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**REPORT No. 29/20**  
**CASE 12.865**  
MERITS REPORT (PUBLICATION)

DJAMEL AMEZIANE  
UNITED STATES OF AMERICA

Approved electronically by the Commission on April 22, 2020.

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DJAMEL AMEZIANE  
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APRIL 22, 2020

**I. SUMMARY**

1. On August 6, 2008, the Inter-American Commission on Human Rights (the “Inter-American Commission” or “IACHR”) received a petition and request for precautionary measures<sup>1</sup> presented by the Center for Constitutional Rights (CCR) and the Center for Justice and International Law (CEJIL) (the “petitioners”) that alleges the international responsibility of the United States of America (the “State” or “U.S.”) for violations of the rights of Djamel Ameziane.

2. The Commission held a hearing on the admissibility of the petition on October 29, 2010, and subsequently approved its admissibility report No. 17/12 on March 20, 2012.<sup>2</sup> On April 3, 2012, the Commission notified this report to the parties and placed itself at the disposition of the parties to reach a friendly settlement.<sup>3</sup> The parties enjoyed the time periods provided for in the IACHR’s Rules of Procedure to present additional observations on the merits. On September 7, 2017, the Commission held a hearing on the merits of the case. All the information received by the Commission was duly transmitted to the parties.

3. The petitioners alleged that Mr. Ameziane was arbitrarily detained during more than eleven years at Kandahar airbase and at Guantánamo Bay, where he was subjected to torture, poor detention conditions, and other cruel and inhumane treatment. They alleged that he lacked access to an effective legal remedy and basic due process guarantees to challenge his detention and secure his release, as well as to obtain reparation for other harms suffered. They alleged that he was forcibly returned to Algeria in 2013, in violation of the principle of *non-refoulement*, and that since that time he has been tried on terrorism charges by Algerian authorities and continues to suffer the effects of his decade in U.S. custody.

4. The State alleged that Mr. Ameziane’s detention was not arbitrary, that U.S. policy is to treat detainees humanely, that Mr. Ameziane enjoyed adequate due process protections and access to an effective remedy before U.S. courts, and that his transfer to Algeria was not illegal.

5. On the basis of determinations of fact and law, the Inter-American Commission concluded that the State is responsible for the violation of articles I (life, liberty, and security), II (equality before the law), III (religious freedom and worship), IV (freedom of expression), V (protection of honor, personal reputation, and private and family life), VI (right to family and protection thereof), XI (protection of health and well-being), XVIII (fair trial), XXI (assembly), XXIII (property), XXIV (petition), XXV (protection from arbitrary detention), and XXVI (due process) of the American Declaration on the Rights and Duties of Man (the “American Declaration”). The Commission formulated the corresponding recommendations to the State.

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<sup>1</sup> Precautionary measures were granted on August 20, 2008 (No. MC-211-08) with the object of ensuring that Mr. Ameziane not be subject to torture or to cruel, inhumane or degrading treatment in U.S. custody, and not be deported to any country where he might be subjected to torture or other mistreatment. The precautionary measures remain in force. *See also* MC-259-02 and extension granted in 2013.

<sup>2</sup> IACHR. Report No. 17/12. Case 12.865. Admissibility. Djamel Ameziane (United States). March 20, 2012. Alleged violations admissible: Articles I, II, III, V, VI, XI, XVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man.

<sup>3</sup> The petitioners requested that the Commission facilitate friendly settlement negotiations via letter dated June 13, 2012, and the State expressed its willingness to enter into said negotiations via letter dated July 24, 2012. Subsequently, the Commission held working meetings to discuss a friendly settlement between the parties on November 3, 2012 and March 13, 2013, in which the petitioners expressed their principal concern about the timeline for Mr. Ameziane’s transfer from the Guantánamo prison and the country to which he would be transferred. The petitioner notified the Commission of their withdrawal from friendly settlement negotiations via letter dated June 14, 2013, citing a lack of concrete advances in the same.

## II. POSITIONS OF THE PARTIES

### A. Petitioners

6. The petitioners alleged that Mr. Ameziane was arbitrarily detained by the U.S. government during nearly twelve years at Kandahar airbase and at Guantánamo Bay, where he was subjected to torture, poor detention conditions, and other cruel and inhumane treatment. They alleged that he lacked access to an effective legal remedy and basic due process guarantees to challenge his detention and secure his release, as well as to obtain reparation for other harms suffered. They alleged that he was forcibly returned to Algeria in 2013, in violation of the principle of *non-refoulement*—the obligation not to return an individual to a country or territory where he may be at risk of torture or death—, and that since that time he has been tried on terrorism charges by Algerian authorities and continues to suffer the effects of his decade in U.S. custody.

7. At the merits stage, petitioners alleged violations of all Articles declared admissible by the Commission, as well as Articles IV and XXIII. They alleged that the U.S. has incurred in **aggravated responsibility** in this case because the human rights violations against Mr. Ameziane “(1) occurred as part of a systematic and generalized practice” of torture authorized by the U.S. government by redefining it under domestic law, and “(2) arose out of direct defiance of the IACHR’s precautionary measures” relating to detainee treatment and the prohibition of torture, and to the prohibition on *refoulement*.

8. The petitioners alleged that Mr. Ameziane’s detention for nearly twelve years without charge, and without effective access to prompt judicial review of the legality of his detention constitutes a violation of his **right to protection from arbitrary detention** (Art. XXV), regardless of whether this right is analyzed under international human rights law, or whether the law of war is applied as *lex specialis*. They likewise alleged violations of Mr. Ameziane’s **right to a judicial remedy** (Art. XVIII) and **right to due process of law** (Art. XXVI) throughout his time in U.S. custody because he was intentionally denied effective judicial review of his detention and legal status, *inter alia*, by his detention at Guantánamo, thought to be “a place where no laws applied;” the imposition of administrative review processes that lacked fundamental due process guarantees; the failure to ever decide his *habeas* petition on the merits; and the stay of his *habeas* petition for five years—during which time the State conceded that it had no justification for his detention—on the premise that he would soon be transferred to another country, which lasted until his *refoulement* to Algeria in 2013.

9. The petitioners alleged that Mr. Ameziane’s arbitrary detention, conditions of detention, and mistreatment at Guantánamo Bay—described at length in subsequent sections of this Merits Report—amounted to torture and cruel, inhuman, and degrading treatment (“CIDT”) that was deliberately and purposefully imposed on him by the U.S. government, and which deprived him of his **rights to liberty and personal security** (Art. I), **to religious freedom and worship** (Art. III), **to protection of honor, reputation, and private life** (Art. V), **to establish a family** (Art. VI), **to the preservation of health and to well-being** (Art. XI), and **to humane treatment in custody** (Art. XXV). Likewise, petitioners alleged that his internment in Guantánamo violated his right to **nondiscrimination and equality before the law** (Art. II) because Mr. Ameziane, like all of the nearly 780 men and boys detained at Guantánamo to date, was a foreign Muslim man, and in the absence of evidence linking him to any involvement in hostilities or terrorism, the U.S. government relied on racial and religious profiling to justify his continued detention.

10. The petitioners alleged that Mr. Ameziane’s **right to property** (Art. XXIII) was violated because the U.S. confiscated and then refused to return all of his possessions—in particular, his life savings—to him upon his release and forced transfer to Algeria. Finally, petitioners alleged the violation of Mr. Ameziane’s **right to a judicial remedy** (Art. XVIII) because U.S. legislation deprives him of civil and criminal remedies for many of these violations; in particular, they contend that the broad and retroactive immunity for U.S. agents established in the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 constitute amnesty laws, which are impermissible under inter-American law in cases of serious human rights violations. Likewise, they alleged the violation of the **right to truth** (Arts. IV and XXVI), incorporating the rights of victims and their family members, as well as society as a whole, to know the truth about vital matters of public interest, including grave and systematic human rights violations—both related to the particular human rights violations Mr. Ameziane experienced in U.S. custody and his continuing stigmatization as a former Guantánamo detainee,

and the larger systematic deprivation and violation of human rights that occurred and continues to occur at Guantánamo Bay, perpetrated by U.S. authorities, countless details of which remain unknown to the public.

## B. State

11. At the merits stage, the State presented arguments relating to the admissibility of the case—concretely, the Commission’s alleged lack of competence to consider the matter—which will not be addressed in this report, as they were previously decided by the Commission in Admissibility Report No. 17/12.

12. Regarding **arbitrary detention**, the State alleged that “Mr. Ameziane was detained under the Authorization for Use of Military Force [...], as informed by the law of war, in the ongoing conflict with al-Qaida, the Taliban, and associated forces. This law authorizes the President [...] to [*inter alia*] detain persons who are part of al-Qaida, the Taliban, or associated forces.” Regarding **due process guarantees** and the existence of an **effective legal remedy**, the State alleged that “[a]ll Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of *habeas corpus*,” and enjoy access to counsel and to “appropriate evidence,” and that Mr. Ameziane effectively enjoyed this right.

13. Regarding **non-refoulement**, the State reaffirmed its position that the American Declaration does not contain either “an express or implied *non-refoulement* commitment,” but stated that the U.S. “does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country” and noted that “Mr. Ameziane does not allege that he has been subjected to torture by the Government of Algeria since his transfer.”

14. With regard to the remainder of the alleged violations, the State did not specifically refer to the facts alleged by Mr. Ameziane. Regarding **humane treatment**, the State alleged that “[a]ll U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws,” and described policy changes in this regard, including Executive Order 13491, “Ensuring Lawful Interrogations,” and Department of Defense policy directives enacted since 2009. Regarding **medical care**, it alleged that “[d]etainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians.” Regarding **religious practice**, it alleged that the State “makes every effort to accommodate the religious and cultural practices of detainees.”<sup>4</sup>

## III. PRELIMINARY CONSIDERATION

15. The Commission has addressed the situation of arbitrary detention, torture, and violations of due process and the right to an effective remedy at Guantánamo Bay prison repeatedly over the past two decades, using all of its various mechanisms, and has previously made conclusive legal findings regarding numerous structural human rights violations at Guantánamo<sup>5</sup>—several of which will prove dispositive in the analysis of law. The Commission was the first international body to call upon the U.S. to take urgent steps to respect the basic rights of the detainees, two months after the arrival of the first prisoners in January of 2002,<sup>6</sup> and has granted and repeatedly amplified precautionary measures in favor of Guantánamo Bay detainees.<sup>7</sup> Since 2013, the Commission has called for the immediate closure of the detention facilities at Guantánamo Bay.<sup>8</sup>

<sup>4</sup> It continued, “Detainees at Guantanamo have the opportunity to pray five times each day. [...] Detainees receive 20 minutes of uninterrupted time to practice their faith. The guard force strives to ensure detainees are not interrupted” during this time. Likewise, personnel schedule activities “mindful of the prayer call schedule. Every detainee at Guantanamo is issued a personal copy of the Quran in the language of his choice. Strict measures are in place throughout the facility to ensure that the Quran is handled appropriately by U.S. personnel. The Joint Task Force recognizes Islamic holy periods like Ramadan by modifying meals schedules [...] [Guantánamo personnel] receive cultural training to ensure they understand Islamic practices.”

<sup>5</sup> See generally IACHR, *Toward the Closure of Guantánamo* (2015).

<sup>6</sup> PM 259/02 - Detainees in the U.S. Military Base in Guantanamo, March 12, 2002.

<sup>7</sup> PM 259/02 - Detainees in the U.S. Military Base in Guantanamo, March 12, 2002; Extension October 28, 2005; Extension July 23, 2013; PM 08/06 - Omar Khadr, U.S., March 21, 2006; PM 211/08 - Djamel Ameziane, U.S., August 20, 2008; PM 422/14 - Mustafa Adam Al-Hawsawi, U.S., July 7, 2015; PM 46/15 - Moath al-Alwi, U.S., March 31, 2015.

<sup>8</sup> PM 259/02 - Detainees in the U.S. Military Base in Guantanamo, Extension July 23, 2013.

16. In this context, the Commission notes that the facts of this case are largely not disputed by the parties. The issues relating to the legal architecture of the “war on terror” and federal litigation regarding the rights of Guantánamo detainees are at this point largely matters of public record, as are many of the facts relative to Mr. Ameziane’s legal case; other claims made by Mr. Ameziane regarding his treatment in and conditions of detention have not been disputed by the State over ten years of active litigation, including two public hearings on the Admissibility and the Merits before the Commission. Therefore, where there is dispute as to the facts of the case, the Commission will place special emphasis on the respective positions of the parties.

#### IV. FINDINGS OF FACT

##### A. Context: The September 11, 2001 terrorist attacks and the U.S. legal response

17. In the days following the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001—horrific attacks of unprecedented magnitude that killed some 2,996 individuals and injured more than 6,000—the U.S. Congress approved the Authorization for the Use of Military Force (AUMF), which 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>9</sup> Subsequently, the President signed a Military Order on November 13, 2001 that empowered the Defense Department to detain any non-U.S. citizen who the President determined “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor,” among others, denied such detainees the right to challenge any aspect of their detention before any U.S., foreign, or international court, and provided for their trial by military commission.<sup>10</sup> Pursuant to these orders, hundreds of individuals were captured, detained, and interrogated in subsequent months, at U.S. military bases, including Guantánamo Bay, and in foreign prisons and “black sites” operated by the Central Intelligence Agency (CIA).<sup>11</sup>

18. The first prisoners captured under these directives were transferred to Guantánamo Bay Naval Base, Cuba, on January 11, 2002.<sup>12</sup> U.S. authorities chose to open the prison at Guantánamo Bay in part due to the belief that U.S. federal courts “could not properly exercise habeas jurisdiction over a [non-citizen] detained” there.<sup>13</sup> (The Supreme Court later held to the contrary in *Rasul v. Bush*,<sup>14</sup> discussed *infra* part E.) Since that time, nearly 780 men and boys, ranging in age from 13 to 89, have been imprisoned at the facility.<sup>15</sup> As of May 2018, 40 men remained imprisoned there.<sup>16</sup>

19. In January 2002, a series of memos from the Office of the Legal Counsel (Department of Justice) and the President’s White House Counsel argued that members of al Qaeda and the Taliban were not protected by the Third Geneva Convention relative to the Treatment of Prisoners of War.<sup>17</sup> The White House Counsel, in particular, argued to the President that this “new kind of war” (the “war on terrorism”) “renders

<sup>9</sup> U.S. Public Law 107-40, 115 Stat. 224 (2001). On this history, *see also* Toward the Closure of Guantánamo, paras. 71-82.

<sup>10</sup> “Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57831 (Nov. 13, 2001), available at: <https://www.gpo.gov/fdsys/pkg/FR-2001-11-16/pdf/01-28904.pdf>.

<sup>11</sup> *See, e.g.*, Eur. Ct. H.R., Case of El-Masri v. Macedonia (Grand Chamber), Application No. 39630/09 (Dec. 13, 2012); Eur. Ct. H.R., Case of al Nashiri v. Poland, Application No. 28761/11 (Jul. 24, 2015); Eur. Ct. H.R., Case of Husayn (Aby Zubaydah) v. Poland, Application No. 7511/13 (Jul. 24, 2015); *see also, e.g.*, Washington Post (Dana Priest), “CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11” (Nov. 2, 2005), available at: <http://www.pulitzer.org/winners/dana-priest>.

<sup>12</sup> Washington Post, “A Guantánamo Timeline” (2005), available at: [http://www.washingtonpost.com/wp-srv/world/daily/graphics/guantanomotime\\_050104.htm?noredirect=on](http://www.washingtonpost.com/wp-srv/world/daily/graphics/guantanomotime_050104.htm?noredirect=on).

<sup>13</sup> Memorandum of Patrick F. Philbin, Deputy Assistant Attorney General, and John Yoo, Deputy Assistant Attorney General, to William J. Haynes II, “Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba” (Dec. 28, 2001), available at: <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf>.

<sup>14</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>15</sup> ACLU, Guantánamo by the Numbers (last updated May 2018), available at: <https://www.aclu.org/issues/national-security/detention/guantanamo-numbers>.

<sup>16</sup> *Id.*

<sup>17</sup> *See* New York Times, A Guide to the Memos on Torture, available at: <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html?>. *See also* ICRC, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>.

obsolete [the Geneva Conventions'] strict limitations on questioning of enemy prisoners," and that a legal conclusion that the Geneva Convention does not apply to these prisoners would "substantially reduce the threat of domestic criminal prosecution under the War Crimes Act" of 1996.<sup>18</sup>

20. On February 7, 2002, the President issued a memorandum on detainee treatment concluding that al Qaeda and Taliban detainees were not entitled to prisoner of war status under the Third Geneva Convention; rather, it concluded that the U.S. had an essentially political commitment, based on its "values as a Nation," to ensure that "detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [the Third Geneva Convention]."<sup>19</sup> As U.N. experts have recognized, this wording—repeated in military policy documents over the following years—is "ambiguous in that it implies that military necessity may override the principles of the Geneva Conventions," and contributed to "confusion about the rules" of detainee treatment in detention.<sup>20</sup> The U.S. government maintained this basic position until January 2009, when it recognized the applicability of Common Article 3 standards to Guantánamo detainees (see below).

21. In subsequent months, lawyers from the Office of the Legal Counsel authored a series of legal memoranda authorizing the use of "enhanced interrogation techniques"—including waterboarding, prolonged sleep deprivation and stress positions—against detainees in the context of the "war on terror."<sup>21</sup> These practices were widespread in U.S. detention programs.<sup>22</sup> In 2004, a leaked report by the International Committee of the Red Cross revealed the ICRC's assessment that the detention regime at Guantánamo "cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."<sup>23</sup> In 2009, the Justice Department's Office of Professional Responsibility concluded that these legal memoranda permitting the use of "enhanced interrogation techniques" consistently favored a permissive view of the torture statute, with the effect of "authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture," even "justif[ying] acts of outright torture under certain circumstances," and that their legal analysis was inconsistent with the professional standards applicable to Department of Justice Attorneys.<sup>24</sup>

<sup>18</sup> Memorandum of Alberto Gonzales, White House Counsel, "Decision re: Application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban" (Jan. 25, 2002), available at: <https://nsarchive2.gwu.edu//NSAEBB/NSAEBB127/02.01.25.pdf>.

This determination was presumably made in light of the fact that the Office of the Legal Counsel had previously opined that "causing great suffering or serious bodily injury to [prisoners of war], killing or torturing them, [or] depriving them of access to a fair trial" would constitute grave breaches of the Third Geneva Convention punishable under the War Crimes Act. Memorandum of John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, "Application of Treaties and Laws to al Qaeda and Taliban Detainees" (Jan. 9, 2002), available at: <https://nsarchive2.gwu.edu//NSAEBB/NSAEBB127/02.01.09.pdf>.

<sup>19</sup> Memorandum of the President, "Humane Treatment of al Qaeda and Taliban Detainees" (Feb. 7, 2002), available at: <https://nsarchive2.gwu.edu//NSAEBB/NSAEBB127/02.02.07.pdf>.

<sup>20</sup> U.N. Economic and Social Council, *Situation of Detainees at Guantánamo Bay*: Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006), paras. 47-48 [hereinafter "U.N. Special Mandate Holders' Report"].

<sup>21</sup> Letter from John C. Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, 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 (Aug. 1, 2001), available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>; Memorandum of Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at: <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>; Memorandum of Jay S. Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel of the CIA, Re: Interrogation of Al Qaeda Operative (Aug. 1, 2002), available at: [https://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel\\_Aug2Memo\\_041609.pdf?noredirect=on](https://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf?noredirect=on).

<sup>22</sup> See, e.g., Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (2012), available at: <https://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html>; Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* (2011), available at: <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees>.

<sup>23</sup> New York Times, "Red Cross Finds Detainee Abuse in Guantánamo" (Nov. 30, 2004), available at: <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>.

<sup>24</sup> 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." IACHR, *Toward the Closure of Guantánamo* (2015), para. 116 (citing Department of Justice, Office of Professional Responsibility, Report, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central

22. On January 22, 2009, the President issued an Executive Order entitled “Ensuring Lawful Interrogations,” which states that individuals detained “in any armed conflict [...] shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of [the U.S.]” and established “Common Article 3 [s]tandards as a [m]inimum [b]aseline” in this regard.”<sup>25</sup> In the present case, the State additionally referred the IACHR to subsequent statutory changes intended to codify this Executive Order, to create mandatory reporting and investigation requirements, to ensure ICRC access to detainees, and to facilitate detainees’ communication with their family members.<sup>26</sup> The Commission understands these developments to reflect a change from previous positions of the U.S. Executive, according to which the Geneva Conventions did not apply to persons detained pursuant to the “war on terror.”

23. On December 9, 2014, the U.S. Senate Select Committee on Intelligence released the executive summary of the “Committee Study of the [C.I.A.’s] Detention and Interrogation Program,” which confirmed the widespread practice of torture, including at Guantánamo Bay.<sup>27</sup> The State has since asserted to the Commission that the harsh interrogation techniques detailed in the SSCI Report “are not representative of how the [U.S.] deals with the threat of terrorism today, and are not consistent with [U.S.] values.”<sup>28</sup>

24. The Commission additionally takes note of contextual information regarding the use of private military and security companies to perform key security functions and operations in the different contexts in which this case takes place, as well as serious accusations regarding engagement of these actors in human rights violations acting in collaboration with or support of State military operations.<sup>29</sup>

25. Finally, the Commission notes that in November 2017, the Prosecutor of the International Criminal Court requested that its Trial Chamber III open an investigation regarding the situation in Afghanistan, noting, *inter alia*, that “the information available provides a reasonable basis to believe that members of [United States] armed forces and members of the Central Intelligence Agency (“CIA”) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.”<sup>30</sup>

## B. Information about Djamel Ameziane

26. Djamel Ameziane was born on April 14, 1967, in Algiers, Algeria, sixth in a family of eight children.<sup>31</sup> He obtained a university degree in Algeria and worked there as a hydraulics technician; however, he fled Algeria in 1992 due to discrimination and harassment based on his religion as a practicing Muslim.<sup>32</sup> He

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>25</sup> Executive Order 13491, Ensuring Lawful Interrogations, 74 F.R. 4893 (Jan. 22, 2009), available at: <https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations>.

<sup>26</sup> State’s merits brief at 5.

<sup>27</sup> Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (2012), available at: <https://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html>; see also generally IACHR, *Toward the Closure of Guantánamo* (2015), paras. 101-108.

<sup>28</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 115 (citing Submission of the Government of the United States to the IACHR with respect to the Draft Report on the Closure of Guantánamo, OEA/Ser.L/V.II.Doc. 30 January 2015, March 30, 2015, p. 5).

<sup>29</sup> Comm’n on Wartime Contracting in Iraq and Afghanistan. *Transforming Wartime Contracting, Controlling cost, reducing risk. Final Report to Congress* (2011), available at: [https://cybercemetery.unt.edu/archive/cwc/20110929213820/http://www.wartimecontracting.gov/docs/CWC\\_FinalReport-lowres.pdf](https://cybercemetery.unt.edu/archive/cwc/20110929213820/http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf); Comm’n on Wartime Contracting in Iraq and Afghanistan. *At what risk? Correcting over-reliance on contractors in contingency operations* (Feb. 24, 2011), available at: <https://www.hsdl.org/?abstract&did=685406>; Washington Post. Contractors are Cited in Abuses at Guantánamo (Jan. 4, 2007), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/03/AR2007010301759.html>; Congressional Research Service. *Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007-2017*. (Apr. 18, 2017), available at: <https://fas.org/sgp/crs/natsec/R44116.pdf>.

<sup>30</sup> International Criminal Court. Office of the Prosecutor. Situation in the Islamic Republic of Afghanistan, Request for authorisation of an investigation pursuant to article 15. ICC-02/17-7-Conf-Exp, Nov. 20, 2017, para. 4, available at: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

<sup>31</sup> Initial petition, para. 36.

<sup>32</sup> *Id.* at paras. 36-37.

left Algeria and traveled to Vienna, Austria, where he lived and worked legally until 1995, when changes in Austria's visa regime made it impossible for him to extend or renew his visa.<sup>33</sup> Subsequently, he moved to Canada, where he sought asylum; his petition was denied in 2000.<sup>34</sup>

27. Mr. Ameziane then fled to Afghanistan, believing that there he could practice his religion freely and would not be deported to Algeria; after the terrorist attacks of September 11, 2001 and the outbreak of war in Afghanistan, he fled across the border to Pakistan.<sup>35</sup> There, he was detained by local authorities, who transferred him to U.S. custody allegedly in exchange for a bounty.<sup>36</sup> Petitioners state that Mr. Ameziane was told by soldiers at Guantánamo "that the Pakistanis sold people to them in Afghanistan for \$2,000 and in Pakistan for \$5,000."<sup>37</sup> The State has not controverted this allegation.

28. Mr. Ameziane was subsequently detained at the U.S. airbase in Kandahar, Afghanistan and at Guantánamo Bay Naval Station, Cuba, where he remained detained until his forced transfer to Algeria on December 5, 2013. During more than twelve years in U.S. custody, he was never charged with a crime and never had the legality of his detention determined by a judge.

### C. Mr. Ameziane's detention at Kandahar airbase, Afghanistan and Guantánamo Bay, Cuba

29. As established in the Admissibility report, the IACHR's analysis in this case encompasses the facts since Mr. Ameziane entered into the custody of U.S. officials in Pakistan in 2001; the period of more than one month that Mr. Ameziane was held at the U.S. airbase in Kandahar, Afghanistan during 2002; and his detention in the U.S. detention facility at Guantanamo Bay from 2002 until 2013.

30. Throughout his time in U.S. custody, Mr. Ameziane has alleged a series of acts perpetrated against him and his fellow detainees by U.S. agents—*inter alia*, beatings, death threats, threats to return him to a country where he would be tortured, the use of dogs to create terror, waterboarding, exposure to extreme cold temperatures for extended periods, removal/denial of clothing, sleep deprivation, sensory deprivation, interrogations lasting more than 30 hours, failure to provide adequate medical treatment, religious abuse and interference, psychological abuse, and solitary confinement—which have caused and continue to cause him lasting physical and psychological harm. During the proceedings before de IACHR, the State has not made direct reference to or controverted any of the acts alleged by Mr. Ameziane.

31. Mr. Ameziane's initial *habeas corpus* petition filed before the federal courts alleged, "Indeed, many of these violations—including isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror—were actually interrogation techniques approved for use at Guantánamo by the most senior Department of Defense Lawyer."<sup>38</sup> Similarly, the U.S. Senate "Torture Report" found that the effects of enhanced interrogation techniques on the detainees included "hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation."<sup>39</sup>

32. Mr. Ameziane related to the Commission that after arriving in Pakistan, "I was welcomed initially but quickly betrayed by villagers who were rounding up foreigners and selling them for bounties. I was turned over to the Pakistani forces, who in turn gave me to the US military, which flew me to Kandahar on a

<sup>33</sup> Id. at para. 37-38.

<sup>34</sup> Id. at para. 38.

<sup>35</sup> Id. at 39.

<sup>36</sup> Initial petition at para. 39

<sup>37</sup> Id.

<sup>38</sup> Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (Feb. 17, 2005). Submitted with initial petition (citing Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Nov. 27, 2002); *Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, at 62-65 (Apr. 4, 2003)).

<sup>39</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 119 (citing U.S. Senate, Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Declassification Revisions (Dec. 3, 2014)); see also International Rehabilitation Council for Torture Victims, Effects of torture. Available at: <http://www.irct.org/what-is-torture/effects-of-torture.aspx>.

military cargo plane. I was chained, handcuffed, hooded and tied with other prisoners to the floor of the plane.”<sup>40</sup> Mr. Ameziane was transferred to the U.S. detention center at the airbase in Kandahar, Afghanistan in January 2002, where he spent approximately five weeks.<sup>41</sup> Contemporary reports described the detention conditions at Kandahar airbase as below international human rights standards.<sup>42</sup> Mr. Ameziane continued:

When we arrived, it was total chaos [...] We were beaten and brutalized by the soldiers. One thing I remember clearly were armed guards yelling, “Kill them! Kill them!” as we arrived. And I remember the soldiers had vicious, barking dogs that they would bring close to our heads, while we were chained face-down to the freezing cold ground, so close in fact that I could feel their breath on my face. The guards used the dogs to terrify us, and because they thought that we as Muslims especially did not like dogs [...] [R]ight when I thought I could not take any more abuse and might lose my mind, I was brutally interrogated. I also encountered other prisoners who were hooded and beaten, and others who were deprived of sleep to the point of hallucination, all in an effort to get them to confess to various things that the interrogators said they had done. This went on continuously while I was held in Kandahar.<sup>43</sup>

33. Mr. Ameziane was transferred to Guantánamo Bay Naval Station on or about February 11, 2002. He related, “I thought my life was over completely. For the 15-hour flight, I was once again chained and bound with others, with opaque goggles, earmuffs and a mask over my nose and mouth. I was chained to a seat, forbidden from speaking, and it was living hell. I was not treated like a human being.”<sup>44</sup> He was initially held at Camp X-Ray, where, he related to the Commission:

My cell [“an outdoor cage” in Camp X-Ray] was like a dog kennel, and indeed it was unfit for a human being. The cell was two meters square and made of wire mesh, with a cement floor and a roof of sheet metal. At first we were not permitted to speak much at all [...] I was eventually given a thin mat and blanket, a bucket for water, and a bucket for human waste [...] We were given food, but no time to eat it, and the guards constantly harassed us and yelled obscenities at us. They purposefully interrupted our prayers and systematically deprived us of sleep. They sprayed us with water when we slept. We were searched and harassed and demeaned constantly.<sup>45</sup>

34. Mr. Ameziane alleged that this mistreatment in Camp X-Ray was for the purpose of interrogating him in an attempt to corroborate statements he is claimed to have made—under torture—while at Kandahar airbase. He stated, “If I put it on myself to cite all the forms of physical and psychological torture throughout these past years, I would have to write perhaps hundreds of pages. [...] But this was the context in which I was interrogated during my time in Camp X-Ray, and later in the other camps. Despite all that I endured, I never made the statements that are attributed to me in [FBI reports from that period].”<sup>46</sup>

35. After a few months in Camp X-Ray, Mr. Ameziane was transferred on several occasions to solitary confinement in Camp I for stretches of up to one month, where he was left in a “cold, rusty metal cell” with only a shirt, a pair of pants, and flip flops.<sup>47</sup> He related, “Everything at Guantanamo rusts quickly in the hot, salty sea air. I slept there on a very cold metal bed, but once again was often kept awake at night by guards making a racket outside my cell.”<sup>48</sup>

36. Mr. Ameziane told the Commission, “Eventually, the physical abuse that mostly characterized my early years in Guantanamo gave way to psychological abuse. Although the physical harassment and abuse

<sup>40</sup> Statement of Djamel Ameziane before the IACHR. Submitted by petitioners for Sept. 7, 2017 merits hearing [hereinafter “Djamel Ameziane statement for merits hearing”].

<sup>41</sup> Initial petition at para. 16.

<sup>42</sup> Initial petition at fn. 29 (citing U.N. Commission on Human Rights, M. Cherif Bassiouni, Report of the Independent Expert on the Situation of Human Rights in Afghanistan, “Advisory Services and Technical Cooperation in the Field of Human Rights,” para. 45, U.N. Doc. E/CN.4/2005/122 (Mar. 11, 2005)).

<sup>43</sup> Djamel Ameziane statement for merits hearing.

<sup>44</sup> Djamel Ameziane statement for merits hearing.

<sup>45</sup> Djamel Ameziane statement for merits hearing.

<sup>46</sup> Statement of Djamel Ameziane (Jan. 17, 2009). Submitted with petitioners’ merits brief.

<sup>47</sup> Initial petition at para. 50; *see also* Djamel Ameziane statement for merits hearing.

<sup>48</sup> Djamel Ameziane statement for merits hearing.

continued, as did the religious discrimination, the psychological abuse was far worse. I would rather have continued to be beaten physically than locked away in isolation and forgotten, which is what happened to me.”<sup>49</sup>

37. Petitioners stated that “[f]or a period of about six months in 2006, for no infraction,” Mr. Ameziane was sent to the “Romeo” block of Camp 3 and the “Mike” block of Camp 2,

which the military reserved for detainees who were perceived to be uncooperative. He was given only a thin mat on which to sleep, a pair of pants, a smock, and a pair of flip-flops, and a sheet that was handed to him at 10 p.m. and taken away at 5 a.m. At night, guards would wake him each quarter or half hour by kicking on the wall or the door of his cell and yelling [...] When he was taken out of his cell shackled and chained each day to go to the “recreation yard,” he was forbidden from speaking with other prisoners or moving his eyes left and right [...] Sometimes, when his eyes would shift slightly to the side, his escort guards would brutally shove him against the wall, slamming his head against the wall with such force once that blood came out of his nose and mouth.<sup>50</sup>

38. Regarding interrogation techniques, petitioners stated,

In another violent incident, guards entered his cell and [slammed his head against the floor] [...] The bashing dislocated Mr. Ameziane’s jaw [...] [G]uards sprayed cayenne pepper all over his body and then hosed him down with water to accentuate the effect of the pepper spray and make his skin burn. They then held his head back and placed a water hose between his nose and mouth, running it for several minutes over his face and suffocating him, an operation they repeated several times. Mr. Ameziane writes, “I had the impression that my head was sinking in water. I still have psychological injuries, up to this day. Simply thinking of it gives me the chills.” Following his waterboarding, he was taken to an interrogation room, where his feet were chained to a metal ring fixed to the floor and he was left writhing in pain and shivering under the cold air of the air conditioner, his clothes soaked and his body burning from the effect of the pepper spray.

Mr. Ameziane [...] was once kept inside an interrogation room for over 25 hours and allowed out only once for half an hour. Another time, he was kept in an interrogation room for over 30 hours with loud techno music blasting, “enough to burst your eardrums.”

[Throughout 2008,] Mr. Ameziane [had] late night interrogation sessions with an interrogator he identifies as “Antonio,” who chain smokes for the duration of their two-hour sessions, blows smoke in Mr. Ameziane’s face, yells obscenities and taunts him, and has threatened him with the use of other “harsher” methods. Before these sessions begin, Mr. Ameziane sits bound to a chair waiting for up to an hour, with his feet shackled to the floor and his wrists cuffed so tightly that his hands are left swollen and discolored. He is left shackled and cuffed in the interrogation room for up to another hour after these sessions end waiting to be returned to his isolation cell, making these interrogations and abusive four-hour ordeal. While Mr. Ameziane’s attorneys made a formal complaint in February [2008] to the military about Antonio’s conduct, the sessions and abuse [continued].<sup>51</sup>

39. In April 2007, Mr. Ameziane was transferred to solitary confinement in Camp 6, “what we called a tomb above the ground. A super-max type prison made of concrete and steel, with no windows and only single cells.”<sup>52</sup> Petitioners described the cell as “a windowless 6-foot-by-12-foot concrete and steel cell, with a solid steel door and no openings for natural light or air. The only openings are a metal food slot and three narrow “windows” that all face the interior of the prison and serve only to allow prison guards to look in and keep watch. The temperature inside his cell is extremely cold, so much so that [Mr. Ameziane] describes even the air as a ‘tool of torture.’”<sup>53</sup> Mr. Ameziane stated that he was transferred to Camp 6 “for no apparent reason:”

Perhaps it was to punish me for meeting with my lawyers and litigating a habeas corpus case [...] Maybe it was just to be sadistic. I do not know. But what I can say with certainty is that my health and well-being took a turn for the worst in Camp 6. [...] There, I was kept in a windowless room in isolation, and because I could see nothing but white walls [...] my eyesight deteriorated. I asked repeatedly for an eye exam, but adequate

<sup>49</sup> Djamel Ameziane statement for merits hearing.

<sup>50</sup> Initial petition at para. 50 (citing Letter from Djamel Ameziane to Wells Dixon, Nov. 6, 2007 (unclassified)).

<sup>51</sup> Initial petition at paras. 51-53 (citing Letter from Djamel Ameziane to Wells Dixon, Mar. 17, 2008 (unclassified)).

<sup>52</sup> Djamel Ameziane statement for merits hearing.

<sup>53</sup> Initial petition at para. 55 (citing Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo* (June 2008)).

medical treatment was denied to me for almost one year. I received an examination and was promised glasses for a long time, but did not receive glasses until months later, and only after my attorney found out and made a request on my behalf. Even then, the glasses I received were the wrong prescription, and I could not wear them without hurting my eyes further. Camp 6 was also kept deliberately cold 24 hours a day, and as a result I suffered from rheumatism in my legs and feet, which continues to this day. [Throughout], interrogators continued to harass and threaten me, including with forced transfer to Algeria, where they led me to believe I would be tortured and killed.

If you want to begin to understand what this feels like [...] go into your bathroom wherever you live, close and lock the door, and remain there for one year. You will be allowed to have exactly one censored book or magazine at a time, from a limited library. The only time you will leave is occasionally for a quick shower, where you will be mostly naked in front of your guards, to harass you and offend your religious beliefs, or maybe for an hour every day or two where you will be taken to another cell where you can see a small patch of sky and nothing else. This might happen at any time including the middle of the night, so you might not actually see the sky. Maybe or maybe not there will be another prisoner nearby, and maybe or maybe not the guards will allow you to speak with one another.

The only other time you will leave your cell is to be interrogated and threatened, or to meet with your lawyer, which would immediately be followed by further interrogations about what you discussed with your lawyer. Indeed, the guards did whatever they could to discourage and prevent us from meeting with our lawyers. Sometimes they would say, for example, “You have a reservation today.” Reservation to us meant interrogation, so we would refuse, only to find out later that it was supposed to be a meeting with our lawyers. If you can start to imagine this sort of thing happening [for years], then you can start to understand how I suffered terribly and nearly lost my mind in that horrible place. You would be lucky if you do not lose your mind as some of the men did, and as I nearly did, staring at the walls of Camp 6.<sup>54</sup>

40. Petitioners elaborated, “The only staple items that Camp VI prisoners are permitted in their cells are a thin mat on which to sleep, a pair of pants, a shirt, and a pair of flip flops. All other items – things like a toothbrush, toothpaste, a Styrofoam cup, and a towel – are considered “comfort items” and can be taken away for any infraction. Mr. Ameziane writes, ‘I would even venture that if they could confiscate the air we breathe, it would be counted as a [Comfort Item].’”<sup>55</sup>

41. Mr. Ameziane stated that President Obama’s entry into office in January 2009 gave him some initial hope, and conditions improved in the camps at that time: “We were moved out of isolation and allowed to interact in a more communal environment [...] For the first time, we were allowed to pray and celebrate the Muslim holy days together without fear of retribution.”<sup>56</sup> Several detainees who feared persecution in their home countries were resettled in third countries during this period, and he hoped to be transferred too—particularly because he had been cleared for transfer for a second time in May 2009.<sup>57</sup> But “the US authorities purposefully blocked my transfer to any country except Algeria [...] the one place I feared most,” and “by January 2011, transfers essentially stopped entirely.”<sup>58</sup>

42. In April 2013, amid growing desperation due to the U.S.’ failure to close the prison, Mr. Ameziane participated in a prison-wide hunger strike, described in greater detail below. In apparent retaliation for this hunger strike, the government conducted a raid on Camp 6 on April 13, 2013, in which all of Mr. Ameziane’s legal and non-legal materials were seized by guards and “detainees including Mr. Ameziane were placed in isolation as apparent punishment for their participation in the widespread hunger strike.”<sup>59</sup> In December 2013, he was forcibly transferred to Algeria.

<sup>54</sup> Djamel Ameziane statement for merits hearing.

<sup>55</sup> Initial petition at para. 56.

<sup>56</sup> Djamel Ameziane statement for merits hearing.

<sup>57</sup> See *infra* section D.2.

<sup>58</sup> Djamel Ameziane statement for merits hearing.

<sup>59</sup> Motion for Status Conference to Address the Government’s Seizure of Legal Materials (July 26, 2013). Submitted with petitioners’ merits brief.

## 1. Information about the impact of indefinite detention on Mr. Ameziane

43. It is undisputed that Mr. Ameziane was held in U.S. custody from January 2002 to December 2013, during which time he was neither charged with a crime nor had the legality of his detention determined by a judge. In particular, from 2008 to 2013, he was approved for transfer (*see infra* section D.2)—that is, the State conceded in domestic proceedings that it had no cause to continue to detain him and claimed to be seeking his transfer to another country—but he remained incarcerated at Guantánamo as the State failed to transfer him expeditiously.

44. Mr. Ameziane stated: “To make matters worse, the US government went to court to stop my lawyers at CCR from telling anyone I had been approved for transfer by either administration [which frustrated, among others, attempts to resettle him]. [...] [T]he US cleared me for transfer, but did everything in its power to keep me in detention and keep secret from the outside world my cleared status.”<sup>60</sup>

45. Mr. Ameziane stated: “[The U.S.] did nothing, which was quite obvious to those of us who remained in detention [...] We saw and felt no progress. It was extremely depressing [...] It was this inaction, too, that caused the outbreak of a hunger strike at the prison in April 2013.”<sup>61</sup> This, in light of the fact that the Special Envoy for the closure of Guantánamo was reassigned and not replaced in January 2013; transfers had long since ceased due in part to restrictions imposed by the Congress; detainees’ cases were not advancing in the federal courts, and detainees perceived that “they were facing a dead end.”<sup>62</sup> He continued:

Rather than address [...] and try to alleviate [the detainees’] concerns, the military locked everyone back in [isolation]. Many men were also force-fed, and in one instance that I was aware of, the guards shot some detainees with rubber bullets at point-blank range for resisting.<sup>63</sup> This only caused the hunger strike to spread to most of the other detainees. I, too, joined the strike in protest, and because at that point I had really lost all hope and wanted to die. I was finished. During the summer of 2013, I lost 60 lbs., my nose bled and my skin deteriorated into rashes and scabs. I was a wreck, emotionally, too. I could not even bear to meet with my lawyers in person. We communicated only by mail.

In the end, President Obama recommitted to closing the prison and transfers began again. The hunger strike subsided, but I and many other men never really recovered from that point onward. Indeed, the few months that followed are somewhat of a blur to me now. My lawyers went back to court to press my case because I still was not being transferred. But the reaction of the State Department was harsh: the president’s new Guantanamo Envoy began forcibly repatriating detainees to countries where they feared persecution, notwithstanding resettlement offers elsewhere. That is what happened to me.<sup>64</sup>

46. In this regard, the IACHR has previously noted that while the hunger strikes at Guantánamo are an important issue in and of themselves, they are fundamentally a symptom of the unsustainable situation of indefinite detention.<sup>65</sup>

47. Petitioners argued to the D.C. District Court in 2013 that Mr. Ameziane’s case is particularly galling because the U.S. failed to take any steps between 2009 and 2013 to secure Mr. Ameziane’s safe transfer from Guantánamo, despite petitioners’ efforts to secure his resettlement during this time:

<sup>60</sup> Djamel Ameziane statement for merits hearing.

<sup>61</sup> Djamel Ameziane statement for merits hearing.

<sup>62</sup> IACHR, *Toward the Closure of Guantánamo* (2015), paras. 137-139.

<sup>63</sup> Regarding this incident, *see also* IACHR, *Toward the Closure of Guantánamo* (2015), para. 141. The Commission has previously written that in response to the hunger strike, the commander of the JTF-GTMO ordered the transition of detainees to solitary confinement; all detainee possessions, including legal and non-legal materials, were reportedly seized; a policy of genital searches of any detainee who left the camp (e.g. to meet with counsel or the ICRC), which detainees regarded as a form of religious discrimination and humiliation; and about 45 of the 106-130 striking detainees were subjected to force-feeding. While the military announced on September 23, 2013 that the hunger strike had ended and it would no longer provide daily updates on participating detainees, as of the beginning of 2014, 25 detainees reportedly remained on hunger strike, 16 of whom were being force-fed. IACHR, *Toward the Closure of Guantánamo* (2015), paras. 141-143, 150 (citing New York Times, Appeals Court Allows Challenges by Detainees at Guantanamo Prison (Feb. 11, 2014), available at: <http://www.nytimes.com/2014/02/12/us/appeals-court-clears-way-for-guantanamo-challenges.html>).

<sup>64</sup> Djamel Ameziane statement for merits hearing.

<sup>65</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 152.

As the government's [redacted] makes plain, Mr. Ameziane continues to be held not because his detention continues to serve any ostensible purpose (e.g., to prevent return to the battlefield), but rather because the government has made absolutely no meaningful effort to transfer him to any country since his case was stayed in 2009 [...] [and] the government has blocked [redacted] foreign governments from resettling him. The government also fails to offer any indication that it will attempt to transfer Mr. Ameziane in the near future. To be clear, [redacted] provides not a single shred of evidence—not one phone call, email, meeting or other discussion is cited—that it has attempted to [redacted] try to transfer Mr. Ameziane, or that it will do so in the near future.<sup>66</sup>

48. Petitioners further argued in these domestic proceedings that “[t]he knowledge that [Mr. Ameziane] is not being released despite his approval for transfer, and despite the fact that certain governments have indicated interest in possibly resettling him, is particularly cruel, inhuman, and degrading, rising to the level of a violation of Common Article 3 of the Geneva Conventions.”<sup>67</sup>

49. The risks to detainee health and to the U.S.’ ability to comply with its humane treatment obligations under Common Article 3 posed by indefinite detention have further been established by internal reviews carried out by the Defense Department. It concluded:

The Review Team is convinced that the ability of detainees to understand their future has a direct correlation to detainee behavior and conditions inside the camp population, *and will impact the long-term ability to comply with Common Article 3 of the Geneva Conventions*. Rising tension and anxiety among the detainees leads to acts of defiance, non-compliance with camp rules, and manifestations of self-harm or attempts to injure or kill camp personnel. Therefore, we recommend seeking immediate assistance [...] to expeditiously determine the detainees’ future and take action to repatriate or transfer detainees as appropriate. [...] *Not knowing when they might depart Guantánamo (for home or elsewhere) has almost certainly increased tension and anxiety within the detainee population* (emphasis added).<sup>68</sup>

50. The IACHR has previously considered the severe and lasting physiological and psychological damage caused by Guantánamo detainees’ high degree of uncertainty over basic aspects of their lives, including whether or when they will be tried; whether or when they will be released; and whether they will see their family members again. This continuing state of suffering and uncertainty causes stress, fear, depression, and anxiety, and affects the central nervous system and the cardiovascular and immune systems.<sup>69</sup> Detainees being held indefinitely “very commonly have sleep problems, anxiety attacks, [as well as] any number of physical ailments that are attributable to an aging population.”<sup>70</sup> In this respect, “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.”<sup>71</sup>

## 2. Additional information about interrogations at Guantánamo Bay

51. The Commission has previously considered the existence of a pattern or practice in the use of torture and other CIDT for the purposes of interrogation at Guantánamo, placing special emphasis on the express authorization of many interrogation practices by the Secretary of Defense, including the use of stress positions, isolation, sensory deprivation, forced shaving and nudity, deprivation of basic hygienic accessories

<sup>66</sup> Motion for Order of Release and Other Relief in Response to the Government’s Status Report Regarding Efforts to Transfer Mr. Ameziane (Aug. 12, 2013). Submitted with petitioners’ merits brief.

<sup>67</sup> Motion for Status Conference to Address the Government’s Seizure of Legal Materials (July 26, 2013). Submitted with petitioners’ merits brief.

<sup>68</sup> Department of Defense, Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement (2009), available at: [https://dod.defense.gov/Portals/1/Documents/pubs/REVIEW\\_OF\\_DEPARTMENT\\_COMPLIANCE\\_WITH\\_PRESIDENTS\\_EXECUTIVE\\_ORDER\\_ON\\_DETAINEE\\_CONDITIONS\\_OF\\_CONFINEMENTa.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf). Cited in id.

<sup>69</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 134 (citing 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>70</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 126.

<sup>71</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 126 (citing 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>).

and exploitation of detainees' fears (such as fear of dogs),<sup>72</sup> as well as beating, deprivation of food and water, sexual humiliation, exposure to loud music, threats of firing squad, electric shocks, dousing with chemicals, and disproportionate use of force in searches and for minor disciplinary offenses, among others.<sup>73</sup>

52. In light of the torture he alleges, Mr. Ameziane has questioned the validity of all information contained in his administrative review ("CSRT" and "ARB"; *see infra* section D) proceedings from 2004-2006. He stated: "I do not remember making any statements to support any of the accusations against me. If I said anything, it was out of fear and only as a result of torture and other abuse. My words were intentionally altered by the interrogators who took the liberty to write what they wanted; they were modified by the interpreters with whom I worked, who spoke Middle Eastern dialects that are completely different from my Algerian dialect; I would even say they were altered by the CSRT and ARB processes. I am not going to go into the question of [these processes'] legitimacy because enough has been said [...] even by former members of these commissions to the American media. They are at once the jailer, the judge, the jury and the executioner. I reject the charges."<sup>74</sup>

53. In its response to the IACHR's report *Toward the Closure of Guantánamo*, the U.S. government indicated a number of investigations undertaken by the Armed Forces that generated hundreds of recommendations to improve detention and interrogation operations; the Department of Defense and the CIA have allegedly instituted processes to address these recommendations.

### 3. Information about medical care at Guantánamo Bay

54. Mr. Ameziane indicated that he has developed a number of physical ailments relating to his conditions of detention and treatment in Guantánamo, including a deterioration in his vision related to his years in solitary confinement, rheumatism in his legs, and post-traumatic stress disorder and depression, all aggravated by lack of adequate and timely medical care.

55. Petitioners provided several additional examples of inadequate medical care:

Mr. Ameziane has also felt pain in an area on the side of his head for almost a year. After a doctor at the prison gave him a cursory examination and told him there was nothing the matter, Mr. Ameziane asked how he could be sure without conducting further tests. The doctor replied, "I am the test." He told Mr. Ameziane there was nothing further he could do and left the room.

[...]

On one occasion, Mr. Ameziane went into convulsions in his cell, where guards left him writhing on the floor for hours before taking him to the infirmary. The attending doctor inserted [...] asked one of the soldiers standing watch to assist him by inserting a syringe needle into Mr. Ameziane's vein. With Mr. Ameziane lying prostrate and cuffed to the examination table, the guard stuck the needle into his forearm, which began spurting blood. The doctor and the guards laughed while Mr. Ameziane lay chained to the table.

[...]

For months, Mr. Ameziane has been requesting a pair of socks from the infirmary to help with rheumatism he suffers in his feet and legs. Recently, when Mr. Ameziane asked the medical military staff once again for the socks, he was told "the medical' no longer supplies socks. You have to ask your interrogator for that."<sup>75</sup>

56. The State, for its part, alleged in general terms that "[d]etainees receive timely, compassionate, quality healthcare and have regular access to primary care and specialist physicians;" that healthcare providers "approach their interactions with detainees in a manner that encourages provider-patient trust and rapport;" and that healthcare provided to detainees "is comparable to that which U.S. service personnel receive while

<sup>72</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (2011) [hereinafter "*Report on Persons Deprived of Liberty*"], para. 363 (citing U.N. Special Mandate Holders' Report, U.N. Doc. E/CN.4/2006/120 (2006), paras. 49-50; IACHR, Hearing on P.M. 8/06 - Omar Ahmed Khadr, 124<sup>o</sup> Period of Sessions (Mar. 13, 2006) (Mr. Khadr, another Guantánamo detainee, alleged, *inter alia*, that he was interrogated by military personnel; denied medical treatment; handcuffed and shackled for prolonged periods of time; threatened with mad dogs; threatened with rape; and his head covered with a plastic bag)).

<sup>73</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 363 (citing Physicians for Human Rights, *Broken Laws, Broken Lives: medical evidence of torture by US personnel and its impact*, 2008, available at: [https://s3.amazonaws.com/PHR\\_Reports/BrokenLaws\\_14.pdf](https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf)).

<sup>74</sup> Statement of Djamel Ameziane (Jan. 17, 2009). Submitted with petitioners' merits brief.

<sup>75</sup> Initial petition at paras. 60-62 (citing Letter from Djamel Ameziane to Wells Dixon, Apr. 4, 2008 (unclassified)).

serving at [Guantánamo].”<sup>76</sup> Furthermore, healthcare personnel “are held to the highest standards of ethical care and at no time have been released from their ethical obligations. Medical care is not provided or withheld based on a detainee’s compliance or noncompliance with detention camp rules.”<sup>77</sup>

57. The IACHR has previously considered information regarding a variety of problems in the provision of health care at Guantánamo. Perhaps most disturbing, it has considered that “by participating in the interrogation teams, psychiatrists, psychologists and physicians, have fully disrupted the patient-doctor relationship.”<sup>78</sup> Second, despite the State’s affirmations that detainees receive a similar standard of care as U.S. personnel at Guantánamo, the IACHR has considered that detainees’ healthcare needs are materially different, as they have difficult problems that are not commonly seen in military medicine.<sup>79</sup> Moreover, 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.”<sup>80</sup> Furthermore, there is high turnover as front-line clinicians rotate every 7 to 9 months, and the clinic at Guantanamo does not have the facilities to evaluate and treat people with more serious illnesses.<sup>81</sup>

58. In this regard, U.N. experts have also considered reports that “(i) the conditions of confinement [at Guantánamo] have had devastating effects on the mental health of the detainees, (ii) the provision of health care has been conditioned on cooperation with interrogators; (iii) health care has been denied, unreasonably delayed, and inadequate; (iv) detainees have been subjected to non-consensual treatment, including drugging and force-feeding; and (v) health professionals systematically violate professional ethical standards, precluding the provision of quality health care for detainees.”<sup>82</sup>

#### **4. Information about interference with religious practice and religious abuse**

59. Mr. Ameziane described numerous instances of religious abuse, discrimination, insults, and interferences with his religious practice, as well as structural interferences with his ability to practice his religion while in U.S. custody. Likewise, he alleged that confinement in the prison at Guantánamo itself was a form of religious discrimination, as all of the nearly 800 men and boys held there over the years were Muslim.

60. At Kandahar airbase in Afghanistan, Mr. Ameziane described “desecration of the Qur’an during guards’ daily searches of prisoners’ cells, for example, by throwing the holy books on the ground, stepping on them, or ripping their pages and throwing them away. On one particular occasion, a soldier brandished a Qur’an in his hand for all the prisoners in the vicinity to see, and then plunged it into a tank full of excrement into which the prisoners’ toilet buckets had been emptied. Following this incident, the prisoners decided to return their Qur’ans to the camp authorities so as to prevent further abuse, but the authorities refused to take them back.”<sup>83</sup>

61. Petitioners described “one occasion when during dawn prayer, a guard began howling like a dog in imitation of the ritual Muslim call to prayer. When Mr. Ameziane asked the guard why he was imitating the call, the guard came over to his cell and threw water in his face. A few minutes later, Mr. Ameziane was taken to solitary confinement, where he was held for five days. He was told it was punishment for throwing water at the guard.”<sup>84</sup> Additionally, while in the “Romeo” and “Mike” blocks of Camp 2 and 3, “Mr. Ameziane suffered routine abuse and disruptions. Guards would yell insults and obscenities at him while he prayed and sometimes throw stones at the metal grill window of his cell.”<sup>85</sup>

<sup>76</sup> State’s merits brief at 7, fn. 14.

<sup>77</sup> *Id.* at 8.

<sup>78</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 127.

<sup>79</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 127.

<sup>80</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 128.

<sup>81</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 127.

<sup>82</sup> U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 70.

<sup>83</sup> Initial petition at para. 67.

<sup>84</sup> Initial petition at para. 63.

<sup>85</sup> *Id.* at para. 64.

62. In solitary confinement in Camp 6, Mr. Ameziane’s “conditions of isolation create[d] a structural interference with his religious practice. Since he and his fellow prisoners can only pray in their separate, individual cells, they cannot see or hear their prayer leader well enough to pray communally.”<sup>86</sup>

63. In addition to incidents described in other sections of this report, Mr. Ameziane “witnessed acts of abuse against his fellow detainees. He has seen prisoners punished by having their eyelids and eyebrows, beards, mustaches, and hair completely shaved, or the shape of a cross or a soccer ball on their heads[, as well as] incidents where soldiers have desecrated prisoners’ Qur’ans, for example, by spraying water on them, trampling on them, or scrawling obscenities into them.”<sup>87</sup>

64. The IACHR has previously discussed religious and cultural competence issues at Guantánamo, including the lack of a Muslim Chaplain; concerns about whether all food provided to detainees is halal; the ability of detainees to pray and practice their religion communally; structural and particular interferences with the practice of religion at Guantánamo; and incidents of religious abuse, including desecration of the Qu’ran.<sup>88</sup>

## 5. Information about the impact of his time in U.S. custody on Mr. Ameziane and his family

65. Mr. Ameziane’s father passed away while he was in Guantánamo; he learned of his death while he was in solitary confinement in Camp 6. Mr. Ameziane stated, “I urge you to think about [how you would feel]. You would be crushed and devastated as I was, and you would hope to die as I once did in that awful place.”<sup>89</sup> Likewise, “[h]is brothers and sisters have had wedding ceremonies he has been unable to attend and have had children who have never known their uncle [...] letters sent from his family often do not reach him until years later.”<sup>90</sup> Ultimately, Mr. Ameziane “was denied meaningful contact with his family for over eleven years, and additionally was deprived of starting his own family and developing his own personal life.”<sup>91</sup> Petitioners stated that “it was not until March 2008 that the [Defense Department] announced that it would allow detainees an hour-long telephone call up to twice a year to a family member.”<sup>92</sup> Petitioners alleged that “the stigma of being labeled an “enemy combatant” and “terrorist” has damaged his and his family’s good name and reputation, and has continued to harm him after his release.”<sup>93</sup>

66. Mr. Ameziane told the Commission:

Thinking back on those early days at Guantanamo, I do not know how I did not go completely crazy. My experiences there were like a nightmare from which I could not awake. Thousands of miles from my home and my family, with no contact with the outside world, I did not even think my family would know where to look for me. They probably thought I was dead. Indeed, after I was released I learned from my brother in Canada that they did not know where I was or what had happened to me until a Canadian official told him a few years after my arrival that I was in Guantanamo. My brother could not believe it.

[...]

I also learned since from my brother in Canada that mother, who is now very elderly, tried to send clothes and other items to me in Guantanamo, to care for me. I never received them. My brothers knew I would not, but how could they stop my mother from trying, it is what mothers do, they said. My mother, and my other family members, are surely also victims of Guantanamo.

[...]

There was also a time when I wanted to have a family of my own but this too has been prevented both by my detention at Guantanamo and by the after-effects of my detention. I am unemployed, in ill health, and in need [of] medical care. I have no access to employment [...] [I]t is still very difficult, and painful, to think about everything that happened to me at Guantanamo, to learn how my family suffered, and to move forward with my life. I am 50 years old, and I lost many of the prime years of my life to Guantanamo. It was all for no good reason, and at great, great cost [...] [I]t is hard, especially now, to remember every injustice.

<sup>86</sup> Initial petition at para. 65.

<sup>87</sup> Initial petition at para. 66.

<sup>88</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 130.

<sup>89</sup> Djamel Ameziane statement for merits hearing.

<sup>90</sup> Initial petition at para. 68.

<sup>91</sup> Petitioners’ merits brief at para. 134.

<sup>92</sup> Petitioners’ merits brief at para. 145 (citing Reuters, *U.S. says some Guantánamo prisoners can phone home*, Mar. 12, 2008).

<sup>93</sup> *Id.*

Thinking about it overwhelms me and I get numb. My mind sometimes goes blank. I know from my experience that Guantanamo was created to destroy people, to destroy Muslims, who are the only people to have been held there, and it has nearly destroyed me. I want to be free of it forever, to forget and move on with my remaining years.<sup>94</sup>

## **D. The right to *habeas corpus* for Guantánamo detainees and Mr. Ameziane’s federal *habeas* petition**

### **1. Legal framework and developments, 2002-2009**

67. As discussed above in section A, in the months and years after the 2001 terrorist attacks, the Executive (and later, the Legislative) Branch sought to ensure that detainees of the “war on terror” were beyond the legal reach of the Geneva Conventions, the *habeas* jurisdiction of the federal courts, and, in general, the jurisdiction of any domestic, foreign, or international tribunal.<sup>95</sup> The legal uncertainty around the jurisdiction of U.S. federal courts to hear *habeas corpus* petitions—that is, the right of detainees to challenge the legality of their detention before a judicial authority—gave rise to years of litigation of the issue.<sup>96</sup> In a first major decision, the Supreme Court held in June 2004 in *Rasul v. Bush* that Guantánamo detainees can legally challenge their detention in U.S. courts, because Guantánamo Bay is subject to the U.S.’ “plenary and exclusive” jurisdiction.<sup>97</sup> Following this ruling, more than 200 *habeas* petitions were filed on behalf of more than 300 Guantánamo detainees before the U.S. District Court for the District of Columbia (“D.C. District Court”).<sup>98</sup>

68. In response to this ruling, the Department of Defense announced the creation of Combatant Status Review Tribunals (CSRTs), followed by periodic Administrative Review Boards (ARBs), as a purported substitute for *habeas corpus* to determine whether detainees are actually “enemy combatants,” and whether they continue to pose a threat to the U.S. The CSRTs were widely condemned, including by the Supreme Court, for failure to adhere to even minimal due process guarantees.<sup>99</sup> In this regard, the Commission has previously considered that the CSRTs were not an adequate substitute for judicial review, concluding that “it remains entirely unclear from the outcome of those proceedings what the legal status of the detainees is or what rights they are entitled to under international or domestic law.”<sup>100</sup> U.N. experts likewise expressed concern that “[i]n determining the status of detainees, the CSRT has recourse to the concepts recently and unilaterally developed by the [U.S.] Government, and not to the existing international humanitarian law regarding belligerency and combatant status.”<sup>101</sup> Mr. Ameziane, for his part, described the CSRT process saying “They are at once the jailer, the judge, the jury and the executioner.”<sup>102</sup>

69. Additionally, the U.S. Congress passed the Detainee Treatment Act (DTA) in December 2005, which expressly stripped federal courts of jurisdiction over any new Guantánamo *habeas* petitions and created a purported substitute remedy which consisted of review by the U.S. Court of Appeals for the District of

<sup>94</sup> Djamel Ameziane statement for merits hearing.

<sup>95</sup> See “Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57831 (Nov. 13, 2001), available at: <https://www.gpo.gov/fdsys/pkg/FR-2001-11-16/pdf/01-28904.pdf> (individuals subject to the Order “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 [U.S.], or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”).

<sup>96</sup> In this section, see also generally IACHR, *Toward the Closure of Guantánamo* (2015), paras. 159-162.

<sup>97</sup> *Rasul v. Bush*, 542 U.S. 466 (2004). Justice Kennedy concurred that “Guantánamo Bay is in every practical respect a [U.S.] territory” over which the U.S. has long exercised “unchallenged and indefinite control.” *Id.* at 487 (Kennedy, J., concurring).

On the same day, the court decided *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which held that U.S. citizens cannot be held without due process of law and the right to challenge an “enemy combatant” designation before an impartial authority.

<sup>98</sup> Initial petition, para. 24.

<sup>99</sup> See, e.g., U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), paras. 28-29; *In re Guantanamo Detainees Cases*, 355 F.Supp.2d 443, 468-478 (D.D.C. 2005) (CSRT proceedings “deny [detainees] a fair opportunity to challenge their incarceration”); *Boumediene v. Bush*, 553 U.S. 723 (2008) (CSRTs subjected detainees to “considerable risk of error in the tribunal’s findings of fact”).

<sup>100</sup> IACHR, PM 259-02 (extension granted Oct. 28, 2005), para. 8.

<sup>101</sup> U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 28(d).

<sup>102</sup> Statement of Djamel Ameziane (Jan. 17, 2009). Submitted with petitioners’ merits brief.

Columbia Circuit (“D.C. Circuit Court of Appeals”) of whether the military conducted the CSRTs in compliance with the procedures established for CSRTs.<sup>103</sup>

70. In June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the military commissions established by the November 2001 Military Order violate U.S. and international law, and held that Common Article 3 of the Geneva Conventions (“at least”) applies to the trial of Guantánamo detainees by military commission.<sup>104</sup> In response, the U.S. Congress passed the Military Commissions Act (MCA) in September 2006, which authorized a new system of military commissions by statute, and expressly stripped the federal courts of jurisdiction to hear *habeas* or “any other” claims by Guantánamo detainees or any other individual captured after September 11, 2001, held as an “enemy combatant” in U.S. custody anywhere in the world.<sup>105</sup>

71. Finally, on June 12, 2008, the Supreme Court held in *Boumediene v. Bush* that the MCA’s *habeas*-stripping provision is unconstitutional with respect to Guantánamo detainees and that the review provided for under the DTA is not an adequate substitute for *habeas*,<sup>106</sup> reopening detainees’ ability to litigate their *habeas* petitions before the federal courts. Petitioners argued that in this way, through Executive Order, statutory law, and litigation, the U.S. government delayed effective access to *habeas corpus* to Guantánamo detainees for more than six years.<sup>107</sup>

72. Petitioners likewise argued that, at least since 2006 and according to the government itself, “the objective of the ongoing detention of Guantánamo detainees is not primarily to prevent any individuals from taking up arms against the United States, but to obtain information and intelligence.”<sup>108</sup>

73. Notwithstanding these changes, *Boumediene* left issues including “the content of the law that governs petitioners’ detention,” access to counsel, and rules of evidence to be used in *habeas* proceedings to be decided by the lower courts.<sup>109</sup> The Commission has previously considered how, since *Boumediene*, the D.C. Circuit Court of Appeals—whose decisions are authoritative unless and until the Supreme Court elects to hear another case regarding a Guantánamo detainee—has eroded *Boumediene*’s due process protections.<sup>110</sup> In this regard, the Commission has previously concluded that “[w]hile 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 [...] Given the duration of the detention and the severity of the regime [...] it is clear that a higher standard of review is required to bring standards into compatibility with human rights norms.”<sup>111</sup>

## 2. Mr. Ameziane’s *habeas corpus* petition

74. In this context, Mr. Ameziane was held virtually *incommunicado* until June 2004, when the Supreme Court’s decision in *Rasul* for the first time afforded the Guantánamo detainees access to lawyers and *habeas* review in U.S. courts. Mr. Ameziane did not participate in his CSRT held in 2004 or in subsequent ARB

<sup>103</sup> Detainee Treatment Act of 2005, § 1005(e) (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 [U.S.] or its agents relating to any aspect of the detention;” review by the D.C. Circuit Court of Appeals is limited to “whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] [...]”).

<sup>104</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>105</sup> The restriction on hearing challenges related to conditions of confinement was reiterated in the Military Commissions Act of 2009. See IACHR, *Toward the Closure of Guantánamo* (2015), para.194.

<sup>106</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>107</sup> Initial petition, para. 22.

<sup>108</sup> Initial petition at para. 136 (citing U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 24; ARB procedures, § 3F(1)(c)).

<sup>109</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 162; see also generally paras. 163-183.

<sup>110</sup> See, *inter alia*, *Al-Bihani v. Obama*, 590 F.3d 866, 875, 879 (D.C. Cir. 2010) (holding that international law is not binding in Guantánamo detainee cases); *Al Odah v. U.S.*, 611 F.3d 8 (D.C. Cir. 2010) (holding that hearsay evidence is always admissible in Guantánamo detainee cases); *Al Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010) (holding that that appellate court may reverse findings of fact and credibility determinations made by trial courts); *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) (holding that there is a presumption in favor of the accuracy of the government’s evidence). See also IACHR, *Toward the Closure of Guantánamo* (2015), para. 185 (concluding that D.C. Circuit case law which enables burden-shifting from the government to petitioners and applies presumptions in favor of government evidence “fails to offer the protection that access to the writ of habeas corpus is intended to provide.”).

<sup>111</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 186.

proceedings,<sup>112</sup> believing that these proceedings would not provide due process and would be used to justify his indefinite detention.<sup>113</sup>

75. The unclassified summaries of evidence used in Mr. Ameziane's CSRT and subsequent ARBs indicate that the U.S.' basis for detaining Mr. Ameziane as of 2004-2006 included fundamentally: that he had used fraudulent passports to travel to Canada, Afghanistan, and Pakistan, and that he used an alias upon his detention by Pakistani and U.S. authorities; that he belonged to a mosque in Montreal, Canada; that a Tunisian member of that mosque gave him advice and money to travel to Afghanistan, where he hoped to be able to live under sharia law and without fear of deportation; and that in Kabul, he stayed in a guesthouse where Taliban fighters also stayed, and in Jalalabad, in a guesthouse for Arabs in the neighborhood in which the Taliban intelligence headquarters is located. On the other hand, the U.S. considered as factors in favor of his release: that he denied having received military or terrorist training, seen fighting, been a member of al Qaida, or heard rumors about the September 11 attacks before they happened; that he otherwise denied knowledge about the identity of al Qaida members, future plans for terrorist attacks, the location of training camps, etc.; that he had no intention of participating in terrorist activity if released; and that he had fled Afghanistan for Pakistan "because the non-Taliban and opposition were killing Arabs."<sup>114</sup> The Commission notes that all of this information appears to have been obtained through interrogation of Mr. Ameziane, and notes that these summaries grow progressively more detailed between 2004 and 2006, for which reason it is reasonable to assume that the U.S. continued to incorporate new information obtained via interrogation at Guantánamo Bay into these decisions.

76. In this regard, it is clear that Mr. Ameziane was "never alleged by the U.S. government to have engaged in any acts of terrorism or other hostilities against anyone, to have picked up a weapon or participated in any military training, or to be a member of an alleged terrorist organization. Nor has he ever had any involvement with extremism, terrorism, or any act of violence whatsoever."<sup>115</sup> The State has not otherwise controverted this allegation.

77. On this point, petitioners alleged that the U.S. government's failure to define Mr. Ameziane's status—and in consequence, whether the law of war in fact operates as the *lex specialis* for interpreting international human rights obligations towards him—deprived Mr. Ameziane, like other Guantánamo detainees, of the right to know and exercise his rights to challenge this detention. In particular, they argued that the changing definition of "(unlawful) enemy combatant" impeded the proper determination of Mr. Ameziane's status, like that of all Guantánamo detainees, because the various definitions of the term used since 2002 are so broad and vague that they "conflate different categories of individuals whose detention and rights would be

<sup>112</sup> See Mr. Ameziane's Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) unclassified records from 2004-2006. Submitted with initial petition.

<sup>113</sup> Initial petition, para. 41.

<sup>114</sup> Mr. Ameziane's Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) unclassified records from 2004-2006. Submitted with initial petition.

<sup>115</sup> Initial petition, para. 42; see also Mr. Ameziane's Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) unclassified records from 2004-2006. Submitted with initial petition.

governed by different regimes of international law”<sup>116</sup> and thus “render it impossible to determine the specific rights of Guantánamo detainees and the obligations of the United States.”<sup>117</sup>

78. Mr. Ameziane filed a *habeas corpus* petition before the D.C. District Court on February 24, 2005, following the Supreme Court’s decision in *Rasul*. This petition alleged that Mr. Ameziane

has not been charged with an offense and has not been notified of any pending or contemplated charges. He has not appeared before a lawful military or civilian tribunal, and has not been provided access to counsel or the means to contact and secure counsel. He has not been adequately informed of his rights under the [U.S.] Constitution, the regulations of the [U.S.] Military, the Geneva Convention, the International Covenant on Civil and Political Rights, the [American Declaration], the 195[1] Convention Relating to the Status of Refugees or customary international law. Indeed, Respondents have taken the position that [Mr. Ameziane] should not be informed of these rights. As a result, [Mr. Ameziane] lacks any ability to protect or vindicate his rights under domestic and international law.<sup>118</sup>

79. This petition was subsequently stayed by the district court on April 12, 2005, pending resolution of all appeals in *In re Guantánamo Detainee Cases* (ultimately, until the Supreme Court’s decision in *Boumediene*).<sup>119</sup> His right to *habeas* was then purportedly stripped by the DTA of 2005 and MCA of 2006.<sup>120</sup> Once *Boumediene* was decided in June 2008, Mr. Ameziane was able to continue litigating his *habeas* petition.

80. In October 2008, four months after *Boumediene* was decided, Mr. Ameziane was cleared for transfer from Guantánamo by the Bush Administration. At this time, in sealed proceedings before the U.S. federal court, the U.S. government conceded that there were no “military rationales” for continuing to detain Mr. Ameziane.<sup>121</sup> The U.S. attempted to forcibly transfer Mr. Ameziane to Algeria in October 2008, but the transfer was temporarily enjoined by the district court at Mr. Ameziane’s request due to his expressed fear of being returned to Algeria.<sup>122</sup> Following this, the U.S. attempted to stay the litigation of the *habeas* petition in December 2008 because “the detention of [Ameziane] is no longer at issue” and “the only issue truly remaining is the country to which [Ameziane] should be sent.”<sup>123</sup> The district court denied a stay on this occasion, and the case moved toward a hearing on the merits of the *habeas* petition.<sup>124</sup>

<sup>116</sup> Initial petition, paras. 117-122. *Inter alia*, “combatants,” who “participate[] in an attack intended to cause physical harm to enemy personnel or objects” and whose rights are governed by the Third Geneva Convention, and “non-combatants” (i.e. civilians), who are present in the conflict zone but do not directly participate in hostilities and whose rights are governed by the Fourth Geneva Convention, as well as lawful (“privileged”) and unlawful (“unprivileged”) combatants, the former of which are entitled to prisoner-of-war (POW) status, and the latter of which continue to enjoy non-derogable protections under both international human rights and humanitarian law, such as those contained in Common Article 3 of the Geneva Conventions and Art. 75 of the First Optional Protocol.

In contrast, the Executive military order of Nov. 13, 2001 (*see supra* note 9) defined “enemy combatant” as:

any individual who is not a [U.S.] citizen with respect to whom the President determines [...] that: (1) there is reason to believe that such individual [...] (i) is or was a member of [...] al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism or acts in preparation therefore [against the U.S.] [...]; or (iii) has knowingly harbored one or more individuals described [above]; and (2) it is in the interest of the [U.S.] that such individual be subject to this order.

At the time of Mr. Ameziane’s CSRT in 2004, a Guantánamo detainee was determined to be properly held as an “enemy combatant” if he: was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the [U.S.] [...]. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces.

“Unlawful enemy combatant” was first statutorily defined by the MCA, § 3(a)(1), amending § 948a(1)(A), as:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the [U.S.] [...] who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces; or (ii) a person who [...] has been determined to be an unlawful enemy combatant by a [CSRT] or another competent [Executive] tribunal [...]

<sup>117</sup> Initial petition, para. 121.

<sup>118</sup> Petition for Writ of Habeas Corpus in *Ameziane v. Bush*, 05-CV-392 (D.D.C.), at para. 24 (Feb. 17, 2005). Submitted with initial petition.

<sup>119</sup> Order in *Ameziane v. Bush*, 05-CV-392 (D.D.C. Apr. 12, 2005). Submitted with initial petition. *See also* *In re Guantánamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005); *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. 2005).

<sup>120</sup> Initial petition, para. 44.

<sup>121</sup> *See* Petitioners’ letter dated October 29, 2012 and accompanying appendices.

<sup>122</sup> *See* Petitioners’ letter dated October 29, 2012 and accompanying appendices.

<sup>123</sup> Petitioners’ letter dated October 29, 2012; *see also*, in this regard, Opening Brief for Appellee in *Ameziane v. Obama*, No. 09-5236, at 5 (D.C. Cir.) (submitted Aug. 27, 2009) (citing affirmations by the government in the record of the case).

<sup>124</sup> Petitioners’ merits brief, para. 24. *See also* Motion for Order of Release and Other Relief in Response to the Government’s Status Report Regarding Efforts to Transfer Mr. Ameziane (Aug. 12, 2013). Submitted with petitioners’ merits brief (recapitulating this procedural history).

81. However, following Mr. Ameziane's re-authorization for transfer by the Obama Administration's Guantánamo Review Task Force on May 21, 2009, the district court granted a stay of the *habeas* litigation at the government's request and over Mr. Ameziane's objections.<sup>125</sup>

82. The district court subsequently held a series of hearings to address the stay and related issues, including whether Mr. Ameziane could publicly state that he had been approved for transfer<sup>126</sup>—in particular, whether he could disclose this information to countries where he was applying for resettlement in order to advance the resettlement process. Throughout this litigation, the position of the government was that if detainees were to begin negotiating their resettlement with third countries using information about their cleared status, it would interfere with sensitive diplomatic efforts to relocate all Guantánamo detainees.<sup>127</sup> Implicit and explicit in this position was that the government was unwilling to consider Mr. Ameziane's transfer to any country other than Algeria, believing that limited resettlement spots in third countries needed to be reserved for detainees who could not be returned to their countries of origin.<sup>128</sup> In hearings, the district judge expressed repeatedly

No one can give me a good reason why [Ameziane] is going to sit [in Guantánamo] for as long as humanly possible [...] He gave up his habeas, not voluntarily but because [the government] wanted a stay, and I agreed that it ought to be stayed because it's a waste of everyone's time [because both parties agree that he should not be detained]. But for him to give that right up and be in a worse position that somebody who exercises their habeas rights [because he cannot disclose that he is cleared for transfer, unlike if he were to win his habeas case], you can't have it both ways. It's just not fair.<sup>129</sup>

83. Mr. Ameziane and his lawyers were ultimately prevented by a D.C. Circuit Court order from disclosing publicly that Mr. Ameziane had been cleared for transfer,<sup>130</sup> complicating, among others, efforts to resettle Mr. Ameziane in a third country and to fully litigate his case before this Commission, given that this information could not be communicated to co-petitioners CEJIL or the IACHR until October 2012.<sup>131</sup>

84. On October 5, 2012, the D.C. Circuit Court of Appeals unsealed voluminous records relating to dozens of Guantánamo detainees' federal habeas litigation, at the State's request. These unsealed records revealed publicly the information described above: that Mr. Ameziane's *habeas corpus* petition had been stayed since May 2009 because Mr. Ameziane had twice been cleared for transfer to a third country in 2008 and 2009, and the "only remaining issue" in his case was to which country he would be transferred.<sup>132</sup>

85. The State subsequently represented to the Commission in 2013 that it "will not oppose a motion by Mr. Ameziane to lift the stay on his *habeas* case in order to litigate the lawfulness of his detention."<sup>133</sup> However, the record of Mr. Ameziane's case before the district court makes clear that in fact the government requested that his *habeas* case be stayed in 2009 in order not to have to litigate a claim that it considered "a waste of everyone's time," as a successful *habeas* case would only leave Mr. Ameziane in the same position—awaiting transfer from Guantánamo.<sup>134</sup> Petitioners argued that for the U.S. to change its position regarding the

<sup>125</sup> See petitioners' letter dated October 29, 2012 and accompanying appendices (detailing stay entered on May 27, 2009 and confirmed in subsequent proceedings).

<sup>126</sup> Transcript of Motion Hearing before the Honorable U.S. District Judge (June 30, 2009); Transcript of Status Hearing before the Honorable U.S. District Judge (July 7, 2009). Submitted with petitioners' letter dated October 29, 2012.

<sup>127</sup> See, e.g., *Ameziane v. Obama*, No. 92-5236 (D.C. Cir. Jan. 8, 2010). Submitted with petitioners' letter dated October 29, 2012 (agreeing with this argument and ordering that Mr. Ameziane not disclose his cleared status).

<sup>128</sup> Transcript of Motion Hearing before the Honorable U.S. District Judge (June 30, 2009). Submitted with petitioners' letter dated October 29, 2012.

<sup>129</sup> Transcript of Status Hearing before the Honorable U.S. District Judge at 104, 112-113 (July 7, 2009). Submitted with petitioners' letter dated October 29, 2012.

<sup>130</sup> *Ameziane v. Obama*, No. 92-5236 (D.C. Cir. Jan. 8, 2010). Submitted with petitioners' letter dated October 29, 2012.

<sup>131</sup> Petitioners' letter dated October 29, 2012.

<sup>132</sup> See petitioners' letter dated October 29, 2012 and accompanying appendices.

<sup>133</sup> State's letter dated May 15, 2013.

<sup>134</sup> In domestic proceedings, petitioners also alleged manipulation of Mr. Ameziane's cleared status under the Bush Administration as a litigation tactic when, following the district court's injunction preventing his transfer to Algeria and denial of a stay of his *habeas* case in late 2008, the government abruptly revoked Mr. Ameziane's clearance for transfer in January 2009 "because [...] [the government] wanted the freedom to argue on the merits of his habeas case (and has since argued) that there are military rationales for his continued detention."

effectiveness of litigating his *habeas corpus* case as a remedy to end his detention is a bad-faith tactic to further delay Mr. Ameziane's transfer from Guantánamo, is inequitable, and should be precluded by estoppel.<sup>135</sup>

86. With respect to all of the foregoing, the State indicated to the Commission that Mr. Ameziane filed a *habeas* petition "on February 24, 2005, challenging the lawfulness of his detention. The case was stayed in May 2009 pending efforts to transfer Mr. Ameziane and ultimately dismissed as moot following his transfer to Algeria. Mr. Ameziane had access to counsel in connection with his *habeas* proceeding throughout his time in detention. Further, prior to the May 2009 stay, the United States submitted to the *habeas* court and Mr. Ameziane's counsel filings detailing the factual bases for Mr. Ameziane's detention, and the court held multiple hearings related to the bases for detention."<sup>136</sup> The State reiterated the Obama Administration's commitment to closing Guantánamo, and argued that "restrictions that Congress has placed on transfers of Guantanamo detainees since 2011 have served as significant impediments to closing the facility," but highlighted that on December 23, 2016, there were 59 detainees at Guantanamo, compared to 242 detainees on January 20, 2009, when the President took office.<sup>137</sup>

87. In summary, from January 2002 to June 2008, Mr. Ameziane's right to *habeas corpus* to determine the legality of his detention was either unavailable under applicable federal law or stayed pending litigation in higher courts. Mr. Ameziane was first cleared for transfer from Guantánamo because no "military rationales" existed for his continued detention in October 2008. Finally, from May 2009 until his forced transfer in December 2013, Mr. Ameziane remained detained in Guantánamo with his federal *habeas* case stayed as he waited for the government to act to safely transfer him from Guantánamo and end his detention, culminating in his forced transfer to his home country of Algeria, where he feared persecution and torture, addressed in the following section.

## **E. Mr. Ameziane's forced transfer to Algeria from Guantánamo Bay**

### **1. General framework and considerations regarding transfers**

88. Between January 2009 and December 2010, cleared detainees could be transferred or released from Guantánamo by the Executive. However, the National Defense Authorization Act (NDAA), effective January 2011, placed a number of restrictions on the ability of the Executive to transfer detainees, which dramatically slowed the pace of transfers after this date.<sup>138</sup> The NDAA for FY 2011 put in place onerous procedural requirements that made transfer of detainees from Guantánamo extremely difficult;<sup>139</sup> these requirements were only eased in the NDAA for FY 2014, after Mr. Ameziane's transfer.<sup>140</sup> Notwithstanding, the Commission has previously considered that "[e]ven 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 [including] diplomatic negotiations [and] the search for opportunities within the existing statutory limitations."<sup>141</sup>

89. In April 2009, the D.C. Circuit Court held in *Kiyemba v. Obama* (known as *Kiyemba II*)—a case involving *habeas* petitions by nine Guantánamo detainees challenging their transfer based on fear of torture in their home country—that the judiciary may not review executive branch decisions regarding when or where to transfer detainees from Guantánamo, and held invalid a district court ruling requiring the government to

Opening Brief for Appellee in *Ameziane v. Obama*, No. 09-5236, at 5 (D.C. Cir.) (submitted Aug. 27, 2009). Submitted with petitioners' letter dated October 29, 2012.

<sup>135</sup> Petitioners' merits brief, para. 29.

<sup>136</sup> State's merits brief at 4.

<sup>137</sup> State's merits brief at 5.

<sup>138</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 274; see also generally *id.* at paras. 274-301.

<sup>139</sup> Whereas 67 detainees were transferred from Guantánamo between January 2009 and January 2011, only 15 were transferred between January 2011 and December 2013, of which only two were actually transferred via the NDAA's "certification" process (the others were arranged due to exceptions to the restrictions). IACHR. *Toward the Closure of Guantánamo* (2015), para. 282.

<sup>140</sup> See *id.*

<sup>141</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 289.

give a detainee's counsel 30 days' advance notice of the detainee's transfer from Guantánamo.<sup>142</sup> The court concluded:

The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws.<sup>143</sup>

90. The U.S. alleged that its Special Task Force issued a set of recommendations to ensure that U.S. transfer practices "comply with the domestic laws, international obligations, and policies of the [U.S.] and do not result in the transfer of individuals to face torture."<sup>144</sup> In this regard, "[a]ll transfers [...] are conditioned on the receipt of assurances of humane treatment from the receiving government. The U.S. government will transfer a detainee only if it determines that the transfer is consistent with our humane transfer policy[, considering] the totality of relevant factors," including "the individual's allegations of prior or potential future mistreatment in the receiving State; the receiving State's overall human rights record; the specific factors suggesting that the individual in question is at risk of being tortured [...]; whether similarly situated individuals have been tortured [...]; and any humane treatment assurances provided by the receiving State (including an assessment of their credibility)." All of this, with the objective of determining whether "it is more likely than not that the individual will be tortured in the country to which he is being transferred."<sup>145</sup>

91. The State elaborated that humane treatment assurances "should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be consistent with applicable international and domestic law." In this regard, it takes into account "information regarding the judicial and penal conditions and practices of the receiving country; U.S. relations with the receiving country; the receiving country's capacity and incentives to fulfill its assurances; political or legal developments in that country; the country's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity."<sup>146</sup> The State made clear that, in case of "credible allegations that diplomatic assurances were not being honored, [it] would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments made to the U.S. government."<sup>147</sup> The State did not, however, provide the IACHR with any specific information regarding the individualized evaluation and determination it allegedly made in Mr. Ameziane's case in accordance with the criteria described above.

92. The IACHR has previously noted that transfers from Guantánamo Bay "have a significant political dimension," and "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."<sup>148</sup> The IACHR has likewise criticized the institution of "transfer" (subject to security measures) as opposed to release of many Guantánamo detainees, considering that all remaining detainees have been unlawfully detained for more than a decade, and inter-agency review has resulted in a decision not to prosecute many of them, including Mr. Ameziane; thus "any such restrictions

<sup>142</sup> *Kiyemba v. Obama*, No. 08-5424 (D.C. Cir. 2009); In March 2010, the Supreme Court denied certiorari to review the case. Subsequent attempts to reverse that ruling have been unsuccessful. *See, e.g.*, American Constitution Society blog, "Kiyemba II – Cruel and Unusual Punishment Determined Constitutional" (Mar. 24, 2010), available at: <http://www.acslaw.org/acsblog/node/15653>; SCOTUSblog, New challenge to Kiyemba II by Lyle Denniston (Aug. 24, 2010), available at: <http://www.scotusblog.com/2010/08/new-challenge-to-kiyemba-ii/>; Lawfare, Another Cert Petition to Get Munaf and Kiyemba II Before the Justices (Sept. 23, 2011), available at: <http://www.lawfareblog.com/2011/09/another-cert-petition-to-get-munaf-and-kiyemba-ii-before-the-justices/>.

<sup>143</sup> *Kiyemba v. Obama*, No. 08-5424 (D.C. Cir. 2009), available at: .

<sup>144</sup> State's merits brief at 9-10 (citing Department of Justice, *Report of the Special Task Force on Interrogation and Transfer Policies* (2009), available at: <https://www.justice.gov/oip/foia-library/2009-report-special-task-force-interrogation-and-transfer-policies/download>).

<sup>145</sup> State's merits brief at 10.

<sup>146</sup> State's merits brief at 10-11.

<sup>147</sup> *Id.*

<sup>148</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 285.

[security measures, restrictions of liberty] imposed by the [U.S.] or by the receiving country would constitute an arbitrary interference with the enjoyment of the detainees' human rights."<sup>149</sup>

93. The Commission continued:

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.<sup>150</sup>

## 2. Mr. Ameziane's forced transfer

94. Throughout proceedings before the Commission, petitioners argued that Mr. Ameziane would be at risk of persecution if returned to Algeria and needed to be resettled in a third country in order to safely leave Guantánamo.<sup>151</sup> They argued that Mr. Ameziane would be at risk of being targeted and subjected to arbitrary arrest and detention in Algeria on the basis of: stigma relating to his time in Guantánamo, his prior application for asylum in Canada, and his and his family's status as observant Muslims in their hometown of Kabylie, Algeria.<sup>152</sup> They also mentioned that U.S. interrogators had indicated to Mr. Ameziane that he would be mistreated if returned to Algeria, and threatened to return him to Algeria if he did not cooperate with them; that his brother indicated that "Mr. Ameziane would be shot" if returned, and that "everyone thinks my family is connected to terrorism because [Mr. Ameziane] is in Guantánamo;" and that the Algerian Ambassador to the U.S. has stated that "all Algerian citizens in Guantánamo would be considered serious security threats, and would be subject to further detention and investigation if returned."<sup>153</sup> Regarding Mr. Ameziane's particular situation, "the Ambassador stated specifically that there is no reason an Algerian citizen who had lived in Canada or Europe would go to Afghanistan except to engage in unlawful activity."<sup>154</sup>

95. The experience of Guantánamo detainees transferred to Algeria before Mr. Ameziane's transfer raised concerns about return to that country. For example, in *Toward the Closure of Guantánamo*, the Commission described how detainee Abdul Aziz Naji was transferred to Algeria on or about July 17, 2010, despite his reported statements that he would rather remain in Guantanamo than be sent to his country of origin, where he feared persecution and torture. Upon arrival in Algeria, he was allegedly held incommunicado for 20 days, then released but kept under constant surveillance. In 2012, allegedly following a one-hour trial at which no new evidence was presented other than the accusations made against him by the U.S. in 2002, he was sentenced to three years in prison. Mr. Naji reportedly nearly died in prison.<sup>155</sup>

96. The State blocked Mr. Ameziane's resettlement to at least one third country between 2009 and 2013.<sup>156</sup> Mr. Ameziane's representatives indicated that at the time of his transfer, he was awaiting a reply from the government of Canada to his request to resettle in that country. They also indicated that in 2010

<sup>149</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 287.

<sup>150</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 288.

<sup>151</sup> Initial petition, para. 70.

<sup>152</sup> *Id.* at para. 71.

<sup>153</sup> *Id.* at para. 72.

<sup>154</sup> *Id.*

<sup>155</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 298; see also Washington Post, A detainee goes home, against his will (July 19, 2010), available at: [http://voices.washingtonpost.com/checkpoint-washington/2010/07/a\\_detainee\\_goes\\_home\\_against\\_h.html](http://voices.washingtonpost.com/checkpoint-washington/2010/07/a_detainee_goes_home_against_h.html); New York Times, Fear of Freedom (July 24, 2010), available at: <http://www.nytimes.com/2010/07/25/opinion/25sun1.html> ("Algeria may well have promised not to torture the two men, but it is hard to take that promise seriously, or to know whether it has already been broken. Government officials there say they are not detaining Mr. Naji, but have not accounted for his whereabouts"); Reprieve, Innocent ex-Guantánamo detainee Abdul Aziz Naji arbitrarily denied bail by Algeria (May 2, 2012), available at: [https://reprieve.org.uk/press/2012\\_05\\_02\\_ex\\_guantanamo\\_aziz\\_denied\\_bail\\_algeria/](https://reprieve.org.uk/press/2012_05_02_ex_guantanamo_aziz_denied_bail_algeria/).

<sup>156</sup> Reply in Further Support of Motion for Order of Release and Other Relief (Sept. 20, 2013). Submitted with petitioners' merits brief.

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.<sup>157</sup>

97. On December 5, 2013, Mr. Ameziane and Bensayah Belkacem, a fellow Algerian national, were forcibly transferred to Algeria by the U.S. government, despite Mr. Ameziane's fears of persecution in that country, which he had repeatedly conveyed to U.S. officials and the ICRC.<sup>158</sup> At the time, the Commission condemned the transfer, considering that it had been carried out "against Djamel Ameziane's will and in violation of international human rights law."<sup>159</sup> At that time, a State Department spokesman defended the decision saying that the U.S. had previously repatriated 14 other Algerians and 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>160</sup> U.S. government officials claim that the transfer took place "consistent with our humane treatment policy."<sup>161</sup>

98. Mr. Ameziane stated, "I did not kick and scream and cling to my cell door as some men did. I went to the plane to accept whatever further fate awaited me. I was broken, I was finished, I had nothing left."<sup>162</sup> He was transferred via military cargo plane, where "[m]y feet were chained to the floor of the plane and my hands were shackled to my waist for the entire flight. I was blindfolded and was wearing noise-cancelling headphones as well."<sup>163</sup> Upon arrival in Algeria, "I was handed over to the [authorities] who boarded the plane, cuffed my hands behind my back, pulled my T-shirt up to cover my face [...] They brutally got me out of the plane and [...] drove me to the police station where I was subjected to a short interrogation."<sup>164</sup> He was then jailed at the General Directorate of National Security, where he remained until December 10; during that time, he was subjected to several interrogations, and held in a large cell "along with criminals and drug traffickers" in poor hygienic conditions, which left him sick and hardly able to leave his bed for months.<sup>165</sup>

99. On December 10, 2013, he was taken to the courthouse, where he was interrogated and then placed under judicial supervision and released on probation. More than two years later, Mr. Ameziane was subjected to a criminal trial in Algeria alongside Bensayah Belkacem, on charges of "joining an active terrorist group abroad."<sup>166</sup> Mr. Ameziane stated: "I was notified a few days ahead of the trial that I would face criminal charges alleging my membership in a terrorist group outside of Algeria. I was very surprised and terrified, and contacted my lawyers at CCR. I was certain a guilty plea would be manufactured to ensure I remained in prison forever even though I was innocent."<sup>167</sup>

100. The trial was held in May 2016, and the General Prosecutor sought a sentence of ten years' imprisonment for the defendants.<sup>168</sup> According to Mr. Ameziane, the proceedings on the day of the trial were summary in nature, and he and Mr. Belkacem were quickly acquitted of the charges.<sup>169</sup> He stated that following his exoneration "I was ultimately able to obtain a passport. I am now free and clear as far as the Algerians are concerned. I am very thankful for this, particularly as I had feared persecution for so many years. It is a weight that has been lifted from me."<sup>170</sup>

<sup>157</sup> Petitioners' merits brief at para. 16.

<sup>158</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 299; Djamel Ameziane statement for merits hearing; Declaration of Jay Alan Liotta, April 11, 2014. Submitted with petitioners' merits brief.

<sup>159</sup> IACHR, Press Release 103/13, IACHR Condemns Forced Transfer of Djamel Ameziane from Guantánamo 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). See also OHCHR, "UN rights experts on torture and counter-terrorism concerned about the fate of Guantánamo detainees," Dec. 10, 2013; New York Times (Editorial Board), "A Bad Decision at Guantánamo," Dec. 6, 2013. Submitted with petitioners' letter dated January 20, 2014.

<sup>160</sup> New York Times, Two Guantánamo Detainees Are Involuntarily Repatriated to Algeria (Dec. 5, 2013), available at: <http://www.nytimes.com/2013/12/06/us/politics/two-guantanamo-detainees-are-involuntarily-repatriated-to-algeria.html>.

<sup>161</sup> Declaration of Jay Alan Liotta, April 11, 2014. Submitted with petitioners' merits brief.

<sup>162</sup> Djamel Ameziane statement for merits hearing.

<sup>163</sup> Declaration of Djamel Ameziane, February 13, 2014. Submitted with petitioners' merits brief.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Decision of the Criminal Court of the Algiers Judicial Council (May 23, 2016). Submitted with petitioners' letter dated August 30, 2017.

<sup>167</sup> Djamel Ameziane statement for merits hearing.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

## F. Mr. Ameziane's situation since returning to Algeria

101. Mr. Ameziane reported to the Commission that after being released from detention in Algeria,

[I] went to live with my brother. I was very ill and could not speak or get up from bed for a long time. My family was very worried for my health, and also worried that the secret police would come and take me away forever. I also did not have any identity documents. I had no right to work or ability to earn income [...] I have had to borrow money in order to take the bus to report to the court and in order to live [...] My brother has offered me temporary lodging in his small home where he lives with his six children, but I fear that I may become a burden to him. I do not have any money to rent an apartment and [have been refused assistance by various government officials and the ICRC].

[...]

I have continued to try to improve my situation but it has been very difficult because of my prior detention at Guantanamo [...] I have obtained documentation, but still have no permanent work, no money, and no place of my own to live. But for the generosity of my brother, I would be homeless today at 50 years old. Indeed, I fear that I am a burden to my family.

[...]

I have no access to employment [...] [because the unemployment rate is very high, and as someone] who has been out of the workforce for more than a decade and who carries stigma of Guantanamo, it is impossible. [...] I struggled for a long time to get my identity papers, signed up for public assistance and housing but have not received it, and tried to find work consistently but unsuccessfully.<sup>171</sup>

## G. Availability of legal remedies for violations alleged in this report

### 1. Remedies to challenge detention conditions at Guantánamo Bay

102. At least until 2014, there was no recognized judicial remedy to challenge any aspect of the conditions of confinement at Guantánamo Bay. Judicial review of such claims was explicitly barred by § 7(a)(2) of the Military Commissions Act of 2006, which stripped the federal courts of jurisdiction over claims “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of any person detained as an “enemy combatant.”<sup>172</sup> In *Boumediene v. Bush* the U.S. Supreme Court declined to address the scope of conditions of confinement claims via *habeas* challenges; subsequently, district court judges continued to give effect to § 7(a)(2) of the MCA,<sup>173</sup> at least until Mr. Ameziane’s transfer from Guantánamo. (In 2014, after his transfer, the D.C. Circuit for the first time permitted a *habeas* claim related to force-feeding to proceed in *Aamer v. Obama*.<sup>174</sup>) Neither party has alleged that Mr. Ameziane was ever able to challenge the conditions of his detention in a court of law.

### 2. Remedies to secure the return of confiscated property

103. At the time of Mr. Ameziane’s arrest, officials seized 740 British pounds, 429,000 Afghans, and 2,300 Pakistani rupees from him,<sup>175</sup> or the equivalent of about US \$11,500 in 2001 (IACHR’s calculation). The U.S. government has a policy of retaining all currency seized from Guantánamo detainees, arguing that “[a]lthough detainees might use the funds returned to them for legitimate and benign purposes, such as to purchase food or clothing, it also remains possible that former detainees will use their returned money to help finance terrorist activities.”<sup>176</sup>

104. Mr. Ameziane’s lawyers brought a civil suit in the U.S. seeking the return of this money, but the suit was dismissed; the court indicated in its decision that neither the Defense Department’s confiscation

<sup>171</sup> *Id.*

<sup>172</sup> Military Commissions Act of 2006, Pub. L. 109–366, 120 Stat. 2636 (Oct. 17, 2006), § 7(a)(2).

<sup>173</sup> Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, February 3, 2010, p. 37; see also *Khadr v. Bush*, 587 F.Supp.2d 225, 235 (D.D.C. 2008) (“the Supreme Court appears to have left [the MCA’s bar on judicial review of conditions of detention] undisturbed”); *In re Guantanamo Bay Detainee Litigation*, 577 F.Supp.2d 312, 314 (D.D.C. 2008) (the MCA strips jurisdiction of such claims). See also IACHR, *Toward the Closure of Guantánamo* (2015), para. 267.

<sup>174</sup> See IACHR, *Toward the Closure of Guantánamo* (2015), para. 268.

<sup>175</sup> Declaration of Jay Alan Liotta, April 11, 2014. Submitted with petitioners’ merits brief.

<sup>176</sup> *Id.*

of his money nor the stigma associated with prior detention at Guantánamo (which might be mitigated by a U.S. court ruling that the detention was unlawful) constitute “concrete collateral consequence[s] of his detention at Guantanamo that [are] susceptible to judicial correction” via *habeas corpus*.<sup>177</sup> The court held that the fact that this situation leaves Mr. Ameziane without a remedy to secure the return of his property is not constitutionally problematic, because “[n]ot every violation of a right yields a remedy, even when the right is constitutional.”<sup>178</sup> In this same decision, his *habeas corpus* petition was dismissed as moot.<sup>179</sup>

### 3. Investigation and criminal prosecution of acts of torture

105. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 provide an ongoing and retroactive complete defense to civil and criminal prosecution to the State agents responsible for Mr. Ameziane’s treatment at Guantánamo Bay.<sup>180</sup> Section (a) of the statute provides, in relevant part:

In any civil action or criminal prosecution against [a State agent], arising out of the [agent’s] engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity [...] that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such [agent] did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available [to protect from suit or civil liability or provide immunity from prosecution].

106. In other words, the DTA provided that in a civil or criminal action against a U.S. agent engaged in “detention and interrogation of [non-U.S. citizens],” a finding that activities were “officially authorized and determined to be lawful at the time they were conducted” and that the agent “did not know that the practices were unlawful” is a complete defense, where it is relevant to weigh “good faith reliance on advice of counsel” in determining that the agent did not know the practices were unlawful. Moreover, the MCA of 2006 made this provision retroactive for all civil and criminal actions related to actions occurring between September 11, 2001 and the passage of the DTA on December 30, 2005.<sup>181</sup>

107. In this light, and notwithstanding information provided by the U.S. in 2015 regarding “the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody” and criminal investigations regarding at least “101 persons alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks” conducted by the Department of Justice that were ultimately declined for prosecution,<sup>182</sup> the Commission has not received information to date indicating that criminal prosecution has been brought against any person involved in acts of torture in Guantánamo.<sup>183</sup> In particular, no party has alleged in this case that any criminal investigation or prosecution has ever been brought regarding Mr. Ameziane’s treatment while in U.S. custody.

### 4. Remedies to receive civil reparations for harms suffered in U.S. custody

108. As described above, the Detainee Treatment Act of 2005 and the MCA contain broad and retroactive language stripping the federal courts of jurisdiction to hear “any other action against the [U.S.] or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of [a

<sup>177</sup> Mem. Op., *Ameziane v. Obama*, 58 F.Supp.3d 99 (D.D.C. 2014). Submitted with petitioners’ merits brief.

<sup>178</sup> *Id.* (citing *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 320 (D.C. Cir. 2012)).

<sup>179</sup> *Id.*

<sup>180</sup> See Military Commissions Act of 2006, § 8(b). Currently codified as 42 U.S.C. § 2000dd-1, “Protection of United States Government personnel engaged in authorized interrogations.”

<sup>181</sup> Military Commissions Act of 2006, § 8(b)(3).

<sup>182</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 117 (citing Submission of the Government of the United States to the IACHR with respect to the Draft Report on the Closure of Guantánamo, p. 6).

<sup>183</sup> See also IACHR, *Toward the Closure of Guantánamo* (2015), para. 118.

non-U.S. citizen]” determined to be an “unlawful enemy combatant,”<sup>184</sup> and creating a complete defense to civil or criminal actions against U.S. agents for harms relating to “detention and interrogation of [non-U.S. citizens].”<sup>185</sup> These provisions, particularly taken together, appear to foreclose the possibility of any effective remedy that could result in reparations for former Guantánamo detainees, by purporting to strip the federal courts of jurisdiction over any such claims and by creating a complete defense for the State agents involved.

109. And indeed, the Commission has not, to date, received information from any party indicating the existence of any effective civil remedy to receive reparations for harms suffered by Guantánamo detainees while in U.S. custody. In this regard, the Commission has previously considered information about two claims dismissed by the federal courts: one, a “Bivens” claim (a cause of action for damages resulting from a violation of constitutional rights by a federal officer acting under color of law) brought by a former Guantánamo detainee, and the other, an Alien Tort Statute claim against a Boeing subsidiary accused of arranging flights for the CIA in the context of the “extraordinary rendition program,” rejected based on national security concerns.<sup>186</sup>

## H. The current situation of detainees at Guantánamo Bay

110. As of the date of this merits report, the detention facility at Guantánamo Bay remains open, in violation of the Commission’s precautionary measures. According to available information, as of May 2018, 40 men remained imprisoned there.<sup>187</sup> In February 2018, the Commission condemned the President’s announcement calling for the prison to remain open and opening the possibility that additional detainees may be transferred there in the future.<sup>188</sup> On this occasion, the IACHR reiterated its call “to transfer the remaining detainees away from Guantánamo, returning those in indefinite detention to their country of origin or third countries, and trying the cases of those facing prosecution before military commissions in the federal courts.”<sup>189</sup>

## V. ANALYSIS OF LAW

### A. Preliminary considerations regarding applicable law

#### 1. Application of the American Declaration and interpretation in light of developments in international human rights law since its adoption

111. The American Declaration is a source of legal obligation that may be applied by the Inter-American Commission to the U.S. on the basis of the State’s commitment to uphold respect for human rights as provided for and defined in the Charter of the Organization of American States (OAS).<sup>190</sup> The U.S. deposited its instrument of ratification of the OAS Charter on June 19, 1951. Article 20 of the Commission’s Statute, as well as its Rules of Procedure, authorize the IACHR to examine the alleged violations of the Declaration raised by the petitioners against the State, relating to acts or omissions that occurred after the U.S. joined the OAS.

112. The Commission has long held that it is necessary to consider the provisions of the American Declaration in the broader context of both the inter-American and international human rights systems, in light

<sup>184</sup> Military Commissions Act of 2006, § 7(a).

<sup>185</sup> Military Commissions Act of 2006, § 8(b)(3).

<sup>186</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 119 (citing 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.*, Nov. 15, 2011. Available at: <https://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc>).

<sup>187</sup> ACLU, *Guantánamo by the Numbers* (last updated May 2018), available at: <https://www.aclu.org/issues/national-security/detention/guantanamo-numbers>.

<sup>188</sup> IACHR, Press Release No. 31/18, IACHR Condemns Decision of the United States to Maintain Guantanamo Prison Open, Feb. 20, 2018, available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/031.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/031.asp).

<sup>189</sup> *Id.*

<sup>190</sup> IACHR. Report No. 3/87. Case 9647. Roach and Pinkerton. United States (1987), paras. 48-49; I/A Ct. H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. [hereinafter “*Interpretation of the American Declaration*”], para. 47 (“[T]he member states of the [OAS] have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the [OAS] cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.”)

of developments in international human rights law since the Declaration was adopted and having regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.<sup>191</sup> Pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris* of international human rights law over time and in present-day conditions. In the present case, relevant international instruments include the International Covenant on Civil and Political Rights (ICCPR, 1967), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), and the 1967 Protocol to the 1951 Convention on the Status of Refugees, to which the U.S. is Party<sup>192</sup>. It is necessary for the Commission to take these instruments into account as well because one instrument may not be used as a basis to deny or limit other favorable or more extensive human rights that individuals might otherwise be entitled to under international or domestic law or practice.<sup>193</sup>

113. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may additionally be drawn from the provisions of other prevailing international and regional human rights instruments. In particular, this includes the American Convention on Human Rights, which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to Member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the Declaration.<sup>194</sup>

## 2. Application and interaction of international humanitarian law with international human rights law

114. In the course of this litigation and all matters before the Commission concerning Guantánamo Bay, the U.S. has consistently argued that the Commission lacks jurisdiction to consider these matters because international humanitarian law (IHL, also known as the law of war) applies as *lex specialis*.<sup>195</sup> The Commission understands this to be a specific manifestation of the State's general and longstanding position regarding lack of jurisdiction,<sup>196</sup> because it is well established that when interpreting and applying the provisions of inter-American human rights instruments, it is both appropriate and necessary to take into account Member States' obligations under other human rights and humanitarian law treaties, which together create an interconnected and mutually-reinforcing regime of human rights protections.<sup>197</sup>

115. In particular, where situations of armed conflict may be concerned, international human rights law is in no way displaced by the law of armed conflict or any other regime of international law. Rather, human rights law continues to apply except to the extent that it may properly be made the subject of

<sup>191</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 68. *See* I/A Ct. H.R., *Interpretation of the American Declaration*. Advisory Opinion OC-10/89 of July 14, 1989, para. 37. *See also* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 ("an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

<sup>192</sup> The U.S. is Party only to the 1967 Refugee Protocol, through which the substantive provisions of the 1951 Convention are incorporated. *See* UNHCR, *Convention and Protocol relating to the Status of Refugees*, introductory note, available at: <http://www.unhcr.org/3b66c2aa10.pdf> ("The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.")

<sup>193</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 45 (citations omitted). *See also* IACHR, Report No. 109/99, Case 10.951. Coard et al. United States. Sept. 29, 1999, para. 42 ("As a general matter, while the Commission may find it necessary to look to the applicable rules of [IHL] when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.")

<sup>194</sup> *See* IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (2000), para. 38; IACHR, *Garza v. United States*, Case No. 12.275, Annual Report of the IACHR 2000, paras. 88-89.

<sup>195</sup> *See, e.g.*, State's merits brief.

<sup>196</sup> *See, e.g.*, IACHR, Report No. 17/12, Case 12.865. Admissibility. Djamel Ameziane (United States). March 20, 2012. On the issue of the Commission's jurisdiction to consider the human rights obligations of all states party to the OAS Charter, *see also* IACHR, *Report on Terrorism and Human Rights* (2002), para. 38, and accompanying citations, as well as *supra* footnote 190 and accompanying text.

<sup>197</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 45.

derogations<sup>198</sup> (a situation that no party alleges to exist in this case). Moreover, there is an integral linkage between the law of human rights and humanitarian law because they share a “common nucleus of nonderogable rights and a common purpose of protecting human life and dignity;”<sup>199</sup> indeed, there may be a substantial overlap in the application of these bodies of law, and certain core guarantees (such as the prohibition of torture, as a *jus cogens* norm) will continue to apply in all circumstances.<sup>200</sup> Conversely, the test for assessing the observance of a particular right in a situation of armed conflict, such as the right to personal liberty, may under certain circumstances be distinct from that applicable in peacetime. Under such circumstances, it is appropriate to refer to the applicable *lex specialis* of IHL in order to evaluate whether a detention was “arbitrary” or not within the meaning of Articles I and XXV of the American Declaration.<sup>201</sup>

116. In this regard, while the Commission looks to the American Declaration as the primary source of international obligations and applicable law in cases concerning the United States, this does not mean that the Commission may not make reference to other sources of law in effectuating its mandate, including international humanitarian law.<sup>202</sup> In interpreting and applying human rights protections to facts such as those described in this report, then, it may be necessary for the Commission to refer to and consider pertinent provisions of international humanitarian law as the applicable *lex specialis*.<sup>203</sup>

## **B. Right to protection from arbitrary detention (Arts. I and XXV)<sup>204</sup>**

### **1. International human rights and humanitarian law standards regarding arbitrary detention**

117. The Commission has long recognized that “[i]t is only when the legal status of [detainees] is properly determined that they can be afforded the rights to which they are entitled under domestic and international law by reason of that status.”<sup>205</sup> This is because IHL regulates the justifications for and conditions of deprivations of liberty differently from international human rights law, and thus affects an analysis of State compliance with international human rights obligations in armed conflict situations.<sup>206</sup> The significant implications that the application of different international law regimes may have for a person’s right to personal liberty and security, in turn, highlights the importance of ensuring that a fair procedure exists for determining the status of individuals taken into custody by a State in order to ensure that they are afforded the international protections to which they are entitled.<sup>207</sup>

118. On one hand, international human rights law requires 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

<sup>198</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 29.

<sup>199</sup> IACHR, Report No. 109/99. Case 10.951. Coard et al. United States. Sept. 29, 1999, para. 39 (citing IACHR, Report No. 55/97 (Case 11.137, *Abella v. Argentina*), Annual Report of the CIDH 1997 (Apr. 13, 1998), at 307. [...] The American Declaration had its genesis in the recognition that the atrocities of World War II had demonstrated the linkage between respect for human rights and peace, the threat to fundamental rights in times of war, and the need to develop protections independent of the reciprocal undertakings of states. *See*, Act of the Inter-American Conference on Problems of War and Peace (the resolution which led to the adoption of the Declaration)).

<sup>200</sup> *Id.* (citation omitted).

<sup>201</sup> *See, e.g.*, IACHR, Report No. 109/99. Case 10.951. Coard et al. United States. Sept. 29, 1999, para. 42 *et seq.* (describing this principle and applying it in the context of the U.S. military intervention in Grenada).

<sup>202</sup> IACHR, Report No. 109/99. Case 10.951. Coard et al. United States. Sept. 29, 1999, para. 38 (citing I/A Ct. H.R. ‘*Other Treaties’ Subject to the Advisory Jurisdiction of the Court* (Art. 64 Am. Conv. H.R.), Advisory Opinion OC-1/82, para. 46).

<sup>203</sup> *See* IACHR, *Report on Terrorism and Human Rights* (2002), para. 29 (citing *See* Case 11.137, Report N° 5/97, *Abella* (Argentina), para. 161; *Coard et al.* (United States), Case 10.951, Report N° 109/99, paras. 37-42; I/A Ct. H.R. ‘*Other Treaties’ Subject to the Advisory Jurisdiction of the Court* (Art. 64 Am. Conv. H.R.), Advisory Opinion OC-1/82; *Interpretation of the American Declaration*. Advisory Opinion OC-10/89 of July 14, 1989; *Bámaca Velásquez v. Guatemala*, Judgment of Nov. 25, 2000, paras. 207-209. *See similarly* ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, ICJ Reports 1996, para. 25).

<sup>204</sup> Art. I states, “Every human being has the right to life, liberty, and the security of his person.”

Art. XXV states, in relevant part: “No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. [...] 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. [...]”

<sup>205</sup> IACHR, *Report on Terrorism and Human Rights* (2002), Executive Summary, para. 9.

<sup>206</sup> *See supra* footnote 116 and accompanying text.

<sup>207</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 141.

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>208</sup> The Commission has recognized that reasons of public security may justify restrictions on liberty or the extension of normal periods of preventive or administrative detention, subject to certain safeguards.<sup>209</sup>

119. However, the Commission has clarified that even under these circumstances, detention may continue for only that period necessary in light of the situation, and must remain subject to non-derogable protections to guard against prolonged incommunicado or indefinite detention and violations of non-derogable rights, including the right to humane treatment and the right to a fair trial.<sup>210</sup> 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>211</sup> These protections also 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.<sup>212</sup> In this regard, the Commission has previously determined a law authorizing the extension of incommunicado preventative detention in certain cases for up to 15 days to be contrary *per se* to the right to have the legality of detention promptly determined by a judge.<sup>213</sup>

120. In contrast, IHL permits detention of combatants by a party to an armed conflict to prevent members of opposing forces from continuing to fight,<sup>214</sup> and in general permits detention until the cessation of active hostilities. The particular rules governing detention may vary according to the status of the detainee (i.e. prisoner of war, privileged or unprivileged belligerent).<sup>215</sup> For this reason, where the detainee is not a combatant or where there is a doubt as to his or her status, IHL requires review of the person’s status and, accordingly, his or her susceptibility to and conditions of detention or internment.<sup>216</sup> While the applicability and scope of international humanitarian law protections to Guantánamo detainees remains the subject of legal debate,<sup>217</sup> it is clear that, at minimum, Common Article 3 of the Geneva Conventions and the Second Additional Protocol provide certain minimum standards of treatment for detainees in non-international armed conflicts, though they do not specify legal or procedural safeguards.<sup>218</sup>

121. IHL generally permits the administrative detention or internment of civilians and others who have not taken any active part in hostilities only under exceptional circumstances, when imperative concerns of security require it, when less restrictive measures could not accomplish the objective sought, when the action is taken in compliance with pre-existing law, and ensuring the right of the detainee to be heard and to appeal the decision, as well as regular review of any continuation of the detention.<sup>219</sup> In this regard, minimum human rights standards require that the decision-maker in review proceedings meet prevailing standards of impartiality, that the detainee is given an opportunity to present evidence and to know and meet the claims of the opposing party, and that the detainee be given an opportunity to be represented by counsel or other

<sup>208</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 120.

<sup>209</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 90 (citing IACHR, *Report on Terrorism and Human Rights* (2002), para. 25); *see also Report on Terrorism and Human Rights* (2002), paras. 50-51.

<sup>210</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 127.

<sup>211</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 139-140.

<sup>212</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 92.

<sup>213</sup> In that case, specifically regarding Articles 7(5) and 8(2)(f) of the American Convention. IACHR, *Toward the Closure of Guantánamo* (2015), para. 127 (citing IACHR, Report N° 49/00. Case 11.182. Odolfo Asencios Lindo et al. Peru. Apr. 13, 2000, para. 85. *See similarly* Eur. Court H.R., *Case of Aksoy v. Turkey*, Judgment of Dec. 18 1996, Report of Judgments and Decisions 1996-VI, N° 26, para. 78).

<sup>214</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 142 (citing ICRC, *Commentary on the Third Geneva Convention; The Handbook of Humanitarian Law in Armed Conflicts* (D. Fleck, ed. 1995), at 326 (indicating that the “purpose of captivity is to exclude enemy soldiers from further military operations. [...] Taking an enemy combatant prisoner can therefore never serve as a punishment but only to prevent further participation in military operations against the detaining power.”).

<sup>215</sup> *See generally* IACHR, *Report on Terrorism and Human Rights* (2002), paras. 130-146.

<sup>216</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 145.

<sup>217</sup> *See* IACHR, *Toward the Closure of Guantánamo* (2015), paras. 83-85.

<sup>218</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 85.

<sup>219</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 143 (citing IACHR, Report No. 109/99. Case 10.951. Coard et al. United States. Sept. 29, 1999, paras. 52, 53, 54). *See also*, in this regard, IACHR, *Toward the Closure of Guantánamo* (2015), para. 87.

representative.<sup>220</sup> Even where armed hostilities may occur over a prolonged period, this factor alone cannot justify the extended detention or internment of civilians; their detention is only justified as long as security concerns strictly require it.<sup>221</sup>

122. As the Commission considered in 2002, notwithstanding these specific rules and mechanisms governing the detention of persons in situations of armed conflict, there may be circumstances in which the continued existence of active hostilities becomes uncertain, or where a belligerent occupation continues over a prolonged period of time. Where this occurs, the regulations and procedures under IHL may prove inadequate to properly safeguard the minimum human rights standards of detainees. In this regard, the Commission has previously considered that where detainees find themselves in uncertain or protracted situations of armed conflict or occupation, the supervisory mechanisms as well as judicial guarantees under international human rights law and domestic law, including *habeas corpus*, may necessarily supersede IHL where this is necessary to safeguard the fundamental rights of those detainees.<sup>222</sup>

## 2. Arbitrary detention at Guantánamo Bay

123. The Commission has previously determined that under both international human rights and humanitarian law, “the indefinite detention of persons still held at Guantánamo 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.”<sup>223</sup> This is so because, even if IHL is applied as *lex specialis*, the “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.”<sup>224</sup>

124. The Commission found at that time that the arbitrariness of detention is particularly clear with respect to those prisoners who have been cleared for transfer by the U.S. government.<sup>225</sup> It further 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>226</sup>

## 3. Arbitrary detention of Mr. Ameziane

125. The Commission’s previous determination regarding the arbitrariness of indefinite detention at Guantánamo “without charge [for] more than a decade” is dispositive in Mr. Ameziane’s case, as he was held in U.S. custody for nearly 12 years without charge; for five of those years, moreover, the U.S. admitted in federal court that he was not properly detained, yet failed to release him. Notwithstanding, in this section the Commission will proceed to analyze additional elements of his case that contribute to the overwhelming determination that Mr. Ameziane’s detention was arbitrary by any measure of international human rights or humanitarian law.

126. The Commission observes that Mr. Ameziane’s arbitrary detention is closely tied to his lack of access to an effective judicial remedy throughout his time in U.S. custody, an issue that will be analyzed in greater depth below in section D.1. For the present analysis, it is sufficient to establish that no competent

<sup>220</sup> Id. (citing Report No. 51/01. Case 9903. Rafael Ferrer-Mazorra *et al.* United States (Apr. 4, 2001), para. 213. *See similarly* Eur. Court H.R., *Brannigan v. United Kingdom*, May 26, 1993, Ser. A 258-B, para. 58).

<sup>221</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 143 (citation omitted).

<sup>222</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 146 (citations omitted).

<sup>223</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 96; *see also* 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>224</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 96.

<sup>225</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 93.

<sup>226</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 93 (citing IACHR, Resolution No. 2/11, Regarding the Situation of the Detainees at Guantanamo Bay, Precautionary Measure 259-02, July 22, 2011).

tribunal ever determined that Mr. Ameziane was legally detained by the U.S. government, nor made any determination regarding Mr. Ameziane's status under international humanitarian law (IHL).

127. As a threshold issue, the Commission notes that the U.S. failed, throughout Mr. Ameziane's time in detention, to ever properly determine his status under international law. The Commission recalls that it has called for the proper determination of detainee status in the framework of its precautionary measures since 2002.<sup>227</sup> In particular, as determined in the findings of fact, the U.S. held Mr. Ameziane virtually *incommunicado* from January 2002 to June 2004 at Kandahar airbase and Guantánamo Bay—in a context in which the policy of the U.S. government at the time was to deny that any regime of law, domestic, international, or foreign, applied to Mr. Ameziane's detention. Subsequently, the State denied him meaningful review of his status under international law both by failing to ensure basic due process guarantees—by using “Combatant Status Review Tribunals” as a purported alternative to *habeas corpus* without ensuring basic guarantees such as access to counsel, evidence, and substantive judicial review—and by continuing to classify him as an “enemy combatant,” which has no clear analogue in IHL and thus does not offer clarity as to Mr. Ameziane's legal status or rights under international and domestic law.<sup>228</sup> From 2008 on, the U.S. government admitted in federal court that Mr. Ameziane was not properly detained and purported to be seeking to safely transfer him.

128. The Commission considers that the failure to ever properly determine Mr. Ameziane's status under international law, which impeded him from ever effectively knowing and attempting to vindicate his rights under international human rights or humanitarian law, constitutes a violation of article XXV of the American Declaration.

129. Under international human rights law, Mr. Ameziane's detention was manifestly arbitrary because he was not promptly brought before a competent judicial authority but rather held *incommunicado* for two-and-a-half years—and in fact, the legality of his detention was never determined by a judicial authority—and was ultimately held for nearly 12 years without charge. The Commission does not find that persuasive “reasons of public security” justified his extended detention. First, the Commission has no evidence indicating that an individualized determination was made in this respect at least until Mr. Ameziane's CSRT was conducted. Second, in addition to the serious due process concerns regarding CSRT and ARB processes and the fact that the information in them was obtained via torture, as discussed elsewhere in this report—Mr. Ameziane's CSRT and ARB records do not present persuasive evidence that he constituted a threat to public security, and in fact present strong evidence of religious discrimination in the decision to continue his detention, discussed further *infra* section E of this chapter. Third, the lack of security reasons to detain him was incontrovertible at least as of 2008, given the State's expressed lack of “military rationales” to continue detaining him at that time.

130. Even assuming *arguendo*, however, that “reasons of public security” could have initially justified a more extended period of preventive detention in this case, the Commission considers that the total duration of detention, the absence of due process to determine the legality of detention, supervise, and review continuing detention, as well as the absence of non-derogable protections relating to detention conditions and appropriate periodic review for extended detention, make clear the violation under international human rights law.

131. Mr. Ameziane's detention was also clearly arbitrary under international humanitarian law. Assuming *arguendo* that Mr. Ameziane could have properly been detained in Pakistan in late 2001 as a prisoner of war, privileged, or unprivileged belligerent, his decade-long detention was arbitrary because it “clearly [went] beyond an exceptional and strictly necessary measure ordered for security reasons,” rather than for purposes of continued interrogation. The Commission considers that throughout his time in Guantánamo, the lack of security reasons to detain Mr. Ameziane was apparent, becoming incontrovertible at least as of 2008, in line with the analysis above.

<sup>227</sup> IACHR, PM 259-02 (Mar. 13, 2002) (stating “it remains entirely unclear from their treatment by the [U.S.] what minimum rights under international human rights and humanitarian law the detainees are entitled to.”); *see also id.* (Mar. 18, 2003; Jul. 29, 2004; Oct. 28, 2005).

<sup>228</sup> *See* IACHR, PM 259-02 (extension granted Oct. 28, 2005), para. 8.

132. In this regard, the Commission calls attention to the lack of a factual showing by the State that there were valid security reasons to detain or continue to detain Mr. Ameziane, and, to the contrary, the affirmations by petitioners, substantiated by his CSRT and ARB records, that Mr. Ameziane was “never alleged by the U.S. government to have engaged in any acts of terrorism or other hostilities against anyone, to have picked up a weapon or participated in any military training, or to be a member of an alleged terrorist organization;” that he was sold to U.S. authorities for a bounty by Pakistani authorities; and Mr. Ameziane’s affirmations that any purported confessions by him were made under torture, and are untrue. None of these allegations have been contested by the State in the current proceedings, despite ample opportunity to do so.

133. For this reason, the Commission considers it relevant to additionally analyze Mr. Ameziane’s situation understood as a civilian detained in the context of armed conflict. As such, he would be entitled to even greater protections under IHL, including a higher standard to justify his initial and continuing detention, and ample opportunity to challenge his detention with guarantees of due process. Under this analysis, the State would not be able to meet its burden of demonstrating “imperative concerns of security” to justify his detention; that it had respected due process guarantees throughout his detention; and that there were no less restrictive measures available than rendition and internment in “an intentional system of cruel, unusual and degrading treatment and [...] torture”<sup>229</sup> that could have accomplished the objective sought.<sup>230</sup>

134. In summary, the State failed, over twelve years, to ever effectively determine Mr. Ameziane’s status under international law; moreover, under any analysis of arguably applicable law, Mr. Ameziane’s detention in U.S. custody was arbitrary. For these reasons, the Commission concludes that the United States is responsible for the violation of the right to protection from arbitrary detention, established in articles I and XXV of the American Declaration, against Djamel Ameziane.

**C. Right to humane treatment in detention (Arts. I and XXV),<sup>231</sup> in connection with the right to religious freedom (Art. III),<sup>232</sup> to the preservation of health and to well-being (Art. XI),<sup>233</sup> and to the protection of private and family life (Arts. V and VI)<sup>234</sup>**

135. Perhaps in no other area is there greater convergence between international human rights and humanitarian law than in the standards of humane treatment. Both regimes provide for many of the same minimum and non-derogable requirements for the humane treatment of all persons held under the authority and control of a State.<sup>235</sup> 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.<sup>236</sup>

<sup>229</sup> New York Times, “Red Cross Finds Detainee Abuse in Guantánamo” (Nov. 30, 2004), available at: <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>.

<sup>230</sup> See also IACHR, *Toward the Closure of Guantánamo* (2015), para. 225 (considering that detention in federal prison is a viable less restrictive measure for Guantánamo detainees charged with crimes).

<sup>231</sup> Article I provides, “Every human being has the right to life, liberty and the security of his person.”

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

<sup>232</sup> Article III provides, “Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.”

<sup>233</sup> Article XI provides, “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”

<sup>234</sup> Article V provides, “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”

Article VI provides, “Every person has the right to establish a family, the basic element of society, and to receive protection therefore.”

<sup>235</sup> The prohibition on torture and cruel, inhuman, and degrading treatment is established for the purposes of this report in Arts. I, XXV, and XXVI of the American Declaration (and their analogues, Arts. 5 and 7.1 of the American Convention), and in Common Article 3 of the Geneva Conventions (prohibiting “torture, cruel treatment, and outrages upon personal dignity”)—which furthermore constitutes a norm of customary international law. See IACHR, *Report on Terrorism and Human Rights* (2002), paras. 149, 184.

<sup>236</sup> IACHR, *Report on Terrorism and Human Rights* (2002), paras. 147-148.

136. It is a basic tenet of inter-American human rights jurisprudence that the State is the guarantor of the rights of persons deprived of liberty, and thus must take the necessary measures to respect and ensure the rights of all individuals in its custody.<sup>237</sup> The Commission has explained this concept as follows:

The State, by depriving a person of his liberty, places itself in the unique position of guarantor of his right to life and to humane treatment. When it detains an individual, the State introduces that individual into a "total institution"—such as a prison—where the various aspects of his life are subject to an established regimen; where the prisoner is removed from his natural and social milieu; where the established regimen is one of absolute control, a loss of privacy, limitation of living space and, above all, a radical decline in the individual's means of defending himself. All this means that the act of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.<sup>238</sup>

137. The legal consequence of the State's position as guarantor is the rebuttable presumption that the State is internationally responsible for violations of the rights to life or to humane treatment committed against persons under its custody.<sup>239</sup> In particular, whenever a person is detained in a normal state of health, and later appears with health issues, the State bears the burden to provide a "satisfactory and convincing" explanation of the situation, supported by sufficient evidence.<sup>240</sup> In the absence of such an explanation, State responsibility for what has happened to the individual while in State custody should be presumed.<sup>241</sup> This obligation is also connected to the obligation to provide information and evidence regarding a person's treatment in State custody, particularly given that this information generally lies partially or wholly in the hands of the State.<sup>242</sup>

### 1. The prohibition of torture and cruel, inhuman, or degrading treatment or punishment (CIDT)

138. An essential aspect of the right to personal security is the absolute prohibition of torture, a *jus cogens* (peremptory) norm of international law.<sup>243</sup> The Commission has defined torture as: 1) an intentional act through which severe physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose (e.g. to intimidate, punish, or obtain information) or intentionally (i.e. to produce a certain result in the victim); 3) by a state agent or by a private actor acting at the instigation of or with the acquiescence of the former.<sup>244</sup> Torture may thus be understood as an aggravated form of inhuman treatment perpetrated with a purpose; the essential criterion to distinguish between torture and other CIDT "primarily results from the intensity of the suffering inflicted."<sup>245</sup>

<sup>237</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 50. This principle was first developed by the Inter-American Court in *Neira Alegria v. Peru*, and subsequently developed in further jurisprudence. I/A Ct. H.R. *Neira Alegria et al. v. Peru*. Judgment of Jan. 19, 1995, para. 60; *Juvenile Reeducation Institute v. Paraguay*. Judgment of Sept. 2, 2004, paras. 152-153; see also generally I/A Ct. H.R., *Cuadernillo de Jurisprudencia de la Corte IDH No. 9: Personas Privadas de Libertad* (2017), available at: <http://www.corteidh.or.cr/sitios/libros/todos/docs/privados9.pdf>.

Likewise, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas provide that "All persons subject to the jurisdiction of any member State of the [OAS] shall be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees [...] [T]aking into account the special position of the States as guarantors [...] their life and personal integrity shall be respected and ensured, and they shall be afforded minimum conditions compatible with their dignity" (Principle I).

<sup>238</sup> IACHR, Report No. 41/99, Merits, *Minors in Detention*, Honduras, Mar. 10, 1999, para. 135; IACHR, *Special Report on the Human Rights Situation at the Challapalca prison in Peru*, para. 113.

<sup>239</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 57; see also para. 349.

<sup>240</sup> I/A Ct. H.R. *Mendoza vs. Argentina*. Judgment of May 14, 2013, para. 203 (citing *Juan Humberto Sánchez vs. Honduras*. Judgment of June 7, 2003, para. 100; *Fleury and others vs. Haití*. Judgment of Nov. 23, 2011, para. 77).

<sup>241</sup> I/A Court H.R., Provisional Measures, *Matter of Urso Branco Prison regarding Brazil*, Order of June 18, 2002, Whereas, para. 8.

<sup>242</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 57; see also I/A Ct. H.R., *Juan Humberto Sánchez vs. Honduras*. Judgment of June 7, 2003, para. 111; *Espinoza González vs. Perú*. Judgment of Nov. 20, 2014, para. 177.

<sup>243</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 155 (citing IACHR, *Report on Canada* (2000), para. 118).

<sup>244</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 154 (citing *Martín de Mejía Case*, at 185); see also, e.g., IACHR, Report No. 33/16. Case 12.797. Merits. *Linda Loaiza López Soto and family*. Venezuela. July 29, 2016, paras. 225-226.

<sup>245</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 158 (citing, *inter alia*, Case 10.832, Report N° 35/96, *Luis Lizardo Cabrera* (Dominican Republic) and jurisprudence of the now-defunct European Commission on Human Rights).

139. Likewise, the CAT, to which the U.S. is a party, defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>246</sup>

140. While no inter-American instrument defines “cruel, inhuman or degrading treatment,” nor defines it in relation to torture, the jurisprudence of the Inter-American Commission has established that “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>247</sup> Additionally “degrading treatment is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his [or her] physical and moral resistance,” which “is exacerbated by the vulnerability of a person who is unlawfully detained.”<sup>248</sup> Furthermore, a form of treatment must attain a minimum level of severity in order to be considered “inhuman or degrading”; the evaluation of this “minimum level” is specific to the facts of each case, including the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim,<sup>249</sup> as well as “race, color, nationality, immigration status, and other factors.”<sup>250</sup>

141. In the context of interrogation and detention, inter-American jurisprudence has previously found a variety of acts to constitute at least inhumane treatment, and some to constitute torture, including, *inter alia*:

prolonged incommunicado detention; keeping detainees hooded and naked in cells and interrogating them under the drug pentothal; holding a person’s head in water until the point of drowning; beating, cutting with pieces of broken glass, putting a hood over a person’s head and burning him or her with lighted cigarettes; threats of a behavior that would constitute inhumane treatment; threats of removal of body parts, exposure to the torture of other victims; death threats.<sup>251</sup>

142. IHL likewise closely regulates detention conditions and humane treatment of prisoners of war and civilians.<sup>252</sup> Article 75 of Additional Protocol I, in particular, regulates the conduct of interrogations of all detainees, regardless of their status.

143. The Inter-American Court has additionally specified that any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the

<sup>246</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

<sup>247</sup> IACHR, Report No. 35/96, Case 10.832, *Luis Lizardo Cabrera*, Dominican Republic, Feb. 19, 1998, para. 77 (citing Eur. Com. H.R., *The Greek Case*, 1969, 12 Y. B. Eur. Conv. on H.R. 12).

<sup>248</sup> IACHR, Report No. 64/12, Case 12.271, Merits, *Benito Tide Méndez et al.* (Dominican Republic), Mar. 29, 2012, para. 194; *see also* IACHR, *Report on Terrorism and Human Rights* (2002), para. 159 (citing *Loayza Tamayo v. Perú*, Sept. 19, 1997, para. 57; ECtHR, *Ribitsch v. Austria*, Judgment of Dec. 4, 1995, Series A No. 336, para. 36); I/A Ct. H.R., *Cantoral Benavides v. Peru*, Merits, Judgment of Aug. 18, 2000, para. 100.

<sup>249</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 157 (citing IACHR, Report No. 35/96, Case 10.832, *Luis Lizardo Cabrera*, Dominican Republic, Feb. 19, 1998, para. 78, citing *Ireland v. United Kingdom*, *supra* note 386, paras. 162-163).

<sup>250</sup> IACHR, Report No. 64/12, Case 12.271, Merits, *Benito Tide Méndez et al.* (Dominican Republic), Mar. 29, 2012, para. 194.

<sup>251</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 161 (citations omitted); the report further cites the U.N. Special Rapporteur on Torture (1986) on acts that involve the infliction of suffering severe enough to constitute torture, including “[...]prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance, total isolation and sensory deprivation, being held in constant uncertainty in terms of space and time, threats to torture or kill relatives, and simulated executions,” and decisions of the U.N. Human Rights Committee finding conduct including “beatings, electric shocks and mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons incommunicado for more than three months while keeping that person blindfolded with hands tied together [...]” to constitute torture and other inhumane treatment. *Id.* at para. 162.

<sup>252</sup> *See* IACHR, *Report on Terrorism and Human Rights* (2002), para. 192 (detailing these regulations).

person. 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>253</sup>

## 2. International human rights standards regarding detention conditions

144. As guarantor of the rights of the individuals in its custody, the State has the duty to ensure that their detention conditions are consistent with the dignity inherent to all human beings.<sup>254</sup> In this regard, detention conditions should not make the fact of confinement more punitive than it already is by its nature.<sup>255</sup> Similarly, IHL—as reflected in Common Article 3, Additional Protocol II (as applicable), and customary IHL—establishes the rights of detainees in relation to treatment and detention conditions.<sup>256</sup>

145. The Commission has considered that the U.N. Standard Minimum Rules for the Treatment of Prisoners prescribe basic benchmarks against which to evaluate whether the treatment of prisoners satisfies the standards of humanity under the inter-American instruments in such areas as accommodation, hygiene, clothing and bedding, food, recreation, exercise and medical treatment, discipline, punishment and use of instruments of restraint.<sup>257</sup> The IACHR has considered that these rules apply regardless of the type of behavior for which the person has been imprisoned.<sup>258</sup> Likewise, the IACHR recalls that these standards derive directly from the State’s special position as guarantor of the rights of persons deprived of liberty, given the extreme power imbalance between the State and the detained individual, and the nature of confinement itself, which prevents the detainee from satisfying on his or her own his or her basic needs—in particular related to economic, social and cultural rights—that are essential to permit a dignified life, to the extent possible under such circumstances. In this regard, the principal element that defines deprivation of liberty is the individual’s dependence on the decisions made by the personnel of the establishment where he or she is being held;<sup>259</sup> and “the act of imprisonment carries with it a specific and material commitment to protect the prisoner’s human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights,”<sup>260</sup> including obligations to guarantee the right to health, the right to food, and the right to clean water, among others.

146. Both the Commission<sup>261</sup> and the Court<sup>262</sup> have found it necessary to consider the *cumulative effect or impact* of the conditions of imprisonment to which a person is subjected, in order to determine whether such conditions as a whole constitute a form of CIDT or torture.<sup>263</sup> In this regard, the jurisprudence of the inter-American system has found that the following conditions of detention, among others, may reach the threshold of CIDT: lack of adequate infrastructure; lack of adequate ventilation and natural light; unsanitary cells; lack of beds; lack of adequate medical care or drinking water; lack of adequate sanitation (having to urinate or defecate in receptacles or plastic bags); lack of minimum privacy in sleeping quarters; very little and poor quality food; few chances to exercise; lack of education or sports programs, or few chances to engage in such activities;

<sup>253</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 112 (citing I/A Ct. H.R., *Cantoral Benavides v. Peru*, Merits, Judgment of Aug. 18, 2000, para. 96; see also *Loayza Tamayo v. Peru*, para. 57).

<sup>254</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 241; see also IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (Principle I).

<sup>255</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 430.

<sup>256</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 132 (citing ICRC, Resource Center, The relevance of IHL in the context of terrorism, Jan. 1, 2011. Available at: <https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>).

<sup>257</sup> IACHR, *Report on Terrorism and Human Rights*, para. 167 (citing UN Standard Minimum Rules for the Treatment of Prisoners, Rules 8-34; see also IACHR, *Report on Persons Deprived of Liberty* (2011), para. 432).

<sup>258</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 432 (citing IACHR, Report No. 28/09, Case 12.269, Merits, Dexter Lendore, Trinidad y Tobago, Mar. 20, 2009, paras. 30-31; Report No. 78/07, Case 12.265, Merits, Chad Roger Goodman, Bahamas, Oct. 15, 2007, paras. 86-87; Report No. 67/06, Case 12.476, Merits, Oscar Elías Bicot *et al.*, Cuba, Oct. 21, 2006, para. 152; Report No. 76/02, Case 12.347, Merits, Dave Sewell, Jamaica, Dec. 27, 2002, paras. 114-115).

<sup>259</sup> Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21, Feb. 16, 2009, Ch. III: Thematic considerations, para. 46.

<sup>260</sup> IACHR, Special Report on the Human Rights Situation at the Challapalca prison in Peru, para. 113; IACHR, Report No. 41/99, Merits, Minors in Detention, Honduras, March 10 1999, para. 135.

<sup>261</sup> IACHR, Report No. 28/09, Case 12.269, Merits, Dexter Lendore, Trinidad y Tobago, Mar. 20, 2009, para. 34; Report No. 76/02, Case 12.347, Merits, Dave Sewell, Jamaica, Dec. 27, 2002, para. 116; Report No. 56/02, Case 12.158, Merits, Benedict Jacob, Grenada, Oct. 21, 2002, para. 94; Report No. 41/04, Case 12.417, Merits, Whitley Myrie, Jamaica, Oct. 12, 2004, para. 46.

<sup>262</sup> See, e.g., I/A Ct. H.R., *Case of Vélez Loor V. Panama*, Judgment of Nov. 23, 2010, para. 227; *Boyce et al. V. Barbados*, Judgment of Nov. 20, 2007, para. 94.

<sup>263</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 434.

periodic use of forms of collective punishment and other abuses; solitary confinement and incommunicado detention; and imprisonment in locations that are extremely far away from the family residence and in severe geographic conditions.<sup>264</sup> It is worth noting, at this point, that Mr. Ameziane was subjected to all of these conditions at some point in his detention by the U.S., and several throughout the entire period of his detention.

147. When a State intentionally subjects a person to particularly injurious conditions of detention for a particular purpose, this may rise to the level of torture.<sup>265</sup> The Commission has previously considered this to be the case of the treatment of detainees at Guantánamo,<sup>266</sup> as has the ICRC.<sup>267</sup> In this regard, it is relevant to recall, in line with the Istanbul Protocol on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”), that “[t]he distinction between physical and psychological methods [of torture] is artificial,” and a “method-listing” approach to quantifying or assessing whether particular acts or conditions rise to the level of torture “may be counter-productive, as the entire clinical picture produced by torture is much more than the simple sum of lesions produced by methods on a list.”<sup>268</sup>

148. With respect to the right to food, the IACHR’s Principles establish that “Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns, as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law.”<sup>269</sup>

149. Regarding discipline, the Commission has stated that prison authorities should ensure that disciplinary procedures are provided for in law, proportional to the behavior being punished and used only on an exceptional basis, when other means prove inadequate to maintain order.<sup>270</sup> Likewise, punishments imposed on inmates must not constitute acts of torture or CIDT; nor be imposed in such a way that they amount to a violation of other rights, such as the right to protection of the family.<sup>271</sup> In this regard, the imposition of collective punishment, the suspension or restriction of food and drinking water, corporal punishment, close confinement in an unlit cell, and the use of means and instruments of coercion and physical restraint as a form of disciplinary sanction are all prohibited.<sup>272</sup>

<sup>264</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 434 (citing, *inter alia*, I/A Ct. H.R., *Loayza Tamayo V. Peru*, para. 89; *Cantoral Benavides V. Peru*, para. 85; *Hilaire, et al. V. Trinidad and Tobago*, para. 76.b; *Caesar V. Trinidad and Tobago*, para. 99; *Tibi V. Ecuador*, para. 151; *Suárez Rosero V. Ecuador*, para. 91; “*Juvenile Reeducation Institute V. Paraguay*, paras. 165-171; *Fermín Ramírez V. Guatemala*, paras. 54.55-57; *Raxcacó Reyes V. Guatemala*, para. 43.23; *García Asto and Ramírez Rojas V. Peru*, paras. 97.55-57; *López Álvarez V. Honduras*, paras. 54.48 y 108; *Miguel Castro-Castro Prison V. Peru*, paras. 296 y 297; *Montero Aranguren et al. V. Venezuela*, paras. 90-99 y 104; *Boyce et al. V. Barbados*, paras. 94-102).

<sup>265</sup> In this regard, the Istanbul Protocol includes among different possible methods of torture the following categories:

“(m) Conditions of detention, such as a small or overcrowded cell, solitary confinement, unhygienic conditions, no access to toilet facilities, irregular or contaminated food and water, exposure to extremes of temperature, denial of privacy and forced nakedness;

(n) Deprivation of normal sensory stimulation, such as sound, light, sense of time, isolation, manipulation of brightness of the cell, abuse of physiological needs, restriction of sleep, food, water, toilet facilities, bathing, motor activities, medical care, social contacts, isolation within prison, loss of contact with the outside world [...]”

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, U.N., New York and Geneva, 2004 [hereinafter “Istanbul Protocol”], para. 145. Available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

<sup>266</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 435 (citing U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), paras. 49-50).

<sup>267</sup> New York Times, “Red Cross Finds Detainee Abuse in Guantánamo” (Nov. 30, 2004), available at: <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>.

<sup>268</sup> Istanbul Protocol (2004), para. 145.

<sup>269</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, (Principle XI.1).

<sup>270</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 372.

<sup>271</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 382.

<sup>272</sup> *Id.* at para 383 (citing *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principles XXII.4, XI, I; U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 31, 33).

### 3. Particular considerations regarding solitary confinement, incommunicado, and indefinite detention

150. Solitary confinement has been defined as “[t]he physical isolation of individuals who are confined to their cells for twenty-two to twenty four hours a day. [...] The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.”<sup>273</sup> The Commission has considered that solitary confinement should only be used on an exceptional basis, for the shortest amount of time possible and only as a measure of last resort.<sup>274</sup> Indeed, the U.N. has pointed to the need to move toward the abolition of solitary confinement.<sup>275</sup>

151. The circumstances for the use of solitary confinement must be established by law, and its use must always be subject to strict judicial oversight;<sup>276</sup> in this regard, “[u]nder no circumstances may [solitary confinement] be left exclusively in the hands of the authorities in charge of [a detention center] without proper judicial oversight.”<sup>277</sup> In no instance should solitary confinement of an individual last longer than thirty days.<sup>278</sup> The Inter-American Court has further clarified that solitary confinement cells, like all detention cells, “must fulfill the minimum standards for proper accommodation, sufficient space and adequate ventilation.”<sup>279</sup>

152. The Commission has concluded that it is “widely established in international human rights law that solitary confinement for extended periods of time constitutes at the very least a form of [CIDT];<sup>280</sup> as does the uncertainty of the duration of the same.”<sup>281</sup> Moreover, solitary confinement can be utilized as a form of torture.<sup>282</sup> In one case, for example, the Commission found the imposition of solitary confinement to amount to torture where: (i) it was deliberately imposed; (ii) it endangered the individual’s physical integrity, taking into account his health prior to imposition of the measure; (iii) it was imposed as a punishment; (iv) the act was attributable to the State (in this case, because it was perpetrated by State agents).<sup>283</sup> The Commission notes that this analysis is illustrative but not exhaustive, as the basic analysis (suffering rising to the level of torture, perpetrated for a purpose, attributable to the State) may in principle be satisfied in any number of ways.

153. Likewise, the Commission has previously found prolonged incommunicado detention to constitute cruel and inhuman treatment.<sup>284</sup> Certain aspects of the prohibition of prolonged incommunicado

<sup>273</sup> Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007; see also IACHR, *Report on Persons Deprived of Liberty* (2011), para. 397; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim report submitted to the General Assembly in accordance with G.A. Res. 62/148, A/63/175, adopted on July 28, 2008, Ch. IV: *Solitary confinement*, para. 84 [hereinafter “Special Rapporteur on Torture, 2008 report”].

<sup>274</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 411 (citing Special Rapporteur on Torture, 2008 report, Ch. IV: *Solitary confinement*, para. 83); see also IACHR, *Principles and Best Practices* (2008), Principle XXII.3.

<sup>275</sup> In particular, the U.N. Basic Principles for the Treatment of Prisoners establish that “[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged” (Principle 7).

<sup>276</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 411.

<sup>277</sup> *Id.* at para. 412.

<sup>278</sup> *Id.* at para. 411.

<sup>279</sup> *Id.* at para. 408 (citing I/A Ct. H. R. *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006, para. 94); see also *id.* at 414.

<sup>280</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 413 (citing, *inter alia*, U.N., Hum. Rts. Comm., General Comment No. 20: *Prohibition of torture and cruel treatment or punishment (Art. 7)* (1992), para. 6; U.N., Hum. Rts. Comm., Communication No. 577/94, Víctor Alfredo Polay Campos, Perú, CCPR/C/61/D/577/1994 (Jan. 9, 1996), paras. 8.6, 8.7, 9; Special Rapporteur on Torture, 2008 report, Ch. IV: *Solitary confinement*, para. 7; I/A Ct. H.R., *Castillo Petruzzi et al. v. Peru*. Judgment of May 30, 1999, para. 194; *Loayza Tamayo v. Peru*. Judgment of Sept. 17, 1997, paras 57-58; Afr. Comm. H.R., Communication No. 250/2002, Zegveld y Epbrem v. Eritrea, session 34, Nov. 6-20, 2003, para. 55); see also I/A Ct. H.R. *Velásquez Rodríguez v. Honduras*. Judgment of July 28, 1988, para. 156; *Lori Berenson Mejía v. Peru*. Judgment of Nov. 25, 2004, paras. 106, 109; *Cantoral Benavides v. Peru*. Merits. Judgment of Aug. 18, 2000, para. 83.

<sup>281</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 413 (citing U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 87).

<sup>282</sup> *Id.* at para. 413 (citing *Istanbul Protocol*, paras. 145(M) and 234); see also IACHR, *Principles and Best Practices* (2008), Principle XXII; International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Trial Chamber II, Judgment of March 15, 2002, para. 183.

<sup>283</sup> IACHR. Report N° 35/96. Case 10.832. Luis Lizardo Cabrera. Dominican Republic (Feb. 19, 1998), para. 86.

<sup>284</sup> See also IACHR, *Report on Terrorism and Human Rights* (2002), para. 164 (citing, *inter alia*, I/A Ct. H.R. *Velásquez Rodríguez v. Honduras*. Judgment of July 28, 1988, para. 156; *Godínez-Cruz v. Honduras*. Judgment of Jan. 20, 1989, para. 164; *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. Judgment of Nov. 19, 1999, paras. 162-164).

detention are further considered to be non-derogable (e.g. access to counsel and judicial review), precisely due to their fundamental importance for ensuring the non-derogable right to humane treatment.<sup>285</sup>

154. Similarly, the IACHR has stressed that even in extraordinary circumstances, indefinite detention—particularly of individuals who have not been charged—constitutes a flagrant violation of international human rights law and in itself constitutes a form of CIDT.<sup>286</sup>

#### 4. Particular considerations regarding adequate medical care in detention

155. The obligation to provide adequate medical care for persons deprived of liberty arises directly from the State's duty to ensure their humane treatment under Article I of the American Declaration,<sup>287</sup> in light of the intimate correlation between physical and mental health and personal integrity. The IACHR has thus established that “where persons deprived of liberty are concerned, the obligation of States to respect their physical integrity, not to use cruel or inhuman treatment, and to respect the inherent dignity of the human person, includes guaranteeing access to proper medical care.”<sup>288</sup> The Commission has thus defined the right to health for persons deprived of liberty as “the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care [and] permanent availability of suitable and impartial medical personnel [...]”<sup>289</sup> In this regard, medical “treatment shall be based on scientific principles and apply the best practices” and “the provision of health services shall, in all circumstances, respect [...] medical confidentiality; patient autonomy; and informed consent to medical treatment within the physician-patient relationship.”<sup>290</sup>

156. In this regard, adequate medical care is a minimum and indispensable material requirement for the State to ensure the humane treatment of prisoners in its custody.<sup>291</sup> Incarceration may not be allowed to compound the deprivation of liberty with illness and physical and mental distress.<sup>292</sup> Indeed “lack of adequate medical assistance could be considered [a *per se* violation of the right to humane treatment], depending on the specific circumstances of the person, the type of disease or ailment, and the time spent without medical attention and its cumulative effects.”<sup>293</sup> The State's duty to provide adequate and appropriate medical care to people in its custody is all the greater where a prisoner's injuries or health concerns are the direct result of action by the authorities.<sup>294</sup> Likewise, the right to health of people in detention implies the provision of emergency care, regular and independent medical revisions, adequate and prompt medical treatment with access to medicines when required, and even specialized attention according to the individual's particular physical or mental health necessities in such circumstances. The State is obligated to guarantee that the situation of deprivation of liberty does not imply *de facto* or *de jure* discrimination in access to health care, which means that it must guarantee, at least, reasonable levels of availability, accessibility, acceptability and quality of such health facilities, goods or services in relation to people in detention.

157. The Istanbul Protocol establishes that it is a gross contravention of health-care ethics to participate, actively or passively, in torture or condone it in any way.<sup>295</sup> Principles of medical ethics make clear that health professionals have a moral duty to protect the physical and mental health of detainees, and that

<sup>285</sup> Id. at para. 127.

<sup>286</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 134.

<sup>287</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 519.

<sup>288</sup> Id. (citing IACHR, Application to the I/A Court H.R. in the *Case of Pedro Miguel Vera Vera*, Case 11.535, Ecuador, Feb. 24, 2010, para. 42. The IACHR has also established that “[i]f the State does not fulfill its obligation, by action or omission, it violates Article 5 of the Convention and, in cases of deaths of prisoners, violates Article 4.” *Third Report on the Human Rights Situation in Colombia*, Ch. XIV, para. 33).

<sup>289</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 521 (citing IACHR, *Principles and Best Practices* (2008), Principle X).

<sup>290</sup> Id. at para. 522 (citing IACHR, *Principles and Best Practices* (2008), Principle X).

<sup>291</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 526 (citing I/A Ct. H.R., *García-Asto and Ramírez-Rojas V. Peru*. Judgment of Nov. 25, 2005, para. 126).

<sup>292</sup> Id.

<sup>293</sup> Id. at para. 527 (citing I/A Ct. H.R., *Montero-Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006, para. 103).

<sup>294</sup> Id. at para. 530 (citing I/A Ct. H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of Nov. 25, 2006, para. 302).

<sup>295</sup> Istanbul Protocol (2004), para. 52.

Similarly, the duty of health personnel to refrain from participating in any way in acts that violate the right to integrity of persons in custody of the State is widely developed in 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 [CIDT], adopted by General Assembly Res. 37/194 of Dec. 18, 1982.

assessment of detainees' health in order to facilitate punishment or torture is clearly unethical.<sup>296</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>297</sup>

158. To safeguard against the torture and physical or mental abuse of prisoners, it is crucial for health professionals providing medical care to persons in State custody to operate with due autonomy and independence, free from any form of interference, coercion or intimidation by other authorities.<sup>298</sup> In this regard, health professionals cannot be obliged by contractual or other considerations to compromise their professional independence,<sup>299</sup> and doctors working for State security services must refuse to comply with any procedures that may harm patients or leave them physically or psychologically vulnerable to harm. Where the detainee is a vulnerable adult, doctors have an additional duty to act as an advocate.<sup>300</sup> Doctors also have a duty to speak out and to report any unethical, abusive, or inadequate treatment of patients by members of their employing security services, but without exposing patients, their families, or themselves to foreseeable serious risk of harm.<sup>301</sup>

## 5. Particular considerations regarding freedom of religion and belief in detention

159. In relation to religion, 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>302</sup> Similarly, the Istanbul Protocol clarifies that "violation of taboos" and "behavioral coercion, such as forced engagement in practices against the religion of the victim (e.g. forcing Muslims to eat pork)," may be considered methods of torture.<sup>303</sup> The Commission has previously considered that respect for freedom of religion requires States to ensure that laws or methods of investigation and prosecution are not purposefully designed or implemented in a way that distinguishes to their detriment members of a group based upon a prohibited ground of discrimination, such as religious beliefs, and to guarantee that methods of this nature are closely monitored and controlled to ensure against human rights infringements.<sup>304</sup>

160. The IACHR recalls that, according to the Human Rights Committee, the freedom of religion or belief "may be exercised either individually or in community with others and in public or private;" although restrictions may be permissible if they "are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others," they may not be imposed "for discriminatory purposes or applied in a discriminatory manner." In the case of persons deprived of liberty, the Committee states that such situations must not impair the right "to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint (measure)."<sup>305</sup> Similarly, the Special Rapporteur on Freedom of Religion or Belief has asserted that this right has a multifaceted nature and encompasses a broad range of acts: "it empowers human beings in the entire sphere of religious and non-religious convictions, conscience based positions and religious practices," and it also "covers all aspects of religious and belief-related life: not only the 'believing', but also the 'belonging' and the 'behaving', that is, individual and community

<sup>296</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 [CIDT], adopted by General Assembly Res. 37/194 of Dec. 18, 1982.

<sup>297</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 114 (citing Istanbul Protocol (2004), para. 53).

<sup>298</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 561.

<sup>299</sup> Istanbul Protocol (2004), para. 66.

<sup>300</sup> See IACHR, *Report on Persons Deprived of Liberty* (2011), para. 564.

<sup>301</sup> Istanbul Protocol (2004), para. 67.

<sup>302</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 135 (IACHR, *Principles and Best Practices* (2008), Principles XI and XXV).

<sup>303</sup> Istanbul Protocol (2004), para. 145(s),(t).

<sup>304</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 363 (citing IACHR, *Report on Argentina* (1980), at 251-254 (criticizing measures taken by the Government of Argentina against the activities of members of the Jehovah's Witnesses)).

<sup>305</sup> Human Rights Committee. General Comment No 22. UN Doc. CCPR/C/21/Rev.1/Add.4, Sept. 27, 1993, paras. 4, 8.

practices connected with convictions and traditions”<sup>306</sup>. In this sense, the IACHR considers that no one is required to justify the exercise of his or her freedom of religion or belief, even if deprived of liberty, and that this must be respected as inherent in all human beings. Further, when considering discrimination on the basis of religion or belief, it is necessary to evaluate not only formal but substantive equality, which includes indirect and structural discrimination, and may include the adoption of measures of reasonable accommodation.

## 6. The right to private and family life in the context of detention

161. The IACHR has established that, in light of the exceptional circumstances that imprisonment creates, the State is obligated to take steps to effectively ensure the right to maintain and cultivate family relationships.<sup>307</sup> Indeed, it has found that the right to family and family-life “is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances.”<sup>308</sup> The Commission has previously considered that “[alt]hough imprisonment necessarily restricts the full enjoyment of the family by forcibly separating a member from it, the state is still obliged to facilitate and regulate contact between detainees and their families and to respect the fundamental rights of all persons against arbitrary and abusive interferences by the state and its public functionaries.”<sup>309</sup>

162. In this respect, “the Commission has repeatedly indicated that visiting rights are a fundamental requirement for ensuring respect of the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family,”<sup>310</sup> and fundamental to the protection of dignity and humane treatment of persons deprived of liberty.<sup>311</sup> As such, the State must create the conditions necessary to enable contact between detainees and their families (e.g. via mail, visits, and telephone calls), and correct all structural deficiencies that keep contact and communication between inmates and their families from taking place on a sufficiently regular basis under secure conditions that respect their dignity.<sup>312</sup>

## 7. Torture and other cruel, inhuman, or degrading treatment or punishment of Mr. Ameziane

### a. Preliminary considerations

163. In the present case, Mr. Ameziane has alleged a series of acts and omissions by agents of the United States throughout his time in U.S. custody—*inter alia*, beatings, death threats, threats to return him to a country where he would be tortured, the use of dogs to create terror, waterboarding, exposure to extreme cold temperatures for extended periods, removal/denial of clothing, sleep deprivation, sensory deprivation, interrogations lasting more than 30 hours, failure to provide adequate medical treatment, religious abuse and interference, psychological abuse, and solitary confinement—which have caused and continue to cause him lasting physical and psychological harm, and which he contends rise to the level of torture or other cruel, inhuman or degrading treatment or punishment and otherwise violate his right to humane treatment. Moreover, several of these tactics—most notably, solitary confinement, extended interrogations, the use of stress positions, sleep deprivation, sensory assaults and sensory deprivation, and the use of dogs to create terror—were officially approved for use at Guantánamo.

164. The State has not contested the veracity of any of Mr. Ameziane’s claims, or even concretely referred to the specific events he alleges. It has not escaped the notice of the Commission, either, that in litigation before the Commission the State has referred to the issue of humane treatment exclusively in terms of policies and legal frameworks put in place since 2009. In this regard, the State has alleged, in general terms,

<sup>306</sup> Report of the Special Rapporteur on freedom of religion or belief. UN Doc. A/71/269, Aug. 2, 2016, paras. 14, 15.

<sup>307</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 576 (citing IACHR, Report No. 67/06, Case 12.476, Merits, Oscar Elías Bicet *et al.*, Cuba, Oct. 21, 2006, para. 237; Report No. 38/96, Case 10.506, Merits, X and Y, Argentina, Oct. 15, 1996, para. 97- 98; Eur. Ct. H.R. *Case of Messina v. Italy* (No. 2), (Application no. 25498/94), Judgment of Sept. 28, 2000, Second Section, para. 61).

<sup>308</sup> IACHR, Report No. 38/96, Case 10.506, X and Y, Argentina, Oct. 15, 1996, para. 96.

<sup>309</sup> *Id.* at para. 97 (citing Article 37 of the United Nations Standard Minimum Rules on the Treatment of Prisoners); *see also* IACHR, Report No. 1/17, Case 12.804, Merits, Néstor Rolando López *et al.* Argentina, Jan. 26, 2017, para. 124.

<sup>310</sup> *Id.* at para. 98 (citation omitted).

<sup>311</sup> IACHR, Report No. 1/17, Case 12.804, Merits, Néstor Rolando López *et al.* Argentina, Jan. 26, 2017, para. 124.

<sup>312</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 577.

since 2009, that the policy of the U.S. is to treat Guantánamo detainees humanely, and that policies are in place regarding detainee treatment that are sufficient to ensure respect for their rights, including under Common Article 3 of the Geneva Conventions. While the Commission regards as undeniably positive the move to, among others, clarify the applicability of Common Article 3 standards to detainee treatment since 2009, it recalls that inter-American human rights law is concerned with the responsibility of States, and not particular government administrations. For this reason, the failure of the State ever to refer to Mr. Ameziane's treatment in U.S. custody prior to 2009, the specific conduct he alleged, and official policy regarding detainee treatment at that time, is deeply concerning.

165. The Commission further understands the lack of reference by the State to these matters as indicating a lack of controversy about the use of torture and other CIDT in U.S. detention programs prior to 2009, as well as about the incompatibility of such practices with the State's international obligations. The Commission thus understands this situation, in which Mr. Ameziane has alleged acts and omissions constituting torture and other CIDT; the State has not seriously contested or otherwise referred to these allegations, and in particular to events before 2009; and in which a permissive legal and policy environment favorable to the use of torture existed prior to that date, to be sufficient to establish both that the acts alleged by Mr. Ameziane occurred, and that they occurred in U.S. custody. Notwithstanding, the Commission will analyze here additional elements of this case that demonstrate the State's responsibility for violations of the right to humane treatment.

166. Numerous international bodies, including the IACHR, have previously concluded that the detention regime at Guantánamo Bay represents a system of cruel and inhumane treatment. It is also undisputed that all conduct alleged by Mr. Ameziane, as well as the structural conditions of his detention, are attributable to the State or its agents. As such, the analysis in the following sections of whether specific acts or conditions, considered individually, rise to the level of torture will focus principally on the remaining two elements of torture: whether these acts or conditions were inflicted on Mr. Ameziane with a purpose, and the level of suffering occasioned by them.

167. The Commission recalls, however, that this analysis is not an exercise in marking off a checklist of conduct that may constitute a human rights violation, "as the entire clinical picture produced by torture is much more than the simple sum of lesions produced by methods on a list." In this regard, it is relevant to keep in mind at all times the larger context surrounding Mr. Ameziane's claims: the harsh conditions of detention, which themselves constituted cruel and inhuman treatment, and the apparent arbitrariness—even absurdity—of the conduct perpetrated against him, as over more than a decade of indefinite detention he was never charged with a crime, adduced to be or have contacts with terrorists, and was cleared for transfer by 2008.

**b. Considerations regarding acts perpetrated for purposes of interrogation**

168. Mr. Ameziane alleged a series of acts perpetrated against him in U.S. custody for the purpose of interrogation, meeting the requirement of purpose. Several of these, moreover, are widely recognized as rising to the level of torture. The Commission finds that, taken together and over the course of years of confinement (until 2008 or 2009 when he was cleared for transfer and thus, to the Commission's understanding, ceased to be interrogated) and in his particular conditions of confinement (*see infra* section 5.c), the treatment inflicted upon him for the purposes of interrogation undoubtedly rises to the level of torture.

169. These included: beatings and brutalization by soldiers, the use of dogs to create terror, and brutal interrogation at Kandahar airbase in Afghanistan; and at Guantánamo Bay, the use of routine and persistent disruption of his sleep, eating, and prayers by guards, leaving him perpetually exhausted and hungry; regular and persistent exposure to cold temperatures without adequate clothing; blunt trauma (beatings, punches, kicks, slaps) causing, at least, the dislocation of his jaw; chemical exposure to pepper spray; asphyxiation via waterboarding (simulated drowning); verbal abuse and humiliation; threats of death, further torture, and return to Algeria to be tortured. This, in addition to other conduct rising to the level of cruel and inhuman treatment also perpetrated for the purposes of interrogation, including prolonged exposure to music "loud enough to burst your eardrums" and prolonged interrogations; shackling before, during, and after

interrogations to the point of losing feeling in his limbs and shackling to the floor; other sensory deprivation; and other harassment and harsh interrogation techniques.

170. The Commission concludes that these acts perpetrated against Mr. Ameziane for the purposes of interrogation rise to the level of torture and cruel and inhuman treatment, in violation of Articles I and XXV of the American Declaration.

**c. Considerations relating to indefinite detention as a form of cruel and inhuman treatment**

171. The Commission has previously cited the conclusion of the U.N. Committee against Torture, that indefinite detention constitutes a *per se* violation of the Convention Against Torture (referring to Article 16 of the CAT, which prohibits CIDT), particularly given that the objective of ongoing detention at Guantánamo is not security (i.e. to prevent combatants from returning to the battlefield), but to gather intelligence.<sup>313</sup> In this regard, U.N. mandate holders stated as early as 2006 that “the indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with [...] the Geneva Conventions.”<sup>314</sup>

172. In this case, the Commission has considered substantial information regarding the impact of indefinite detention during more than 11 years on Mr. Ameziane—including five years during which the State admitted he was not legally detained, but failed to make any meaningful effort to release him. Petitioners alleged that the State’s conduct during this time in failing to expeditiously transfer him from Guantánamo constitutes CIDT. The Commission agrees.

173. The Commission emphasizes in particular that from 2009 on, Mr. Ameziane was cognizant that he had been approved for transfer, and also that the U.S. had fought for and won a court order to prevent him from telling anyone of this fact, thus frustrating his possibilities of resettlement in several countries that had expressed interest in his case. As Mr. Ameziane stated: “The bottom line is that the US cleared me for transfer, but did everything in its power to keep me in detention and keep secret from the outside world my cleared status.” The desperation of this situation, particularly as transfers slowed dramatically and it became clear that the prison would not in fact be expeditiously closed, led Mr. Ameziane to participate in the 2013 hunger strike, in which he lost 60 pounds, developed rashes and sores on his body, and “lost all hope and wanted to die.”

174. The Commission finds that Mr. Ameziane’s prolonged detention was cruel and inhuman, because it “deliberately cause[d] severe mental or psychological suffering, which, given the particular situation, is unjustifiable.” Here, it is worth elaborating on two terms in particular: “deliberate,” and “unjustifiable.” In this case, Mr. Ameziane’s continued detention after 2009 is apparently attributable not to a particular, deliberate cruelty directed against him by a particular judge or jailer, but the deliberate cruelty of a legislature that did everything in its power to halt efforts to close Guantánamo and, within the Executive, a (deliberate) bureaucratic indifference to the existence and well-being of Mr. Ameziane and his fellow detainees, and an institutional inertia that, according to the information before the Commission, resulted in a failure to make even one “phone call, email, meeting, or other discussion” in furtherance of his release from Guantánamo at any time from 2009 to August 2013. Under these circumstances, of course, any suffering caused to Mr. Ameziane following his clearance for transfer is flatly unjustifiable, because he should not have been detained, and the U.S. had no basis to continue treating him as a suspected terrorist housed with and subject to the same regime as detainees who have been charged; rather, he should have been “treated as [a] person[] who ha[s] never been charged—which is what [he is]—whom the authorities have no legitimate interest in detaining.”<sup>315</sup>

175. Mr. Ameziane’s personal experience, as the Commission addressed above, is corroborated by broader studies. The U.S. itself (via internal review carried out by the Department of Defense) concluded that

<sup>313</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 94 (citing U.N. Committee Against Torture (CAT), *Conclusions and Recommendations, United States of America*, 25 July 2006, CAT/C/USA/CO/2, para. 22).

<sup>314</sup> U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 23. *See also* IACHR, *Toward the Closure of Guantánamo* (2015), para. 94.

<sup>315</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 288.

indefinite detention at Guantánamo compromises the State’s “long-term ability to comply with Common Article 3 of the Geneva Conventions,” and creates rising tension and anxiety among detainees, as well as fomenting both violent outbursts and self-harm by detainees. The Commission, too, has considered its physiological and psychological impacts on detainee health, as well as evidence that indefinite detention leaves detainees “vulnerable to developing debilitating neuropsychiatric disorders secondary to trauma and stress.” Indefinite detention also necessarily impacts the right to family, as it creates fundamental uncertainty about whether or when detainees will be able to see their families again.

176. For these reasons, the Commission concludes that Mr. Ameziane’s indefinite detention without charge, for the principal purpose of continuing interrogation and, subsequently, for no purpose at all and due solely to the failure of the State to ensure his expeditious transfer to a third country, constitutes cruel and inhuman treatment and a violation of Articles I and XXV of the American Declaration, in connection with Article V (right to private and family life).

**d. Considerations relating to solitary confinement and incommunicado detention**

177. It is clear as a matter of settled law that Mr. Ameziane’s prolonged solitary confinement at Guantánamo Bay constitutes cruel and inhuman treatment. The question before the Commission here is whether it additionally constitutes torture, taking into account the severity of suffering inflicted and whether it was inflicted with a purpose.

178. The Commission considers that Mr. Ameziane’s extended period of solitary confinement in Camp 6 beginning in April 2007 rises to the level of torture, in view of 1) the conditions of his confinement in a “super-max type prison” or “tomb above ground” (*see also infra* section 5.e); 2) the serious deterioration of his physical and mental health occasioned by his conditions of confinement, including deterioration of his vision, exacerbation of rheumatism in his legs and feet due to cold temperatures and lack of appropriate clothing, and anxiety and depression due to having been “locked away in isolation and forgotten;” 3) the structural interference that this created to communal prayer in order to practice his religion, and to communication with his family and the outside world; 4) the prolonged nature of the detention (well over 30 days) without any judicial oversight; and 5) the complete uncertainty about how long this situation would persist, and consequent profound anxiety and fear that it might last indefinitely. Additionally, the Commission takes into account the allegation—which cannot be conclusively proven or denied due to lack of information from the State—that Mr. Ameziane may have been transferred to solitary confinement in retaliation (as punishment) for meeting with his lawyers and litigating his *habeas corpus* case.

179. The Commission additionally considers that Mr. Ameziane’s solitary confinement as punishment for his participation in the 2013 hunger strike, itself a product of the desperation produced by indefinite detention among the remaining detainees, plainly constitutes torture. This is because it inflicted severe suffering with the purpose of punishing Mr. Ameziane. He testified that “at that point I had really lost all hope and wanted to die. I was finished. [...] I lost 60 lbs., my nose bled and my skin deteriorated into rashes and scabs,” and he could not bear to meet with his lawyers in person. This finding is underlined by the fact that he was illegally detained during this time and should not have been in Guantánamo at all.

180. Likewise, Mr. Ameziane’s incommunicado detention from January 2002 to June 2004 constitutes cruel and inhuman treatment according to settled inter-American standards. Moreover, the fact of being held incommunicado during this time—a policy decision by the President, who believed that no court could properly exercise jurisdiction over the detainees—abetted the other inhumane treatment and torture inflicted on Mr. Ameziane as it prevented any court from intervening to vindicate his rights.

181. For these reasons, the Commission concludes that Mr. Ameziane’s solitary confinement in Camp 6 in or about 2007 and in retaliation for his participation in the 2013 hunger strike constitute torture, and his incommunicado detention from 2002 to 2005 constitutes cruel and inhuman treatment, in violation of Articles I and XXV of the American Declaration.

**e. Violations related to Mr. Ameziane’s conditions of detention and specific implications regarding the right to food**

182. The Commission has previously considered that the conditions of confinement at Guantánamo constitute a violation of the right to humane treatment.<sup>316</sup> In this section, the Commission will analyze the particular conditions to which Mr. Ameziane was exposed. In this regard, the Commission notes that Mr. Ameziane provided detailed allegations as to his conditions of detention at Camp X-Ray, and while in solitary confinement; he did not provide detailed information regarding his conditions in other camps or at other times.

183. The Commission finds that the conditions at Camp X-Ray, where detainees were initially held upon arrival in Guantánamo, plainly violated minimum standards of humane treatment for detainees and constituted cruel and inhuman treatment. Mr. Ameziane stated that he was held in an outdoor cage “like a dog kennel,” without appropriate clothing or blankets for exposure to the elements, and with only “a bucket for water and a bucket for human waste.” The Commission additionally finds that these conditions of exposition to the elements, unhygienic conditions, lack of sanitary facilities, exposure to extremes of temperature, denial of privacy, and restriction of sleep and food, were conditions calculated, in conjunction with the other mistreatment inflicted on Mr. Ameziane and his fellow detainees during this time, to cause severe suffering for the purposes of interrogation. Taken together with this broader context of mistreatment, then, Mr. Ameziane’s experience in Camp X-Ray is properly described as torture.

184. The Commission finds that Mr. Ameziane’s conditions of detention in the other camps where he was held in solitary confinement until 2009 also violated minimum standards of humane treatment. In this regard, petitioners stated that the only staple items that prisoners in solitary confinement are permitted in their cells “are a thin mat on which to sleep, a pair of pants, a shirt, and a pair of flip flops. All other items – things like a toothbrush, toothpaste, a Styrofoam cup, and a towel – are considered “comfort items” and can be taken away for any infraction.” The Commission finds that these conditions of extreme deprivation regarding basic needs and hygiene, manipulation of and exposure to temperature extremes, denial of privacy, lack of medical care, and confinement in small, closed cells, plainly rise to the level of cruel and inhuman treatment. The Commission recalls that these conditions of confinement cannot be separated from the other torture to which Mr. Ameziane was being subjected concurrently (mistreatment for the purposes of interrogation and solitary confinement) and, taken together, Mr. Ameziane’s experience during these periods is properly described as torture.

185. Furthermore, the Commission considers that the verification of allegations of periods of restriction of food or lack of access to adequate food regarding the detention of Mr. Ameziane, either as punishment, discrimination or tactic of interrogation, directly conflict with the State’s duty not to take any measure that results in preventing the access to food as part of the rights protected by Article XI of the American Declaration. In cases where an individual or group is unable to enjoy the right to adequate food for reasons beyond their control, such as when they are deprived of liberty under State custody, this obligation is stricter and States, as guarantors, have a direct and positive obligation to supervise and provide adequate food in order to secure such a right and a dignified existence.

186. For the foregoing reasons, the Commission concludes that Mr. Ameziane’s conditions of detention in Camp X-Ray and in solitary confinement constitute cruel and inhuman treatment—within a wider context during those period of mistreatment rising to the level of torture—, in violation of Articles I and XXV of the American Declaration. Further, the deprivation of food under State custody in the aforementioned context amounts itself to a breach of the right to food contained in Article XI of the American Declaration.

**f. Religious abuse and discrimination against Mr. Ameziane**

187. Mr. Ameziane described a situation of near-constant religious abuse, discrimination, insults, and interferences with his religious practice, at least until 2009, as well as structural interferences with his ability to practice his religion while in U.S. custody. Likewise, he alleged that confinement at Guantánamo itself

<sup>316</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 136.

was a form of religious discrimination, as all of the nearly 800 men and boys held there over the years were Muslim. The State, for its part, alleged, in general terms, that U.S. personnel make “every effort to accommodate the religious and cultural practices of detainees,” and that official policy requires that the Qu’ran be treated with respect.

188. At Kandahar airbase in Afghanistan, Mr. Ameziane described the use of dogs to create terror “because they thought that we as Muslims especially did not like dogs,” and routine desecration of the Qur’an by the guards. This situation became so extreme that the prisoners eventually decided to return their Qur’ans to camp authorities to prevent further abuse, but the authorities refused to take them back. Throughout his time at Guantánamo, Mr. Ameziane described consistent demeaning and harassing treatment of detainees, including a guard “howling like a dog” in imitation of the call to prayer; retaliation by guards for questioning demeaning treatment, routine disruption of and abuse during his daily prayers, and witnessing the shaving of other prisoners and desecration of their Qu’rans.

189. Moreover, he alleged that the conditions of solitary confinement in which he lived during years of his time at Guantánamo created a structural interference with his religious practice, as he was unable to pray communally as his religion requires.

190. The Commission considers that this pattern and practice of religious harassment and abuse by U.S. authorities, and structural interferences with his religious practice—in the context of systematic cruel and inhuman treatment and torture, as discussed throughout this section—additionally constitute degrading treatment, as it was perpetrated “for the purpose of humiliating and degrading the victim and breaking his [or her] physical and moral resistance,” exacerbated by Mr. Ameziane’s vulnerability as a person who was unlawfully detained, his status as a foreigner, and as a Muslim in Guantánamo. Likewise, the Commission finds that the pervasive, severe nature of this conduct indicates that it constituted purposeful religious discrimination, which the State has not attempted to justify in terms of its objectivity, reasonableness, or proportionality, throughout this litigation.

191. For the foregoing reasons, the Commission concludes that the religious harassment and abuse that Mr. Ameziane experienced in U.S. custody constitutes degrading treatment and discrimination, much of it perpetrated for the purposes of interrogation or punishment, within a broader context of mistreatment in U.S. custody rising to the level of torture. This, in violation of Articles I, II and XXV of the American Declaration, in conjunction with the right to religious freedom and worship as established in Article III of the American Declaration.

**g. Violations of Mr. Ameziane’s right to private and family life**

192. Mr. Ameziane indicated that he experienced a number of interferences with his ability to communicate with his family, his lawyers, and the outside world in general while in detention. Among others, he indicated that letters to and from his family in Algeria could take months or years to arrive at their destination; that for the first several years of his detention, his family was unaware that he was in Guantánamo; that while detained, Mr. Ameziane’s father died, his brothers and sisters married and had children, and he was unable to effectively participate in these important moments of family life; that his family was never able to visit him; and that in general, his meaningful contact with the world (including other visitors, such as his lawyers, and other detainees at Guantánamo) was severely disrupted throughout his time in detention.

193. The Commission finds that the State plainly failed to ensure Mr. Ameziane’s right to private and family life, as it failed to create the conditions necessary to enable meaningful contact between him and his family members, and in particular, that government policy at Guantánamo prevented communication from taking place “on a sufficiently regular basis under secure conditions that respect their dignity,” to the serious detriment of Mr. Ameziane’s and his family’s mental and emotional well-being.

194. The Commission concludes that the severe disruption of Mr. Ameziane’s relationship with his family and ability to maintain communication with them during his nearly twelve years of arbitrary detention constitute a violation of Articles V and VI of the American Declaration.

#### **h. Violations of Mr. Ameziane’s rights related to inadequate or improper medical care**

195. Mr. Ameziane indicated that he has developed a number of physical and psychological ailments as a result of his conditions of detention and inhumane treatment in Guantánamo, including a deterioration in his vision related to his years in solitary confinement, rheumatism in his legs and feet, the extreme physical and mental suffering he experienced as a result of his participation in the 2013 hunger strike, and post-traumatic stress disorder and depression, all aggravated by lack of adequate and timely medical care. The State alleged, in general terms, that detainees at Guantánamo receive “timely, compassionate, quality healthcare.” It made no mention of or response to Mr. Ameziane’s particular claims regarding access to adequate health care.

196. The Commission recalls that the State’s obligation “to respect [the] physical integrity [of persons deprived of liberty], not to use cruel or inhuman treatment, and to respect the inherent dignity of the human person, includes guaranteeing access to proper medical care.” In this case, the information available to the Commission indicates that the medical treatment received by Mr. Ameziane, such as it was, was not timely, impartial, effective, or respectful. In general, Mr. Ameziane related that the medical care he received was dismissive, cursory, and failed to appropriately address the health problems he was experiencing. He made no mention of health care for his depression and symptoms of post-traumatic stress disorder occasioned by his years of torture, interrogation, and isolation. Given the length of Mr. Ameziane’s detention, the torture to which he was subjected throughout his time in detention and the fact that most or all of the health problems he described are presumptively the result of direct action by State agents or developed under their custody, the Commission considers that this situation amounts to a *per se* violation of the right to humane treatment and the right to health.

197. The Commission finds that the State not only failed to guarantee Mr. Ameziane access to proper and timely healthcare, but that Mr. Ameziane’s treatment by healthcare professionals at Guantánamo was at times abusive and otherwise violated medical ethics. For example, he related going into convulsions in his cell and being left for hours on the floor before being taken to the infirmary; once there, he was administered an injection by a soldier, in the presence of an attending doctor, who was apparently untrained to do so and caused blood spurt across the table, at which the attending staff laughed.

198. The Commission additionally considers that the State’s failure to provide independent medical professionals to treat Guantánamo Bay detainees—particularly in light of the serious allegations regarding the complicity or participation of medical personnel in interrogations, and the general lack of medical confidentiality in Guantánamo—constitutes an autonomous violation of the right to the preservation of health and to well-being of Mr. Ameziane, as a person deprived of liberty under State custody, as it created a serious, independent obstacle to his ability to ever receive adequate medical care.

199. In this regard, Mr. Ameziane also related to the Commission facts constituting a grave violation of medical ethics: the conditioning of the receipt of medical care on cooperation with interrogators. In particular, he related that at one point in his detention, he was required to request socks—a minimal measure to ameliorate his rheumatism—from his interrogator, rather than from his doctor.

200. In sum, the Commission considers that the facts related by Mr. Ameziane relating to his conditions of detention, treatment by Guantánamo authorities, and medical care received or not received, effectively substantiate that: “(i) the conditions of confinement [at Guantánamo] have had devastating effects on the mental health of the detainees, (ii) the provision of health care has been conditioned on cooperation with interrogators; (iii) health care has been denied, unreasonably delayed, and inadequate; (iv) detainees have been subjected to non-consensual treatment, including drugging and force-feeding; and (v) health professionals systematically violate professional ethical standards, precluding the provision of quality health care for detainees.”<sup>317</sup>

<sup>317</sup> U.N. Special Mandate Holders’ Report, U.N. Doc. E/CN.4/2006/120 (2006), para. 70.

201. The Commission considers that the above, in addition to constituting a clear violation of Articles I and XXV of the American Declaration, additionally constitutes a violation of Article XI, the right to the preservation of health and well-being. The Commission recalls that it is well-established that the State is responsible to provide appropriate medical care to individuals deprived of liberty, in compliance with its obligations as guarantor of their rights and in order to ensure that deprivation is not compounded by “illness and physical and mental distress,” which would have the effect of constituting a *de facto* additional punishment. This duty, of course, “is all the greater where a prisoner’s injuries or health concerns are the direct result of action by the authorities.”

202. In the present case, the State was obligated to ensure that Mr. Ameziane’s arbitrary detention was not compounded by additional mental and physical suffering, which it failed to do both by torturing him and subjecting him to inhuman detention conditions, and by failing to provide him with appropriate medical care for the injuries and other health problems he developed as a consequence of his detention and torture. While the Commission recognizes, according to international standards, that the right to the highest attainable standard of health is a right to be progressively realized, in accordance with available resources, this right also entails immediate obligations that are indisputable in the case of persons deprived of liberty. The Commission thus considers that the violation of that standard is particularly evident in this case as the entirety of Mr. Ameziane’s health problems discussed in this case are directly attributable to the State and there is no information before the Commission indicating that Mr. Ameziane received appropriate medical care, either physical or mental, for any of his medical conditions at any point. Finally, the Commission notes that the lack of appropriate medical care in this case operated as a *de facto* additional punishment of Mr. Ameziane, a violation of his rights that is aggravated by the fact that Mr. Ameziane was never shown to be legally detained or charged with any crime whatsoever.

203. Finally, the Commission notes that the failure to ever determine that Mr. Ameziane was a victim of torture at the domestic level is attributable not only to the lack of investigation of the facts, but also to a lack of appropriate medical evaluation and treatment. In this regard, this failure by the State is also linked to violations of its duty of due diligence in investigations (*see infra* section D.4).

204. For the foregoing reasons, the Commission concludes that the denial of adequate medical care to Mr. Ameziane constitutes a *per se* violation of the right to humane treatment and health. This conclusion is strengthened, given that the denial was intentional, on occasions abusive, and had the effect of causing the deterioration of his health and gravely exacerbating the effects of Mr. Ameziane’s overall torture and cruel and inhumane treatment in U.S. custody, in violation of Articles I, XI, and XXV of the American Declaration.

**i. Conclusions regarding torture of Mr. Ameziane at Guantánamo Bay**

205. In light of the foregoing considerations and conclusions, the Commission finds the existence of an officially-sanctioned regime of cruel and inhuman treatment for the purposes of interrogation at Guantánamo that was applied to Mr. Ameziane, during which he was subjected to a number of methods of physical and psychological torture, including at least: blunt trauma (beating, punching, kicking, slapping); asphyxiation via waterboarding (drowning); chemical exposure to pepper spray, accentuated with water; humiliation and verbal abuse, death threats, threats of further torture, and threats of return to Algeria to be tortured; use of dogs to create terror; religious abuse (taunting, harassment, particular and structural interferences with his ability to practice religion, witnessing violation of taboos such as desecration of the Qu’ran and forced shaving); purposeful inhumane conditions of detention, including small, confined cells, solitary confinement, unhygienic conditions, lack of access to sanitary facilities, exposure to extremes of temperature, denial of privacy; persistent interference with eating and sleeping, lack of recreational and other activities; and deprivation of normal sensory stimuli during extended periods (years), including sound, light, sense of time, loss of contact with the outside world and of social contacts within the prison; and denial of effective medical care to address the consequences and aftermath of more than a decade of exposure to all of the above.

206. The Commission considers that the magnitude of the conduct and conditions inflicted on Mr. Ameziane, over the course of nearly 12 years of arbitrary detention, is sufficient to qualify his treatment at Guantánamo, in its totality, as torture, in violation of Articles I and XXV of the American Declaration.

**D. Right to freedom of expression, assembly, and petition (Arts. IV, XXI and XXIV)<sup>318</sup>**

207. The IACHR has previously stated that participation in protests and strikes may constitute, in addition to a form of expression, a form of exercising the right of petition to competent authorities, whether in the public or private interest, and of obtaining a swift resolution of the petition, in the terms of articles IV, XXI and XXIV of the American Declaration. Moreover, the Commission reiterates that some types of speech receive special protection in inter-American jurisprudence because of their importance to the exercise of other human rights, or to the consolidation, proper functioning and preservation of democracy, including speech that is an element of the identity or personal dignity of the person expressing him or herself.<sup>319</sup>

208. In this regard, the fact that a person is deprived of liberty does not lead to the conclusion that he or she loses the possibility to exercise his or her rights to expression and petition.<sup>320</sup> Any restriction of or decision regarding a protest should be established by law and in the service of an overriding interest;<sup>321</sup> in this case, the application of such an extreme punishment of solitary confinement to those detainees exercising their right of petition, clearly does not comply with any of these requirements.

209. Various forms of expression and petition are conveyed through what is known as social protest. In this case, Guantánamo detainees joined in a hunger strike to petition the authorities for an end to their arbitrary detention. The Commission recalls that this hunger strike took place in a context in which it had become clear to detainees that the prison would not be closed expeditiously; transfers had long since ceased; detainees' cases were not advancing in the federal courts, and detainees perceived that "they were facing a dead end." The strike constituted one of the few, if not only, available possibilities for the detainees to effectively express themselves and call for the closure of the prison; however, "[r]ather than address [...] and try to alleviate [the detainees'] concerns, the military locked everyone back in" solitary confinement. The Commission finds that retaliation for joining a collective hunger strike violates freedom of expression, as well as the right of assembly and petition to the authorities.

210. The Commission thus finds that use of solitary confinement in 2013 as retaliation by the State for participating in a hunger strike, in addition to constituting torture as discussed above, additionally constitutes a violation of Mr. Ameziane's freedom of expression, assembly, and right of petition, as expressed in Articles IV, XXI, and XXIV of the American Declaration.

<sup>318</sup> Article IV states, "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

Article XXI states, "Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature."

Article XXIV states, "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."

<sup>319</sup> IACHR, *Inter-American Legal Framework on Freedom of Expression* (2009), para. 32. See also IACHR, *Second Report on Human Rights Defenders* (2011).

<sup>320</sup> See also IACHR, *Report on Persons Deprived of Liberty* (2011), para. 52 (citing I/A Ct. H.R., *Case of the Juvenile Reeducation Institute*, paras. 152-153, stating: "the State [...] must [...] ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.")

<sup>321</sup> See IACHR, *Inter-American Legal Framework on Freedom of Expression* (2009), paras. 69-79.

## E. Right to due process of law (Art. XXVI)<sup>322</sup> and to an effective legal remedy (Art. XVIII)<sup>323</sup>

211. Inter-American jurisprudence on access to justice emphasizes that it is not only a fundamental human right but also an essential pre-requisite for the protection and promotion of all other rights. For this reason, it is a fundamental principle that the formal existence of a remedy in law is not sufficient;<sup>324</sup> States must further ensure that remedies are adequate and effective in practice to establish whether a human rights violation has occurred, and to provide redress.<sup>325</sup> An effective remedy is one that is capable of producing the result for which it was designed,<sup>326</sup> has a useful effect (*effet utile*), and is not illusory.<sup>327</sup>

212. As addressed above, under inter-American law no person may 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. Furthermore, the right to judicial protection is not subject to suspension, including in situations of armed conflict or a state of emergency, when it is necessary to protect such interests as life or personal integrity.<sup>328</sup> In this sense, the Commission has recognized that the writ of *habeas corpus* is an essential guarantor of the right to be free from arbitrary detention,<sup>329</sup> as well as a judicial remedy that is essential for the protection of non-derogable rights and serves to preserve legality in a democratic society.<sup>330</sup>

213. The IACHR has previously stated that the U.S. has the international legal obligation to afford all persons detained under its jurisdiction, including those held in Guantánamo Bay, a proper judicial proceeding to challenge the legality of their detention. It concluded in this regard that the non-existence of effective domestic remedies places persons detained at Guantanamo in a defenseless position.<sup>331</sup>

214. The Commission has considered that two basic remedies must be available for the protection of the fundamental rights of persons deprived of liberty.<sup>332</sup> First, a remedy to safeguard the right not to be subjected to unlawful or arbitrary detention; second, a prompt, suitable and effective remedy to guarantee that conditions of detention do not violate the physical integrity of the detainees. The IACHR's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, state 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>333</sup> This right moreover requires the State to adopt the necessary measures to guarantee that inmates will not be subjected to reprisals or retaliation for exercising these rights.<sup>334</sup>

<sup>322</sup> Art. XXVI states: "Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

<sup>323</sup> Art. XVIII states: "Every person may resort to the courts to ensure respect for his legal rights. 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."

<sup>324</sup> See, among others, I/A Ct. H.R. *Hilaire et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, para. 145; *Case of 19 Merchants v. Colombia*, Judgment of July 5, 2004, para. 191; *Serrano Cruz Sisters v. El Salvador*, Judgment of Mar. 1, 2005, para. 69.

<sup>325</sup> See, e.g., IACHR, *Toward the Closure of Guantánamo* (2015), para. 153; see also I/A Ct. H.R. *Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 109; IACHR, *Report on Persons Deprived of Liberty* (2011), para. 246 (citing I/A Ct. H.R., *Velásquez Rodríguez V. Honduras*, Judgment of July 29, 1988, para. 66; *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 Am. Conv. H.R.). Advisory Opinion OC-9/87 of Oct. 6, 1987, para. 24).

<sup>326</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 246 (citing I/A Ct. H.R., *Velásquez Rodríguez V. Honduras*, para. 66).

<sup>327</sup> See, for example, I/A Ct. H.R. *Case of the Constitutional Tribunal v. Peru*, Judgment of Jan. 31, 2001, paras. 73, 75; *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of Aug. 5, 2008, para. 138.

<sup>328</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 158.

<sup>329</sup> See also IACHR, PM 259-02 (Oct. 28, 2005), at 8.

<sup>330</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 189 (citing, *mutatis mutandi*, I/A Ct. H.R., *Habeas corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) Am. Convention H.R.). Advisory Opinion OC-8/87 of Jan. 30, 1987, para. 42).

<sup>331</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 189 (citing, 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, Dec. 14, 2009, paras. 70 and 80).

<sup>332</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 244.

<sup>333</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 271 (citing IACHR, *Principles and Best Practices* (2008) Principle V).

<sup>334</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 243 (citing Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 33.4)).

215. Similarly, the Commission has emphasized the importance of prompt and effective judicial oversight of detentions, in order to protect the well-being of detainees while they are wholly within the control of the State and therefore particularly vulnerable to abuses of authority.<sup>335</sup> States are also required to investigate, prosecute, and punish serious violations of human rights—including torture—an issue that will be addressed at greater length below.

### 1. Lack of an effective legal remedy to challenge Mr. Ameziane’s detention

216. As addressed above in section B of this chapter, Mr. Ameziane’s detention at Guantánamo Bay was arbitrary by any measure of international human rights or humanitarian law. This fact is intimately related to Mr. Ameziane’s lack of effective access, throughout his time in detention, to an effective legal remedy to challenge and determine the legality of his detention. This is effectively summarized by the fact that, during nearly twelve years of detention, he never received a hearing on the merits of his *habeas corpus* petition, making manifest the ineffectiveness of the remedy—which should be decided expeditiously—as applied in this case.

217. Moreover, as determined in the findings of fact, the U.S. acted intentionally throughout this time to prevent Mr. Ameziane from receiving a decision on the merits of the legality of his detention, by holding him *incommunicado*, by creating purported substitute review processes that did not adequately guarantee due process, by officially denying his legal right to seek *habeas corpus* via Executive Order and statutory law, and through litigation tactics (concretely, the years-long stay of his case).

218. In particular, the U.S. held Mr. Ameziane virtually *incommunicado* from January 2002 to June 2004 at Kandahar airbase and Guantánamo Bay—in a context in which the policy of the U.S. government at the time was to deny that any regime of law, domestic, international, or foreign, applied to Mr. Ameziane’s detention, and to deny him access to any legal authority to determine the legality of his detention. Following the Supreme Court’s decision in *Rasul v. Bush* in 2004 granting access to *habeas corpus* for Guantánamo detainees, the State acted to deny him meaningful review of his detention first, by creating “Combatant Status Review Tribunals” and “Administrative Review Boards” that failed to comport with basic guarantees of due process and failed to determine his status under international law, and second, by passing the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, which purported to strip the federal courts of jurisdiction to hear his *habeas* case. Following the Supreme Court’s reaffirmation in *Boumediene v. Bush* in June 2008 that the federal courts have the power to hear *habeas* cases from Guantánamo, the litigation of Mr. Ameziane’s case resumed.

219. However, from October 2008 on,<sup>336</sup> the U.S. government maintained the position in federal court that Mr. Ameziane was not properly detained under domestic law—for which reason, it claimed, the litigation of his *habeas corpus* claim was unnecessary. The government secured an indefinite stay of Mr. Ameziane’s *habeas* case in May 2009, and an order definitively preventing him from speaking publicly about his clearance for transfer in January 2010. Having effectively blocked Mr. Ameziane from obtaining his liberty either by litigating his case or by securing third-country resettlement, the State remained obligated to take the necessary steps to release Mr. Ameziane from its custody as soon as possible. However, the Executive branch did not, as far as the facts available to the Commission indicate, ever take any concrete action to do so: the Legislature acted during this time to create procedural obstacles to Mr. Ameziane’s release; and over five years, the courts failed to effectively supervise the progress of the Executive in releasing Mr. Ameziane. His *habeas* case was ultimately dismissed in 2014 as moot, because he was no longer in detention.

220. Throughout the litigation associated with his detention, moreover, a series of defects in due process guarantees are evident. Most prominently, Mr. Ameziane’s right to counsel was explicitly denied during his *incommunicado* detention. Mr. Ameziane additionally alleged deliberate interference in the lawyer-client relationship by Guantánamo guards during his years in detention, as well as regular interrogation about what he had communicated to his lawyers. He related that “Sometimes they would say, for example, ‘You have a

<sup>335</sup> IACHR, *Report on Terrorism and Human Rights* (2002), paras. 121-122 (citations omitted).

<sup>336</sup> With the exception of early January 2009, prior to the change of administration, when the government abruptly revoked his clearance for transfer in an apparent move to be able to defend Mr. Ameziane’s continuing detention on the merits, *see supra* footnote 134, and the period from January to May 2009 while the incoming Obama administration reviewed and re-affirmed his clearance for transfer.

reservation today.’ Reservation to us meant interrogation, so we would refuse, only to find out later that it was supposed to be a meeting with our lawyers.” He further alleged that his transfer to solitary confinement in Camp 6 was possible retaliation against him for litigating his *habeas* case.

221. Additionally, Mr. Ameziane’s legal and non-legal materials were confiscated by U.S. authorities during a raid on his cell during the April 2013 hunger strike, raising serious concerns about respect for the confidentiality of those documents and respect for the lawyer-client privilege. Mr. Ameziane was subjected to CSRT and ARB review proceedings that lacked basic guarantees, including the right to counsel and to review evidence against him. Finally, his right to a decision on the merits of his case within a reasonable time period was evidently denied because his case was never decided on the merits, but rather dismissed as moot nine years after it was filed.

222. In sum, from 2002 to 2008, the State sought to deny the existence of Mr. Ameziane’s legal right to an effective judicial remedy to challenge his detention through Executive proclamation, legislation, and litigation; from 2008 to 2013, the State admitted that Mr. Ameziane was not legally detained, but failed to take any action to free him, until finally returning him to his home country where he feared torture. Throughout his detention, the State created obstacles to the vindication of this right so extreme that Mr. Ameziane was ultimately prevented from ever receiving a judicial decision on the merits as to the legality of his detention, including serious interferences with his due process rights. For these reasons, the Commission concludes that the United States is responsible for the violation of the right to due process and to an effective remedy, established in articles XXVI and XVIII of the American Declaration, against Djamel Ameziane.

## **2. Lack of an effective remedy to challenge conditions of confinement at Guantánamo**

223. Prompt and effective judicial oversight of detentions is essential to protect the well-being of detainees while they are wholly within the control of the State and therefore particularly vulnerable to abuses of authority. The IACHR has previously found that prisoners at Guantanamo have been prevented from litigating any aspect of the conditions of their detention before federal courts<sup>337</sup>—at least until 2014, after Mr. Ameziane’s forced transfer from Guantánamo—and concluded that the prohibition on litigating any aspect of the conditions of detention at Guantánamo before federal courts “constitutes *per se* a violation of one of [the detainees’] most fundamental human rights,”<sup>338</sup> the right to an effective remedy.

224. The Commission reaffirms this finding here with respect to Mr. Ameziane, and finds that the official denial of the existence of any legal remedy to challenge his conditions of detention and inhumane treatment in detention constitutes both a violation of the right to due process and to an effective remedy, established in articles XXVI and XVIII of the American Declaration, as well as a root cause of virtually all of the violations described above in section C of this chapter regarding torture, cruel, inhuman, and degrading treatment, and inhumane conditions of detention, as it denied him any effective opportunity to vindicate those rights and challenge, prevent, or halt those violations.

## **3. Lack of effective civil remedies to receive reparations for torture, arbitrary detention, and other claims**

225. It is a basic principle of inter-American human rights law that in order to find that an effective remedy for a human rights violation exists, the remedy must also be sufficient to obtain reparation for the harm caused. In this respect, it is apparent that no effective remedy exists in domestic law to vindicate any of the violations declared in this report, because to date, 16 years after his initial detention, Mr. Ameziane has been unable to access any such remedy, and every indication of domestic law is that no such remedy is meant to exist.

226. In particular, as the Commission found in the section on proven facts, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 contain broad and retroactive language stripping the

<sup>337</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 136.

<sup>338</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 270.

federal courts of jurisdiction to hear “any other action against the [U.S.] or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of [a non-U.S. citizen]” determined to be an “unlawful enemy combatant,” and creating a complete defense to civil or criminal actions against U.S. agents for harms relating to “detention and interrogation of [non-U.S. citizens].” These provisions, particularly taken together, appear to foreclose the possibility of any effective remedy that could result in reparations for former Guantánamo detainees, by purporting to strip the federal courts of jurisdiction over any such claims and by creating a complete defense for the State agents involved. And indeed, the Commission has not received to date, from any party, any indication that an effective domestic remedy to receive reparation for the human rights violations perpetrated against Mr. Ameziane in State custody exists or can be reasonably foreseen to exist.

227. The Commission finds that the State has acted intentionally to deny via legislation any potential effective remedy for the multiple grave human rights violations perpetrated against Mr. Ameziane in U.S. custody. The Commission concludes that the United States is responsible for the violation of the right to due process and to an effective remedy, established in articles XXVI and XVIII of the American Declaration, against Djamel Ameziane.

**4. Lack of effective remedies to investigate and punish torture and other grave human rights violations**

**a. The obligation to pursue criminal investigations, prosecute and, as appropriate, punish human rights violations, including torture**

228. For more than a decade, the IACHR has called for the U.S. to “thoroughly and impartially investigate, prosecute, and punish all allegations of torture and other ill-treatment of detainees.”<sup>339</sup> The jurisprudence of the inter-American system is clear that, once there is a complaint or there are grounds to believe that an act of torture has been committed, the authorities are obligated to initiate, immediately and *ex officio*, an efficient, impartial and effective investigation directed toward the determination of the truth and the eventual prosecution and, as applicable, punishment of those responsible.<sup>340</sup>

229. An effective investigation should be conducted within a reasonable time, which should be ensured by the intervening judicial bodies.<sup>341</sup> Judicial authorities are also responsible to ensure the rights of the detainee, which involves obtaining and securing any evidence that may prove the alleged acts of torture. Similarly, the State should ensure the independence of the medical and health care personnel so they are able to freely perform the required medical evaluations, and adhere to established standards of medical ethics.<sup>342</sup>

230. In cases of persons deprived of liberty, the IACHR has set a higher standard regarding the State’s duty to investigate because detainees are within the exclusive control of State agents, and it is the State that controls all the probative means to clarify the facts. Consequently, any allegation regarding difficulty or impossibility of establishing the identity of those responsible should be strictly and rigorously scrutinized.<sup>343</sup>

231. The IACHR has documented the use of torture for purposes of interrogation and criminal investigation as a widespread practice in the Americas,<sup>344</sup> considering that this situation is due to, *inter alia*, a culture of violence in State security forces and institutionalized acceptance that detainee abuse is valid and

<sup>339</sup> IACHR, PM 259-02 (extension granted October 28, 2005), para. 8

<sup>340</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 118 (citing IACHR, Case No. 12.519, *García Lucero et al.*, Chile, Submission before I/A Ct. H.R. (Sept. 20, 2011), para. 76); see also IACHR, *Report on Persons Deprived of Liberty* (2011), para. 345; I/A Ct. H. R. *Tibi V. Ecuador*. Judgment of Sept. 7, 2004, para. 159; I/A Ct. H.R. *Vélez Loor V. Panama*. Judgment of Nov. 23, 2010, para. 240; *Bueno-Alves V. Argentina*. Judgment of May 11, 2007, para. 108; *García-Prieto et al. V. El Salvador*. Judgment of Nov. 20, 2007, para. 101.

<sup>341</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 345 (citing I/A Ct. H.R. *Bulacio v. Argentina*. Judgment of Sept. 18, 2003, para. 114).

<sup>342</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 346 (citing I/A Ct. H.R. *Cabrera-García and Montiel-Flores V. Mexico*. Judgment of Nov. 26, 2010, para. 135. The Court cited paras. 56, 60, 65, 66 and 76 of the Istanbul Protocol).

<sup>343</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 347 (citing IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, Nov. 18, 1997, para. 394); see also IACHR, Report No. 172/10, Case 12.651, Merits, César Alberto Mendoza *et al.*, Argentina, Nov. 2, 2010, para. 311.

<sup>344</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 351-364.

appropriate; impunity (the overall failure to investigate, pursue, arrest, prosecute, and convict State agents who commit acts of torture); and the practice of granting probative value to confessions and information obtained by means of torture or CIDT.<sup>345</sup> In this respect, the Commission has considered that an institutional commitment to investigate complaints of torture and abuse, and to prosecute and punish those responsible, requires authorities to send a consistent, official message that such behavior shall be repudiated via administrative, disciplinary and criminal proceedings.<sup>346</sup>

232. Furthermore, the prohibition on considering as valid evidence obtained by means of torture is a fundamental measure to prevent the use of torture for purposes of criminal investigation that must be respected.<sup>347</sup> In order for this exclusionary rule to truly function as a judicial protection of the right to due process and as a mechanism to prevent torture, it is essential that it be implemented in such a way that the burden of proving that the confession or statement was made voluntarily is on the competent authorities, and not the victims.<sup>348</sup>

233. Resorting to torture and cruel, inhuman and degrading treatment as a method of investigating crimes, in addition to concretely constituting a violation of individuals' right to humane treatment and to a fair trial, is in the final analysis an assault on the rule of law itself and the very essence of any democratic society in which, by definition, the rights of all persons must be respected.<sup>349</sup>

**b. The impermissibility of amnesty laws under Inter-American jurisprudence and the right to truth**

234. The Inter-American Commission and Court have repeatedly held that amnesty laws are impermissible in cases of serious human rights violations.<sup>350</sup> The IACHR has maintained that the enforcement of amnesty laws that restrict access to justice in cases of serious human rights violations has two adverse effects. First, it renders ineffective the States' obligation to respect and observe the rights and freedoms recognized in the American Declaration and their obligation to ensure the free and full exercise of those rights and freedoms to all persons subject to their jurisdiction, without any form of discrimination. Second, it hampers access to information concerning the facts and circumstances surrounding the violation of a fundamental right<sup>351</sup> and prevents the exercise of the legal remedies available under domestic law.<sup>352</sup>

<sup>345</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 364 (citations omitted).

<sup>346</sup> IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VI, para. 20; U.N. CAT/OP/MEX/1, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico*, May 27, 2009, para. 62.

<sup>347</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 364 (citing, *inter alia*, U.N. Convention Against Torture (Article 15), Inter-American Convention to Prevent and Punish Torture (Article 10), International Covenant on Civil and Political Rights (Article 14.3); Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle V); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (Principle 21.1); UN Declaration on the Protection of All Persons from Being Subject to Torture and Other [CIDT] (Article 12)); *see also* I/A Court H.R., *Cabrera-García and Montiel-Flores V. Mexico*, Judgment of Nov. 26, 2010, paras. 166-167; U.N., Hum. Rts. Comm., General Comment No. 21: Humane treatment of persons deprived of liberty (Art. 10), para. 6.

<sup>348</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 364 (citing I/A Ct. H.R., *Cabrera-García and Montiel-Flores V. Mexico*, Judgment of Nov. 26, 2010, paras. 136 y 176; U.N., Hum. Rts. Comm., *Consideration of reports submitted by States Parties under Article 40 of the Covenant, Concluding observations: Mexico*, CCPR/C/MEX/CO/5, adopted on May 17, 2010, para. 14).

<sup>349</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 370.

<sup>350</sup> On early decisions regarding the impermissibility of amnesty laws in Argentina and Uruguay, *see* IACHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311; Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992-93) (Argentina); Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375; Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992-93) (Uruguay); I/A Ct. H.R. *Certain Attributes of the [IACHR]*, Advisory Opinion OC-13/93 of July 16, 1993, paras 30, 37, 57(1).

Subsequent decisions by the Inter-American Court include: I/A Ct. H.R. *Barríos Altos v. Peru*, Merits, Judgment of Mar. 14 2001; *La Cantuta v. Peru*, Judgment of Nov. 29, 2006; *Almonacid Arellano and others v. Chile*, Judgment of Sept. 26, 2006; *Gelman v. Uruguay*, Judgment of Feb. 24, 2011; *Gomes Lund et al. ("Guerilha do Araguaia") v. Brazil*, Judgment of Nov. 24, 2010; *Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of Oct. 25, 2012. *See also* *Gelman* at paras. 195-197 (reviewing jurisprudence of the Inter-American Commission and Court on amnesty laws).

<sup>351</sup> IACHR, *The Right to Truth in the Americas* (2014), para. 22 (citing *Cf.* IACHR, Report No. 1/99, Case 10,480, Lucio Parada Cea et al., El Salvador, Jan. 27, 1999, para. 150; Report No. 136/99, Case 10,488, Ignacio Ellacuría, S.J., et al., El Salvador, Dec. 22, 1999, para. 225).

<sup>352</sup> IACHR, *The Right to Truth in the Americas* (2014), para. 22 (citation omitted).

235. In this regard, the Commission has established that “both [...] amnesty laws and comparable legislative measures that impede or [require] the conclusion of the investigation and trial of State agents who may be responsible for serious violations of the American Convention or the American Declaration violate several provisions of those instruments,”<sup>353</sup> including, *inter alia*, obligations related to due diligence in investigations, due process and the obligation to provide effective remedies, as well as obligations related to the right to truth.

236. The Commission has established that the right to the truth is directly connected to the rights to judicial guarantees and judicial protection, set forth in Articles XVIII and XXIV of the American Declaration, as well as, in some cases, to the right of access to information (Article IV) (where the obligation to guarantee access to information about serious human rights violations available in State facilities and files is concerned). In this regard, the right to the truth has two dimensions. The first dimension is the right of the victims and their family members to know the truth about the events that led to serious violations of human rights, and the right to know the identity of those who played a role in the violations. This means that the right to the truth creates a State obligation to clarify and investigate the facts, as well as prosecute and punish those responsible for serious human rights violations.<sup>354</sup>

237. As a result, not only victims of human rights violations and their family members, but society as a whole, are entitled to this right. The Commission has maintained that society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future.<sup>355</sup>

**c. The Detainee Treatment Act of 2005 and Military Commissions Act of 2006 as impermissible amnesty laws**

238. Here, the Commission must determine whether the provisions of the DTA of 2005 and MCA of 2006 currently codified at 42 U.S.C. § 2000dd-1, as well as § 7(a)(2) of the MCA of 2006, constitute impermissible amnesty laws.

239. The provisions of the DTA and MCA codified at 42 U.S.C. § 2000dd-1 provide an ongoing and retroactive (to September 11, 2001) complete defense to civil and criminal prosecution of State agents engaged in “detention and interrogation of [non-U.S. citizens]” in U.S. operations across the world, including at Guantánamo Bay, and appear to cover, temporally and substantively, the entirety of Mr. Ameziane’s treatment in U.S. custody.

240. In particular, as the Commission found in the chapter on proven facts, the DTA provides that in a civil or criminal action against a U.S. agent engaged in “detention and interrogation of [non-U.S. citizens],” a finding that activities were “officially authorized and determined to be lawful at the time they were conducted” and that the agent “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful” is a complete defense, where it is relevant to weigh “good faith reliance on advice of counsel” in determining “whether a person of ordinary sense and understanding would have known the practices to be unlawful.” Moreover, the MCA of 2006 made this provision retroactive for all civil and criminal actions related to actions occurring between September 11, 2001 and the passage of the DTA on December 30, 2005.

241. The Commission finds that the creation of this complete defense to prosecution for crimes committed in connection with the detention and interrogation of detainees, on the basis that legal guidance in force at the time indicated that certain interrogation techniques amounting to torture were legal, constitutes a significant, not to say insurmountable, barrier to the effective prosecution and punishment of individuals who may be responsible for serious human rights violations and is tantamount to an amnesty law. This is because

<sup>353</sup> IACHR. Report No. 44/00. Case 10.820. Americo Zavala Martinez. Peru. Apr. 13, 2000, para. 68; *see also* IACHR. Report No. 47/00, Case 10.908. Perú, Apr. 13, 2000, para. 76; IACHR. Report No. 55/99, Cases 10.815; 10.905; 10.981; 10.995; 11.042, and 11.136. Perú, Apr. 13, 1999, para. 140.

<sup>354</sup> IACHR. *The Right to Truth in the Americas* (2014), para. 14.

<sup>355</sup> *Id.* at para. 15.

its practical effect is necessarily to frustrate the effective investigation of such crimes by disincentivizing their prosecution, given the low likelihood of success on the merits as defendants may invoke the complete defense that official memoranda at the time stated that such actions were legal. In light of the wide and changing set of official directives issued between 2002 and 2008—some of which the Department of Justice later determined “authoriz[ed] a program of CIA interrogation that many would argue violated the torture statute,” and even “justified acts of outright torture under certain circumstances”<sup>356</sup>—the only crimes that would arguably remain prosecutable under this law would be incidents which exceeded even the exceedingly permissive policy framework at the time, leaving beyond the purview of criminal prosecution with any reasonable prospect of success all other acts that plausibly complied with the prevailing legal and policy directives at the time they were committed.

242. This conclusion is strengthened by reading the above provision alongside § 7(a)(2) of the MCA, which purports to strip the courts of jurisdiction over “any other action against the [U.S.] or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of [a non-U.S. citizen] who is or was detained by the [U.S.] and has been determined by the [U.S.] to have been properly detained as an enemy combatant or is awaiting such determination.” This provision purports on its face to remove any claims against the State or its agents relating to “any aspect” of detainee treatment from the purview of U.S. courts, principally foreclosing the possibility of civil remedies and reparations, but also potentially applying to criminal prosecution for detainee treatment.

243. The Commission likewise considers the available information regarding the absence of any effective prosecution or punishment of State agents who may be responsible for torture at Guantánamo Bay, as well as regarding the dismissal of civil claims by former Guantánamo detainees that have been rejected by the federal courts, in finding that these provisions operate as amnesty laws.

244. The Commission finds that the provisions of the DTA of 2005 and MCA of 2006 currently codified at 42 U.S.C. § 2000dd-1, and § 7(a)(2) of the MCA of 2006, constitute amnesty laws as they purport to prevent the effective prosecution and punishment of State agents who may be responsible for grave human rights violations, including torture, perpetrated against detainees in the framework of the “war on terror.” The Commission concludes, in this regard, that the United States is responsible for the violation of the right to due process and to an effective remedy, established in articles XXVI and XVIII of the American Declaration, as well as the right to truth as emergent from the same, against Djamel Ameziane and society as a whole, to the extent that this law acts to prevent society as a whole from learning the truth about grave human violations perpetrated in U.S. detention programs, including at Guantánamo Bay.

**d. Failure to effectively investigate, prosecute, and punish grave human rights violations, including torture, perpetrated against Mr. Ameziane at Kandahar airbase and Guantánamo Bay**

245. The Commission finds that the State has failed to appropriately investigate, prosecute, and, as appropriate, punish individuals responsible for acts of torture perpetrated against Mr. Ameziane while in State custody. In particular, the Commission has received no indication to date from any party indicating that criminal prosecution has been brought against any person involved in acts of torture or cruel, inhuman and degrading treatment in U.S. custody. Moreover, no party has alleged in this case that any criminal investigation or prosecution has ever been brought regarding Mr. Ameziane’s treatment while in U.S. custody at Kandahar airbase and Guantanamo Bay.

246. The Commission additionally notes that under certain circumstances, acts of torture and cruel, inhuman, or degrading treatment or punishment, such as those committed against Mr. Ameziane, may also constitute international crimes, including war crimes and crimes against humanity.<sup>357</sup> The obligation to

<sup>356</sup> DOJ, 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, at 251-252.

<sup>357</sup> These acts are prohibited by, *inter alia*, Common Article 3 of the Geneva Conventions of 1949, the Charters of the International Criminal Tribunals for the Former Yugoslavia (1993, arts. 2, 5) and Rwanda (1994, arts. 3, 4), and the Rome Statute (1998, arts. 7, 8). Other relevant

investigate, prosecute, and punish such crimes is well established at the international level.<sup>358</sup> The Commission considers that, in light of the seriousness of the torture and other inhumane treatment committed against Mr. Ameziane, as addressed in this report, and indicia that could tend to establish on the one hand, the existence of a context of armed conflict, whether international or non-international in character, and on the other, the existence of an official policy sanctioning torture and the civilian status of Mr. Ameziane and other Guantánamo detainees,<sup>359</sup> as part of its duty of due diligence, the State should additionally develop and appropriately exhaust hypotheses of criminal investigation regarding the possible commission of war crimes and crimes against humanity in this context.

247. In carrying out effective investigations of these crimes committed against Mr. Ameziane, the Commission additionally highlights the relevance of investigating the potential role and eventual responsibility of private military and security personnel and corporations in light of the public reports indicating their presence in several of the contexts in which the facts of this occurred, including interrogations at Guantánamo Bay.<sup>360</sup> In this regard, the IACHR agrees with the Special Rapporteur on Torture that “States cannot absolve themselves from international legal responsibility for acts of torture and other cruel, inhuman or degrading treatment or punishment carried out by private military or security contractors operating on their behalf,”<sup>361</sup> and recalls that, in addition to the absolute prohibition of torture under IHL and international human rights law, if such acts reach the threshold of war crimes or crimes against humanity, restrictions of the duty to investigate are prohibited and perpetrators may also be subject to prosecution under international criminal law.

248. The Commission finds that the State has failed to effectively investigate, prosecute, and punish individuals responsible for grave human rights violations, including torture, perpetrated against Mr. Ameziane in U.S. custody. The Commission concludes, in this regard, that the United States is responsible for the violation of the right to due process and to an effective remedy, established in articles XXVI and XVIII of the American Declaration, against Djamel Ameziane.

#### **F. Right to equality under the law (Art. II)<sup>362</sup>**

249. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized by the Inter-American Court as *jus cogens* norms, “because the whole legal structure of national and international public order rests on it [...] Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.”<sup>363</sup> States are required to ensure that their laws, policies and practices respect these rights; in particular,

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historical antecedents include, *inter alia*, U.N. General Assembly. Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Resolution 95(I), 11 December 1946 (affirming, *inter alia*, Art. 6 of the Nuremberg Charter, defining war crimes and crimes against humanity); Report of the International Law Commission. Part III: Formulation of the Nuremberg Principles. UN. Doc. A/CN.4/34, 1950 (adopting the Nuremberg Principles, including Principles VI(b),(c), including ill treatment and inhumane acts as international crimes).

<sup>358</sup> See, e.g., U.N. General Assembly. Question of the punishment of war criminals and of persons who have committed crimes against humanity. Resolution 2583 (XXIV) Dec. 15, 1969; Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. Resolution 3074 (XXVIII) Dec. 3, 1973 (“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”).

<sup>359</sup> For the Commission, this includes *prima facie* the lack of criminal charges against the majority of detainees and their “cleared for transfer” status during relevant periods, see also *Toward the Closure of Guantánamo*, para. 280 *et seq.*, notwithstanding more specific evidence that could emerge from government records, including CSRT, ARB, and *habeas corpus* proceedings, regarding each detainee that could tend to establish or negate civilian status.

<sup>360</sup> Washington Post, Contractors Are Cited in Abuses at Guantanamo (Jan. 4, 2007), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/03/AR2007010301759.html>. See *supra* para. 24.

<sup>361</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/34/54, 14 February 2017, para. 47.

<sup>362</sup> Article II provides: “All 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.”

<sup>363</sup> See I/A Ct. H.R. *Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 101.

international human rights law not only prohibits policies and practices that are deliberately discriminatory, but also those which have a discriminatory effect, even when discriminatory intent cannot be shown.<sup>364</sup>

250. While not all distinctions in treatment are prohibited, and may be permissible when shown to be reasonable and objective, the test for distinctions based on race, religion, or national origin is particularly strict. The mere allegation and/or existence of a legitimate purpose is not sufficient to justify a distinction based on a suspect category; the measure must also be strictly necessary to attain that purpose, meaning that no other less harmful alternative exists;<sup>365</sup> and proportional, which means the realization of a proper balance in terms of the interest at stake and the benefits and sacrifices involved.

251. International human rights instruments, including the American Declaration and the International Covenant on Civil and Political Rights (ICCPR), may recognize differences in treatment of non-citizens for limited purposes such as entry at borders, nationality, residence, or voting, but 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.<sup>366</sup> In particular, it is relevant to recall that “one of the American Declaration’s objectives [...] was to assure in principle ‘the equal protection of the law to nationals and [non-nationals] alike in respect to the rights set forth.’”<sup>367</sup> The Commission has previously considered in this regard the similar jurisprudence of the U.N. Human Rights Committee, regarding the right of access to and equality before the courts, which cannot be limited based on nationality, and the European Court of Human Rights, which held as discriminatory a U.K. law that permitted indefinite detention of non-U.K. nationals.<sup>368</sup>

252. Furthermore, a variety of human rights monitors have criticized the fact that the implementation of extraordinary counter-terrorism or national security measures since the terrorist attacks of September 11, 2001 “have resulted in myriad violations and abuses of fundamental human rights and principles, including the right to freedom of religion or belief (...) Some States have instituted discriminatory practices that intentionally or unintentionally target individual adherents or groups of persons of a particular faith they perceive to be predisposed to terrorist or other violent acts”.<sup>369</sup> The IACHR emphasizes that all counter-terrorism and national security strategies must respect international human rights norms, including the principle of non-discrimination and the rule of law in their design, implementation, and evaluation;<sup>370</sup> in this regard, the perception that national security needs may supersede the principle of non-discrimination, in particular related to the exercise of the right to freedom of religion or belief and national origin, may imperil respect for human rights and the foundations of peace, freedom and justice in societies.<sup>371</sup>

253. The Commission has considered that the legal regime establishing detention at Guantánamo applies exclusively to non-U.S. citizens,<sup>372</sup> and that all Guantánamo detainees have been Muslim men and

<sup>364</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 226 (citing IACHR, *Report on Immigration in the United States: Detention and Due Process* (2010), para. 95).

<sup>365</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 222 (citing IACHR, Application to I/A Ct. H.R. in the Case of Karen Atala and daughters v. Chile, Case 12.502, Sept. 17, 2010, paras. 85-89).

<sup>366</sup> See also in this regard, IACHR, *Toward the Closure of Guantánamo* (2015), para. 223 (citing IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (2000), para. 96).

<sup>367</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 74 (citing IACHR, Report No. 113/14, Case 11.661, Merits, Manickavasagam Suresh, Canada, Nov. 7, 2014, para. 86; IACHR, Report No. 51/01, Case 9903, Rafael Ferrer-Mazorra et al., United States, Apr. 4, 2001, para. 239; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (2000), para. 96).

<sup>368</sup> IACHR, *Toward the Closure of Guantánamo* (2015), paras. 227-228 (citing Hum. Rts. Comm. *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); ECtHR, *A. and Others v. the United Kingdom*, no. 3455/05, 19 February 2009, § 186).

<sup>369</sup> Interim Report of the Special Rapporteur on freedom of religion or belief. UN Doc. A/73/362, Sept. 5, 2018, paras. 3-12.

<sup>370</sup> U.N. General Assembly. Res. 60/288. The United Nations Global Counter-Terrorism Strategy. UN Doc. A/RES/60/288, Sept. 8, 2006; Report of the U.N. Secretary-General, Plan of Action to Prevent Violent Extremism. UN Doc. A/70/674, Dec. 24, 2015.

<sup>371</sup> See, inter alia, Interim Report of the Special Rapporteur on freedom of religion or belief. UN Doc. A/73/362, Sept. 5, 2018; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. UN Doc. A/HRC/31/65, Apr. 29 2016; Report of the Special Rapporteur on freedom of religion or belief (Mission to the U.K.). UN Doc. A/HRC/7/10/Add.3, Feb. 7, 2008.

<sup>372</sup> Here, the example of Yasser Hamdi (of *Hamdi v. Rumsfeld*) is instructive; when it was discovered that he was born in the U.S., he was removed from Guantánamo to litigate his *habeas* claim (and subsequently returned to Saudi Arabia under an agreement requiring him to renounce his U.S. citizenship). See IACHR, *Toward the Closure of Guantánamo* (2015), para. 221.

boys.<sup>373</sup> The U.S. has justified the creation of a 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; however, 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.<sup>374</sup> The Commission considered that a less restrictive alternative (namely, trial and incarceration in federal courts and prisons) exists.<sup>375</sup> In light of the foregoing, the IACHR has previously concluded that “the existence of a particularly severe detention regime and a severely restrictive justice system exclusively designed to hold and try [non-U.S. citizen Muslims] constitutes a violation” of article II of the American Declaration.<sup>376</sup>

254. Here, the Commission reaffirms this finding with respect to Mr. Ameziane. It notes that a finding of discrimination in his case is bolstered by the fact that the evidentiary basis for his continued detention expressed as early as 2004 may be summarized as: he was a Muslim who wished to live in Afghanistan under sharia law and without fear of deportation to Algeria; he used false passports to travel internationally; and he stayed in a guesthouse in Afghanistan where Taliban fighters also stayed, and in a guesthouse for Arabs in Pakistan in the same neighborhood as Taliban headquarters. The Commission finds that from the foregoing and in the absence of any direct evidence linking Mr. Ameziane to the Taliban or al Qaida, it is apparent that Mr. Ameziane’s status as a Muslim and a foreigner was an important factor used by the U.S. to justify his continuing detention, in violation of his right to equality before the law.

255. The Commission concludes that by holding Djamel Ameziane, a non-U.S. citizen Muslim man, in this particularly severe regime of indefinite detention without fundamental due process guarantees, the United States is responsible for the violation of the right to equality before the law, established in article II of the American Declaration, against Mr. Ameziane.

## **G. The obligation of *non-refoulement*, in connection with the rights to due process and an effective remedy**

### **1. The prohibition of *refoulement* in inter-American jurisprudence and other international instruments**

256. The principle of *non-refoulement* refers to the prohibition on the transfer of a person to a country or territory where they would be likely to face persecution,<sup>377</sup> torture, or cruel, inhuman or degrading treatment or punishment. Because this prohibition relates to the protection of the most fundamental and non-derogable rights, it is additionally considered to reflect a norm of *jus cogens*,<sup>378</sup> including by the Inter-American

<sup>373</sup> *Id.*

<sup>374</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 224.

<sup>375</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 225. *See also* 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>

<sup>376</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 226.

<sup>377</sup> Within the meaning article 33 of the 1951 Convention on the Status of Refugees.

<sup>378</sup> U.N. High Comm’r for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, Nov. 1997, available at: <http://www.refworld.org/docid/438c6d972.html>; *see also* Goodwin-Gill & McAdam. *The Refugee in International Law* (3d ed.) (2007), at 345-354, 354 (“Thus, though a minority of commentators continue to deny the existence of *non-refoulement* as a principle of customary international law, the general consensus is that it has now attained that status. It encompasses *non-refoulement* to persecution, based on article 33 of the 1951 Convention, and also to torture or cruel, inhuman or degrading treatment or punishment.” (citation omitted)).

While, as Goodwin-Gil and McAdam explain, the *non-refoulement* principle emerged around the time of the adoption of the 1951 Refugee Convention and in response to the refugee situation in Europe following World War II that motivated its drafting, the *jus cogens* status of the principle has consolidated rapidly since this time. In the regional context, this is reflected, for example, by the inroads the concept had made by the time of the Cartagena Declaration of 1984, which expanded the regional definition of ‘refugee’ and resolved, among others, “To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*”. OAS, *Cartagena Declaration on Refugees*, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 19 - 22 Nov. 1984.

Court.<sup>379</sup> In this regard, the Commission has previously held variously that this guarantee is reflected in article XXVI of the American Declaration (non-imposition of cruel, infamous, or unusual punishment),<sup>380</sup> as well as article I where the individual's right to life or personal integrity is violated upon return, and article XVIII where the right to due process is not respected in the process of return.<sup>381</sup>

257. The Commission recalls that when interpreting and applying the provisions of inter-American human rights instruments, it is both appropriate and necessary to take into account developments in the field of international human rights law since adoption of the American Declaration, as well as Member States' obligations under other human rights law treaties and related bodies of law, such as humanitarian law and international refugee law,<sup>382</sup> which together create an interconnected and mutually-reinforcing regime of human rights protections (*see supra* section A of this chapter). In this regard, the Commission notes that for the purposes of the present case, the United States' *non-refoulement* obligation is additionally expressly recognized in its obligations under the Convention Against Torture<sup>383</sup> and the 1967 Protocol to the Refugee Convention,<sup>384</sup> to which it is Party.<sup>385</sup>

258. The Commission will therefore evaluate the State's compliance with its *non-refoulement* obligations and the American Declaration here in light of the *jus cogens* status of the norm under customary international law, understanding that these developments since the adoption of the American Declaration reflect the fullest expression of the norm and the most adequate statement of the current state of international and inter-American human rights law. The Commission considers that the incorporation of the *jus cogens* prohibition of *refoulement* is a textbook example of the proper interpretation and application of the American Declaration in line with the currently-existing *corpus juris* of international human rights law.

259. The Commission has previously upheld the prohibition of *refoulement* in a variety of cases involving the deportation or threatened deportation of migrants, both in cases involving claims of asylum<sup>386</sup> and cases involving other potential threats to life or personal integrity.<sup>387</sup> It has likewise consistently called on the U.S. to respect the principle of *non-refoulement* with respect to all Guantánamo detainees; in Resolution 2/06, the 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 not transferred or removed and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation."<sup>388</sup> This request was reiterated in precautionary measure 211/08 granted on behalf of Djamel Ameziane, noting his status as a member of Algeria's ethnic Berber minority.<sup>389</sup> In this regard, the Commission has previously concluded that "[f]orced transfers of

<sup>379</sup> I/A Ct. H.R. *Pacheco Tineo Family v. Bolivia*. Judgment of Nov. 25, 2013, para. 151 ("The prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum. This principle is also a customary norm of international law, and is enhanced in the inter-American system by the recognition of the right to seek and to receive asylum.")

<sup>380</sup> IACHR. Report N° 63/08. Case 12.534. Admissibility and Merits (Publication). Andrea Mortlock. United States. July 25, 2008, para. 83.

<sup>381</sup> IACHR. Report No. 51/96. *Decision of the Commission as to the Merits of Case 10.675 v. United States* ["Interdiction of Haitians on the High Seas"]. Mar. 13, 1997, paras. 167-171, 180.

<sup>382</sup> *See also* I/A Ct. H.R. *Pacheco Tineo Family v. Bolivia*. Judgment of Nov. 25, 2013, paras. 137-143 (discussing the importance of taking into account the *corpus juris* of international refugee law to inform the scope of protections for migrants under the American Convention, including the obligation of *non-refoulement*).

<sup>383</sup> Article 3.1 of the CAT provides: "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." For codification in domestic law, *see* 8 C.F.R. 208.16 - Withholding of removal under § 241(b)(3)(B) of the Immigration and Nationality Act (INA) and withholding of removal under the Convention Against Torture.

<sup>384</sup> The 1967 Protocol incorporates the substantive obligations of the 1951 Convention, *see supra* footnote 192. Article 33 of the 1951 Convention relating to the Status of Refugees provides: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

<sup>385</sup> *See, e.g.*, Response of the Government of the [U.S.A.] to the [IACHR] Regarding Paul Pierre, P-1431-08, at 3. Submitted with State's merits brief.

<sup>386</sup> *See, e.g.*, IACHR. Report No. 51/96. *Interdiction of Haitians on the High Seas*. Mar. 13, 1997; Report No. 78/11. Case 12.586. Merits. John Doe. Canada. July 21, 2011; Report No. 136/11. Case 12.474. Merits. Members of the Pacheco Tineo Family. Bolivia. Oct. 31, 2011 (and subsequent Inter-American Court case).

<sup>387</sup> IACHR. Report N° 63/08. Case 12.534. Admissibility and Merits (Publication). Andrea Mortlock. United States. July 25, 2008.

<sup>388</sup> IACHR, Res. No. 2/06, On Guantanamo Bay Precautionary Measures, July 28, 2006.

<sup>389</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 297

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.”<sup>390</sup>

## 2. The obligation to ensure due process to evaluate claims of possible *refoulement*

260. The protection of fundamental human rights, such as the rights to life and personal integrity, also presupposes the right to judicial protection in order to make such rights effective. In particular, it implies the right to judicial process to protect the same. As regards the right to seek asylum and to *non-refoulement*, the Commission has found that the right to a hearing for asylum-seekers is clearly established in international law.<sup>391</sup> For example, the Commission has found that the summary interdiction and repatriation of Haitian refugees to Haiti without making an adequate determination of their status, and without a hearing to ascertain their status as “refugees,” violated their right to seek asylum, and their interdiction their right to personal liberty, in violation of the American Declaration.<sup>392</sup>

261. As the Inter-American Court has recognized, the determination of a *non-refoulement* claim, like the determination of refugee status, “entails an assessment and decision on the possible risk of affecting [a person’s] most basic rights, such as life, and personal integrity and liberty. In this way, even if States may determine the proceedings and authorities to implement that right, in application of the principles of non-discrimination and due process they must ensure predictable proceedings, as well as coherence and objectivity in decision-making at each stage of the proceedings to avoid arbitrary decisions.”<sup>393</sup> In particular, compliance with the *non-refoulement* obligation “necessarily means that such persons cannot be [...] expelled without an adequate and individualized analysis” of their case, which includes the right to review of any decision.<sup>394</sup>

262. The Commission considers that key procedural guarantees in such a proceeding include, for the purposes of the present case,<sup>395</sup> the right to a hearing and to a duly founded decision, as well as the right to appeal said decision. In this regard, the Commission considers that the appeal of a decision to deport, transfer, or otherwise effect the return of a person must have suspensive effects (i.e. the execution of any deportation, transfer, or other order must be stayed during the review), and must be carried out by an authority that is independent of the detaining and/or prosecuting authority, in order to comply with minimum guarantees of due process. The Commission recalls that a State’s compliance with these procedural rights is essential to an analysis of whether a decision to effect the return of a person to another country or territory is compatible with the principle of *non-refoulement*. That is, these procedural guarantees apply and may be sufficient to find a violation of the principle of *non-refoulement*, independent of any later finding that an act of torture, persecution, or violation of the right to life actually occurred.<sup>396</sup> Moreover, the Commission reiterates that where a likelihood of persecution, torture, or other CIDT exists, the sufficiency, clarity, and reliability of diplomatic or other assurances that an individual will not be subject to torture or CIDT must be fully assessed, taking into account the past behavior of the State in question.<sup>397</sup>

<sup>390</sup> IACHR. *Toward the Closure of Guantánamo* (2015), para. 301.

<sup>391</sup> IACHR. Report No. 51/96. *Interdiction of Haitians on the High Seas*. Mar. 13, 1997, para. 155.

<sup>392</sup> IACHR. Report No. 51/96. *Interdiction of Haitians on the High Seas*. Mar. 13, 1997, para. 163; *see also id.* at para. 169.

The Commission further found that the U.S.’ act of “interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security of the Haitian refugees,” as well as a violation of the right to life for those killed on return to Haiti. *Id.* at paras. 168-171.

<sup>393</sup> I/A Ct. H.R. *Pacheco Tineo Family v. Bolivia*. Judgment of Nov. 25, 2013, para. 157.

<sup>394</sup> I/A Ct. H.R. *Pacheco Tineo Family v. Bolivia*. Judgment of Nov. 25, 2013, para. 153, 159 (citing IACHR. *Report on the situation of the human rights of applicants for asylum under the Canadian system for the determination of refugee status* (2000), para. 111).

<sup>395</sup> The Inter-American Court has developed a much more complete set of criteria that will not be discussed here for reasons of space, including issues such as competent interpretation, legal assistance, and respect for confidentiality. I/A Ct. H.R. *Pacheco Tineo Family v. Bolivia*. Judgment of Nov. 25, 2013, para. 159.

<sup>396</sup> *See* IACHR. Report No. 136/11. Case 12.474. Merits. Members of the Pacheco Tineo Family. Bolivia. Oct. 31, 2011, para. 152.

<sup>397</sup> *See* IACHR. Report No. 78/13. Case 12.794. Merits. Wong Ho Wing. Peru. July 18, 2013, para. 251.

### 3. *Refoulement of Mr. Ameziane*

263. In the present case, while the State described at length its policy “not to [effect the return] of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture,” as well as the factors it takes into account when evaluating a claim of potential torture in a Guantánamo detainee’s home country, it provided no indication of the concrete evaluation it made in Mr. Ameziane’s case. In this regard, the Commission has no evidence before it indicating the actual existence or contents of an individualized, duly founded decision to return Mr. Ameziane to Algeria, other than the affirmations made by the State in the merits hearing.

264. Furthermore, Mr. Ameziane was prohibited from judicially challenging his transfer to a territory where he feared torture by the prevailing D.C. Circuit precedent of *Kiyemba II*, which held that “The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government’s assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws.”<sup>398</sup> This express preclusion of judicial review of cases of potential *refoulement* constitutes a plain violation of the rights to due process and to an effective remedy, in connection with the obligation of *non-refoulement*. The absence of these two basic guarantees of due process—the right to a hearing and an individualized, duly founded decision, and the right to review—is sufficient to find a violation of the obligation of *non-refoulement* in this case.

265. In addition to the lack of evidence regarding a duly founded decision regarding the propriety of Mr. Ameziane’s return to Algeria, and the clear lack of judicial review to evaluate such a decision—which are sufficient to make a finding that Mr. Ameziane was *refouled* to Algeria—the Commission considers that there are also important elements in this case indicating the actual existence of a substantial risk of torture, other inhumane treatment, or persecution that a reasonable decisionmaker should have evaluated and could have formed the basis for a decision not to return Mr. Ameziane. These include the numerous axes of potential persecution he alleged—as an ethnic Berber, as a practicing Muslim in his family’s hometown of Kabylie, as a person who had previously sought refugee status abroad, and as a former Guantánamo detainee, among others—the Algerian Ambassador’s statement that “all Algerian citizens in Guantánamo would be considered serious security threats, and would be subject to further detention and investigation if returned,” the incarceration and prosecution of other Algerian former Guantánamo detainees upon return, including Abdul Aziz Naji, and the particular cruelty of returning a person to a country where his interrogators have been telling him for years that he will be tortured.

266. In light of the foregoing, the Commission finds that the absence of a duly motivated decision and the lack of effective judicial review of a decision to return Mr. Ameziane, as a person who expressed a well-founded fear of persecution, torture, or other cruel, inhuman or degrading treatment or punishment in his home country, to Algeria, constituted a violation of the principle of *non-refoulement* in violation of the American Declaration, in connection with the rights to due process (Art. XXVI) and to an effective remedy (Art. XVIII).

#### H. **Right to protection of honor and personal reputation (Art. V) in connection with rights to equality, due process, and an effective remedy**

267. The Commission has previously held that “acts of harassment [...] calculated to discredit the victims and damage their reputations and good name vis-à-vis the public” constitute a violation of the right to protection of honor and personal reputation established in article V of the American Declaration.<sup>399</sup> The Inter-American Court, for its part, has held that the State’s public classification or representation of detainees as “terrorist criminals,” and “prisoners for terrorism” “implied an insult to the honor, dignity, and reputation of the [detainees] who had not been convicted at the time of the facts” and their families, as they were “perceived by society as ‘terrorists’ or the next of kin of ‘terrorists,’ with all the negative consequences this implies.”<sup>400</sup>

<sup>398</sup> *Kiyemba v. Obama*, No. 08-5424 (D.C. Cir. 2009).

<sup>399</sup> IACHR. Report No. 67/06. Case 12.476. Oscar Elías Biscet. Cuba. Oct. 21, 2006, paras. 233-234.

<sup>400</sup> I/A Ct. H.R. *Case of Miguel Castro Castro Prison v. Peru*. Judgment of Nov. 25, 2006, paras. 358-359.

268. In the present case, Mr. Ameziane was held for years at Guantánamo Bay as an “enemy combatant,” a label that implied that he was a member of, or associated with, al Qaida or the Taliban, or had otherwise engaged in hostilities against the U.S. However, Mr. Ameziane was never charged with any crime during his nearly twelve years in detention, nor were the proceedings by which he was determined to be an “enemy combatant” conducted with minimal guarantees of due process—or the methods by which the government obtained from Mr. Ameziane the statements used against him free from coercion, violence, and torture—that would permit any degree of confidence as to their accuracy, as discussed in this report. Guantánamo detainees were uniformly described as “terrorists” by U.S. officials in public statements, and in proceedings to obtain the return of Mr. Ameziane’s property (*see also* below), held after his forced transfer to Algeria, the U.S. government continued to intimate that Mr. Ameziane would engage with “terrorist activities,” organizations, and the financing of the same after his release. Mr. Ameziane was also denied access to legal proceedings, such as *habeas corpus*, that might have helped to clear his name by establishing that the State lacked probable cause to continue detaining him; the State has likewise never offered an apology, public or private, for Mr. Ameziane’s detention in Guantánamo.

269. As Mr. Ameziane has testified, both he and his family have suffered in Algeria due to their association with the social stigma of Guantánamo, and Mr. Ameziane has struggled to obtain identity documents, employment, and social benefits as a result of this lasting stigma. Among others, Mr. Ameziane was unable to travel to his own merits hearing in this case, held in Mexico City, Mexico in September 2017, because he and his lawyers were unable to guarantee that he would not be susceptible to detention or extended questioning while in transit to and from the country, due to his past internment in Guantánamo.

270. The Commission finds that the situation described is sufficient to constitute a violation of Mr. Ameziane’s and his family’s right to honor and personal reputation in violation of Article V of the American Declaration, in connection with his rights to due process (Art. XXVI), to an effective remedy (Art. XVIII), and to equality before the law (Art. II).

**I. Right to property (Art. XXIII)<sup>401</sup> in connection with rights to equality, due process and the presumption of innocence, and an effective remedy**

271. The Commission considers that the failure of the U.S. to return to Mr. Ameziane the property confiscated from him upon his detention constitutes a violation of his right to property, in connection with his right to equality before the law, due process, and an effective remedy. In particular, the Commission finds that the rationale of the U.S. government used by the district court to deny return of his property to Mr. Ameziane—that “[a]lthough detainees might use the funds returned to them for legitimate and benign purposes, such as to purchase food or clothing, it also remains possible that former detainees will use their returned money to help finance terrorist activities”—is discriminatory, in that it continues to treat Mr. Ameziane as a potential terrorist despite the fact that twelve years in U.S. custody failed to produce a finding in that regard, or indeed produce any charges against him, and violatory of his due process rights and the presumption of innocence, in that it relies on inappropriate assumptions about him without adequate opportunity to defend himself against the allegations.

272. As the Commission considered above, “[o]nce a detainee has been cleared for transfer, the U.S. authorities have no basis to continue treating him as a suspected terrorist. [...] Detainees cleared for transfer should be treated as persons who have never been charged—which is what they are.”<sup>402</sup> Similarly, the Commission has previously considered that the use of terms that generally apply to former convicts, such as “recidivism,” to describe the potential future conduct of persons released or transferred from Guantánamo is inappropriate because it “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.”<sup>403</sup> In this case, refusal

<sup>401</sup> Art. XXIII states: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

<sup>402</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 288.

<sup>403</sup> IACHR, *Toward the Closure of Guantánamo* (2015), para. 325.

to return Mr. Ameziane's property is based on the justification that he might "re-engage" in terrorism, though there is no evidence before the Commission indicating that he was ever involved in such acts.

273. This failure to return Mr. Ameziane's property moreover demonstrates a violation of Mr. Ameziane's right to an effective remedy. The district court made this violation manifest, as it found that the fact that dismissing the civil suit seeking return of his property leaves Mr. Ameziane without a remedy to secure the return of his property is not constitutionally problematic, because "[n]ot every violation of a right yields a remedy, even when the right is constitutional." The Commission considers that this situation makes plain the need for the State to act to effectively restore Mr. Ameziane's rights.

274. The Commission concludes that the State is responsible for the violation of Mr. Ameziane's right to property (Art. XXIII of the American Declaration), in connection with his rights to due process and the presumption of innocence (Art. XXVI), to an effective remedy (Art. XVIII), and to equality before the law (Art. II).

#### **J. Aggravated State responsibility**

275. Finally, the Commission observes that the facts of the present case took place in a context of 1) failure to comply with precautionary measures granted by the IACHR in favor of Mr. Ameziane; and 2) a permissive State policy regarding the commission of torture in U.S. detention facilities.

276. The Commission granted precautionary measures in favor of all detainees at Guantánamo Bay, and in favor of Mr. Ameziane in particular, to ensure that he was "not subject to torture or to cruel, inhumane or degrading treatment while in [U.S.] custody and to make certain that he is not deported to any country where he might be subjected to torture or other mistreatment."<sup>404</sup> The Commission recalls that the failure of an OAS member State to comply with precautionary measures "results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state's human rights obligations."<sup>405</sup>

277. Additionally, the Commission has considered extensive information in this report and in its prior report, *Toward the Closure of Guantánamo*, regarding the existence in the U.S. of a legal framework that permitted the commission of acts of torture, as well as a continuing set of amnesty laws that prevent the effective investigation and punishment of the same; and a systematic practice of bringing hundreds foreign Muslim men and boys to Guantánamo Bay prison, where they were subjected to inhumane detention conditions and torture, and lacked effective access to the courts in order to protect their fundamental rights. The Commission considers that this constitutes a systematic practice on the part of the State, sanctioned by the highest levels of government, and aggravates the international responsibility of the State.<sup>406</sup>

278. The Commission concludes that both of the foregoing factors create the aggravated international responsibility of the United States in the present case, causing irreparable harm to Djamel Ameziane (as he continued to be subjected to torture and was ultimately returned to Algeria in violation of the prohibition on *refoulement*), and evidencing a systematic lack of respect for the most fundamental human rights of Mr. Ameziane and similarly situated detainees.

#### **VI. ACTIONS SUBSEQUENT TO REPORT No. 156/18**

279. On December 7, 2018, during its 170 period of sessions, the Commission approved Report No. 156/18 on the merits of this matter, with the following recommendations to the State:

1. Take all remaining steps to comply immediately with the recommendations made in its report *Toward the Closure of Guantánamo*, which it fully incorporates here by reference.

<sup>404</sup> IACHR, PM-211/08; see also IACHR, PM-259/02.

<sup>405</sup> IACHR, Case No. 12.243, Report No. 52/01, Juan Raúl Garza. United States, Annual Report of the IACHR 2000, para. 117. See also, IACHR, Report No. 1/05, Case 12.430, Merits, Roberto Moreno Ramos, United States, Jan. 28, 2005, para. 75; see also IACHR, Report No. 52/13, Cases 11.575, 12.333, 12.341. Merits (Publication). Clarence Allen Lackey et al. United States. July 15, 2013, para. 244.

<sup>406</sup> See, e.g., I/A Ct. H.R., Myrna Mack Chang v. Guatemala. Judgment of Nov. 25, 2003, para. 139.

2. Return to Mr. Ameziane the property (currency) confiscated from him upon his capture in Pakistan in 2001;
3. Make adequate material and moral reparation for the human rights violations established in this report, including both economic compensation and measures of satisfaction. These include:
  - a. Adequate economic compensation for twelve years of arbitrary detention;
  - b. Adequate economic compensation for the lasting physical and psychological harm done to Mr. Ameziane as a consequence of the conditions of detention he endured and torture he suffered;
  - c. Measures of satisfaction such as, for example, a public statement by the President or other sufficiently high-ranking official that Mr. Ameziane is not and never has been a terrorist, and that he was wrongly detained and suffered torture in U.S. custody. Such measures should be coordinated with Mr. Ameziane and his representatives, in order to ensure that they constitute effective reparation.
4. Provide for appropriate medical and psychological care for Mr. Ameziane's rehabilitation, coordinating the measures to be taken with him and his representatives.
5. Begin and/or continue criminal investigations for torture committed against Mr. Ameziane at Kandahar Airbase and Guantánamo Bay Detention Center. These investigations should be carried out with due diligence and within a reasonable time period with the goal of completely clarifying the facts of what occurred, identifying those allegedly responsible, including the possible involvement of medical personnel and private military and security companies, and imposing the corresponding criminal sanctions for the human rights violations established in this report. The Commission recalls that acts of torture, as a grave violation of international law, cannot be subject to amnesty laws or statutes of limitation for its investigation and punishment.
6. In addition to the recommendations made in *Toward the Closure of Guantánamo*, implement laws and policies that will ensure non-repetition of the facts described in the present report, including:
  - a. Repeal the Military Commissions Act and the Detainee Treatment Act, consistent with the violations declared in this report;
  - b. Take the necessary measures to assign responsibility and corresponding punishments for the official sanction of torture at the highest levels of government during the period 2002-2008;
  - c. Create a truth commission for Guantánamo to effectively investigate all human rights violations there committed;
  - d. Ensure the effectiveness of legal remedies, both to challenge the legality of detention in circumstances like those of the present case and to ensure judicial review of decisions to transfer individuals to countries or territories where they fear persecution, torture, or cruel, inhuman or degrading treatment or punishment;
  - e. Create an effective judicial or administrative mechanism to ensure integral reparation for individuals subjected to similar conditions as Mr. Ameziane in Guantánamo Bay prison, including accessible and effective means to facilitate the submission and processing of complaints, including criminal complaints, before U.S. national authorities, regardless of where in the world the complainant is located.
  - f. Develop and deliver international humanitarian and human rights law training addressed to U.S. military forces and intelligence agencies, with a particular focus on the absolute prohibition of torture and cruel, inhumane and degrading treatment.

- g. Publish an official statement containing the main conclusions of this Merits Report in a national daily newspaper, by radio and by television broadcast, in coordination and collaboration with the victim and his lawyers.
- h. Ensure that international human rights law obligations, in particular those relating to non-derogable rights, are included in any counter-terrorism or national security strategy or policy.
- i. Create a public space to disseminate and raise awareness about the main conclusions of the IACHR regarding the context in which the violations declared in this report occurred.

280. On February 26, 2019, the IACHR transmitted the report to the State, with a time period of two months to present information on the measures taken to comply with the recommendations set forth in the report.

281. On April 23, 2019, the State presented a note in response to Report 156/18, indicating that it had taken under advisement the “nonbinding recommendations” set forth in the report and objected on the way the Commission interpreted and applied the law of armed conflict in the draft report. The State alleges that OAS Member States have not granted the Commission the competence or authority to do so.

282. On June 4, 2019, the petitioners requested the Commission to issue a final merits report given that the State has reported no efforts to implement any of the preliminary report’s recommendations.

#### **VII. ACTIONS SUBSEQUENT TO REPORT 97/19**

283. On June 17, 2019, the Commission approved Final Merits Report No. 97/19 in which the Commission reiterated all of its recommendations to the State. On July 3, 2019, the IACHR transmitted the report to the State and the petitioners with a time period of two months to inform the Commission on the measures taken to comply with its recommendations. To date, the Commission has not received any response from the United States or the petitioners regarding Report No. 97/19.

#### **VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS:**

284. From the available information to the date of the approval of this report, the Commission notes that the United States has not complied with the recommendations set forth in the merits report.

285. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of articles I (life, liberty, and security), II (equality before the law), III (religious freedom and worship), IV (freedom of expression), V (protection of honor, personal reputation, and private and family life), VI (right to family and protection thereof), XI (protection of health and well-being, including the right to food), XVIII (fair trial), XXI (assembly), XXIII (property), XXIV (petition), XXV (protection from arbitrary detention), and XXVI (due process) of the American Declaration on the Rights and Duties of Man. In consequence,

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES OF AMERICA:**

1. Take all remaining steps to comply immediately with the recommendations made in its report *Toward the Closure of Guantánamo*, which it fully incorporates here by reference.
2. Return to Mr. Ameziane the property (currency) confiscated from him upon his capture in Pakistan in 2001;
3. Make adequate material and moral reparation for the human rights violations established in this report, including both economic compensation and measures of satisfaction. These include:

- a. Adequate economic compensation for twelve years of arbitrary detention;
  - b. Adequate economic compensation for the lasting physical and psychological harm done to Mr. Ameziane as a consequence of the conditions of detention he endured and torture he suffered;
  - c. Measures of satisfaction such as, for example, a public statement by the President or other sufficiently high-ranking official that Mr. Ameziane is not and never has been a terrorist, and that he was wrongly detained and suffered torture in U.S. custody. Such measures should be coordinated with Mr. Ameziane and his representatives, in order to ensure that they constitute effective reparation.
4. Provide for appropriate medical and psychological care for Mr. Ameziane's rehabilitation, coordinating the measures to be taken with him and his representatives.
  5. Begin and/or continue criminal investigations for torture committed against Mr. Ameziane at Kandahar Airbase and Guantánamo Bay Detention Center. These investigations should be carried out with due diligence and within a reasonable time period with the goal of completely clarifying the facts of what occurred, identifying those allegedly responsible, including the possible involvement of medical personnel and private military and security companies, and imposing the corresponding criminal sanctions for the human rights violations established in this report. The Commission recalls that acts of torture, as a grave violation of international law, cannot be subject to amnesty laws or statutes of limitation for its investigation and punishment.
  6. In addition to the recommendations made in *Toward the Closure of Guantánamo*, implement laws and policies that will ensure non-repetition of the facts described in the present report, including:
    - a. Repeal the Military Commissions Act and the Detainee Treatment Act, consistent with the violations declared in this report;
    - b. Take the necessary measures to assign responsibility and corresponding punishments for the official sanction of torture at the highest levels of government during the period 2002-2008;
    - c. Create a truth commission for Guantánamo to effectively investigate all human rights violations there committed;
    - d. Ensure the effectiveness of legal remedies, both to challenge the legality of detention in circumstances like those of the present case and to ensure judicial review of decisions to transfer individuals to countries or territories where they fear persecution, torture, or cruel, inhuman or degrading treatment or punishment;
    - e. Create an effective judicial or administrative mechanism to ensure integral reparation for individuals subjected to similar conditions as Mr. Ameziane in Guantánamo Bay prison, including accessible and effective means to facilitate the submission and processing of complaints, including criminal complaints, before U.S. national authorities, regardless of where in the world the complainant is located.
    - f. Develop and deliver international humanitarian and human rights law training addressed to U.S. military forces and intelligence agencies, with a particular focus on the absolute prohibition of torture and cruel, inhumane and degrading treatment.
    - g. Publish an official statement containing the main conclusions of this Merits Report in a national daily newspaper, by radio and by television broadcast, in coordination and collaboration with the victim and his lawyers.
    - h. Ensure that international human rights law obligations, in particular those relating to non-derogable rights, are included in any counter-terrorism or national security strategy or policy.

- i. Create a public space to disseminate and raise awareness about the main conclusions of the IACHR regarding the context in which the violations declared in this report occurred.

## **IX. PUBLICATION**

285. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Approved by the Inter-American Commission on Human Rights on the 22 day of the month of April, 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño and Julissa Mantilla Falcón, Commissioners.