



RESOLUTION No. 2/11

Regarding the Situation of the Detainees at Guantanamo Bay, United States MC 259-02

On February 25, 2002, the Inter-American Commission on Human Rights received a request for precautionary measures in favor of the 254 detainees who were being held by the United States at its Naval Station in Guantanamo Bay, Cuba, at that time. On March 12, 2002, the Commission 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.

On subsequent occasions, the Commission extended the scope of these precautionary measures and requested that the United States thoroughly and impartially investigate, prosecute, and punish all allegations of torture and other ill treatment of the detainees. It also requested that the United States fully respect the *non-refoulement* principle established in the UN Convention against Torture and emphasized that diplomatic assurances should not be used to circumvent the State's obligations under that convention. As part of its ongoing efforts to monitor the situation, the Commission has held four hearings on the matter since 2005.

On July 28, 2006, the Commission issued Resolution 2/06 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 at Guantanamo Bay. It urged the United States to close the detention facility and to remove the detainees through a process that complied with its obligations under international law.

According to information that the Commission has received 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 force¹ and the review of habeas corpus petitions by the federal courts.² With respect to the former, the Executive determined that of the 240 persons who were detained at Guantanamo Bay in 2009, 48 could be held indefinitely without criminal charges in light of the alleged threat that they present to U.S. national security.³ It was further determined that 30 nationals of Yemen were subject to an indeterminate period of "conditional detention" for similar reasons.⁴ While the Executive expressed its intent to prosecute 36 individuals detained at Guantanamo, the Commission observes that to date, reports indicate that only six cases

¹ Final Report of the Guantanamo Review Task Force, January 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (hereinafter "Final Report of the GRTF").

² This process of review began after the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which recognized the detainees' right under the U.S. Constitution to pursue writs of *habeas corpus* before federal courts.

³ Final Report of the GRTF, January 22, 2010, at 23-25.

⁴ Final Report of the GRTF, January 22, 2010, at 25-26.

have been resolved by military commissions and one prosecution has taken place in U.S. courts.⁵

The Commission notes that the grounds for detaining the 78 aforementioned individuals will be subject to continuing review by both the U.S. courts and the Executive branch. However, it is troubled by the lack of clarity regarding the circumstances that will justify the release of the detainees. In particular, the Commission notes with concern that U.S. courts have held that their release will be appropriate when the political branches determine that hostilities have ceased.⁶

The Commission is also troubled that in many circumstances, the writ of *habeas corpus* does not appear to constitute an effective remedy for those individuals whose ongoing detention has been found to be unwarranted. To date, the Commission has been informed that only 59 writs of *habeas corpus* have been the subject of a definitive judicial resolution. Furthermore, a number of persons whose writs have been granted remain in detention because U.S. courts purportedly lack the authority to order detainees' release until the Executive arranges for their transfer abroad.⁷

The United States has recognized that the laws of war govern the detention and treatment of the detainees at Guantanamo Bay.⁸ At the same time, while the law of war generally provides for a party to the conflict to deprive combatants of their liberty as a security measure for the duration of hostilities,⁹ the U.S. government contends that many of the features of traditional armed conflict do not apply to the conflict in which it is presently engaged.¹⁰ Its combat operations are reportedly in response to a series of terrorist acts perpetrated in countries throughout the world by purported members of transnational groups. In contrast to a traditional armed conflict, there is unlikely to be a definitive settlement of the present state of hostilities.

The Commission reminds the United States that in situations of armed conflict, both international human rights law and international humanitarian law apply.¹¹ Although

⁵ Carol Rosenberg, *Defenders: USS Cole Bombing Case Too Tainted for Death Penalty Trial*, The Miami Herald, July 15, 2011; Human Rights Watch, *US: Military Commission Trials for 9/11 Suspects a Blow to Justice*, April 4, 2011; Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, The New York Times, January 25, 2011.

⁶ *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010).

⁷ *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*").

⁸ Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009); *see also*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-35 (2006).

⁹ *See, e.g.*, Common Article 3 to the Geneva Conventions of August 12, 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War (Aug. 12, 1949), 75 U.N.T.S. 287, *entered into force* October 21, 1950, Articles 21, 118; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* December 7, 1978, Article 2(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *entered into force* December 7, 1978, Article 75.

¹⁰ Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

¹¹ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002), para. 61; IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (1999), Chapter IV, para. 9; Continues...

international humanitarian law is the *lex specialis* for determining states' obligations in these situations, in certain circumstances, its norms may not provide sufficient protection for the rights of the persons affected.¹² It is important to recall that the relevant provisions of international human rights law were established to protect individuals from being deprived of their liberty for prolonged periods of time at the unfettered discretion of the Executive.¹³

The Commission has emphasized the duty of states to protect the security of their citizens, and it has recognized that reasons of public security may justify the extension of normal periods of preventive or administrative detention.¹⁴ Nevertheless, it has also observed that extraordinary circumstances "cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom."¹⁵

In the present case, the ongoing detention of at least 78 of the beneficiaries of the present precautionary measures appears to be based on their alleged prior links to terrorist organizations and the contention that their release anywhere in the world may result in future acts of violence against the United States. At the same time, the United States considers that there is insufficient evidence against them to secure a conviction in the courts of justice.¹⁶ Under these circumstances, the Commission considers that the detention of these individuals constitutes a violation of their fundamental rights.¹⁷ As such, the Commission reiterates that the United States should close the Guantanamo Bay facility without delay and try or release the detainees through a process undertaken in full accordance with international human rights and humanitarian law.

The Commission also reiterates its profound concern with respect to the detention of children at Guantanamo Bay. The petitioners have alleged that juvenile detainees were not segregated from the adult population, nor were they provided with education or rehabilitation assistance.

Continuation...

IACHR, Report No. 5/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, paras. 158-59; *see also*, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para. 25 (8 July 1996).

¹² IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002), paras. 61, 146; IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (1999), Chapter IV, para. 11; IACHR, Report No. 5/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, paras. 158-66.

¹³ *See, e.g.*, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX (1948), Article XXV; IACHR, Report No. 51/01, Case 9903, Rafael Ferrer-Mazorra et al, United States, April 4, 2001, paras. 209 *et seq.*

¹⁴ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002), para. 140.

¹⁵ IACHR, Annual Report, 1976, OEA/Ser.L/V/II.40 Doc. 5 corr. 1 (7 June 1977) section II, Part II.

¹⁶ Final Report of the GRTF, January 22, 2010, at 22-24.

¹⁷ *See*, IACHR, Resolution 2/06 on Guantanamo Bay Precautionary Measures, Annual Report 2006, OEA/Ser.L/V/II.127 Doc. 4 rev. 1, Annex 5; *see also*, Concluding Observations (United States), CAT/C/USA/CO/2, July 25, 2006, para. 22; U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Situation of detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 para. 84 (Feb. 15, 2006); Eur. Ct. H.R., *Al Jedda v. United Kingdom*, App. No. 27021/08 (Grand Chamber), July 7, 2011, paras. 99-100.

With regard to the United States' duty to ensure that transfers of detainees from Guantanamo Bay respect the *non-refoulement* principle established in the UN Convention against Torture, the Commission notes that since 2002, the United States has arranged for the release and transfer to other countries of hundreds of detainees. Nevertheless, the petitioners allege that several of these detainees have been forcibly transferred to countries where they may face a risk of torture or cruel, inhuman and degrading treatment or punishment.¹⁸ The petitioners claim that at present, the State plans to transfer approximately 90 detainees whose identities have not been revealed. These individuals do not have the right to receive advanced notice of their impending transfers or to challenge the decision to send them to a particular country.¹⁹ According to the State, the diplomatic assurances that it obtains prior to transferring detainees are consistent with its obligations under Article 3 of the Convention against Torture.

The Commission has previously stated that the obligation of *non-refoulement* requires that persons who may face a risk of torture in the receiving country have access to an adequate, individualized examination of their circumstances by a competent, independent and impartial decision-maker, through a process which is fair and transparent.²⁰ The Commission deplores the absence of mechanisms to review the Executive's decision to transfer detainees, as transfers under these conditions could result in irreparable harm to their fundamental rights.²¹

Finally, the Commission has not been presented with clear information indicating whether the allegations of torture at Guantanamo Bay have been investigated with a view to prosecuting and punishing the responsible parties. The Commission reminds the State that independent, impartial investigations into alleged acts of torture are an indispensable basis to avoid impunity and the repetition of such acts in the future. The Commission reiterates that the United States is required to conduct such investigations by virtue of its international obligations.

In conclusion, the failure of the United States to give effect to the Commission's precautionary measures has resulted in irreparable harm to the fundamental rights of the detainees at Guantanamo Bay, as the Commission has stated on previous occasions. The United States has recognized the detainees' right to judicial review of the bases for their ongoing deprivation of liberty; however, the U.S. courts appear consistently to defer to the Executive in a manner that renders this right illusory. Once again, the Commission urges 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

¹⁸ See, e.g., IACHR, Press Release No. 75/10, IACHR Deplores Forced Transfer of Guantanamo Detainee, August 2, 2010.

¹⁹ *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*").

²⁰ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002), para. 394; IACHR, Report No. 51/96, Case 10.675, "Haitian Interdiction Case" (United States), March 13, 1997, para. 163.

²¹ See, Concluding Observations (United States), CAT/C/USA/CO/2, July 25, 2006, para. 21; United Nations, Press Release, UN Rights Experts on Torture and Counter-Terrorism Concerned about Fate of Guantanamo Detainees, July 21, 2010.

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-maker. Finally, the Commission considers it of utmost importance that the United States allow it to visit the detention facility at Guantanamo Bay and to freely interview any person detained there.

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