

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

October 28, 2005

Ref. Detainees in Guantanamo Bay, Cuba
Precautionary Measures Precautionary Measures N° 259
United States

Dear Ms. LaHood:

On behalf of the Inter-American Commission on Human Rights, I write in order to acknowledge receipt of your observations dated October 20, 2005 concerning the precautionary measures noted above.

I also wish to inform you that during the Commission's 123rd Regular Period of Sessions, the Commission considered the information provided by the parties in this matter since the Commission's last reiteration of the precautionary measures on July 29, 2004. This information included the written submissions of the United States dated December 15, 2004 and October 19, 2005, the written observations of the Petitioners dated February 22, 2005 and October 20, 2005, and the oral submissions made by the parties during the hearings convened before the Commission on March 3, 2005 during the Commission's 122nd Regular Period of Session and on October 20, 2005 during the Commission's 123rd Regular Period of Sessions. Based upon the information provided, the Commission decided to reiterate and extend the precautionary measures, and accordingly, in a note of today's date, addressed the government of the United States in the following terms:

As Your Excellency is aware, in the precautionary measures granted on March 12, 2002, which were maintained and expanded in communications dated July 23, 2002, March 18, 2003, and July 29, 2004, the Commission asked the United States to:

- (1) take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.
- (2) to conduct thorough and impartial investigations into all allegations of torture and other ill treatment of detainees under its authority and control and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility, in light of the State's obligation to ensure that detainees are not subjected to treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.

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In its communications, the Commission also requested that the United States provide information concerning the location, status and treatment of individual detained by the United States in other facilities in connection with its post-September 11, 2001 anti-terrorist initiatives, including information as to the United States' policies and practices governing the prohibition of any form of treatment that may amount to torture or cruel, inhumane or degrading in nature in the detention or interrogation of such persons. In addition, the Commission asked for information concerning the Petitioners' allegation that children under the age of 18 continued to be held by the United States at Guantanamo Bay and that they have not been segregated from the adult population or provided with education or rehabilitation assistance.

Additional Observations of the United States

In its written and oral representations to the Commission, Your Excellency's government has made several submissions. First, the United States has argued that the Petitioners' request is inadmissible for failure to exhaust domestic remedies. In particular, the State contends that there are ongoing and timely federal habeas corpus proceedings arising out the June 28, 2004 decision of the United States Supreme Court in the case of *Rasul v. Bush*,¹ in which that Court held that United States courts have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. According to the United States, as of September 27, 2005, 160 habeas lawsuits involving 292 detainee petitions have been filed with US courts.² These proceedings are said to include *Hamdan v. Rumsfeld*³ and *In re Guantanamo Detainees*,⁴ in which the US District Court reached conflicting conclusions on the question of whether non-resident aliens have any cognizable constitutional rights or any viable claims either under treaties or customary international law, and in respect of which a decision on a consolidated appeal to the US Court of Appeals for the District of Columbia is said to be pending.⁵ Your Excellency's government also indicates that in the course of these habeas corpus proceedings, the federal courts have reviewed or are reviewing numerous motions and other requests including motions to dismiss the petition, motions for a restraining order, motions regarding transfer of a detainee from Guantanamo, requests for discovery, and motions relating to procedures regulating access of attorneys to individuals, and that the government has filed extensive submissions in these proceedings.⁶

The State also referred in this connection to certain administrative proceedings established at Guantanamo Bay, including proceedings before Combatant Status Review Tribunals that began in July 2004 and are comprised of officials of the US armed forces who determine whether detainees are properly classified as "enemy combatants." In addition, the Commission was informed of Administrative Review Boards, which are also comprised of members of the US armed forces and are said to provide an opportunity for the detainee to explain "why he or she no longer presents a threat to the United States or its allies in the ongoing armed conflict with al Qaida and its affiliates or supporters or to explain why release would otherwise be appropriate."⁷ The State argues that these proceedings constitute additional domestic proceedings available to the detainees, and further, that these proceedings address satisfactorily the principal concerns raised by the Commission in its request for precautionary measures.⁸

In addition to its submissions on the admissibility of the precautionary measures request, the United States reiterated its previous argument that the Commission's jurisdiction and competence do not extend to the laws and customs of war or to issuing requests for

¹ U.S.S.C., *Rasul et al. v. Bush, President of the United States, et al.*, No. 03-334 (June 28, 2004).

² State's observations of October 19, 2005, pp. 1, 5.

³ *Hamdan v. Rumsfeld*, 415 F. 3d 33 (D.C. Cir. 2005).

⁴ *In re Guantanamo Detainees*, 355 F. Supp. 2d 311 (D.D.C. 2005).

⁵ *Boumediene v. Bush*, 2005 U.S. Lexis 14580 (D.C. Cir. 2005).

⁶ State's observations of October 19, 2005, p. 6.

⁷ State's observations of December 15, 2005, pp. 9-13, 19-21.

⁸ State's observations of October 19, 2005, p. 2.

precautionary measures against non-States Parties to the American Convention.

With respect to the issue of the treatment of detainees, the State has contended that the US President and the Department of Defense have confirmed that the United States remains committed to complying with its obligations under the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment. In this regard, the Department of Defense denies any allegations of torture at Guantanamo and restates its commitment to treating detainees humanely. It has also indicated that there have been several official reviews of conditions of detention at Guantanamo and elsewhere, and that allegations of detainee abuse are investigated and those who commit wrongdoing will be punished. According to Your Excellency's government, as of December 2004 major independent investigations at Guantanamo have documented eight instances of infractions which have resulted in action ranging from admonishment to court-martial.⁹ In addition, the State indicates that detainees are provided with excellent medical care, including mental health treatment, that they receive adequate food, shelter and clothing, and that they are permitted to receive and send mail to family and friends via petitions and postcards.¹⁰ Regarding interrogation techniques at Guantanamo, the State referred the Commission to a June 22, 2004 US Department of Defense press release explaining the various interrogation techniques approved and disapproved at Guantanamo from the period beginning January 2002, and indicated that the facility at Guantanamo is continually open to the ICRC, chaplain staff and legal staff, and foreign and domestic media, and that official reviews have been conducted by the Department of Defense into conditions at Guantanamo as well as individual allegations of abuse.¹¹ These are said to have included an investigation at the direction of the Secretary of Defense in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo, where the investigation ultimately revealed no information to support the allegation.¹²

With respect to interrogation techniques in particular, the United States has indicated that the Department of Defense has taken several actions in an attempt to address allegations of any prisoner abuse by US military personnel abroad, including the establishment of an Independent Panel to review operations and provide independent advice on the treatment of detainees. The State has also indicated that more than 50 individuals have been referred for court-martial and that new guidelines have been issued by the Secretary of Defense on procedures for investigations into deaths of any person held as a detainee in the custody of the US armed forces.¹³

Further, the State contends that there are no juveniles currently detained at Guantanamo and that the three juveniles under the age of sixteen previously held there were treated appropriately and were transferred to Afghanistan under conditions intended to provide for their safety and rehabilitation.¹⁴

Finally, with regard to its actions involving the possible repatriation of detainees, the United States indicates that it takes seriously the principle of non-refoulement. It states in this respect that its policy is to obtain specific assurances from a receiving country that it will not torture the individual being transferred to that country, that it would take steps to investigate credible allegations of torture and take appropriate action if there were reasons to believe that those assurances were not being honored, and that it would not transfer a detainee where those assurances are not sufficient when balanced against an individual's specific claim.¹⁵

⁹ State's observations of December 15, 2004, pp. 22-25.

¹⁰ State's observations of December 15, 2004, p.30.

¹¹ State's observations of December 15, 2004, pp. 25-27.

¹² State's observations of December 15, 2004, pp. 26-27.

¹³ State's observations of December 15, 2004, pp. 28-29.

¹⁴ State's observations of December 15, 2004, pp. 18-19.

¹⁵ State's observations of December 15, 2004, p. 27-28 .

Additional Observations of the Petitioners

In their additional observations to the Commission, the Petitioners have contested the jurisdictional objections raised by the State as well as observations on the merits of the precautionary measures. With respect to the proceedings pending before US courts and administrative tribunals, the Petitioners state that as of October 2005, more than 500 men continue to be detained at Guantanamo Bay.¹⁶ They also claim that of these, approximately 280 have obtained counsel to represent them on habeas corpus petitions in the US District Court to challenge their detentions, but the substance of their claims has yet to be determined by any court.¹⁷ Accordingly, the Petitioners state that there are still approximately 225 detainees who have been completely denied any right to access counsel because no one except the government knows who they are. In addition, for those detainees with counsel, the Petitioners contend that the US military has interfered on multiple levels with the Guantanamo detainees' right to a confidential attorney-client relationship, including measures to diminish trust between detainees and their lawyers and monitoring attorney-client meetings.¹⁸

Further, the Petitioners indicated in their October 20, 2005 observations that reviews by the Combatant Status Review Tribunal, which determine whether a detainee is an "enemy combatant," had been completed and that 558 of the 596 detainees were determined to be "enemy combatants not entitled to prisoner of war protections," but that several of the 38 men determined not to be enemy combatants since March 29, 2005 are still being held at Guantanamo purportedly because the Government does not know where to send them.¹⁹ The Petitioners also state that there have been 309 Administrative Review Board proceedings to date, which are to assess annually the need to continue to detain each enemy combatant during the course of ongoing hostilities, through which 8 people have been released, 55 have been transferred, and decisions to continue to detain were made for 111 of the detainees, leaving 135 awaiting determination. In addition, according to the Petitioners, Military Commissions that have been set up to try detainees for crimes arising out of the armed conflict detainees are scheduled to proceed in respect of four detainees who have been charged following the lifting of a court-ordered stay.²⁰ The Petitioners also claim that procedural changes implemented by the government to the Commissions do not address the Petitioners' concerns regarding the fairness of the process.²¹

In this regard, the Petitioners claim that none of the tribunals established at Guantanamo Bay, including the Combatant Status Review Tribunals, the Administrative Review Boards, or the Military Commissions, fulfill international standards of due process, in part because they apply an overbroad notion of "enemy combatant," the detainees do not have access to classified material and, in the case of the first two bodies, they are presided over by US military personnel and do not provide for the right to independent counsel for the detainee.²² Moreover, according to the

¹⁶ Petitioners' observations of October 20, 2005, p. 1.

¹⁷ Petitioners' observations of October 20, 2005, pp. 1-2.

¹⁸ Petitioners' observations of October 20, 2005, pp. 4-6, citing, *inter alia*, Charlie Savage, Guantanamo Detainees Find Fault with Lawyers: Inmate Frustration Breeds Mistrust, Boston Globe, August 10, 2005; Declaration of Clive A. Stafford Smith, para. 104, September 12, 2005, submitted in *Sadar Doe v. Bush*, Petitioners' opposition to respondents' motion to show cause why the case should not be dismissed for lack of proper "next friend" standing and opposition to motion to stay proceedings, Civil Action No. 05-CV-1704-JR (D.D.C. September 12, 2005).

¹⁹ Petitioners' observations of October 20, 2005, pp. 6-7, citing, *inter alia*, J. White and R. Wright, *U.S. holding talks on return of detainees*, Washington Post, August 9, 2005 (indicating that in August, the US government stated that 15 Uighurs and 2 Uzbeks could not be returned to their home countries because of fears of torture, but could be released into the custody of another government).

²⁰ Petitioners' observations of October 20, 2005, p. 7, citing *Hamdan v. Rumsfeld*, 415 F. 3d 33 (D.C. Cir. July 15, 2005); *United States of America v. David M. Hicks*, PO 106, Docketing Order, September 23, 2005.

²¹ Petitioners' observations of October 20, 2005, p. 2.

Petitioners, detainees have reported that they have given false information because of torture and the Combatant Status Review Tribunals have relied on such statements in determining whether detainees should be classified as enemy combatants, contrary to the obligations of the United States under international law.²³ Accordingly, the Petitioners have requested the Commission to further expand its precautionary measures by urging the US government to comply with its obligation not to use torture or other abusive tactics when it determines the legal status of individuals in US detention or other proceedings.²⁴

With respect to the conditions and treatment of detainees, the Petitioners have argued that assurances by the U.S. government that it is treating the detainees humanely have been proven to be unreliable based upon recent sources indicating that detainees have been subjected to treatment including beatings, sleep deprivation, exposure to extreme temperatures, sensory deprivation, and prolonged isolation and that such treatment has been approved at the highest levels of authority in the United States. Alleged sources for this information include media reports, statements by U.S. government officials, government legal memoranda leaked to the media, reports by the International Committee of the Red Cross, and first-hand accounts provided by at least 17 individuals who had since been released from Guantanamo.²⁵ In their October 20, 2005 observations, the Petitioners added that Guantanamo Bay detainees engaged in widespread and often life-threatening hunger strikes in June to July 2005 and from August to October 2005 in order to protest their detention and treatment, that 200 detainees were participating as of October 7, 2005 and that 21 participants were being force fed through nasal tubes but without effective medical care.²⁶ Further, the Petitioners state that US authorities regularly violate the Muslim detainees' religious rights through interrogation policies such as the "Futility" technique that aim to undermine the subject's confidence in the structure that support his cause by degrading his religion,²⁷ as well as by failing to recognize religious discrimination as abuse and punish individuals who perpetrate it, among other means.²⁸ Finally, the Petitioners allege that the US government has failed to investigate high-level officials for torture and other cruel, inhuman or degrading treatment in US detention facilities, but rather has rewarded and promoted such officials.²⁹

With respect to the transfer of detainees, the Petitioners have claimed that 247 detainees once held at Guantanamo have been transferred to other countries, including Egypt, Iran, Yemen and Tajikistan, in circumstances that do not adequately protect against the possibility that the transferees may be subjected to torture or other inhuman treatment.³⁰ The Petitioners note in this respect that the countries to whom the detainees have been transferred have deplorable human rights records as documented for many years by the U.S. State Department's Country Reports, and that although the U.S. government has negotiated transfer agreements with some Muslim countries that would seek assurances that they would refrain from torture and that

²² Petitioners' observations of February 22, 2005, pp. 5-12; Petitioners' observations of October 20, 2005, pp. 6-9, citing, *inter alia*, Administrative Review Board Summary, a summary of Acting Deputy Secretary of Defense Gordon England's review of board recommendations; Department of Defense, Military Commission Order No. 1, August 31, 2005.

²³ Petitioners' observations of February 22, 2005, pp. 21-24.

²⁴ Petitioners' observations of February 22, 2005, p. 21.

²⁵ Petitioners' observations of February 22, 2005, pp. 13-17, Petitioners' observations of October 20, 2005, p. 2.

²⁶ Petitioners' observations of October 20, 2005, pp. 3, 13-17, citing, *inter alia*, World Medical Association Declaration on Hunger Strikes, adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly, Marbella, Spain, September 1992.

²⁷ Petitioners' observations of October 20, 2005, pp. 20-21, citing, *inter alia*, Final Report of the Independent Panel to Review DoD Detention Operations, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

²⁸ Petitioners' observations of October 20, 2005, pp. 18-22.

²⁹ Petitioners' observations of February 22, 2005, pp. 18-19.

³⁰ Petitioners' observations of October 20, 2005, pp. 9-13. See also State's Observations, December 15, 2004, p. 18 (indicating that as of December 14, 2004, 57 detainees had been transferred from Guantanamo to the control of other governments, including 29 to Pakistan, 7 to Russia, 5 to Morocco, 5 to Great Britain, 4 to France, 4 to Saudi Arabia, 1 to Denmark, 1 to Spain, and 1 to Sweden).

transferees would be treated humanely,³¹ great concerns remain that many of those transferred will be subjected to indefinite detention without trial, torture and other abuse.³² Further, the Petitioners note that the United States has no means of enforcing or monitoring compliance with assurances given by the receiving state.³³ The Petitioners note that habeas counsel for some of the represented detainees have obtained preliminary injunctions from the US courts prohibiting the Government from removing them from Guantanamo without first giving both counsel and the court 30 days notice of the intended transfer. According to the Petitioners, some of these petitions are pending, some have been denied, and unrepresented detainees are left with no judicial protection from illegal transfers.³⁴ Based upon these submissions, the Petitioners have asked the Commission to expand its precautionary measures to cease sending persons under US control to third countries where they may be at risk of torture or cruel, inhuman or degrading treatment, give individuals facing transfer from Guantanamo and their lawyers, including the Center for Constitutional Rights as coordinating counsel for the unknown detainees, 30 days notice before they are transferred, and give individuals facing transfer a real opportunity to contest the transfer including access to counsel and an independent hearing.

Findings of the Inter-American Commission on Human Rights

After considering the observations of the parties, the Commission has made the following findings concerning its precautionary measures granted in favor of the detainees at Guantanamo Bay.

With regard to the jurisdictional objections raised by the United States, the Commission has already considered and rejected the State's claims based upon the Commission's authority to adopt precautionary measures in respect of non-states parties to the American Convention and to consider and apply international humanitarian law and does not consider it necessary to deliberate further on these points.

With respect to the State's objection to the precautionary measures based upon non-exhaustion of domestic remedies, which was first raised in the State's observations of December 17, 2004, the Commission acknowledges the international principle according to which the international jurisdiction of human rights is intended to reinforce and complement, rather than replace, domestic jurisdiction. It is for this reason that the rule of prior exhaustion of domestic remedies is applied to petitions filed before the inter-American human rights system, in order to allow the State to resolve the problem under its internal law before being confronted with an international proceeding. At the same time, it has been recognized by this Commission and other international adjudicative bodies that the effective exercise of their mandates requires the ability, in certain circumstances, to request a state to act or refrain from acting in situations of extreme gravity or urgency where application of the usual rule of exhaustion of domestic remedies may not be appropriate or practicable.³⁵ This arises most frequently where urgent measures are

³¹ Petitioners' observations of October 20, 2005, p. 10, citing Andrea Koppel and Elise Labott, U.S. Officials: Gitmo transfer talks active, CNN, August 9, 2005, available at <http://www.cnn.com/2005/US/08/09/detainee.release/index.html>; Robin Wright and Josh White, U.S. Holding Talks on Return of Detainees; Administration Close to Reaching Agreements with 10 Muslim Governments, Washington Post, August 9, 2005.

³² Petitioners' observations of October 20, 2005, pp. 10-11.

³³ Petitioners' observations of October 20, 2005, p. 11, citing "Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can't Ensure Good Treatment, Miami Herald, March 8, 2005.

³⁴ Petitioners' observations of October 20, 2005, p. 11, citing, *inter alia*, *Abdah v. Bush*, No. 04-1254, 2005 WL 711814 (D.D.C. March 29, 2005).

³⁵ See, e.g., Commission's Rules of Procedure, Article 25(1) (providing that "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons"); American Convention on Human Rights, Art. 63(2) (providing that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission"); Statute of the International Court of Justice, Article 41(1) (providing that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party"); European Court of Human Rights, Rules of Court (October 2005), Rule 39(1) (providing that "[t]he Chamber or, where

necessary to preserve the tribunal's ability to consider a complaint and issue an effective remedy, for example by avoiding irreparable prejudice to the rights of the parties pending the determination of a petition or case,³⁶ or where such measures are otherwise necessary to prevent irreparable harm to persons.³⁷ In light of the inherently urgent and vital nature of such measures, the Commission, like other international bodies,³⁸ has not considered establishment of the exhaustion of domestic remedies requirement to be a precondition for its longstanding authority to grant precautionary measures.³⁹ At the same time, the Commission may take into account the possible existence and invocation of protective measures at the domestic level in determining whether to grant or maintain precautionary measures. Consequently, in the present case, the Commission cannot accept the State's submission that alleged non-exhaustion of domestic remedies *per se* deprives the Commission of jurisdiction to grant or maintain the precautionary measures in this matter.

With respect to the Commission's request for the State to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a

appropriate, its President may, at the request of a party or any other person concerned, or of its own motion, indicate to the parties any interim measures which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it"); Rules of Procedure of the Human Rights Committee, adopted July 26, 1989, Art. 86 (providing that (t)he Committee may, prior to forwarding its views on the communication to the State part concerned, inform the State of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In so doing, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication"); Rules of Procedure of the UN Committee Against Torture, UN Doc. CAT/C/Rev.4, Art. 108(1) (providing that "{a)t any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) for new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations").

³⁶ See, e.g., Case N° 12.243, Report N° 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117; IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001), paras. 71, 72; I/A Court H.R., Case of James *et al.* (Trinidad and Tobago), Order of August 29, 1998, "Considering" para. 9 (finding that executing the beneficiaries of the measures pursuant to death sentences before the Commission and the Court had an opportunity to decide petitions filed on their behalf would "create an irremediable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system").

³⁷ See, e.g., I/A Court H.R., Lysias Fleury Case, Order for Provisional Measures dated June 7, 2003, "Considering", paras. 6, 7 (observing that aim of provisional measures in national legal systems, in general, is to protect the rights of the parties to a dispute, ensuring that the judgment on the merits is not hindered by their actions *pendente lite*, but that "the aim of urgent and provisional measures, in International Human Rights Law, goes further, inasmuch as, in addition to their essentially preventive nature, they effectively protect fundamental rights, insofar as they seek to avoid irreparable damage to persons").

³⁸ See, e.g., ICJ, Case Concerning Avena and other Mexican Nationals (Mexico v. United States), Order for the Indication of Provisional Measures dated 5 February 2003, General List No. 128, para. 58 (stipulating that the granting of provisional measures under Article 41 of the Court's Statute that requested the United States to ensure that three individuals related to the case before the Court were not executed pending the final judgment in the proceedings "in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves"; Eur. Court H.R., Case of Ocalan v. Turkey, Judgment of March 12, 2003, para. 5 (indicating that shortly following the lodging of the application in the case, the Court requested interim measures from the Government of Turkey to ensure that proceedings against the applicant in the State Security Court complied with the due process protections under Article 6 of the European Convention and to "take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention"); UN Human Rights Committee, K.C. (Canada), Communication No. 486/1992, UN Doc. CCPR/C/45/D/486/1992 (August 17, 1992), para. 5.2 (requesting interim measures under Article 86 of the Committee's Rules of Procedure to defer the author's extradition until the Committee had an opportunity to consider the admissibility of the issues placed before it); UN Committee Against Torture, Mafhoud Brada (France), Communication No. 195/2002, UN Doc. CAT/C/34/D/195/2002 (May 24, 2005), para. 1.2 (requesting pursuant to Article 108(9) of the Committee's Rules of Procedure that the State not deport the complainant to Algeria while his complaint was considered).

³⁹ The Commission's authority to request precautionary measures was first included in Article 26(2) of the Commission's Regulations adopted in 1980, which provided that "ijn urgent cases when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damages in cases where the denounced facts are true." See (Current) Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its 660th Meeting, 49th Session, held on April 18, 1980, in Inter-American Commission on Human Rights, Ten Years of Activities, 1971-1981 (1982) at p. 62. The Commission began reporting on precautionary measures granted by it beginning in its 1997 Annual Report. For past summaries of precautionary measures granted by the Commission, see Annual Report of the IACHR 1997, 1998, Chapters III(2)(A), Annual Reports of the IACHR 199-2004, Chapters III(C)(1).

competent tribunal, the State has argued that the actions of the various tribunals established at Guantanamo Bay as well as the federal courts of the United States are addressing the concerning raised by the Commission and therefore that it is "wholly unnecessary and improper for the Commission to retain jurisdiction over this proceeding." In this respect, the Commission observes that when it first adopted these precautionary measures in March 2002, the urgency of the matter arose from the fact that according to available information, the detainees at Guantanamo Bay remained entirely at the unfettered discretion of the United States government. As no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights, the Commission considered that the rights and protections to which the detainees may be entitled under international or domestic law could not be said to be the subject of effective legal protection by the State absent clarification of the legal status of the detainees. Over two years later, the U.S. Supreme Court reached essentially the same conclusion in its judgment in the case of *Rasul v. Bush*,⁴⁰ in which a majority of the Court held that United States courts have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. The Court's finding in this respect was based upon, *inter alia*, the longstanding and fundamental role that the writ of habeas corpus plays as a means of reviewing Executive detention. In this respect, Mr. Justice Stevens, writing for the majority, quoted Justice Jackson's statement from his dissenting opinion in the case of *Shaughnessey v. United States ex rel. Mezei*, that

"Executive imprisonment has long been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint."⁴¹

Notwithstanding the Supreme Court's pronouncement, the information before the Commission indicates that over one year since the decision, nearly half of the detainees at Guantanamo Bay have not been given effective access to counsel or otherwise provided with a fair opportunity to pursue a habeas corpus proceeding in accordance with the Supreme Court's ruling, despite the fact that the purpose of habeas is intended to be a timely remedy aimed at guaranteeing personal liberty and humane treatment.⁴² Moreover, in those habeas petitions that have been filed, no final determinations have yet been reached as to the legal status of the detainees or the rights to which they are entitled under domestic or international law. While the State argues that the procedures before the Combatant Status Review Board and the Administrative Review Boards likewise satisfy the Commission's request, 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. The information available only indicates that 558 of the 596 detainees have been found by the Combatant Status Review Tribunal to be "enemy combatants not entitled to prisoner of war protections." Accordingly, the Commission does not consider that these procedures have adequately responded to the concerns at the base of the Commission's request for precautionary measures.

In these circumstances, the Commission considers that the urgent situation at Guantanamo Bay continues to exist and, moreover, has been exacerbated by the fact that some detainees have been subjected to additional processes and proceedings, including removal to third countries and trial by military commission, while their legal status remains unclear. Based upon these considerations, the Commission finds that the State has not complied with this aspect of the Commission's request for precautionary measures, that a serious and urgent situation of irreparable harm to persons remains at Guantanamo Bay, and therefore reiterates its request that the State take the immediate measures necessary to have the legal status of the detainees at Guantanamo Bay effectively determined by a competent tribunal.

⁴⁰ U.S.S.C., *Rasul et al. v. Bush, President of the United States, et al.*, No. 03-334 (June 28, 2004).

⁴¹ *Id.*, at 6, citing *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 218-219 (1953) (Dissenting opinion of Justice Jackson).

⁴² *See* I/A Court H.R., *Castillo Paéz Case*, Judgment of November 3, 1997, Ser. C No. 34, para. 83 (holding that "[t]he purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life").

The Commission has also requested that the State conduct thorough and impartial investigations into all allegations of torture and other ill treatment of detainees under its authority and control and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility. In this regard, it has long been emphasized within the inter-American human rights system that states must use the means at their disposal to prevent human rights violations and to provide effective remedies for any violations that do occur, including undertaking thorough and effective investigations capable of identifying and punishing persons responsible for human rights infringements.⁴³ In response to the Commission's request, the State has indicated, without significant detail, that several official reviews of conditions of detention at Guantanamo and elsewhere have been undertaken and that allegations of detainee abuse are investigated and those who commit wrongdoing are punished. The State has also indicated that as of December 2004 major independent investigations at Guantanamo have documented eight instances of infractions which have resulted in action ranging from admonishment to court-marshal.

The Commission is encouraged by indications that the State has taken some measures to investigate and prosecute allegations of mistreatment at Guantanamo Bay. At the same time, the Commission remains concerned by the information presented by the Petitioners and available through the media more generally which suggests that instances of abuse and other inhumane treatment may be continuing at Guantanamo and that these instances may include the denial of proper medical treatment to detainees who have participated in hunger strikes as well as methods of interrogation directed at the religious affiliations of certain detainees. The Commission is also concerned that, according to the State's submissions, all of the investigations of abuse at Guantanamo have been undertaken internally by the Department of Defense, which is the very institution alleged to be responsible for the instances of abuse, which may call into question the impartiality of the measures taken. As the Commission has previously found, notwithstanding the threat or gravity of a situation of terrorist violence, and regardless of whether it arises in the context of armed conflict, the right to humane treatment is a non-derogable right, and the prohibition against torture constitutes a peremptory norm of international law and therefore may not be suspended or restricted under any circumstances.⁴⁴ In light of the serious nature of these allegations, the Commission reiterates its request that the State take all measures necessary to thoroughly and impartially investigate, prosecute and punish all instances of torture and other mistreatment that may be perpetrated against the detainees at Guantanamo Bay, whether through methods of interrogation of otherwise. This must include respect for the prohibition against the use in any legal proceeding of statements obtained through torture, except against a person accused of torture as evidence that the statement was made.⁴⁵

With respect to the Petitioners' allegations concerning the transfer or removal of detainees to third countries in circumstances which do not adequately protect against the possibility that the transferees may be subjected to torture or other inhuman treatment, the State has indicated that it takes seriously the principle of non-refoulement, and that its policy is to obtain specific assurances from a receiving country that it will not torture the individual being transferred to that country and would not transfer a detainee where those assurances are not sufficient when balanced against an individual's specific claim. The submissions of the Petitioners concerning transfer agreements allegedly entered into between the United States and certain Muslim governments appear to support the State's claims in this regard.

On this issue, the Commission has previously stated that the obligation of non-refoulement under applicable international instruments is absolute and does not depend upon a claimant's status as a refugee. This obligation also necessarily requires that persons who may face a risk of torture cannot be rejected at the border or expelled without an adequate, individualized examination of their circumstances even if they do not qualify as refugees, and that the process requires the strictest adherence to all applicable safeguards, including the right to have one's eligibility to enter the process decided by a competent, independent and impartial

⁴³ See, e.g., I/A Court H.R., Velásquez Rodríguez Case, Judgment of 28 July 1988, Series C N° 4, paras. 172-174.

⁴⁴ See IACHR, Report on Terrorism and Human Rights (2002), OAS Doc. OEA/Ser.LV/II.116 Doc. 5 rev. 1 corr. (22 October 2002), para. 216.

⁴⁵ See, e.g., UN Convention Against Torture, Article 15 (providing that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made").

decision-maker, through a process which is fair and transparent.⁴⁶ The Commission has also specifically stated that

[f]or persons who have been subject to certain forms of persecution, such as torture, return to their home country would place them at a risk which is impermissible under international law. As noted above, the prohibition of torture as a norm of *jus cogens*--as codified in the American Declaration generally, and Article 3 of the UN Convention against Torture in the context of expulsion--applies beyond the terms of the 1951 Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.⁴⁷

There is no question that transferring or removing a detainee to a country where he or she may face a real risk of torture or other mistreatment can give rise to a serious and urgent risk of irreparable harm warranting precautionary measures from this Commission.⁴⁸ From the information available to the Commission, which includes judicial decisions from courts in the United States and findings by the U.S. government itself, at least some of the detainees at Guantanamo face real risks of torture and other mistreatment if removed or transferred to other governments. Further, the information presented indicates that although the United States government may request assurances from the receiving state, it has no method of enforcing or monitoring compliance with these assurances once the detainee is removed, a defect that has been criticized by other international human rights authorities.⁴⁹ Given the absolute nature of the non-refoulement principle and the serious nature of the consequences if it is not fully respected and enforced, the Commission respectfully requests that the United States take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, 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.

Finally, the Commission respectfully requests that the United States provide information concerning the Petitioners' allegation that juveniles under the age of 18 continue to be held by the United States at Guantanamo Bay and that they have not been segregated from the adult population or provided with education or rehabilitation assistance.

⁴⁶ See IACHR, Report on Terrorism and Human Rights (2002), para. 394, citing IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, paras. 25, 70.

⁴⁷ IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para. 154. See also IACHR, Report on Terrorism and Human Rights (2002), para. 395.

⁴⁸ See, e.g., Case 11.661, Report 7/02, Manichavasgan Suresh v. Canada, Annual Report of the IACHR 2002, paras. 7, 8. See similarly UNCAT, Communication No. 195/2002 (France), UN Doc. CAT/C/34/D/195/2002, paras. 1.1, 6.1, 6.2.

⁴⁹ See, e.g., Report of the UN Special Rapporteur on Torture, Theo van Boven, to the General Assembly, UN Doc. A/59/324 (July 2, 2002), para. 37(mentioning a number instances in which there were strong indications that diplomatic assurances were not respected and indicating that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to"); Report of the UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, UN Doc. E/CN.4/2005/103 (February 7, 2005), paras. 56-61 (noting that unlike assurances on the use of the death penalty or trial by a military court which are readily verifiable, assurances against torture and other abuse require constant vigilance by competent and independent personnel and that the mere fact that such assurances are sought is a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated, and concluding that "[g]iven the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation"). See also Human Rights Committee, UN Doc. CCPR/C/SWE, para. 12.

Summary of Precautionary Measures Request

Based upon the foregoing findings, the Commission respectfully request that Your Excellency's Government:

1. take the immediate measures necessary to have the legal status of the detainees at Guantanamo Bay effectively determined by a competent tribunal;
2. take all measures necessary to thoroughly and impartially investigate, prosecute and punish all instances of torture and other mistreatment that may be perpetrated against the detainees at Guantanamo Bay, whether through methods of interrogation or otherwise, and to ensure respect for the prohibition against the use in any legal proceeding of statements obtained through torture, except against a person accused of torture as evidence that the statement was made;
3. take the measures necessary to ensure that any detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantanamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, 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.

The Commission notes that during its last hearing on these measures on October 20, 2005, your government's representative declined to make any oral representations, and that the State indicated in its October 19, 2005 written representations that it intends to defer further formal participation in the matter until the international law requirement of exhaustion of domestic remedies has been fulfilled. The Commission regrets the stance taken by the United States and hopes that it will reconsider its position in light of the Commission's findings in this matter and the important role that the State's participation in this and other proceedings before the Commission plays in reinforcing the protection of fundamental rights in our Hemisphere.

In its communication to the United States, the Commission asked that the State provide information concerning compliance with its precautionary measures, together with the additional information requested, within 30 days.

Sincerely yours,



Clare K. Roberts
President