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Detainees at Guantánamo Bay, Cuba v. United States  
Hearing Before the Inter-American Commission on Human Rights  
Colon Room, OAS Building, Washington D.C.

October 20, 2003, 3pm – 4pm

## SUBMISSION FOR THE PETITIONERS

### PRELIMINARY STATEMENT

The Commission initially adopted measures on behalf of persons detained by the United States government at Guantánamo Bay, Cuba on March 12, 2002. In its request, the Commission called on the Government “to take the urgent measures necessary to have the legal status of the detainees [] determined by a competent tribunal.” Since this time the Commission has twice formally reiterated its request, first in its letter of July 23, 2002 and second in its letter of March 18, 2003 in relation to a separate but related request for precautionary measures submitted by the Center for Constitutional Rights and the International Human Rights Law Group on behalf of Unnamed Persons Detained and Interrogated by the United States. To date, despite these requests, the United States has failed to comply and the detainees thus remain as the Commission stated in its initial request, “entirely at the unfettered discretion of the United States.”

Since making its request, numerous other international organizations as well as the English Court of Appeal have adopted the Commission’s position on the need for an independent assessment as to the detainees’ legal status. Former United Nations High Commissioners for Human Rights,<sup>1</sup> the United Nations Working Group on Arbitrary

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<sup>1</sup> Statement of the High Commissioner on Human Rights on the Detention of Prisoners at U.S. Base in Guantánamo Bay, Cuba, Jan. 16, 2002; Interview With Sergio Viera de Mello With BBC, available at [www.bbc.co.uk](http://www.bbc.co.uk).

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Detention,<sup>2</sup> the European Parliament, the Parliamentary Assembly of the Council of Europe,<sup>4</sup> and the Organization of Security and Cooperation in Europe<sup>5</sup> have all followed the Commission's lead, issuing statements to the effect that an independent determination on the detainees' legal status is imperative. Most recently the International Committee on the Red Cross (ICRC) in an uncharacteristic public statement called on the United States to "institute a due legal process in accordance with the judicial guarantees stipulated by international humanitarian law."<sup>6</sup> Importantly, the ICRC is the only non-governmental body independent of the United States to have been afforded access to the detainees. The Commission's position that the detainees occupy a law-free zone also recently prompted the English Court of Appeal to conclude that they were held in a "legal black hole." *Abassi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598.

As a direct consequence of the United States refusal to implement the Commission's request, the detainees have suffered and will continue to suffer irreparable harm for each and every day the Government maintains its position. From available evidence, it has become increasingly apparent that the Government's refusal to determine their legal status is having a direct adverse impact upon their physical and psychological integrity. Accordingly, Petitioners, as well as updating the Commission on facts relevant to the situation of the detainees, will request that this Commission give serious

<sup>2</sup> Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59<sup>th</sup> Sess., U.N. Doc. E/CN.4/2003/8 at 19-21, Dec. 16, 2002.

<sup>3</sup> Available at <http://europa.eu.int/abc/doc/off/bull/en/200301/p102001.htm>

<sup>4</sup> Available at <http://assembly.coe.int/Documents/AdoptedText/t03/ERES1340.htm>

<sup>5</sup> *OSCE Urges US to Respect Rights of Guantanamo Prisoners*, A.P.F., July 9, 2003

<sup>6</sup> Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5QRC5V7OpenDocument>

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consideration to expanding the scope of its initial measures. Specifically, Petitioners request that the Commission take judicial note of the fact that the circumstances under which the detainees are currently being held may now constitute torture or, at a minimum severe cruel, inhuman or degrading treatment or punishment. The Commission can and should also acknowledge that children are being detained at Guantánamo and that the American Declaration on the Rights and Duties of Man as well as international law imposes certain additional obligations on the United States in order to protect their integrity. The immediate intervention of the Commission through the adoption of additional precautionary measures is now clearly warranted so as to prevent further irreparable harm to the physical and psychological health of the detainees.

#### STATEMENT OF UPDATED FACTS

##### A. The Government is Establishing a Permanent Prison Facility at Guantánamo Bay

According to recent press reports, Camp Delta, where the prisoners are held, consists of four units. The majority of the inmates are housed in three camps described by the Government as maximum security facilities. Inmates are in solitary confinement, restricted to their 6'8" by 8' cells twenty-four hours a day, except for thirty minutes' exercise three times per week, followed by a 10 minute shower. The inmates are shackled while outside their cells, and exercise on a "caged 25-foot by 30-foot concrete slab." Lights are kept on 24 hours a day, and guards pace the rows constantly. Inside each cell, detainees have a hole in the ground toilet, a sink with running water low enough to make washing feet for prayers easy, and an elevated shelf-bunk with a mattress." Charles Savage, *For Detainees At Guantánamo, Daily Benefits – and Uncertainty*, MIAMI HERALD, Aug. 24, 2003.

The prison currently holds approximately 660 inmates from 42 countries. *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS, Aug. 26, 2003. Although some have been released in the past 21 months, others have replaced them and for the past year, the prison has maintained approximately the same number of inmates. See e.g., *Tales of Despair From Guantánamo*, N.Y. TIMES, June 17, 2003. The Government recently confirmed that the prison is expanding. A fifth unit, adding 24,000 square feet, will be completed mid-2004. According to the prison Commander, the new construction signals the Government's commitment to rely on the prison "as long as the global war on terrorism is ongoing ..." Charles Savage, *Growth at Base Shows Firm Stand on Military Detention*, MIAMI HERALD, Aug. 24, 2003. When the new phase is completed, the prison is expected to have capacity for 1,100 inmates.

**B. The Detention of Other Non-Battlefield Detainees and Children Underscores the Need For a Determination on the Status of the Detainees**

As well as the six Algerian nationals transferred to Camp Delta from Bosnia in 2002 (See Amnesty International Report, *One Year On*, available at [www.amnestyusa.org/news/2003/usa01102003\\_2.html](http://www.amnestyusa.org/news/2003/usa01102003_2.html)) at least two other inmates are known to have been captured in countries far from the zone of active hostilities in Afghanistan. Al Rawi, a British resident Iraqi citizen and Al-Banna a Jordanian national with refugee status in Great Britain were both arrested by Gambian officials in the Gambia. Following their arrest, officers from the United States Central Intelligence Agency (CIA) were allegedly involved in their interrogation in that country. In January, 2003 they were flown to Bagram Air Base, Afghanistan, where they were held by the United States military before being transferred to Guantánamo Bay in March, 2003 where they remain to this day. See e.g., Amnesty International Urgent Action, UA 359/02, AI

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Index: AFR 27/006/2002, Dec. 11, 2002; *Al Qaeda Suspects Arrested in the Gambia*, THE INDEPENDENT (Banjul), Dec. 23, 2002.

Moreover, it has recently come to light that children as young as 13 are amongst those detained at Guantánamo. Press reports indicate that at least four of the detainees were less than eighteen years of age at the time of their transfer to Guantánamo. See e.g., Jane Sutton, *US Wants to Send Guantánamo Children Home*, WASH. POST, Aug. 22, 2003. While acknowledging that the Government has made efforts to provide special measures for some of the children, including housing them in a facility separate from the adult population (Camp Iguana) and providing them with specialist counseling, the ICRC has publicly stated that it does not consider Guantánamo an appropriate place to detain them. Specifically, the ICRC expressed concern about the psychological impacts of the experience on their development. See Statement of the ICRC on Guantanamo available at [www.icrc.org/web/eng/siteeng0.nsf/html/SQRC5V?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/html/SQRC5V?OpenDocument).

Although the Government indicated in August, 2003, that three of the children were scheduled for release, this has not yet occurred. Release of the fourth juvenile, a Canadian citizen, has not been discussed. See e.g., Sutton, *supra*.

Article VII of the American Declaration on the Rights and Duties of Man as well as international human rights law<sup>7</sup> and humanitarian law<sup>8</sup> impose certain additional conditions on the detention of children. To date, these conditions have not been fully complied with by the United States in relation to the children it currently holds at

<sup>7</sup> See e.g., United Nations Convention on the Rights of the Child, Art. 37 (a), (b), (c) and (d), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

<sup>8</sup> See Optional Protocol of the Treaty on the Involvement of the Children in Armed Conflict, Arts. 6(3), 7, G.A. res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at U.N. Doc. A/54/49 (2000), entered into force February 12, 2002. Ratified by the United States without reservation, Dec. 23, 2002.

Guantánamo Bay. Specifically, the Government has failed to ensure that they are demobilized, rehabilitated and reintegrated in to society.

As well as children, it has become apparent that very elderly men are being detained there; persons who it seems highly unlikely were actively engaged in the armed conflict in Afghanistan. An Afghan man released in October 2002, was alleged to be in his 70s. *They Interrogated us For Hours*, THE GUARD. (London), Oct. 29, 2002. Another of the detainees, Haji Naim Kuchai, is 65, a diabetic and before his transfer to Guantánamo had to wear a surgical belt following the removal of one of his kidneys. Mr. Kuchai remains incarcerated at the facility. See Amnesty International UA 86/03 AI Index: AMR 51/051/2003 March 27, 2003.

To date the United States has released 65 persons. The Government has stated that all of them were released because they were of no further intelligence value. There is a distinct possibility that many more also fit this criterion. Senior US officials have been reported as saying that they believe that at least a third of them are completely innocent and don't belong there. See e.g., Stuart Taylor, *Guantánamo, A Betrayal of What America Stands For*, NAT. L. J. July 25, 2003. These facts further underscore the need for the Government to immediately convene competent tribunals to determine the legal status of all persons detained at Guantánamo Bay.

**C. There Has Been no Independent and Impartial Review of the Basis of the Detainees Detention**

To date, there has been no review by either military or civilian courts of the basis for the detentions. No competent tribunals have been convened to ascertain their legal status as required by Article 5 of the Third Geneva Convention and the US military's own regulations. US Federal Courts in petitions for habeas corpus filed on behalf of some of

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those detained have determined that no court in the United States has jurisdiction over any claims they may pursue either under the United States constitution or international law. Most recently, the United States Court of Appeals for the District of Columbia circuit upheld this position. *Al Odah v. United States*, 321 F. 3d 1134 (D.C. Cir. 2003). This case is currently pending review by the Supreme Court. Petitioners expect the Court to make a decision on whether or not to review the case on the merits by mid-November.

**D. Trial of the Detainees By Military Commissions Which Can Apply the Death Penalty is Imminent.**

After much delay, the military commission procedure established under the President's Military Order finally got underway with the designation of six of the detainees as fit for trial by military commission. *Six Detainees Soon May Face Military Trials*, N. Y. TIMES, July 6, 2003. Following their designation on July 6, 2003, however, intervention by the United Kingdom on behalf of the two British nationals designated saw the suspension of the process in relation to all British as well as Australian nationals. *US Considers Cuba Britons Case*, N. Y. TIMES, Aug. 12, 2003. Although the United States did not clarify the position, it is understood that the procedure for trial by military commission of other nationals is still on foot. The designations provoked widespread criticism of the military commission structure both in the United States and internationally. For example, in the United States the American Bar Association condemned the rules by which the commissions are to be run as fundamentally unfair.<sup>9</sup>

<sup>9</sup> Report of the American Bar Association on Military Commissions available at [www.abanet.org/leadership/2003/journal/301.pdf](http://www.abanet.org/leadership/2003/journal/301.pdf).

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**E. The Totality of the Conditions Under Which the Detainees Are Being Held May Constitute Torture**

Many of the detainees have been held at Guantánamo Bay, since January 2002. During these twenty one months of captivity, they have had virtually no communication with the outside world, have been held under highly restrictive conditions, subjected to repeated interrogation and, as previously stated have not been afforded the opportunity to challenge the basis of their detention. *See e.g., Amnesty International, USA: The Threat of A Bad Example, AI Index, AMR 51/114/2003, Aug. 2003 at 15-20 available at <http://web.amnesty.org/library/Index/ENGAMR51114203>. With the commencement of the military commission system, the detainees also now have the specter of execution hanging over them, adding to the mental anguish they experience as a consequence of their prolonged arbitrary detention. Although the Government has repeatedly described their treatment as "humane", the ICRC, the only body independent of the government to have access to the detainees, has criticized the detentions there as "intolerable." Neil A. Lewis, *Red Cross Criticizes Indefinite Detention In Guantánamo Bay*, N. Y. TIMES, Oct. 10, 2003.*

Government officials as well as representatives from the ICRC have acknowledged that the indefinite nature of the detention is taking its toll on the inmates. Since the facility opened, twenty-one individuals have attempted suicide 32 times. Significantly, most of these attempts have taken place in the last few months. *Suicide Attempts Now At 32 For Detainees In Guantánamo*, ASSOC. PRESS, Aug. 27, 2003; *see also, Guantánamo Suicide Attempts Rise to 31*, ASSOC. PRESS, Aug. 21, 2003. Although none of the attempts has been successful, one of the detainees has been left brain-damaged after having attempted to hang himself. Prison officers have attributed this

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"to the effects of the indefinite detentions on prisoner morale." In July 2003, in an interview, Private Jennifer Bartlett admitted that their apparently endless detention depressed them: "It's just the duration of the time they have spent here, not knowing what's going to happen, when they are going home. They will sit and read a letter from their family, and they are frustrated, sometimes they get down. Sometimes they cry after reading their letters." Tania Branigan and Vikram Dodd, *The Bitterest Betrayal*, THE GUARD. (London) July 19, 2003

Similarly, a spokeswoman for the ICRC commented that "the uncertainty these internees face as regards their legal status and their future does have an adverse impact on their physical and mental well being. A lot of them are pushed to despair. It is a clear indication that these people are under extreme stress and anxiety." *Id.*

More recently, the ICRC in a public statement stipulated that "[t]he open-endedness of the situation and its impact on the mental health of the population has become a major problem." *See Lewis, supra.*

As well as 32 suicide attempts, as of last year it was reported that 57 inmates were being treated for mental illness and that many others were taking anti-depressants or anti-psychotic medication. Although treatments are being administered, doctors responsible admitted that the cultural and language barriers in some cases were such that they could not be certain that the regimes prescribed were the most effective way forward. Katherine Q. Seelye, *Guantánamo Bay Faces Sentence of Life as Permanent U.S. Prison*, N.Y. TIMES, Sept. 16, 2002 (quoting hospital director, Capt. Albert Shimkus); *see also* Tom Hays, *Guantánamo Mental Disorders Double*, ASSOC. PRESS, Apr. 27, 2002.

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Moreover, interviews conducted with individuals released from the facility suggest that physical acts amounting to torture under international law have in fact been carried out against some of the inmates. Jan Mohammed, formerly detained at Camp Delta, stated in an interview that during questioning his captors at Guantánamo placed the detainees "in the crucifixion position with arms outstretched until we collapsed in the heat" and that "[t]hey beat the soles of our feet." Arab detainees at the facility he said "were taken out and forced to stand among the practice targets on the shooting range" and that US "soldiers used dummy bullets ... trying to terrify and intimidate the al-Qa'ida members." *G'day Inmate: Hicks's Aussie Terror Touch*, THE W'END AUST. (Sydney), Nov. 16, 2002. See also, Barbara Jones, *Is This Really the Way to Treat POWs, Mr. Bush?* MAIL ON SUNDAY, Nov. 10, 2002.

When considered in their totality, the conditions under which the detainees are being held may constitute torture or, at the very least, severe cruel, inhuman degrading treatment and punishment. In and of itself, the Commission,<sup>10</sup> as well as United Nations Human Rights Committee,<sup>11</sup> has found that prolonged incommunicado detention may constitute torture. Detentions at Guantánamo Bay have now reached the criteria of being both prolonged and arbitrary. Thus, the Commission can and should take note of this and request that the Government furnish it with detailed information to substantiate the

<sup>10</sup> Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Oct. 22, 2002 at p. 109 (fn.399) citing Inter-Am. Ct. H. R., *Velasquez-Rodriguez* case, Judgment of 29 July 1988, Series C, No. 4, para. 156 ("prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the [American] Convention on Human Rights [prohibition against torture etc.]" See also para. 187.

<sup>11</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994) finding that "prolonged incommunicado detention in an unknown location" to be "torture and cruel, inhuman treatment in violation of Articles 7 and 10(1)." See also, Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (1999) at p. 349

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position that its treatment of the detainees does not in the circumstances constitute torture or other cruel, inhuman or degrading treatment or punishment under international law.

#### **F. Petition**

At the same time last year, we appeared before the Commission to urge this body to take prompt and decisive action in order to prevent irreparable harm to the rights of the detainees at Guantanamo Bay. We argued that the continued denial of fundamental rights (the right to life, liberty and personal security; right to equality before law; right to a fair trial; right of petition; right of protection from arbitrary arrest; and right to due process of law) would make the full restoration of these rights increasingly difficult. Based on these concerns, we requested that the Commission order the United States to provide specific information on each detainee and afford them full due process rights including the right to counsel and consular visits.

Since these requests were made, the detainees' situation has worsened considerably. The accumulative effect of isolation is taking its toll, suicide attempts continue, the detainees have not been identified or charged. Today, we appear once again before the Commission to urge this body to maintain the precautionary order issued on March 12<sup>th</sup> 2001 and expand its protective measures to address the current situation of the detainees. We justify this request on two grounds: (1) the circumstances of detention have deteriorated to the point that irreparable damage to fundamental rights is not only a risk but a reality and (2) the Government's continued refusal to implement the March 12<sup>th</sup> order.

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The gravity of the detainees' current situation is a direct consequence of the United States government's continued refusal to implement the Commission's March 12<sup>th</sup> order "to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal." During twenty-one months of captivity, detainees as young as 13 and as old as 70 have been held "incommunicado" in what the ICRC has described as "intolerable" conditions. The United States continues to insist in its right to hold the detainees indefinitely out of the reach of their families, their representatives, their governments, and the courts. Petitioners' submission has clearly illustrated the grave impact of the detention conditions on the psychological and physical well being of the detainees. It is imperative that the Commission takes immediate action to address this situation.

The Government's position should not dissuade the Commission from expanding its measures to protect the fundamental rights of those held at Guantanamo Bay. While we recognize that immediate compliance with the measures is unlikely, given the Executive Branch's current policy towards the detainees, a writ of certiorari is currently pending before the United States Supreme Court on whether US courts have jurisdiction over claims presented by those detained in Guantanamo Bay. This, any action the Commission takes now may inform and assist the Supreme Court's determination of the important issues of international law raised here.

Based on these considerations, we urge the Commission to order the United States to adopt the following measures:

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1. To take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent court by undertaking the following action:
  - a. Identify all detainees by name, nationality and address, where known;
  - b. Notify in writing the detainees of all charges (if any) they face;
  - c. Permit access to legal counsel and guarantee confidentiality of attorney/client communications;
  - d. Guarantee the detainees or their representative's access to full judicial review of any determinations made that affect their status and rights.
  - e. Notify all detainees of their rights under Article 36 of the Vienna Convention on Consular Relations, grant them access to consular representatives, should they request it.
2. To implement the measures necessary to prevent torture or cruel, infamous and unusual treatment and punishment of the detainees.
3. To adopt all feasible measures to ensure that persons under the age of 18 at Guantanamo Bay are demobilized, rehabilitated and reintegrated (in accordance with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts) in a manner protecting the psychological, moral and physical integrity of the children.

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Dec-08-2003 11:33am From-

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RELEASED IN FULL

**SCHEDULE - IACHR GUANTANAMO CASE**

DATE	TIME	SUBJECT
16 OCT 03	6 hours	Review Background Material and related USG statements
17 OCT 03	2 hours	Draft USG statement to be given on 20 OCT at the IACHR
18 OCT 03	3 hours	Preparation for anticipated IACHR questions
20 OCT 03	6 hours	Consultation with Department officers prior to appearance, appearance before the IACHR, reply to IACHR questions, followed by consultations with the Department
03 DEC 03		USG Contract Arrives by Mail
03 DEC 03	3 hours	Preparation of Final Report

ORDER NO: SAQMPD04MA005

REQUISITION/REFERENCE NO: 1004-400211

UNITED STATES DEPARTMENT OF STATE  
REVIEW AUTHORITY: CHARLES E LAHIGUERA  
DATE/CASE ID: 03 DEC 2004 200303827

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