspective on jihad, the status of other detainees, details about U.S. personnel who may have tortured or abused the prisoners, and current conditions of confinement. These information contraband provisions and the lack of confidential attorney-client conversations are currently the object of litigation before the military commissions.<sup>286</sup>

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<sup>283</sup> MCA 2009, 10 U.S.C. § 949(c)(b).

<sup>284</sup> MCA 2009, 10 U.S.C. § 949a.(b)(2)(c)(ii).

<sup>285</sup> IAHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>286</sup> IAHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

242. Information contraband is not the only restriction on the communications between detainees and their defense teams. Logistics constitute another important restriction. Military defense lawyers are reportedly not allowed to talk to their clients over the telephone; being therefore required to travel to Guantanamo Bay in person in order to speak to them. This in turn is very time consuming; flights to the naval base are typically weekly, either Monday to Friday or Tuesday to Thursday. Therefore, consulting with the client about any matter normally takes military defense counsel from two to five days of work. The right to speak with their clients over the telephone is being litigated by military defense counsel. This restriction reportedly does not extend to habeas attorneys.<sup>287</sup>
243. According to information provided by defense counsel, in 2012 there were two incidents that have undermined confidence in the military commissions.<sup>288</sup> On January 28, 2012, during a pretrial hearing, the sound system in the courtroom was suddenly cut. The judge later revealed that a government official from an agency that was not disclosed was following the proceedings from outside the courtroom, and intervened to prevent the release of information. The presiding judge was supposedly the sole authority with the ability to censor the proceedings. After determining that the information was not classified, the judge released a transcript of the censored remarks and ordered the agency to disconnect the equipment. Further, around the same time, during a meeting with a detainee, military defense counsel found that a smoke detector in a meeting room in the complex known as Echo 2 was hiding a microphone. The officer in charge of prison security reportedly assured the defense counsel that private meetings between prisoners and their lawyers or representatives of the ICRC were not monitored and that the hidden microphone was disabled.<sup>289</sup> Further, in February 2013, Guantanamo guards reportedly seized confidential legal documents from certain prisoners' cells while they were at the courtroom attending a pre-trial hearing.<sup>290</sup>
244. In response to the mass hunger strike that took place in 2013, the military reinstated an invasive search protocol for detainees before and after they met with counsel, which was considered by the detainees to be a form of religious discrimination and humiliation.<sup>291</sup> On July 11, 2013, a federal district judge ruled that restrictions on Guantanamo detainees' access to counsel violated the detainees' right to habeas proceedings in federal court. The decision struck down the search

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<sup>287</sup> IAHCR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>288</sup> For more information on these and other incidents, see Seton Hall University School of Law, Center for Policy & Research, Spying on Attorneys at Gtmo: Guantanamo Bay Military Commissions and the Destruction of the Attorney-Client Relationship. Available at: [http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/Spying\\_on\\_Attorneys\\_at\\_GTM\\_O.pdf](http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/Spying_on_Attorneys_at_GTM_O.pdf)

<sup>289</sup> AP, Hidden mike revealed at Guantanamo meeting room, February 12, 2013. Available at: <http://bigstory.ap.org/article/secretcy-fears-prompt-sound-changes-guantanamo>

<sup>290</sup> Reuters, Guards seized Guantanamo defendants' legal documents, February 14, 2013. Available at: <http://www.reuters.com/article/2013/02/14/us-usa-guantanamo-idUSBRE91D1LP20130214>

<sup>291</sup> IAHCR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

protocol, restrictions on the locations within the facility where certain detainees could meet with counsel, and the new vans that guards used to transport detainees to meetings with counsel (detainees had to sit in stress positions while traveling to their meetings with their attorneys).<sup>292</sup> The decision was appealed by the U.S. Government.

245. Further, according to publicly available information, in April 2014 Guantanamo defense lawyers in the case of the five alleged masterminds of the September 11 attacks told a military commission that the FBI was spying on their colleagues. The FBI investigation reportedly involved the attempt to turn the security officer of Ramzi Bin Al Shibh's legal team into an FBI informant. The U.S. Government has refused to respond to the request of the defense team to turn over information about who and what the FBI was investigating. According to the Department of Justice, the secret FBI investigation has been closed and referred to the Department of Defense. David Nevins, lead counsel for Khalid Sheikh Mohammed, said the fear of prosecution by the FBI for defense-related activities inhibits them in their ethical obligation to zealously represent the interests of their clients.<sup>293</sup> The litigation on the potential conflicts of interest has further delayed the pre-trial proceedings, adding to the already ongoing delays, a matter that will be addressed in the following chapter.
246. The IACHR has also received troubling information regarding restrictions on access to evidence and unreasonable classification rules.<sup>294</sup> According to standards developed by the U.S. Supreme Court, as a matter of general practices prosecutors must disclose all "material" evidence that is favorable, which is broader in scope than exculpatory evidence.<sup>295</sup> In this regard, the Supreme Court has ruled that evidence is material and must be turned over, even without a request by the defense, if it "creates a reasonable doubt that did not otherwise exist."<sup>296</sup> In contrast, the obligation to disclose exculpatory evidence in military commissions is limited "to any evidence that reasonably tends to [...] negate the guilt of the accused."<sup>297</sup> In addition, under general practice, federal courts presume classified evidence is discoverable unless and until the government demonstrates otherwise. Under the 2009 MCA, however, the burden is on the defense to demonstrate the discoverability of evidence, even though they may not even know it exists.<sup>298</sup> Finally, military commission prosecutors can withhold evidence based on an

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<sup>292</sup> *In re Guantanamo Bay Detainee Litigation*, Misc. No. 12-398 (RCL), Order (July 11, 2013)(Dkt. No. 46). Available at: [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2012mc0398-47](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012mc0398-47). See also, Judge Strikes Restrictions on Guantanamo Detainees' Access to Counsel, Constitutional Law Prof Blog. Available at: <http://lawprofessors.typepad.com/conlaw/2013/07/judge-strikes-restrictions-on-guantanamo-detainees-access-to-counsel.html>

<sup>293</sup> The Huffington Post, FBI Infiltration Of 9/11 Defense Continues to Delay Guantanamo Trial, August 14, 2014. Available at: [http://www.huffingtonpost.com/daphne-eviatar/fbi-infiltration-of-911-d\\_b\\_5679432.html](http://www.huffingtonpost.com/daphne-eviatar/fbi-infiltration-of-911-d_b_5679432.html)

<sup>294</sup> Written submission received during the IACHR's Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>295</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>296</sup> *U.S. v. Agurs*, 427 U.S. 97, 112 (1976).

<sup>297</sup> MCA 2009, 10 U.S.C. § 949j(b)(1)(A).

<sup>298</sup> MCA 2009, 10 U.S.C. § 949p-4(a)(2).

assertion of national security grounds made during a secret hearing. The judge's decision establishing that the Government can withhold the information is not subject to review.

247. In the case of Khalid Shaikh Mohammed, the military commission has established that classified information includes, among others: information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date; information that would reveal or tend to reveal the foreign countries in which the accused was detained from the time of the capture; the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused; the enhanced interrogation techniques that were applied to an accused; and descriptions of the conditions of confinement.<sup>299</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, has described these restrictions as “particularly egregious.” In this regard, the Special Rapporteur stated that the military commissions at Guantanamo:

treat evidence confirming the torture of “high-value detainees” by the CIA as “classified information” on the spurious ground that the accused, having been subjected to waterboarding and other forms of torture, are thereby privy to information about classified CIA interrogation techniques which they cannot be permitted to reveal, in any proceeding open to the public, even to the extent of preventing their attorneys from providing the accused with government classified materials about the ill-treatment to which they were subjected.<sup>300</sup>

248. Further, the IACHR has received information regarding the denial of access to consular assistance. In a public hearing held at the IACHR, military defense counsel alleged that Mr. al Hawsawi, a Saudi “high value detainee” has attempted to communicate with the Saudi Government to no avail. The Saudi Government has also reportedly requested to meet with Mr. al Hawsawi. The Chief Prosecutor for Military Commissions allegedly took the position that Mr. al Hawsawi should not have access to representatives of his Government pursuant to the Vienna Convention for Consular Assistance because the Government of Saudi Arabia could instead watch the process on television.<sup>301</sup>

249. The right to adequate time and facilities to prepare a defense is one of the basic components of the right to a fair trial that cannot be justifiably suspended. In defining this non-derogable guarantee, the IACHR has stated that the “right to

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<sup>299</sup> Amended Protective Order #1 to Protect Against Disclosure of National Security Information, para. 2(g)(4)-(5), February 9, 2013.

<sup>300</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emerson: Framework Principles for securing the accountability of public officials for gross or systemic human rights violations committed in the context of State counter-terrorism initiatives*, A/HRC/22/52, March 1, 2013, foot note 94. Available at: [http://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a-hrc-22-52\\_en.pdf](http://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a-hrc-22-52_en.pdf)

<sup>301</sup> IACHR, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, United States, 154 Period of Sessions, March 16, 2015.

assistance of counsel is in turn intimately connected with the right of a defendant to adequate time and means for the preparation of his or her defense, which requires that all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.” The defendant must also “be afforded access to documents and other evidence under the possession and control of the authorities necessary to prepare his or her case.”<sup>302</sup> Further, the IACHR reminds the United States that, for the purpose of evaluating the State’s compliance with a foreign national’s due process rights under Articles XVIII and XXVI of the American Declaration, it considers the extent to which a State party has given effect to the requirements of Article 36 of the Vienna Convention.<sup>303</sup>

250. The IACHR notes with deep concern that the attorney-client privilege is not respected at Guantanamo Bay. Prison authorities have access to private legal mail, certain topics are prohibited in conversations between defense counsel and their clients, and military defense counsel is not allowed to have telephone conversations with their clients. Further, the IACHR is extremely concerned over the fact that strict classification rules could lead the prosecution to withhold key evidence, and that unreasonable classification rules put the burden on the defense to demonstrate the discoverability of evidence. Based on the aforementioned standards, these restrictions clearly constitute a violation of the right to an adequate defense. This in turn not only affects the detainees’ confidence in the military commissions but also public confidence in the system.

## ***B. Right to periodic review of detention***

251. Following the Supreme Court’s decisions in *Hamdi v. Rumsfeld* and *Rasul v. Bush* referred to above, on July 7, 2004, the Department of Defense issued an order creating the Combatant Status Review Tribunals (CSRT) establishing an administrative review process to determine whether the detainees at Guantanamo were properly classified as “enemy combatants.” Each tribunal was composed of three mid-level officers of the U.S. Armed Forces. The procedure allowed the Government to use hearsay evidence and evidence derived from torture. Detainees were not allowed to see classified evidence.<sup>304</sup>

<sup>302</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, paras. 233, 237, 238, 247.

<sup>303</sup> IACHR, Report No. 44/14, Case 12.873, Report on Merits (Publication), Edgar Tamayo Arias, United States, July 17, 2014, para. 136.

<sup>304</sup> For information on the procedure, see Deputy Secretary of Defense, Memorandum for Secretaries of the Military Departments, July 14, 2006. Available at: <http://www.defense.gov/news/aug2006/d20060809csrtprocedures.pdf>



252. Between July 2004 and June 2007 the CSRTs reviewed 572 detainees and determined that 534 were enemy combatants subject to continued military detention. As indicated in the section on proceedings before federal courts, the Detainee Treatment Act (DTA) of 2005 established that the D.C. Circuit Court had exclusive jurisdiction to review certain aspects of final determinations of CSRTs. As also indicated, in *Boumediene* the Supreme Court found that the CSRTs subjected detainees to “considerable risk of error in the tribunal’s findings of fact” and the DTA’s provision for limited review was “an inadequate substitute for habeas corpus.”<sup>305</sup>
253. Since 2009 the United States has endeavored to determine the legal status of the detainees at Guantanamo Bay by means of a review process carried out by an executive task force<sup>306</sup> and, after the decision issued in *Boumediene*, the review of habeas corpus petitions by the federal courts. The Executive determined that of the 240 persons who were detained in 2009, 48 could be held indefinitely without criminal charges in light of the alleged threat they presented to U.S. national security.
254. On March 7, 2011, President Obama signed Executive Order 13567 directing the Department of Defense to establish the Periodic Review Board (PRB) process “to determine whether certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba represent a continuing significant threat to the security of the United States.”<sup>307</sup> The PRB process is a discretionary, administrative interagency process intended to assist the Executive branch in deciding whether detainees held at Guantanamo Bay should remain in continuing detention. This process applies to those detainees designated for continued law of war detention or referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.<sup>308</sup> The PRB panel consists of senior officials from the Departments of Defense, Homeland Security, Justice, and State; the Chairman of the Joint Chiefs of Staff; and the Office of the Director of National Intelligence.
255. The PRB process does not address the legality of the detention, an issue that is subject to challenge before federal courts through the writ of habeas corpus. According to official information, in assessing the threat posed by each detainee under review, the Board will be given access to all relevant information in detainee disposition and any additional relevant information that has become available. The PRB may also consider diplomatic considerations or security assurances related to the detainee’s potential transfer, the detainee’s mental and physical health, and

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<sup>305</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) at 56, 63-64.

<sup>306</sup> Final Report of the Guantanamo Review Task Force, January 22, 2010. Available at: <http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>

<sup>307</sup> For more information on the PRB, visit the Periodic Review Secretariat website at [www.prs.mil](http://www.prs.mil).

<sup>308</sup> Executive Order 13567, Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, March 7, 2011, Section 1(a). Available at: <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>

other relevant information. The PRB reportedly takes into account all mitigating information relevant to whether the detainee poses a continuing significant threat. The PRB reportedly does not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment to support a determination that continued law of war detention is warranted for a detainee.

256. Detainees are provided an unclassified written summary of the information considered by the PRB, can submit written statements, and appear before the PRB via video or telephone conference. Detainees are provided with a personal representative (a uniformed military officer) to assist them during the process. In cases where information considered by the PRB is withheld from a detainee's personal representative and/or private counsel, substitutes or summaries of the withheld information are provided.
257. Full reviews of each detainee are conducted every three years. The PRB can either recommend continued law of war detention or the detainee's transfer, including establishing the conditions for transfer. The determination can be reviewed by a Review Committee if a member of the Committee seeks review within 30 days, or if the PRB cannot reach consensus. Once a PRB determination becomes final, the detainee may not appeal. If the PRB determines that continued detention is necessary, it will conduct semi-annual file reviews focusing on any new information or change of circumstances.
258. According to publicly available information, the first detainee to be reviewed by the PRB was Mahmud Abd Al Aziz Al Mujahid. On November 20, 2013, the PRB determined that he was eligible for transfer subject to appropriate security and humane treatment conditions. The PRB applied the same conditions imposed for the transfer of other Yemeni nationals, specifically, "that the security situation improves in Yemen, that an appropriate rehabilitation program becomes available, or that an appropriate third country resettlement option becomes available."<sup>309</sup>
259. According to information provided by the U.S. Government, as of March 2015 the PRB had conducted fourteen full hearings and three six-month file reviews.<sup>310</sup> Eight of the full hearings determined that "continued law of war detention of the detainee is no longer necessary,"<sup>311</sup> in five cases the PRB determined that "continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States,"<sup>312</sup> and one was still pending a

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<sup>309</sup> U.S. Department of Defense, Release No. NR-017-14, Completion of First Guantanamo Periodic Review Board, January 9, 2014. Available at: <http://www.defense.gov/releases/release.aspx?releaseid=16473>

<sup>310</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 4.

<sup>311</sup> See PRB final determinations in the cases of Ali Ahmad al-Razihi, Ghaleb Nassar Al Bihani, Fouzi Khalid Abdullah Al Awda, and Muhammad Murdi Issa Al-Zahrani. Available at: <http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>

<sup>312</sup> See PRB final determinations in the cases of Abdel Malik Ahmed Abdel Wahab Al Rahabi, Salem Ahmad Hadi Bin Kanad, Muhammed Abd Al Rahman Awn Al-Shamrani, and Faez Mohammed Ahmed Al-Kandari. Available at: <http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>

final determination. The IACHR notes that, in making the determination, the Board assessed, among other factors, the detainee's potential threat upon transfer, his plans for the future, his family's support, skills and employment prospects, behavior in detention, the efficacy of rehabilitation programs in the country of destination, and the commitment to refrain from supporting extremist groups.

260. According to inter-American standards, persons in pretrial detention have the right to a periodic judicial review of the grounds for their detention in accordance with due process guarantees. In this regard, the IACHR has stated that:

the right to the presumption of innocence and the exceptional nature of pretrial detention give rise to the State's duty to periodically review that the circumstances on which its initial imposition was based still exist. This process of subsequent appraisal is characterized by the fact that, in the absence of evidence to the contrary, procedural risks tend to decrease with the passage of time. As a result, the State's explanations of the need to keep a person in pretrial detention should be more convincing and better grounded as time progresses.<sup>313</sup>

261. The Inter-American Commission has also indicated that judicial authorities are required to effectively guarantee the possibility of submitting arguments and that the reasoning offered by the judge must clearly show that the body of evidence has been rigorously examined.<sup>314</sup>
262. The IACHR notes that the PRB review process is not a judicial proceeding but a discretionary administrative process. Although it is preferable that internment review in the context of armed conflicts be carried out by a judicial body, States can choose to have an administrative board as the review body in that context. According to the ICRC, "the important issue is that persons are not arbitrarily interned and that their internment is reviewed by a body that can effectively do so and order release as soon as internment is no longer necessary." Therefore, regardless of the nature of the body, the review must be performed by a body that is independent and impartial.<sup>315</sup>
263. Assuming that context of armed conflict, in order to be independent and impartial, a review body should comply, among others, with the following requirements: transparency of the procedures and their implementation; direct decision making power (i.e. power to order release without that decision being subject to further confirmation by operational command); access to all available information; members of the review body should be appointed from outside the chain of

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<sup>313</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13, December 30, 2013, para. 202.

<sup>314</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13, December 30, 2013, para. 205.

<sup>315</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, pp. 878-879.

operational command or at least be effectively independent from the latter's influence; the body should be made up of permanent members and internment-review should be their only task; and at least one of the body's members should be a qualified lawyer.<sup>316</sup>

264. The PRB process does not appear to meet some of the above mentioned criteria. Although the Board issues "final determinations," the official information available indicates that "the PRB process is intended to *assist the executive* branch in making informed decisions as to whether detainees held at Guantanamo Bay should remain in law of war detention" (emphasis added).<sup>317</sup> Therefore, the PRB does not appear to be a direct decision-making body. Further, some members of the PRB are appointed within the chain of operational command, such as the Department of Defense and the Joint Chiefs of Staff. Finally, there is no publicly available information on whether outside observers are able to watch the proceedings, if internment-review is the only task of PRB members and if one of them is a qualified lawyer. The IACHR also notes that it is not clear whether attorney-client privilege attaches to PRB proceedings.
265. The IACHR concludes that, although the PRB review process established in 2011 is an important improvement over previous systems of review, it falls short of what is required by the standards developed by the ICRC regarding internment review in the context of armed conflicts. It also notes that the PRB cannot "effectively [...] order release as soon as interment is no longer necessary,"<sup>318</sup> a point that will be discussed in the following chapter.
266. Despite these deficiencies, the IACHR believes that the U.S. Government is providing a more diligent review, on a case-by-case basis, at whether detainees pose a continuing threat. The periodic review of detention could support significant progress toward the closure of Guantanamo given that many of the detainees could potentially be moved from the indefinite detention category to the prosecution category or the cleared category. One issue of concern, however, is the fact that it took the PRB more than two years to start with the review proceedings and, as of March 2015, only fourteen cases have been fully reviewed. Therefore, the existence of the PRB process does not reduce the urgency in addressing continuing arbitrary indefinite detention in Guantanamo.

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<sup>316</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, p. 879.

<sup>317</sup> Periodic Review Secretariat website.

<sup>318</sup> International Review of the Red Cross, Reports and Documents, Expert meeting on procedural safeguards for security detention in non-international armed conflicts, Chatham House and International Committee of the Red Cross, London, 22-23 September 2008, Volume 91 Number 876, December 2009, p. 879.

### C. *Prison conditions and access to justice*

267. In *Boumediene* the U.S. Supreme Court declined to address the scope of conditions of confinement claims. Therefore, in the aftermath of *Boumediene*, district court judges continued to give effect to Section 7(a)(2) of the MCA which bars judicial review of claims relating to conditions of confinement.<sup>319</sup> In *Khadr v. Bush*, the DC District Court asserted that “the Supreme Court appears to have left [the MCA’s bar on judicial review of conditions of detention] undisturbed.”<sup>320</sup> In addition, in *re Guantanamo Bay Detainee Litigation* the Court held that Section 7(a)(2) of the MCA remains valid and strips it of jurisdiction to hear a detainee’s claims that “relat[e] to any aspect of the detention, transfer, treatment, trial, or conditions of confinement.”<sup>321</sup> Therefore, habeas courts have thus far rejected challenges by Guantanamo detainees relating to their conditions of detention.
268. It should be noted, however, that federal courts have recently begun addressing some aspects of the conditions of detention. On February 11, 2014, a federal appellate court ruled for the first time that Guantanamo detainees could bring a habeas claim to challenge their conditions of confinement. The DC Circuit Court ruled in *Aamer v. Obama* that Guantanamo detainees may bring a habeas corpus action in federal court challenging their forced-feeding by the Government.<sup>322</sup> The Court revisited the MCA’s provision that purports to strip courts of jurisdiction over conditions of confinement claims. It ruled that Section 2241(e)(2), which continues in force after *Boumediene*, only barred non-habeas claims related to conditions of confinement and therefore had no impact on habeas claims. Given that the detainees brought a habeas claim covered by Section 2241 (e)(1), which was struck down by *Boumediene*, the Court ruled that the habeas claim survives and sent the case back to the district court for further consideration.
269. Further, as indicated in the previous chapter, on May 16, 2014, U.S. District Judge Gladys Kessler ordered the U.S. Government to temporarily suspend the forced feeding of Mohammed Abu Wa’el Dhiab and preserve all videotapes of the forced feedings and forcible cell extractions of the detainee.<sup>323</sup> Although it was later lifted, this was the first time such a suspension was ordered by a federal judge.

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<sup>319</sup> Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, February 3, 2010, p. 37.

<sup>320</sup> *Khadr v. Bush*, 587 F.Supp.2d 225, 235 (D.D.C., 2008).

<sup>321</sup> *In re Guantanamo Bay Detainee Litigation*, 577 F.Supp.2d 312, 314 (D.D.C. 2008).

<sup>322</sup> *Shaker Aamer v. Barack Obama*, 13-5223 (D.C. Cir. 2014). Available at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/\\$file/13-5223-1479439.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/$file/13-5223-1479439.pdf). See also, *Gitmo Detainees May Assert Mistreatment Claims* by Steven D. Schwinn. Available at: <http://lawprofessors.typepad.com/conlaw/2014/02/gitmo-detainees-may-assert-mistreatment-claims.html>

<sup>323</sup> Reprieve, Press release, Judge orders US government to halt force-feeding of Guantanamo prisoner and preserve video evidence of his ordeal, May 16, 2014. Available at: <http://www.reprieve.org/judge-orders-us-government-to-halt-force-feeding-of-guantaacutenamo-prisoner-and-preserve-video-evidence-of-abuse.html>

270. The IACHR notes with deep concern that prisoners at Guantanamo have been, until recently, prevented from litigating any aspect of the conditions of their detention before federal courts, which constitutes *per se* a violation of one of their most fundamental human rights. The IACHR welcomes the change in recent case law regarding the subject-matter jurisdiction of federal courts to oversee conditions of detention at Guantanamo. As stated in the previous chapter, in order to guarantee that prisoners' rights are effectively protected in accordance with applicable international human rights standards, the State must ensure that all persons deprived of liberty have access to judicial remedies.<sup>324</sup>
271. In its *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, the IACHR highlighted that "two basic remedies must be available for the protection of the fundamental rights of persons deprived of liberty."<sup>325</sup> On one hand, a remedy to safeguard the right not to be subjected to unlawful or arbitrary detention and, on the other hand, a prompt, suitable and effective remedy to guarantee that conditions of detention do not violate the physical integrity of the detainees. In its *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, the IACHR set standards regarding the nature and scope of those remedies. Principle V provides that "[a]ll persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities [...] concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food."<sup>326</sup>

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<sup>324</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.Doc.64, December 31, 2011, para 242.

<sup>325</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II. Doc. 64, December 31, 2011, para. 244.

<sup>326</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle V, March, 2008.



CHAPTER 5  
TOWARDS THE CLOSURE OF  
GUANTANAMO: INTERNATIONAL  
LEGAL OBLIGATIONS WITH REGARD  
TO THE TRANSFER OR RELEASE  
OF DETAINEES





## TOWARDS THE CLOSURE OF GUANTANAMO: INTERNATIONAL LEGAL OBLIGATIONS WITH REGARD TO THE TRANSFER OR RELEASE OF DETAINEES

272. In Resolution 2/06 issued on July 28, 2006, the Inter-American Commission on Human Rights urged the United States to close the detention facility at Guantanamo without delay.<sup>327</sup> Many U.S. Government officials, including former Secretaries of State and Defense, a former CIA Director, as well as 50 retired generals and admirals, members of U.S. Congress, and even President George W. Bush, who opened the facility in 2002, have also called for Guantanamo's closure.<sup>328</sup> On January 22, 2009, President Barack Obama adopted Executive Order 13492 which ordered the closure of the detention facility in no later than one year,<sup>329</sup> a decision that was welcomed by the IACHR and the international community.<sup>330</sup>
273. The reasons for closing the facility have been varied, from pragmatic reasons, such as the effect on national security<sup>331</sup> and financial costs,<sup>332</sup> to more principled

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<sup>327</sup> This request was reiterated in Resolution 2/11 adopted on July 22, 2011 and in the context of Precautionary measure 259-02 on July 23, 2013.

<sup>328</sup> CBS News, *Bush Says He Wants to Close Guantanamo*, May 8, 2006. Available at: <http://www.cbsnews.com/news/bush-says-he-wants-to-close-guantanamo/>. See also, Human Rights First, *Guantanamo: A Comprehensive Exit Strategy*, p. 1. Available at: <http://www.humanrightsfirst.org/uploads/pdfs/close-GTMO-july-2013.pdf>, Feinstein, McCain, McDonough Statement on Guantanamo, June 7, 2013. Available at: <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=cf92f5a0-4b2a-4c86-92c1-58f7dc612b67>; and testimony of Elisa Massimino at the Senate Judiciary Committee's hearing on July 24, 2013, p. 6. Available at <http://www.judiciary.senate.gov/imo/media/doc/7-24-13MassiminoTestimony.pdf>

<sup>329</sup> Executive Order of January 22, 2009, Review and disposition of individuals detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf>

<sup>330</sup> IACHR welcomes order to close Guantanamo detention center, Press release No. 02/09, January 27, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/02-09eng.htm>

<sup>331</sup> In his 2013 speech at the National Defense University, President Obama stated: "Our allies won't cooperate with us if they think a terrorist will end up at GTMO." Available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

<sup>332</sup> The annual cost per Guantanamo detainee is reportedly almost \$1 million while it cost less than \$65,000 per year to hold a prisoner at the most secure federal prison in the United States. Source: Statement of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, Hearing on "Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications", July 24, 2013, p. 1.

reasons.<sup>333</sup> These and other approaches were addressed by the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights, in a hearing entitled “Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications” held on July 24, 2013.<sup>334</sup> Although there are those who consider that detention at Guantanamo is not only constitutional but also necessary,<sup>335</sup> there is a significant national and international consensus that the detention facility should be closed. Six years after the adoption of the executive order, however, the detention facility remains open.

274. Guantanamo detainees can be released through three different mechanisms. First, by an executive order such as the one adopted by President Obama on January 22, 2009. Between that date and December 2010, 67 prisoners were transferred or released. As will be discussed, however, as from January 2011 the U.S. Congress, through the National Defense Authorization Act (NDAA), has placed a number of restrictions that have had a serious detrimental impact on the number of detainees transferred.
275. Second, detainees can challenge the lawfulness of their detention in federal courts. In the two years following *Boumediene*, more than 30 detainees had their habeas corpus requests granted and were released to their countries of origin or third countries.<sup>336</sup> Those who successfully challenged the legality of their detention in U.S. federal courts are not subject to the transfer restrictions established in the NDAA. However, as indicated in the previous chapter, since July 2010 federal courts have shifted the burden of proof to the detainees raising questions about the correct application of *Boumediene* and denying detainees a meaningful opportunity to challenge the legality of their detention. On October 7, 2008, in the case of *Kiyemba v. Obama* the D.C. District Court ordered that 17 Uighurs be immediately released into the United States, the first time that a district court judge ordered Guantanamo prisoners released on a habeas corpus petition. The D.C. Circuit Court, however, reversed the decision, holding that, absent a statute expressly authorizing federal courts to order release of Guantanamo detainees into the United States, they had no power to order the release.<sup>337</sup> The U.S. Supreme Court first granted *certiorari* but, after remanding the case to the appeal court, rejected a subsequent *certiorari* given

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<sup>333</sup> In his State of the Union Address of 2014 President Obama indicated: “this needs to be the year Congress lifts the remaining restrictions on detainee transfers and we close the prison at Guantanamo Bay – because we counter terrorism not just through intelligence and military action, but by remaining true to our Constitutional ideals, and setting an example for the rest of the world.” Speech available at: <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>

<sup>334</sup> The testimonies of the hearing are available at: <http://www.judiciary.senate.gov/meetings/location-change-closing-guantanamo-the-national-security-fiscal-and-human-rights-implications>

<sup>335</sup> See testimonies of Congressman Mike Pompeo and Frank J. Gaffney, Jr., President of the Center for Security Policy at the Senate Judiciary Committee’s hearing on July 24, 2013. Available at <http://www.judiciary.senate.gov/imo/media/doc/7-24-13PompeoTestimony.pdf> and <http://www.judiciary.senate.gov/imo/media/doc/7-24-13GaffneyTestimony.pdf>

<sup>336</sup> A list of some of these cases has been published by Andy Worthington, “Guantanamo Habeas Results: The Definitive List”. Available at: <http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list/>

<sup>337</sup> *Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009).

that the Uighurs had subsequently been resettled.<sup>338</sup> *Kiyemba*, therefore, denied federal courts the authority to provide a remedy to the detainees it ruled were being unlawfully detained at Guantanamo, undermining the decision of the Supreme Court in *Boumediene*. It should be noted in this regard that, since *Boumediene*, the Supreme Court has not issued a decision on habeas regarding Guantanamo detainees.

276. Third, the Department of Defense has the authority to release Guantanamo detainees, as the Department responsible for their detention. Following Executive Order 13492, the Department of Defense conducted an interagency review of the status of each detainee and concluded that 126 of the 240 individuals detained at that time were approved for transfer.<sup>339</sup> However, about half of those cleared were not transferred by December 2010, and now need to meet the requirements imposed by the NDAA.
277. Notwithstanding these obstacles, the Executive branch has taken some steps in recent years to accomplish its goal of closing Guantanamo. Following his May 23, 2013, speech at the National Defense University, President Obama appointed two Special Envoys at the Departments of State and Defense, respectively, to pursue the transfer of detainees designated for transfer. He also lifted the moratorium on detainee transfers to Yemen, and commenced the Periodic Review Board (PRB) process mandated in Executive Order 13567. In addition, since that date and as of January 23, 2015, 44 detainees have been repatriated or transferred to third countries.
278. In this chapter, the IACHR will make an assessment of the current situation of the three categories of prisoners held at Guantanamo Bay: detainees cleared for transfer; detainees facing criminal charges before military commissions; and detainees designated for continued detention (or who had been charged but are currently not considered for prosecution).

## **A. Detainees cleared for transfer**

279. The U.S. Government uses the term “release” to mean release from confinement without the need for continuing security measures in the receiving country, while the term “transfer” is used to mean release from confinement subject to appropriate security measures.<sup>340</sup> A detainee is deemed eligible for transfer “if any threat he poses could be sufficiently mitigated through feasible and appropriate security measures.”<sup>341</sup> Therefore, an approval for transfer is not a determination that the

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<sup>338</sup> *Kiyemba v. Obama*, 563 U.S. (2011).

<sup>339</sup> Final Report, Guantanamo Review Task Force, January 22, 2010. Available at: <http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>

<sup>340</sup> Final Report, Guantanamo Review Task Force, January 22, 2010, p. 3.

<sup>341</sup> Final Report, Guantanamo Review Task Force, January 22, 2010, p. 7.

United States believes that the individual poses no threat, but a risk management decision. Detainees approved for transfer have been unanimously cleared by the Departments of Justice, Defense, State and Homeland Security, the Central Intelligence Agency, and the Federal Bureau of Investigation.

## 1. Challenges to detainees' transfers

280. Since the opening of the detention center at Guantanamo in 2002, more than 640 individuals have been released or transferred to their countries of origin or third countries.<sup>342</sup> Of the 779 individuals detained at Guantanamo, almost 70% were transferred or released from U.S. custody prior to 2009.<sup>343</sup> As of January 2015, 27 countries from Europe, Asia, the Middle East, Africa and Latin America have reportedly resettled a total of 82 foreign Guantanamo detainees.<sup>344</sup> The IACHR notes with deep concern that, according to publicly available information, ten detainees were transferred to unknown locations between July 2003 and March 2004.<sup>345</sup>
281. In December 2010 the U.S. Congress passed the National Defense Authorization Act (NDAA) for fiscal year 2011 which barred any spending on transferring detainees to the United States, prohibited the use of funds to construct or modify U.S. prisons to house detainees from Guantanamo, and put in place onerous requirements on transferring any detainees to another country. The NDAA for fiscal years 2012 and 2013 kept all those restrictions in place. This legislation required a certification that was almost impossible to achieve. The Secretary of State had to certify, no later than 30 days before the transfer that the government of the receiving country met several requirements, such as that it had “taken or agreed to take effective actions to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future.” The statute had two exceptions to certification: when there was a court order or a pre-trial agreement that had been entered in a Military Commission (the latter was removed from the NDAA for fiscal year 2013). As will be addressed below, the NDAA also contemplated a national security waiver.
282. Transfer restrictions imposed by Congress have been a significant obstacle to transfers, and this is reflected in the numbers. Before the first restrictions were enacted in 2011, the Obama administration reportedly transferred 67 prisoners, versus only 15 between January 2011 and December 2013. These transfers were arranged primarily due to exceptions to those restrictions; only two detainees, who

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<sup>342</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 4.

<sup>343</sup> Final Report, Guantanamo Review Task Force, January 22, 2010, p. 1.

<sup>344</sup> Those countries are Afghanistan, Albania, Belgium, Bermuda, Bosnia and Herzegovina, Britain, Bulgaria, Cape Verde, El Salvador, Estonia, France, Georgia, Germany, Hungary, Ireland, Italy, Kazakhstan, Latvia, Oman, Palau, Portugal, Qatar, Saudi Arabia, Slovakia, Spain, Switzerland and Uruguay. Source: The New York Times, The Guantanamo Docket. Available at: <http://projects.nytimes.com/guantanamo/transfer-countries>

<sup>345</sup> The New York Times, The Guantanamo Docket.

were repatriated to Algeria on August 28, 2013, were transferred through the certification process itself.

283. The NDAA for fiscal year 2014 eased these rigid restrictions and gave the administration greater flexibility in accelerating the transfer process. According to Section 1035, detainees can be transferred through three mechanisms: following a review by a PRB; pursuant to a court order; and, for all other transfers, the Secretary of Defense must determine, considering a number of factors, that action has been taken or will be taken to mitigate the risk of a detainee reengaging in terrorist activity, and that the transfer is in the national security interest of the United States. Therefore, the law gives the Secretary of Defense the authority to finalize the transfer of prisoners. The 30-day notification requirement was maintained.
284. The NDAA for fiscal year 2014 eliminated the onerous certification requirements imposed in 2011, a change that was preserved in the NDAA for fiscal year 2015. However, it did not eliminate the other two restrictions (prohibition on the transfer of detainees to the United States and on the use of funds to construct or modify U.S. prisons to house detainees from Guantanamo). A provision on temporary transfer of detainees to the United States for emergency or critical medical treatment was not adopted. The improvements introduced in the NDAA, together with other factors such as the pressure generated by the 2013 mass hunger strike, had an impact on the number of transfers. In 2014, 28 detainees were repatriated or resettled in third countries versus 15 transferred in the previous three years.
285. Transfers depend not only on statutory requirements; they also have a significant political dimension. The factors to be considered by the Secretary of Defense in making a transfer determination, such as the assurances provided by the receiving country to mitigate the risk of the individual engaging in any hostile activity that threatens the United States, are negotiated on a bilateral basis. Therefore, the transfer of individuals from Guantanamo is and has historically been based on diplomatic relationships. The fact that the Western Europeans were released first, along with most of the Saudis and Pakistanis, illustrates this political aspect.
286. The Inter-American Commission notes that transfers are generally authorized subject to “appropriate security measures.”<sup>346</sup> Some requirements for transfer involve, in practice, that the receiving country monitors the detainee and/or restricts their travel for a period of time, generally two years after the release. In some cases, the transfer may involve the detention of the individual upon arrival or participation in a “rehabilitation program.” The Al Salam Rehabilitation Center set up by the Kuwaiti government is an example of such a program. It was created in 2009 within a high-security prison to receive Kuwaiti Guantanamo inmates. The program reportedly begins with a full-time residency and ends with “outpatient

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<sup>346</sup> Language used by the Periodic Review Board in its final determinations. Available at: <http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>

care” in which the individual is constantly monitored. According to the lawyer for Fouzi Al Awda, a former Guantanamo detainee who is part of the program, Mr. Al Awda was required to surrender his passport and check in weekly with local police. His internet usage, religious instruction, social networks, financial affairs, and visits to local mosques will also be reportedly monitored.<sup>347</sup>

287. The IACHR reiterates that Guantanamo detainees have been unlawfully detained for more than a decade, without charge or trial, and an inter-agency review has decided not to prosecute many of them but instead to authorize their transfer. Therefore, any such restrictions imposed by the United States or by the receiving country would constitute an arbitrary interference with the enjoyment of the detainees’ human rights. The IACHR is also disturbed by the reported treatment that U.S. authorities give to detainees during transfer. According to a statement made by the defense counsel of Abu Dhiad, a former Syrian detainee who was resettled in Uruguay together with five others on December 7, 2014. During the flight the detainees were reportedly handcuffed and shackled, their eyes and ears were covered and they wore thick gloves to reduce all contact with their environment.<sup>348</sup>
288. Once a detainee has been cleared for transfer, the U.S. authorities have no basis to continue treating him as a suspected terrorist. Therefore, cleared detainees should be housed separately from the rest of the prisoners, should have ample access to counsel and family members, and should not be subjected to the regime applicable to the rest of the prison population. Detainees cleared for transfer should be treated as persons who have never been charged –which is what they are-- whom the authorities have no legitimate interest in detaining. The only reason they are still at Guantanamo is that they are waiting for a third country to receive them. For these reasons, transfers should be carried out with full respect for the detainees’ rights to liberty and to personal integrity. Upon arrival, former detainees should not be subjected to any unlawful restriction in the receiving country.
289. The Inter-American Commission calls for the repeal of the NDAA provisions that prohibit the transfer of Guantanamo detainees to the United States. Transfers to the United States should be allowed for purposes of emergency medical treatment, trial, or in cases of detainees cleared for transfer who would be at risk in their home country and who are unable or unwilling to go to a third country. Even though restrictions on transfers imposed by Congress have been a significant obstacle in the closure of the detention facility, the Executive branch has the responsibility to explore all potential avenues. This not only includes diplomatic negotiations but also the search for opportunities within the existing statutory limitations, such as interpreting in a flexible manner the requirements imposed by the NDAA, an aspect that will be developed below.

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<sup>347</sup> Vice News, *Life After Guantanamo: The Rehabilitation Program for Kuwait’s Released Inmate*, November 10, 2014. Available at: <https://news.vice.com/article/life-after-guantanamo-the-rehabilitation-program-for-kuwaits-released-inmate>

<sup>348</sup> La Republica, *Los 6 ex reclusos quieren quedarse en Uruguay*, December 6, 2014. Available at: <http://www.republica.com.uy/reclusos-en-uruguay/493003/>

## 2. The situation of detainees from Yemen

290. Closing Guantanamo is, to a great extent, related to the situation of Yemeni detainees and security conditions in their home country. As of March 2015, Yemeni nationals at Guantanamo represented more than 60% of the total prison population (75 out of 122) and 85% of those designated for transfer (48 out of 56).<sup>349</sup> Therefore, it will not be possible to close Guantanamo without effectively addressing this situation.
291. The Guantanamo Review Task Force concluded that the Yemeni detainees posed a unique challenge; they were by far the largest group in the Guantanamo population, and the security situation in Yemen had deteriorated.<sup>350</sup> In 2009 the task force approved the transfer of 36 of the 97 Yemenis detained at that time, subject to appropriate security measures. Seven of those were repatriated between September and December, 2009. Following the attempted bombing of a Detroit-bound airliner on December 25, 2009, by a Nigerian national trained in Yemen, President Obama imposed a blanket moratorium on transfers to Yemen fearing that Guantanamo detainees could be recruited by terrorists. During the term of the moratorium only one Yemeni was released. This was the case of Mohammed Odaini who was detained in Pakistan in 2002 when he was 17 years old. U.S. District Judge Henry H. Kennedy Jr. concluded that his detention was unlawful and ordered his release on May 26, 2010.<sup>351</sup> This court-ordered release was the only exception to the suspension.
292. On May 23, 2013, President Obama lifted the moratorium and announced that transfers to Yemen would resume on a case-by-case basis subject to the establishment of rehabilitation and monitoring programs. On August 1, 2013, the Presidents of the United States and Yemen issued a joint statement in which the latter affirmed his intention “to establish an extremist rehabilitation program [which] could also facilitate the transfer of Yemeni detainees held at Guantanamo.”<sup>352</sup> This rehabilitation program is reportedly being developed with the assistance of the United Nations.<sup>353</sup>
293. U.S. Government officials have indicated that the administration would not necessarily wait until a rehabilitation program has been set up to start transferring

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<sup>349</sup> The New York Times, The Guantanamo Docket.

<sup>350</sup> Final Report, Guantanamo Review Task Force, January 22, 2010, p. 18.

<sup>351</sup> The decision is available at: [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2004cv1254-873](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1254-873)

<sup>352</sup> The White House, Joint Statement by the United States and Yemen, August 1, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/08/01/joint-statement-united-states-and-yemen>

<sup>353</sup> See, The Yemenis at Guantanamo, March 30, 2014. Available at: [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/salim\\_hamdan\\_and\\_the\\_yemeni\\_prisoners\\_who\\_cant\\_leave\\_the\\_prison\\_at\\_guant.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/salim_hamdan_and_the_yemeni_prisoners_who_cant_leave_the_prison_at_guant.html); and The New York Times, Panel Recommends Transferring Yemeni From Guantanamo, January 9, 2014. Available at: <http://www.nytimes.com/2014/01/10/us/panel-recommends-transferring-yemeni-from-guantanamo.html>



some of the Yemeni detainees.<sup>354</sup> Between May 2013, and January 2015, twelve Yemeni detainees left Guantanamo. None of them, however, has been repatriated to Yemen. According to the United States, the current situation in Yemen precludes the U.S. Government from repatriating Yemeni detainees. They indicate, however, that the Government is vigorously engaging with partners and allies around the world for assistance in resettling these detainees.<sup>355</sup>

294. Of the 48 Yemenis cleared for transfer, 18 were designated for transfer without conditions and 30 were conditionally cleared, which means that some other requirements will have to be met before they could be transferred to Yemen, including improved security conditions there or an appropriate rehabilitation program. Mahmud Abd Al Aziz Al Mujahid, the first detainee to be reviewed by the PRB on November 20, 2013, was determined eligible for repatriation provided “the security situation improves in Yemen” and “an appropriate rehabilitation program becomes available.”<sup>356</sup> As of March 2015 he was still held at Guantanamo.
295. The lifting of the presidential moratorium on transfers to Yemen was an important step in addressing the situation of the Yemeni nationals at Guantanamo. The IACHR has stated that this general restriction on transfers, based solely on the detainees’ nationality and on the political situation in Yemen, constitutes a clear violation of the principle of non-discrimination.<sup>357</sup> The situation of Yemeni detainees should be dealt with on an individual case-by-case basis and not as a block. Authorities should thus look at the threat that the particular individual is alleged to pose and not at actions taken by other individuals. Although the resettlement of twelve Yemenis since the lifting of the moratorium is a good sign toward an individualized approach, the pace of such transfers is unacceptably slow. Accelerating the transfer of Yemeni nationals should be a priority in the roadmap for closing Guantanamo.

### 3. The principle of *non-refoulement*

296. The principle of *non-refoulement* prohibits the transfer and deportation of individuals to countries where their life, personal integrity or personal freedom may be in danger. In Resolution 2/06 adopted on July 28, 2006, the Inter-American Commission stated that “where there are substantial grounds for believing that [a detainee] would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, the State should ensure that the detainee is

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<sup>354</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>355</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 10.

<sup>356</sup> U.S. Department of Defense, Release No. NR-017-14, Completion of First Guantanamo Periodic Review Board, January 9, 2014. Available at: <http://www.defense.gov/releases/release.aspx?releaseid=16473>

<sup>357</sup> IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantánamo Naval Base in Light of Current Human Rights Crisis, Press Release No. 29/13, May 1, 2013.

not transferred or removed and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation."<sup>358</sup>

297. In the framework of precautionary measure 259/02 granted on behalf of Guantanamo detainees the IACHR requested the United States to fully respect the *non-refoulement* principle. This request was reiterated in precautionary measure 211/08 granted on behalf of Djamel Ameziane, a member of Algeria's ethnic Berber minority, who claimed he could be subjected to cruel, inhumane and degrading treatment if deported to his native country. Despite these requests, the United States has forcibly transferred detainees to their home country, where there were substantial grounds for believing that they would be in danger of being unlawfully detained and/or subjected to torture. There are also reports about the imprisonment of former Guantanamo detainees once repatriated to their home countries and the fact that their legal status is not clear.<sup>359</sup> The United States, however, argues that, as a matter of fundamental policy and practice, the United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured.<sup>360</sup>
298. Detainee Abdul Aziz Naji was transferred to Algeria on or about July 17, 2010, by all reports against his will. He had reportedly stated that he would rather remain in Guantanamo than be sent to his country of origin, where he feared persecution and torture by the Algerian government or fundamentalist groups.<sup>361</sup> On his arrival in Algeria, his whereabouts were reported as unknown; neither his relatives nor his lawyers have apparently had contact with him.<sup>362</sup> After 20 days in prison he was released but kept under constant surveillance. Press reports indicate that on January 16, 2012, after a one-hour trial, Mr. Naji was sentenced to three years in prison based on unsubstantiated accusations the United States made against him in 2002; no new evidence was supposedly presented.<sup>363</sup> Mr. Naji reportedly came very close to death while in prison and had no contact with his counsel after the transfer.<sup>364</sup>

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<sup>358</sup> IACHR, Resolution No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006.  
<sup>359</sup> See *in this regard*, interview with Lakhdar Boumediene. Available at: <http://www.nogitmos.org/exquant%C3%A1namoprisonerlakhdarboumedienetalksaboutrebuildinghislife/france>

<sup>360</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 10.

<sup>361</sup> The New York Times, Fear for Freedom, July 24, 2010. Available at: <http://www.nytimes.com/2010/07/25/opinion/25sun1.html>

<sup>362</sup> IACHR deplores forced transfer of Guantanamo detainee, Press Release No. 75/10, August 2, 2010.

<sup>363</sup> See *in this regard*, Truthout, Former Guantanamo Prisoner Who Alleged US Torture, Drugging, Sentenced by Algerian Authorities, January 31, 2012. Available at: <http://www.truth-out.org/news/item/6386:former-guantánamo-prisoner-who-alleged-us-torture-drugging-sentenced-by-algerian-authorities>; and Andy Worthington, Algeria's Ongoing Persecution of Former Guantanamo Prisoner Abdul Aziz Naji, September 18, 2013. Available at: <http://www.andyworthington.co.uk/2013/09/18/algerias-ongoing-persecution-of-former-guantanamo-prisoner-abdul-aziz-naji/>

<sup>364</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

299. On December 5, 2013, Djamel Ameziane and Belkacem Bensayah, Algerian nationals who also feared persecution in Algeria, were forcibly transferred to their home country. Ian Moss, a spokesperson for Clifford Sloan, the State Department's Special Envoy for Guantanamo's closure, is cited as defending the government's decision saying the detainees' fears of persecution were unsubstantiated. Mr. Moss was also quoted as stating that resettlement in another country was not a "viable" option and that the United States was "satisfied that the Algerian government would continue to abide by lawful procedures and uphold its obligations under domestic and international law in managing the return of former Guantánamo detainees."<sup>365</sup> According to Ameziane's representatives, however, he was awaiting a reply from the government of Canada to his request to resettle in that country. In 2010 Luxembourg had allegedly offered to receive him, and other countries had extended offers for Djamel Ameziane to settle in their respective territories. The IACHR issued a press release expressing concern at this action absent due consideration of the principle of *non-refoulement*.<sup>366</sup> Once transferred to Algeria, Mr. Ameziane was reportedly held in secret detention until December 16, 2013.
300. In the case known as "Kiyemba II," ten Guantanamo detainees filed habeas corpus petitions challenging their transfer based on the fear of torture in their home country. In April 2009, the DC Circuit Court reversed a ruling of the District Court requiring the government to give a detainee's counsel 30 days' advance notice of the detainee's transfer from Guantanamo. The court of appeals held that the judiciary may not review executive branch decisions regarding when or where to transfer detainees. By holding this notice requirement invalid, the court of appeals held that a detainee has no right to challenge his transfer based on his fear of torture or persecution and took away almost all of the authority of District judges to supervise when and where detainees are moved out of Guantanamo.<sup>367</sup> In March 2010, the Supreme Court denied certiorari to review the case. Subsequent attempts to reverse that ruling have been unsuccessful.
301. Forced transfers of Guantanamo detainees who present claims of fear of persecution or of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, are a breach of precautionary measure 259/02 and also a violation of the United Nations Convention Against Torture, ratified by the United States in 1994. The detention facility at Guantanamo Bay must be immediately

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<sup>365</sup> The New York Times, Two Guantanamo Detainees Are Involuntarily Repatriated to Algeria, December 5, 2013. Available at: <http://www.nytimes.com/2013/12/06/us/politics/two-guantanamo-detainees-are-involuntarily-repatriated-to-algeria.html>

<sup>366</sup> IACHR Condemns Forced Transfer of Djamel Ameziane from Guantanamo to Algeria, Press Release No. 103/13, December 19, 2013.

<sup>367</sup> See *in this regard*, American Constitution Society blog, "Kiyemba II – Cruel and Unusual Punishment Determined Constitutional," March 24, 2010. Available at: <http://www.acslaw.org/acsblog/node/15653>; SCOTUSblog, New challenge to Kiyemba II by Lyle Denniston, August 24, 2010. Available at: <http://www.scotusblog.com/2010/08/new-challenge-to-kiyemba-ii/>; and Lawfare, Another Cert Petition to Get Munaf and Kiyemba II Before the Justices, September 23, 2011. Available at: <http://www.lawfareblog.com/2011/09/another-cert-petition-to-get-munaf-and-kiyemba-ii-before-the-justices/>

closed but this must be done in accordance with international law and in full respect of the detainees' human rights.

#### 4. Executive prerogative powers

302. United States authorities often name Congress and the National Defense Authorization Act (NDAA) as the reasons why Guantanamo remains open. While, as seen above, it is a fact that Congressional restrictions have been an obstacle to the transfer of prisoners, the NDAA has always granted the State the authority necessary to transfer prisoners.
303. Even under the more onerous certification requirements previously imposed by the NDAA, the Executive had the ability to issue case-by-case waivers, a power that the administration never used. The Secretary of Defense could use the national security waiver established in the NDAA and certify the transfer of a prisoner if he were satisfied that the bilateral agreement with the receiving country addressed the U.S. security concerns. The NDAA also permitted the Secretary of Defense to certify a prisoner for release if it were in the national security interest to do so. The U.S. administration also lost the unique opportunity to transfer the 126 prisoners cleared by the interagency task force in 2009 before the Congress restrictions entered into force. About half were not transferred before the NDAA for fiscal year 2011, in part due to the Presidential moratorium on transfers to Yemen.
304. The NDAA for fiscal year 2014 eliminated the certification requirements imposed in 2011. Under existing legislation, it is sufficient that the Secretary of Defense determines, considering a number of factors, that action has been taken or will be taken to mitigate the risk of a detainee reengaging in terrorist activity and the transfer is in the national security interests of the United States. Therefore, the Executive has the authority to finalize the transfer of prisoners.
305. Since the loosening of transfer restrictions, the United States has transferred 11 detainees in 2013 and 23 in 2014. This is an improvement over previous years; however, in order to promptly close Guantanamo, transfers should be accelerated. Although it would be desirable that Congress repeals the current restrictions, this could be done under the existing legislation if the Executive explores all potential avenues. This includes interpreting in a flexible manner the requirements imposed by the NDAA<sup>368</sup> and accelerating the Pentagon approval process.

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<sup>368</sup> See in this regard, Human Rights First, Guantanamo: A Comprehensive Exit Strategy, Annex B: Working within the Current Guantanamo Transfer Restrictions. Available at: <http://www.humanrightsfirst.org/uploads/pdfs/close-GTMO-july-2013.pdf>

## ***B. Detainees not cleared for transfer***

306. As of March 2015, there were 66 Guantanamo detainees who had not been designated for transfer who fall into two categories: detainees designated for prosecution and detainees designated for continuing detention by the interagency review task force in 2009.

### **1. Detainees facing criminal charges**

307. As of December 2014, there were 32 detainees at Guantanamo who had been designated for prosecution by the Guantanamo Review Task Force. The United States administration brought war crimes charges against 19 of them. According to information published by the Office of Military Commissions,<sup>369</sup> by the end of 2014 there were five active cases pending before military commissions involving nine detainees currently held at Guantanamo. Of those active cases, only Abd al-Rahim al-Nashiri, Abd al Hadi al-Iraqi, and the five men accused of plotting the September 11 attacks (Khalid Sheikh Mohammed, Mustafa Ahmad al-Hawsawi, Ali Abd al-Aziz Ali, Waleed Bin 'Attash, and Ramzi Bin al-Shibh) actually face formal charges. All of them are among the category of "high-value" detainees and face the death penalty. In the remaining two cases, a plea agreement has been reached but the detainees remain held at Guantanamo. Several other cases are inactive because charges were dismissed without prejudice or the case has not been referred to a military commission. Since the opening of the detention facility in 2002, only eight prisoners have been convicted at military commissions at Guantanamo; two of those convictions were overturned on appeal.

308. Majid Khan, one of the "high-value" detainees and the only U.S. resident at Guantanamo, pleaded guilty in February 2012. The deal reportedly requires him to testify against Khalid Sheikh Mohammed, the purported mastermind of the September 11 attacks, and other terrorist suspects. The plea agreement allegedly establishes a maximum sentence of 19 years but sentencing was postponed for four years. According to Mr. Khan's counsel, he was abducted in 2003, imprisoned and tortured by U.S. officials at secret overseas "black sites" operated by the CIA before being transferred to Guantanamo in September 2006.<sup>370</sup> Ahmed al-Darbi reached a plea agreement with the prosecution in February 2014, in which he agreed to testify against al-Nashiri. The plea reportedly gave him a sentence of nine to 15 years, of

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<sup>369</sup> Department of Defense, Office of Military Commissions. Available at: <http://www.mc.mil/Cases.aspx?caseType=omc&status=4&id=23>

<sup>370</sup> Appendix A to the Pre-Trial Agreement, February 29, 2012. Available at: [http://www.mc.mil/Portals/0/pdfs/Khan/Khan%20\(AE013\)%20-%20Appendix%20A.pdf](http://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE013)%20-%20Appendix%20A.pdf). See also, The New York Times, Testimony on Al Qaeda Is Required in Plea Deal, February 29, 2012. Available at: [http://www.nytimes.com/2012/03/01/us/majid-khan-pleads-guilty-to-terrorism-plots-in-military-court.html?\\_r=0](http://www.nytimes.com/2012/03/01/us/majid-khan-pleads-guilty-to-terrorism-plots-in-military-court.html?_r=0); and Center for Constitutional Rights, Khan v. Obama/ Khan v. Gates. Available at: <http://ccrjustice.org/ourcases/current-cases/khan-v.-obama/-khan-v.-gates>

which four will be served at Guantanamo and then he will probably be transferred to Saudi Arabia to serve out the remainder of the sentence.<sup>371</sup>

309. At the time of preparation of this report, all active cases before military commissions were still at a pre-trial stage. The case of the five alleged masterminds of the September 11 attacks is the highest-profile case. In 2009, the U.S. administration announced that it would pursue prosecution in federal court in the Southern District of New York against the five detainees who had previously been charged before a military commission. However, in April 2011, after a public and political backlash, the Government stepped back and announced that it would try the alleged terrorists in military commissions. The case has been stalled in the pre-trial stage for three years. The Government prosecutor predicted that the trial would begin in January 2015. However, alleged FBI infiltrations of one of the defense teams have further added to the ongoing delays in the pre-trial proceedings. As indicated in the previous chapter, the FBI allegedly tried to turn the security officer of Ramzi Bin Al Shibh's legal team into an FBI informant. A hearing that was scheduled to take place on December 15, 2014 to focus on this allegation was cancelled, and there is reportedly no estimated timeline for the trial.<sup>372</sup> Ramzi Bin al-Shibh and Al-Hawsawi are seeking severance from the case.<sup>373</sup>
310. Abd al-Rahim al-Nashiri is charged with planning the attempted attack on the USS The Sullivans in January 2000, an attack on the USS Cole in October 2000 that killed 17 American service members, and an attack on the MV Limburg in October 2002.<sup>374</sup> By December 2014 there were two filings pending in the military commission and in federal court. On October 14, 2014, defense counsel filed an appellate brief in a Government interlocutory appeal before the Court of Military Commission Review urging the CMCR to affirm the trial judge's decision to dismiss the Limburg charges. It also filed a mandamus petition asking the DC Circuit Court to enjoin the participation of two of the three members of the panel of the CMCR in the interlocutory appeal. The oral argument on this petition is scheduled to take place on February 10, 2015.<sup>375</sup> Further, the defense contested the jurisdiction over

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<sup>371</sup> Pre-Trial Agreement, February 20, 2014. Available at: <http://www.mc.mil/Cases.aspx?caseType=omc&status=4&id=23>. See also, Human Rights Watch, Ahmed Mohammed Ahmed Haza al-Darbi. Available at: <http://www.hrw.org/news/2014/04/21/ahmed-mohammed-ahmed-haza-al-darbi>

<sup>372</sup> The Daily Times, Guantanamo 9/11 hearing cancelled after US torture report, December 17, 2014. Available at: <http://www.dailytimes.com.pk/foreign/17-Dec-2014/guantanamo-9-11-hearing-cancelled-after-us-torture-report>; The Daily Beast, Prosecutors Have No Idea When 9/11 Mastermind's Trial Will Start, December 17, 2014. Available at: <http://www.thedailybeast.com/articles/2014/12/17/prosecutors-have-no-idea-when-9-11-mastermind-s-trial-will-start.html>.

<sup>373</sup> See *in this regard*, Lawfare, 8/13 Session: Severance, Re-Reconsidered, August 14, 2014. Available at: <http://www.lawfareblog.com/2014/08/813-session-severance-re-reconsidered/>; and 8/14 Session #2: On Severing Al-Hawsawi, August 15, 2014. Available at: <http://www.lawfareblog.com/2014/08/814-session-2-on-severing-al-hawsawi/>

<sup>374</sup> Department of Defense, Office of Military Commissions.

<sup>375</sup> See *in this regard*, Just Security, al-Nashiri mandamus petition: Government response and oral argument date by Marty Lederman, December 3, 2014. Available at: <http://justsecurity.org/17968/al-nashiri-mandamus-petition-government-response-oral-argument-date/>.

the charges involving the bombing of the USS Cole before the DC District Court. The primary issue is whether the armed conflict between the U.S. and Al-Qaeda had commenced by the time of the bombing, in October 2000.<sup>376</sup>

311. Abd al Hadi al-Iraqi is charged in relation to a series of attacks in Afghanistan and Pakistan between about 2003 and 2004, and conspiracy to commit law of war offenses.<sup>377</sup> He was first charged in 2013 and the first set of pre-trial hearings took place in September and November 2014. According to the schedule announced by the military commission, the pre-trial stage is expected to continue until at least July 31, 2015.<sup>378</sup>
312. Since the opening of the detention facility in 2002, eight prisoners have been convicted by military commissions at Guantanamo, the first three by military commissions convened under the Military Commissions Act of 2006. Australian David Hicks was the first detainee to have been convicted by a military commission. He pleaded guilty in April 2007, served part of his sentence in Australia and was released on December 29, 2007. As indicated in the previous chapter, Salim Hamdan was convicted at trial in 2008. After serving his sentence, he was repatriated to Yemen in 2008, where he continued to appeal his conviction. His conviction was overturned in 2012 by the DC Circuit Court. The court concluded that military commissions lacked jurisdiction to try the crime of providing material support for terrorism, which was not a war crime under international law at the time of the offense.<sup>379</sup> Ali Hamza al Bahlul was also convicted at trial in 2008. He was sentenced to life in prison and is serving his sentence at Guantanamo. The question of *ex post facto* laws was again addressed by the D.C. Circuit in his case. On July 2014, the Court vacated two of the three convictions (material support and solicitation) and affirmed the conspiracy conviction.<sup>380</sup> The court remanded that conviction to the original panel of the Court for it to dispose of remaining issues. On October 22, 2014, the DC Circuit heard oral arguments on the single conviction left standing.
313. Five detainees have been convicted under the 2009 MCA. Following a plea agreement before military commissions, Sudanese citizens Ibrahim al Qosi and Noor Muhammed, and Canadian citizen Omar Khadr, were transferred to their home countries. In 2010 and 2011, Ibrahim al Qosi and Noor Muhammed pleaded guilty to providing material support to Al-Qaeda and conspiracy to provide material support and were sentenced to 14 years in confinement. In exchange for the guilty plea and promise to cooperate, the period of confinement was reduced to two years

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<sup>376</sup> See *in this regard*, Just Security, New al-Nashiri developments... regarding the MV Limburg and USS COLE charges by Marty Lederman, October 17, 2014 (Updated as of November 2014). Available at: <http://justsecurity.org/16395/al-nashiri-cmcr-limburg-charges/>.

<sup>377</sup> Department of Defense, Office of Military Commissions.

<sup>378</sup> Department of Defense, Office of Military Commissions, Unofficial/Unauthenticated Transcript, R.M.C. 803 session, September 15, 2014, pp. 26 and 61. Available at: [http://www.mc.mil/Portals/0/pdfs/allraqi/al%20Iraqi%20\(TRANS15Sep2014-PM\).pdf](http://www.mc.mil/Portals/0/pdfs/allraqi/al%20Iraqi%20(TRANS15Sep2014-PM).pdf)

<sup>379</sup> *Hamdan v. U.S.*, 696 F.3d 1238 (2012).

<sup>380</sup> *Al Bahlul v. U.S.*, (2014).

and 34 months, respectively. They were transferred to Sudan on July 10, 2012, and December 18, 2013.<sup>381</sup> In 2010 Khadr pleaded guilty to murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying, and was sentenced to 40 years in confinement. Under the plea agreement, he will serve no more than eight years. He was transferred to Canada in 2012 to serve the remainder of his sentence.<sup>382</sup> As indicated above, Majid Khan and Ahmad al Darbi were convicted following a guilty plea but are still held at Guantanamo. Majid Khan's sentence was postponed pending testimony against Khalid Shaikh Mohammed and Ahmad al Darbi is serving four years of his sentence at Guantanamo.

314. The military commission system has proven to be slow and inefficient. Thirteen years after the U.S. Government opened the detention facility at Guantanamo Bay, only eight detainees have been convicted by a military commission. This represents approximately 1% of all prisoners ever held at Guantanamo. All but two cases resulted in a guilty plea. In the only two cases that resulted in a guilty finding at trial, the material support conviction was overturned on appeal by the D.C. Circuit. The federal courts have yet to resolve whether military commissions can charge conspiracy as a stand-alone offense, the single conviction left standing in the al Bahlul case. The IACHR notes with concern that detainees have pleaded guilty and served sentences for crimes that have later been found to be *ex post facto* by federal courts.
315. The few active cases that are pending before military commissions are at the pre-trial stage. In the case of Khalid Sheikh Mohammed, it took about 11 years for the prosecution to bring charges against him and there is no estimated timeline for the 9/11 defendants' trial. The IACHR also notes with concern that the case of al-Iraqi is at the early pre-trial stages, and that plea agreements generally stipulate that part of the sentence be served in Guantanamo. In the case of al-Darbi, for example, this means that he could possibly be held at Guantanamo until 2018. In Majid Khan's plea agreement, sentencing was reportedly postponed until 2016.
316. As indicated in the previous chapter, the 2006 MCA expressly established the inapplicability of Article 10 of the UCMJ regarding the right to a speedy trial, which was maintained by the 2009 MCA under Section 948(b)(d). Article XXV of the American Declaration recognizes the right "to have the legality of [the] detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released." Therefore, the extreme delay in the handful of cases

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<sup>381</sup> The New York Times, The Guantanamo Docket.

<sup>382</sup> The New York Times, The Guantanamo Docket. Khadr later claimed that the plea agreement was "constructed by the U.S. government in its entirety," that he had signed it only to be released from Guantanamo, and that he has no recollection of the 2002 firefight in Afghanistan, where he was shot and a U.S. soldier fatally wounded (The Star, Omar Khadr: No memory of firefight in Afghanistan, December 13, 2013. Available at: [http://www.thestar.com/news/canada/2013/12/13/omar\\_khadr\\_no\\_memory\\_of\\_firefight\\_in\\_afghanistan.html](http://www.thestar.com/news/canada/2013/12/13/omar_khadr_no_memory_of_firefight_in_afghanistan.html)).



before military commissions constitutes a clear violation of the right to a speedy trial, one of the fundamental due process guarantees.

317. It is thus reasonable to conclude that any practical plan for the closure of Guantanamo is going to have to involve the transfer of a small number of detainees to the United States for prosecution, and that sentences resulting from guilty pleas will have to be served in home or third countries. This would not only help to make the closure of Guantanamo a reality but, if those detainees are prosecuted before federal courts as recommended by the IACHR, it would also provide them with the fundamental guarantees afforded by the U.S. Constitution, ending a controversial and discredited system of military commissions outside of U.S. territory.

## 2. Detainees in continuing detention

318. As of March 2015, there were 56 detainees at Guantanamo who had not been designated for transfer or were not serving sentences or being tried.<sup>383</sup> Those detainees will be examined by the Periodic Review Board established on March 7, 2011, by President Obama.<sup>384</sup> This discretionary, administrative interagency process is intended “to determine whether certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba represent a continuing significant threat to the security of the United States.”<sup>385</sup> It applies to “(i) detainees designated for continued law of war detention; or (ii) referred for prosecution, except for those against whom charges are pending or a judgment of conviction has been entered.”<sup>386</sup>
319. As mentioned in the previous chapter, the PRB process started in July 2013. By March 2015, fourteen full hearings and six-month file reviews had been conducted. In eight cases, the PRB concluded that continued detention was no longer necessary, in five it determined that “continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States,”<sup>387</sup> and one was still pending a final determination. As of the date of preparation of this report, only two of the detainees designated for transfer via the PRB, Kuwaiti national Fouzi Al Awda and Saudi national Muhammed Murdi Issa al Zahrani had been transferred. In the case of Al Awda, the PRB recommended the “detainee’s participation in a full rehabilitation program for at least one year of in-

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<sup>383</sup> Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 4.

<sup>384</sup> IACHR, Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Washington DC, October 3, 2013.

<sup>385</sup> For more information on the PRB, visit the Periodic Review Secretariat website at [www.prs.mil](http://www.prs.mil).

<sup>386</sup> Executive Order 13567 of March 7, 2011, Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.” Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf>

<sup>387</sup> See PRB final determinations in the cases of Abdel Malik Ahmed Abdel Wahab Al Rahabi, Salem Ahmad Hadi Bin Kanad, Muhammed Abd Al Rahman Awn Al-Shamrani, and Faez Mohammed Ahmed Al-Kandari. Available at: <http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>

patient rehabilitation.”<sup>388</sup> The PRB refers to the Al Salam Rehabilitation Center run by the Kuwaiti government, described above.<sup>389</sup>

320. The public perception of risk and how risk assessment is dealt with in the diplomatic field intensify the debate over closing Guantanamo. Dubious data about recidivism adds to this challenge. A Pentagon report released in January 2010 estimated that one-fifth of the detainees who had been released from Guantanamo Bay had resumed extremist activity. However, this report has been criticized by both sides of the issue. Some claimed that the Pentagon’s statistics are inflated. At least two people were reportedly placed on the Pentagon’s list for making statements critical of the United States. Others, however, have criticized the Pentagon for not including more names.<sup>390</sup>
321. According to research conducted by Seton Hall University School of Law in 2012, the Department of Defense reportedly admitted that at least 14 of its 31 named recidivists were merely suspected; that its definition of recidivism has included engaging in propaganda and “other activities”; and that its criteria do not require any hostile acts toward the United States or U.S. interests. Further, the definition of recidivism expands the scope to include “insurgent” activities. In 2012, Todd Breasseale, Public Affairs Officer for the Office of the Assistant Secretary of Defense, admitted that official statements were deeply problematic by virtue of “conflating” the percentage of “confirmed” and “suspected” recidivists to create what he calls an “odd 27-28% number” of total recidivists. According to Mr. Breasseale, it is “odd” precisely because “[s]omeone on the ‘Suspected’ list could very possibly NOT be engaged in activities that are counter to our national security interests (emphasis in the original).”<sup>391</sup>
322. A study published by Human Rights First proposing an exit plan for Guantanamo asserts in this regard that “recidivism figures are estimated percentages of former Guantanamo detainees that may have taken some unlawful or derogatory actions associated with terrorist groups, but may not have directly participated in any terrorist plots or attacks, or otherwise posed a concrete and specific threat to the United States.”<sup>392</sup>

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<sup>388</sup> Department of Defense, Office of Military Commissions, Unclassified Summary of Final Determination, Fouzi Khalid Agdullah Al Awda, July 14, 2014. Available at: [http://www.prs.mil/Portals/60/Documents/ISN232/140714\\_U\\_ISN232\\_FINAL\\_DETERMINATION\\_PUBLIC.pdf](http://www.prs.mil/Portals/60/Documents/ISN232/140714_U_ISN232_FINAL_DETERMINATION_PUBLIC.pdf)

<sup>389</sup> Department of Defense, Office of Military Commissions, Unclassified Summary of Final Determination, Faez Mohammed Ahmed Al-Kandari, July 14, 2014. Available at: [http://www.prs.mil/Portals/60/Documents/ISN552/140714\\_U\\_ISN552\\_FINAL\\_DETERMINATION\\_PUBLIC.pdf](http://www.prs.mil/Portals/60/Documents/ISN552/140714_U_ISN552_FINAL_DETERMINATION_PUBLIC.pdf)

<sup>390</sup> Los Angeles Times, More former Guantanamo detainees returning to militant activity, Pentagon says, January 7, 2010. Available at: <http://articles.latimes.com/2010/jan/07/nation/la-na-guantanamo-repeaters7-2010jan07>

<sup>391</sup> Seton Hall University School of Law, Center for Policy & Research, National Security Deserves Better: “Odd” recidivism numbers undermine the Guantanamo Policy Debate, March 23, 2012. Available at: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/National-Security-Deserves-Better-Odd-Recidivism-Numbers-Undermine-the-Guantanamo-Policy-Debate.pdf>

<sup>392</sup> Human Rights First, Guantanamo: A Comprehensive Exit Strategy, Annex C, p. 28. Available at: <http://www.humanrightsfirst.org/uploads/pdfs/close-GTMO-july-2013.pdf>

323. The U.S. Office of the Director of National Intelligence regularly releases an unclassified “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba.” The last report, dated July 15, 2014, indicates that 17.3% of former detainees have “reengaged” in terrorist or insurgent activities, and that 12.4% are suspected of doing so. The numbers for those detainees transferred after January 22, 2009, (date of the adoption of new guidelines to govern the transfer of detainees) are considerably lower (6.8% and 1.1% respectively).<sup>393</sup> Accordingly, only six former Guantanamo detainees released after January 22, 2009, reportedly engaged in terrorist or insurgent activities. The names of the detainees have not been publicly released. The New America Foundation created a list of former detainees who have “returned to the battlefield.” According to this research, as of June 5, 2014, 3.6% of former Guantanamo detainees were reported to be engaging in militant activities against U.S. and non-U.S. targets (all of them released from Guantanamo before 2007) and 4.6% were suspected of doing so.<sup>394</sup>
324. The IACHR notes with concern that by the end of 2014 there remained approximately 30 detainees who had once been charged but are not currently considered for prosecution or who were still under the category of “continued law of war detention” in an ever-evolving armed conflict. The IACHR is also troubled by the fact that those detainees with respect to whom the PRB determined that continued detention remained necessary (four as of December 2014) will have to wait three years until a new full review would be conducted. This means that some detainees will have to wait until 2018 to have their status reviewed. The IACHR notes that semi-annual file reviews only focus on new information or change of circumstances.
325. Finally, with regard to the risk of “recidivism,” the IACHR points out that the use of this term is erroneous. The term recidivism implies that the person has been convicted of a criminal offense and has reengaged in illegal conduct. These former Guantanamo detainees, however, have never been tried.

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<sup>393</sup> Office of the Director of National Intelligence, Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba, as of July 15, 2014. Available at: [http://www.dni.gov/files/documents/September\\_2014\\_GTMO%20Unclass%20Release.pdf](http://www.dni.gov/files/documents/September_2014_GTMO%20Unclass%20Release.pdf)

<sup>394</sup> New America Foundation, Appendix: How Dangerous are Freed Guantanamo Prisoners?, by Peter Bergen and Bailey Cahall, June 5, 2014. Available at: [http://newamerica.net/publications/resources/2014/how\\_many\\_guantanamo\\_detainees\\_return\\_to\\_the\\_battlefield](http://newamerica.net/publications/resources/2014/how_many_guantanamo_detainees_return_to_the_battlefield)

CHAPTER 6  
CONCLUSIONS AND  
RECOMMENDATIONS



## CONCLUSIONS AND RECOMMENDATIONS

326. As the Inter-American Commission expressed in its Report on Terrorism and Human Rights, now more than ever it is crucial for Member States to ensure that their responses to inexcusable acts of violence such as the terrorist attacks that occurred in the United States on September 11, 2001, faithfully honor the liberties and values upon which the democratic societies of our Hemisphere are built.<sup>395</sup> President Obama expressed very accurately in this regard that Guantanamo is “a facility that should have never been opened [and it] has become a symbol around the world for an America that flouts the rule of law.”<sup>396</sup>
327. The numbers speak for themselves. In its thirteen years of existence, Guantanamo has reportedly housed 779 prisoners. According to official information, only 8% of Guantanamo detainees were characterized as “fighters” for Al-Qaeda or the Taliban; 93% were not captured by U.S. forces; and most of them were turned over to the United States at a time in which the United States offered bounties for the capture of suspected terrorists.<sup>397</sup> Only eight detainees have so far been convicted by a military commission, which represents approximately 1% of all prisoners ever held at Guantanamo; in two of those cases the material support conviction was overturned on appeal by federal courts. As of January 2015, 122 prisoners were still held in continuing detention at Guantanamo. Further, the handful of ongoing prosecutions before military commissions was at the pre-trial stage and, despite some significant improvements included in the Military Commissions Act in 2009, military commissions still raise important due process concerns. Adding to these figures is also the fact that Guantanamo is probably one of the most expensive prisons in the world.
328. The IACHR reiterates that continuing and indefinite detention of individuals in Guantanamo without the right to due process is arbitrary and constitutes a clear violation of international law;<sup>398</sup> and that detention for the sole purpose of obtaining intelligence is a violation of Article I of the American Declaration. As

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<sup>395</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116.Doc.5 rev.1, October 22, 2002, Preface.

<sup>396</sup> Speech of President Obama at the National Defense University on May 23, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

<sup>397</sup> *See in this regard*, Mark Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, Seaton Hall University School of Law Report (2006). Available at: [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf)

<sup>398</sup> IACHR, Press Release 29/13: IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health Reiterate Need to End the Indefinite Detention of Individuals at Guantanamo Naval Base in Light of Current Human Rights Crisis, May 1, 2013.

noted in chapter 5 of this report, there is significant national and international consensus on the need to close the detention center at Guantanamo Bay. On January 22, 2009, President Barack Obama ordered the closure of the facility within one year. This, however, has proven to be more complex than previously thought. Closing Guantanamo has both a legal and a political dimension. Further, it is not only a matter of emptying a prison but rather of closing it in a responsible manner. Transfers must be carried out in compliance with the *non-refoulement* principle and trials must be conducted respecting the defendants' rights to due process and to full judicial guarantees. The contrary would mean shifting the problem without resolving the underlying issue.

329. Based on its analysis in this report, the Commission has developed the following recommendations in order to encourage and support efforts by the United States to properly fulfill its international human rights commitments in the closure of Guantanamo:

### **Conditions of detention**

1. Ensure that detainees are held in accordance with international human rights standards; and that conditions of detention are subject to accessible and effective judicial review.
2. Provide detainees with adequate medical, psychiatric and psychological care that meets their particular health needs with respect for the principles of medical confidentiality, patient autonomy, and informed consent to medical treatment.
3. Ensure that detainees' right to freedom of conscience and of religion is respected, in particular the right to observe communal prayer, and provide inmates access to a Muslim Chaplain.
4. Declassify all evidence of torture and ill-treatment, and make public the conditions of confinement at Camp 7.
5. Establish an independent monitoring body with participation of civil society to investigate the conditions of confinement at Guantanamo Bay, including Camp 7.
6. Comply with the following recommendations issued by the Committee Against Torture with respect to Guantanamo:<sup>399</sup>
  - a. Investigate allegations of detainee abuse, including torture and ill-treatment, appropriately prosecute those responsible, and ensure effective redress for victims;

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<sup>399</sup> CAT/C/USA/CO/3-5, December 19, 2014.

- b. Improve the situation of detainees so as to persuade them to cease their hunger strike; and
  - c. Put an end to the force-feeding of detainees on hunger strike as long as they are able to make informed decisions.
7. Authorize a visit by the IACHR to the detention facility without restrictions, including private interviews with the detainees, in conformity with Article 57(e) of its Rules of Procedure.

### **Access to justice**

8. Try detainees facing prosecution before military commissions in federal courts, respecting the defendants' rights to due process and to all of the judicial guarantees.
9. Ensure detainees' access to a proper judicial review of the legality of their detention, reviews that must be available, adequate and effective, and provide the possibility of release.
10. Courts must undertake a rigorous examination of the Government's evidence to ensure that any detention in this context is based on clear and convincing evidence. A decision of the U.S. Supreme Court could shed light on whether Guantanamo detainees are being afforded a meaningful opportunity to challenge the legality of their detention.
11. Ensure that the attorney-client privilege is respected.
12. Provide detainees and their counsel with all evidence used to justify the detention.

### **Closure of Guantanamo**

13. Close the detention center at Guantanamo Bay.
14. Repeal the National Defense Authorization Act (NDAA) provisions that prohibit the transfer of Guantanamo detainees to the United States for prosecution, incarceration, and medical treatment and ease all restrictions on transfers to third countries.
15. Expedite the Periodic Review Board process and immediately release all detainees who are not to be charged or tried.
16. Accelerate detainees' transfers to their countries of origin, or third countries when their right to life or personal freedom is in danger, in accordance with the principle of non-refoulement, and refrain from relying on diplomatic assurances in cases of risk of persecution.
17. Review the situation of the Yemeni detainees on an individual case-by-case basis.



18. Transfer detainees facing prosecution to the United States to be tried in federal courts.
  19. Transfer convicted detainees to federal prisons to serve the remainder of their sentences.
330. The Inter-American Commission also reiterates its call upon OAS Member States to consider receiving Guantanamo detainees in an effort to achieve the goal of closing the prison and to reaffirm the longstanding tradition of asylum and protection of refugees in the region.<sup>400</sup>

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<sup>400</sup> IACHR Welcomes the Resettlement of Six Guantanamo Detainees to Uruguay and Urges OAS Member States to Follow Uruguay's Example, Press Release No. 147/14, December 10, 2014.