

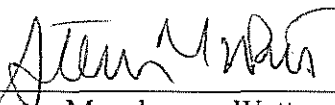
**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF
THAHE MOHAMMED SABAR, SHERZAD KAMAL KHALID, ALI HUSSEIN,
MEHBOOB AHMAD, SAID NABI SIDDIQI, AND HAJI ABDUL RAHMAN**

**BY THE
UNITED STATES OF AMERICA**

**WITH A REQUEST FOR AN INVESTIGATION
AND HEARING ON THE MERITS**

By the undersigned, appearing as counsel for petitioners
UNDER THE PROVISIONS OF ARTICLE 23 OF THE RULES OF PROCEDURE OF
THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS



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I. STATEMENT OF THE CASE

Petitioners are six Afghan and Iraqi citizens who are the innocent victims and survivors of torture and other abusive treatment perpetrated against them by U.S. officials at U.S.-run detention facilities in Afghanistan and Iraq in 2003 and 2004. The U.S. government's own reports document that the torture and inhumane treatment that Petitioners were subjected to was not aberrational; on the contrary, it was widespread and systemic throughout the U.S.-run detention facilities in the two countries. These same reports also document that the torture and inhumane treatment of detainees was the direct result of policies and practices promulgated and implemented at the highest levels of the U.S. government. Despite these reports and Petitioners' and other detainees' credible allegations of torture and inhumane treatment, the U.S. government has failed to conduct any comprehensive criminal investigation, has not held accountable those responsible, and has not provided any form of redress to Petitioners and the many other victims and survivors of U.S. torture and abuse.

Absent such measures, Petitioners sought civil redress in U.S. courts. Petitioners sued certain senior leaders of the U.S. military, including then-U.S. Secretary of Defense Donald Rumsfeld, under the U.S. Constitution and international law. Petitioners' claims, however, were summarily dismissed by the District Court for the District of Columbia in a decision subsequently affirmed by the District of Columbia Court of Appeals. On November 19, 2011, the Court of Appeals denied Petitioners' request to have that decision reconsidered by the full court, leaving Petitioners with no effective recourse before U.S. courts, and without any form of redress for their injuries. Petitioners now seek redress against the United States before this Commission for the rights violations arising from their torture and inhumane treatment.

This petition alleges two separate but related human rights violations that are protected by the American Declaration on the Rights and Duties of Man (“American Declaration”), which imposes binding international legal obligations on the United States. First, senior members of the U.S. military promulgated policies and practices that directly resulted in Petitioners’ torture and cruel, inhuman and degrading treatment by U.S military personnel in U.S.-run detention facilities in Iraq and Afghanistan. Petitioners’ right to be free from such treatment is protected by Articles I and XXV of the American Declaration.

Second, the domestic court’s rejection of Petitioners’ constitutional and international law claims has left them without a remedy for the harms they suffered. Had Petitioners been provided with an adequate legal remedy, they would have been compensated both financially and, more importantly, through a legal declaration that their rights had been violated by the United States. In failing to provide a remedy, the United States has left Petitioners with no recourse for the violations of their rights. This unfair result confirms and promotes a culture of impunity for torture and inhumane treatment perpetrated by U.S. officials in Afghanistan, Iraq, and elsewhere. In denying Petitioners a remedy for the wrongs they suffered, the United States violated Article XVIII of the American Declaration.

Petitioners request that this Commission declare their petition admissible, conduct an investigation into this matter, and hold a hearing on the merits.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Petitioners are six Afghan and Iraqi citizens who were formerly detained by U.S. military forces in either Afghanistan or Iraq. While detained and interrogated, Petitioners were tortured and subjected to other forms of cruel, inhuman or degrading treatment. All

were eventually released from U.S. custody without ever being prosecuted for, or even charged with, any wrongdoing and without ever receiving any redress for their injuries. Petitioners eventually sought redress before U.S. courts, but their cases were dismissed without any consideration of the merits of their claims.

Petitioner Thahe Mohammed Sabbar

Thahe Mohammed Sabbar is a 43-year-old Iraqi who was detained by the United States military for approximately six months from July 2003 to January 2004. Sabbar was detained at various locations in Iraq, including Camp Bucca and Abu Ghraib prison. While in American custody, Sabbar was subjected to acts of torture and cruel, inhuman and degrading treatment. Sabbar's quality of life has suffered greatly since his detention. Sabbar received frequent and severe beatings from U.S. military personnel. Soldiers used guns and an electric weapon to beat and shock Sabbar, and forced him and other detainees to run through a gauntlet of 10 to 20 uniformed soldiers, who screamed at them and beat them with wooden batons. Sabbar was also shackled to a fence with his hands behind his back and was left for several hours at temperatures exceeding 120 degrees Fahrenheit.

In addition to physical abuse, Sabbar was sexually assaulted by U.S. military personnel. On one occasion, one or more soldiers inserted their fingers into Sabbar's anus and grabbed and fondled his buttocks while making moaning sounds and jeering at him. This was done in the presence of other soldiers, including females, in order to further degrade and demean Sabbar.

Soldiers also staged mock executions with Sabbar and other detainees to terrorize and humiliate them. During one such execution, Sabbar and others were forced to stand

against a wall in front of a firing squad. The squad simulated gunfire and then laughed as the detainees lost control of their bladders. Sabbar was also threatened by soldiers who told him they would send him to Guantánamo, where he would be killed.

Throughout his detention, Sabbar was routinely deprived of food and water. At times, guards gave Sabbar and other detainees spoiled food, which caused some detainees to vomit. He was also kept shackled for extended periods and denied access to a toilet, causing him to soil his pants. As a result of this treatment, and of the sexual and physical abuse, Sabbar suffers from incontinence, impotence, and nightmares.

Petitioner Sherzad Kamal Khalid

Sherzad Kamal Khalid is a 42-year old Iraqi citizen who was detained by the United States military for approximately two months from July 2003 through September 2003. Khalid was held at various locations in Iraq where he was subjected to frequent and severe beatings, sexual abuse, and other cruel treatment.

Military personnel regularly and intentionally inflicted physical abuse on Khalid during his detention. Soldiers would severely beat Khalid before each interrogation, leaving his body covered with deep bruises. They also kicked and punched Khalid repeatedly over a period of hours while he was hooded and shackled and seated on the ground, terrorizing and injuring him with random and unanticipated blows. On one occasion, Khalid was forced to run a gauntlet of 10 to 20 uniformed U.S. soldiers who beat him with batons.

Like many other detainees, Khalid was sexually assaulted and humiliated. During a severe beating, soldiers punched him in the mouth, breaking one of his teeth, and grabbed his buttocks, while brandishing a long wooden pole and threatening to sodomize

him on the spot and on every night of his detention. Soldiers also simulated anal rape by grabbing his buttocks and pressing a water bottle against the seat of his pants.

Throughout his detention, interrogators threatened to kill Khalid and subjected him to mock executions in order to coerce confessions. Soldiers would demand a false confession while holding a gun to his head, and placed him before a mock firing squad with simulated gunfire.

Khalid was also routinely deprived of sleep, food, and water. At times, guards gave Khalid spoiled food, causing him to vomit. He was also kept shackled for extended periods and denied access to a toilet, which would cause him to soil his pants. On one occasion, Khalid was shackled to a fence with his hands behind his back and was forced to stand in that position for several hours at temperatures exceeding 120 degrees Fahrenheit, without any water or food. At another point of his detention, Khalid was forced to stay in a so-called "silent tent" for several days, during which time he was severely beaten whenever he started to fall asleep.

Petitioner Ali Hussein

Ali Hussein Ali was only 17 years old when he was detained by the U.S. military in August 2003. He was held in detention for four weeks at Abu Ghraib prison and other locations throughout Iraq.

During his arrest and subsequent detention, Ali suffered excruciating pain and was subjected to degrading and inhuman treatment. Soldiers shot Ali in the neck and back and threw him to the ground before arresting him. Military personnel refused to provide medical care for Ali for hours after the arrest, even though he was bleeding profusely from two gunshot wounds. The bullets were eventually removed from Ali's

neck and back in a brutal fashion and without anesthetic. He was then denied food, water and pain medication for almost two days after he was shot.

The pain inflicted on Ali continued well after the bullets were removed. While he was housed in an outdoor tent at Abu Ghraib, Ali received a life-threatening shrapnel wound during a mortar attack. Once again, military personnel refused to provide Ali with adequate medical care and pain medication. While recovering from abdominal surgery, military personnel intentionally inflicted further pain and torture on Ali. He was dragged roughly from one location to another and kept shackled hand and foot to a bed with a blanket placed over his face. He was then moved to another prison location where he was forced to sleep on the ground outdoors in extremely hot weather without any shelter, despite being in excruciating pain and having an intravenous tube in his arm. Military personnel refused to change the bandages on Ali's surgical wound, which became infected and leaked pus.

Military personnel continued to degrade Ali even at the time of his release. After telling Ali that he would be sent to another prison, they cut off his identification bracelet, confiscated his release papers and physically threw him from a bus to the ground outside while he still had an intravenous tube in his arm.

Petitioner Mehboob Ahmad

Mehboob Ahmad is a 42-year-old citizen of Afghanistan. Ahmad was detained by U.S. military for approximately five months from June to November 2003. He was held at various locations in Afghanistan, including the Gardez firebase and the Bagram Air Base. During his detention, Ahmad was tortured and subjected to torture and other cruel, inhuman and degrading treatment by U.S. military personnel.

Painful techniques used on Ahmad included hanging him upside-down from the ceiling with a chain, and repeatedly pushing and kicking him while he knelt on a wooden pole with his hands chained to the ceiling.

Ahmad was also sexually and psychologically traumatized by U.S. military personnel. He was forced to strip and stay naked for long periods of time, was probed anally, and was threatened with a snarling and barking dog at close range. Interrogators taunted Ahmad by directing insults at his mother and sister and implying that soldiers would rape his wife. He was also threatened with transport to Guantánamo.

Like other detainees, Ahmad was subjected to extreme sensory deprivation and isolation. He was forced to wear sound-blocking earphones; he was forced to wear black, opaque goggles almost continuously for more than a month, and was not allowed to speak with other detainees for the five months that he was in custody.

Petitioner Said Nabi Siddiqi

Said Nabi Siddiqi is a 55-year-old citizen of Afghanistan. Siddiqi was detained by the United States military for nearly two months from July to August 2003 at various locations, including detention facilities in Kandahar and Bagram. During his detention, Siddiqi was subjected to torture or other cruel, inhuman and degrading treatment.

Siddiqi was forced into painful and abusive positions for long periods during interrogations. Among other tactics, soldiers forced Siddiqi to hold a 15-pound piece of wood in his cuffed hands and maintain a pushup position while he was doused with water. Soldiers would beat Siddiqi if he did not maintain the positions, and also kicked and punched him during the interrogations, while flashing bright lights into his eyes and yelling directly into his ears at top volumes. During one two-week span, military

personnel interrogated Siddiqi every night, keeping him handcuffed and blindfolded for that entire period of time.

American forces also exploited Afghan cultural norms to further demean and degrade Siddiqi. Soldiers sexually humiliated Siddiqi by stripping him naked and photographing him, and by probing his anus. During interrogations, soldiers made animal sounds and demanded to know which animals Siddiqi had sex with, and repeatedly told him that his wife was a slut and his daughter was a street beggar. Soldiers also threw stones at Siddiqi and other detainees while they used the toilet and forced them to publicly expose themselves.

During his detention, U.S. military personnel intentionally ignored Siddiqi's medical needs and treated him in a manner that worsened his health. Upon his detention, soldiers confiscated his asthma inhaler despite his shortness of breath. Soldiers also kept Siddiqi and other detainees from sleeping for lengthy periods by throwing stones at them all night and by awakening them and forcing them to roll around while dousing them with water and verbally abusing them. In addition, Siddiqi was kept for weeks in an outdoor area with no protection from the elements and extreme weather.

Petitioner Haji Abdul Rahman

Haji Abdul Rahman is a 55-year-old citizen of Afghanistan. Rahman was detained by the United States military for approximately five months, from December 2003 to May 2004. He was held at various locations in Afghanistan, including the Gardez firebase and the Bagram air base. Rahman suffered severe physical and psychological injuries as a result of torture and other cruel, inhuman and degrading treatment.

While in custody, American personnel deliberately inflicted pain on Rahman. During interrogation, soldiers forced Rahman to wear blackout goggles and kneel with his hands cuffed behind his back; soldiers then placed a chain through the handcuffs, which they repeatedly jerked to pull his arms and wrench his shoulders and wrists. He was forced to wear painful restraints, blackout goggles and handcuffs for virtually the entire first month of his detention. After that first month, soldiers placed Rahman in solitary confinement for 15 days and made him wear blackout goggles and sound-deadening headphones for no reason other than to intimidate, humiliate and degrade him.

Like other detainees, Rahman was subjected to sleep deprivation. He was detained in brightly lit areas for approximately three months, during which time military personnel made loud noises to keep him awake. This sleep deprivation was used to disorient and dehumanize Rahman and other detainees.

Rahman was also sexually humiliated. He was forced to strip naked in front of other people and military personnel anally probed him on multiple occasions. Rahman was also forced to wear blackout goggles while he was naked. He was photographed repeatedly without his clothes on.

B. Background on the U.S. Military Detention and Interrogation Program

Petitioners were held at facilities in Afghanistan and Iraq controlled and operated by the U.S. military. While detained, Petitioners and many other detainees were interrogated and subjected to torture and other abuses by U.S. military personnel and others acting under the direction or with the authorization of senior members of the U.S. military command. The torture and abuse were widespread and systemic and carried out pursuant to a policy, pattern, or practice of misconduct that was sanctioned by the

government of the United States. Authorization for the use of torture and inhumane treatment of detainees was given despite the absolute prohibition on the use of such practices enshrined in U.S. law, including in the military's own regulations.¹

In stark contrast to these mandates, the public record shows that detainees in U.S. custody in Afghanistan and Iraq were subjected to torture and other abuses. Official reports also document that torture and inhumane treatment of detainees were not aberrational or the work of a few rogue soldiers; rather, as the report of former Defense Secretary James Schlesinger concluded, detainee abuse was “widespread” and “not just the failure of some individuals to follow known standards There is both institutional and personal responsibility at higher levels.”² Major General Taguba, who led the U.S. Army's official investigation into the Abu Ghraib prisoner abuse scandal and testified before Congress on his findings in May 2004, has stated publicly: “[t]here is no longer any doubt as to whether the [Bush] Administration committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”³

Official reports, most recently a report of the Senate Armed Services Committee,⁴ and documents produced by the United States in litigation under the Freedom of

¹ See e.g. U.S. Const. amend. V, VIII; 18 U.S.C. § 2340 (2006) (defining torture as an offense against U.S. law); Dep't of the Army, Field Manual 34-52 Intelligence Interrogation (1992) (describing the legal standards governing interrogations by U.S. military personnel, and unequivocally stating that binding international treaties and U.S. policy “expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation”) [“Army Field Manual”].

² Independent Panel to Review DoD Detention Operations, Final Report of the Independent Panel to Review DoD Operations (2004), available at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> [“Schlesinger Report”].

³ Major General Antonio Taguba, *Preface to Broken Laws, Broken Lives: Medical Evidence of Torture by the U.S.* (2008), available at http://brokenlives.info/?page_id=23.

⁴ S. Armed Services Comm., 110th Cong., Inquiry into Treatment of Detainees (Comm. Print 2008) available at

Information Act (“Torture FOIA”),⁵ conclusively demonstrate that then-Secretary of Defense Donald Rumsfeld and other high-ranking military leaders began to abandon the absolute prohibition against torture in 2001, soon after the armed conflict in Afghanistan began.⁶ By the summer of 2002, a report commissioned by the U.S. Joint Chiefs of Staff recommended that interrogation procedures be modified as part of “a new plan to exploit detainee vulnerabilities.”⁷ By late 2002 the Federal Bureau of Investigation (“FBI”) had begun to document and complain internally about interrogation techniques used by the U.S. military on detainees held at Guantánamo Bay, Cuba.⁸ These documents describe the harsh treatment of detainees there as part of an approved list of interrogation methods which FBI agents termed “torture techniques.”⁹ FBI agents also described specific instances of physical and psychological abuse of detainees, sexual humiliations, as well as inhuman and degrading conditions of confinement.¹⁰

These official reports and other documents show that explicit authorization for the use of these procedures and others like them were given for use first on detainees held at the U.S. facility at Guantánamo Bay, Cuba (“Guantánamo”), and that these procedures were later sanctioned for use on detainees in facilities throughout Afghanistan and Iraq.

http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf [“SASC Report”].

⁵ *ACLU v. Dep’t of Defense*, No. 04-cv-4151, 2011 WL 4636596 (S.D.N.Y., Oct. 05, 2011).

⁶ For a comprehensive analysis of the use of torture and inhumane treatment by U.S. authorities on detainees in Afghanistan and Iraq, *see*, American Civil Liberties Union, Shadow Report to the U.N. Committee on Torture, Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad 36, Annexes B6-B13 (2006) [“ACLU Shadow Report”].

⁷ Jameel Jaffer and Amrit Singh, Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond 5 (2007) (quoting Office of the Inspector General of the Department of Defense, No. 06-INTEL-10, Review of DOD Directed Investigations of Detainee Abuse 25 (2006), *available at* <http://www.dodig.mil/fo/Foia/ERR/06-INTEL-10-PublicRelease.pdf>) [“Administration of Torture”].

⁸ ACLU Shadow Report, Annexes B6-B13 (citing to FBI emails and memoranda obtained through the FOIA).

⁹ *Id.* at 36, Annex B6.

¹⁰ *Id.* at 37, Annexes B14-24.

1. The Origins of the Use of Torture and Inhumane Treatment on Detainees in Afghanistan and Iraq

By memorandum dated December 2, 2002, Rumsfeld personally approved a list of coercive interrogation techniques for use on detainees at Guantánamo.¹¹ These techniques included: “stress positions,” 20-hour interrogations, the removal of clothing, playing upon a detainee’s phobias to induce stress (such as through the use of dogs), deception to make the detainee believe the interrogator was from a country with a reputation for torture, the use of falsified documents and reports, isolation for up to 30 days, and sensory deprivation.¹² All of these techniques violated U.S. laws prohibiting torture and inhumane treatment, including the established rules and military standards governing detention and interrogation set forth in Army Field Manual 34-52.¹³

A government investigation (the Fay-Jones investigation) into the misconduct of the 205th Military Intelligence Brigade, which was in charge of the U.S.-run Abu Ghraib prison in Iraq, concluded that interrogation techniques developed and approved for use in Guantánamo were also approved for use on detainees in Afghanistan and Iraq. Those techniques included:

- Use of “sleep adjustment,” a technique of reversing sleep schedules from night to day;
- Forced nudity and “use of clothing” as an incentive for detainee cooperation;
- Abusing detainees with dogs;
- Isolation;
- Sensory deprivation; placing detainees in excessively cold or hot cells with

¹¹ Memorandum from William J. Haynes II, Gen. Counsel of the Dep’t of Def. to Donald Rumsfeld, Sec’y of Def. on Counter-Resistance Techniques (approved and signed by Secretary Rumsfeld, with a handwritten note that referred to the use of forced standing for up to 4 hours at a time, stating, “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”).

¹² See Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf [“ICRC Report”].

¹³ See Army Field Manual, *supra* note 1.

limited light or ventilation.¹⁴

On January 15, 2003, Rumsfeld rescinded his blanket authorization for the use of some of these techniques.¹⁵ However, he failed to take any meaningful action to prevent, investigate, or punish the prior use of these unlawful techniques. Instead, in an order to the commander of the U.S. Southern Command, Rumsfeld stated that he personally could authorize the continued use of the otherwise-rescinded techniques, and that he wanted to be involved in the formulation of a plan to use them: “Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques.”¹⁶

2. The Use of Torture and Inhumane Treatment on Detainees in Afghanistan

Official government reports document that abusive interrogation methods were first used on detainees in U.S.-run facilities in Afghanistan as early as November 2001.¹⁷ Significantly, in January 2002, Rumsfeld issued an order providing that detainees suspected of membership in Al-Qaeda or the Taliban were not protected by the Geneva Conventions as prisoners of war.¹⁸ Documents produced by the Department of Defense pursuant to the Torture FOIA reveal widespread abuse of Afghan detainees. For example:

¹⁴ Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 10, 70 (2004) [“Fay-Jones Report”], *available at* <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

¹⁵ Administration of Torture, *supra* note 7, at 48, A-146 (citing memorandum from Secretary Donald Rumsfeld to SOUTHCOM commander re: counter-resistance techniques, Jan. 15, 2003).

¹⁶ Memorandum from Sec’y Donald Rumsfeld for Commander USSOUTHCOM, Dep’t of Def. (Jan. 15, 2003), *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000020.pdf>.

¹⁷ A.T. Church III, Review of Department of Defense Detention Operations and Detainee Interrogation Techniques 196 (Mar. 7, 2005) [“Church Report”], *available at* <http://www.aclu.org/national-security/church-report>.

¹⁸ Administration of Torture, *supra* note 7, at 19, A-177.

A sworn statement by U.S. personnel in Task Force 202 Military Intelligence reported that a detainee's face was cut and swollen in several places consistent with repeated blows to the face. The detainee stated that guards had asked everybody to stand and when he couldn't, because his leg was numb, he was kicked by guards in the head and face. He was later assaulted by two or three guards on subsequent nights. The declarant had spoken to detainee about a week prior and had not noticed visible marks on his face at the time.¹⁹

In October 2002, military interrogators from Afghanistan were sent to Guantánamo, where they received briefings and instructions from interrogators on abusive interrogation practices.²⁰ Upon their return, they recommended the adoption of new techniques such as, “use of strip searches for ‘degradation,’ hoods for ‘sensory deprivation,’ ‘sensory overload’ through lights, darkness, noises, and dogs, and manipulation of the detainees’ environment through ‘cold, heat, wet, discomfort, etc. . . .”²¹ By late 2002, “interrogators [in Afghanistan] were employing many of the techniques Rumsfeld approved for use at Guantanamo in December of that year.”²² By the end of 2002, U.S. interrogators had killed at least one detainee by chaining his arms to the ceiling of his cell and beating his legs.²³ Another detainee was killed through “blunt force injuries” inflicted during his imprisonment.²⁴

On January 15, 2003, Rumsfeld directed the then-General Counsel of the Department of Defense to convene a “Working Group” on interrogation techniques for his personal review and consideration.²⁵ For its analysis, the Working Group solicited

¹⁹ ACLU Shadow Report, *supra* note 6, at 39, Annex B28-29 (Sworn statement of Military Intelligence Officer in Kandahar, Afghanistan (Feb. 18, 2002)).

²⁰ SASC Report, *supra* note 4, at 148.

²¹ *Id.* at 149.

²² Administration of Torture, *supra* note 7, at 19; *Id.* at 19, n.104 (citing Church Report, *supra* note 17, at 201; Dep’t of Defense, Office of the Insp. General Report at 15-16, 27).

²³ *Id.* at 19-20, A-185-86.

²⁴ *Id.* at 20.

²⁵ Administration of Torture, *supra* note 7, at 48, A-147 (citing Memorandum from Def. Sec’y Donald Rumsfeld to William J. Hayes, General Counsel of the Department of Defense, Jan. 15, 2003), available at <http://www.american-buddha.com/911.torture11503defensetocounsel.htm>.

information from U.S. military officers in Afghanistan concerning techniques then being used by U.S. forces there. The Working Group reported to Rumsfeld on April 4, 2003, and recommended 35 interrogation techniques for use at Guantánamo. On April 16, 2003, Rumsfeld personally approved the use of 24 of them.²⁶ These techniques were based in part on methods employed by U.S. personnel in Afghanistan, and included: isolation for up to thirty days, dietary manipulation, environmental manipulation, “sleep adjustment,” and “false flag” (leading detainees to believe that they have been transferred to a country that permits torture). None of these techniques were consistent with the methods of interrogation permissible under U.S. law, including those authorized in the U.S. Army Field Manual 34-52.²⁷ Rumsfeld also provided that even harsher techniques could be used with his personal authorization.²⁸

U.S. officials at the highest level knew of the extent and severity of the torture and abuse of detainees at detention sites in Afghanistan because reports detailing interrogation methods were sent to U.S. Central Command in January 2003.²⁹ A Department of Defense report from May 2004 on detention operations and detainee interrogations (the “Church Report”), concluded that the torturous methods resulted from a combination of an overbroad reading of the Army Field Manual and implementation of the techniques that Rumsfeld had authorized for use in December 2002.³⁰ Both the initial report and that of the investigation were transmitted to Rumsfeld’s office.³¹ Also, in

²⁶ S. Armed Services Comm., *Inquiry into the Treatment of Detainees in U.S. Custody* 132 (2008) available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf [“Senate Armed Services Report”].

²⁷ *Id.*

²⁸ *Id.*

²⁹ Administration of Torture, *supra* note 7, at 20.

³⁰ *Id.*

³¹ *Id.* (citing the Church Report, *supra* note 17, at 196, 201).

January 2003, the Commander of Task Force-180 (“CJTF-180”) of Afghanistan forwarded to the Pentagon Working Group a list of interrogation techniques used in Afghanistan.³² Thus, by early 2003, senior U.S. officials knew of the pervasive and deadly use of torture during interrogations in Afghanistan, yet Rumsfeld’s office did not respond to the report, granting implicit license for the torture to continue. In fact, whatever nominal restraints that interrogators operated under were largely unenforced and were later eliminated by a March 2004 directive that essentially endorsed techniques authorized for use by Rumsfeld in April 2003.³³

3. The Use of Torture and Inhumane Treatment on Detainees in Iraq

The U.S. military controlled and operated numerous detention facilities in Iraq, including the notorious Abu Ghraib prison, a detention facility known as “Camp Cropper” at the Baghdad international airport, a facility near the city of Umm Qasr known as Camp Bucca, facilities in or near the cities of Tikrit and Mosul, and numerous locations in or near the city of Baghdad.³⁴

In early 2003, Captain Carolyn Wood and members of the 519th Military Intelligence Battalion under her command were transferred from Afghanistan to Iraq. Previously, while deployed in Afghanistan, members of the 519th Military Intelligence Battalion under Wood’s command had tortured and killed two detainees.³⁵ In the summer of 2003, the commander of Iraq’s Task Force requested assistance regarding interrogations from U.S. officials specially trained in harsh interrogation tactics.³⁶ Also

³² Shadow Report, *supra* note 6, at 21.

³³ Administration of Torture, *supra* note 7, at 21.

³⁴ ACLU Shadow Report, *supra* note 6, at 40.

³⁵ Administration of Torture, *supra* note 7, at 21.

³⁶ SASC Report, *supra* note 4, at 170.

in the summer of 2003, in anticipation of obtaining approval for harsher interrogation practices, a member of Lieutenant General Sanchez's staff transmitted an email message asking military intelligence personnel in Iraq to provide by August 14, 2003 a "wish list" of interrogation techniques they wished to use.³⁷ The email stated that the "gloves are coming off" and that "we want these individuals broken."³⁸ At the time the message was sent, General Sanchez was Commander of Coalition Joint Task Force-7, the U.S.-led military coalition in Iraq, and thus was the highest-ranking U.S. military official in Iraq.

The International Committee of the Red Cross ("ICRC"), operating in Iraq, found that "methods of physical and psychological coercion were used by military intelligence in a systemic way to gain confessions and extract information."³⁹ The methods cited by the ICRC included: hooding to disorient and prevent detainees from breathing freely, prolonged use of painful stress positions, attaching detainees to the bars of cell doors while naked or in positions causing physical pain for several hours per day for several consecutive days, holding detainees naked in dark cells for several days, parading detainees naked and hooded or with women's underwear over their heads, deprivation of sleep, food, and/or water, and prolonged exposure to the sun during the hottest time of day.⁴⁰

In September 2003, Rumsfeld and Under Secretary of Defense Stephen Cambone sent Major General Geoffrey Miller, then-commander of the U.S. military joint task force at Guantánamo, to Iraq to deploy more aggressive interrogation methods in detainee

³⁷ Administration of Torture, *supra* note 7, at 50, A-308, 309.

³⁸ *Id.*

³⁹ ICRC Report, *supra* note 12.

⁴⁰ *Id.* at ¶¶ 25-27.

operations there.⁴¹ According to Brigadier General Karpinski, commander of the 800th Military Police Brigade, the unit of the U.S. Army responsible for detention facilities in Iraq, Miller told her that he was sent by Rumsfeld and Under Secretary Cambone to “gitmo-ize” detention facilities there by employing Guantánamo interrogation practices on detainees in Iraq.⁴² Miller established a detention environment in which every moment of a detainee’s day was carefully calculated to break his spirit and facilitate interrogation.⁴³

On September 14, 2003, General Sanchez signed a memorandum authorizing the use of 29 interrogation techniques, 12 of which violated U.S. Army Field Manual standards, including five that went beyond those authorized by Rumsfeld for use at Guantánamo.⁴⁴ These included the use of dogs, stress positions, yelling, loud music, and light control, all of which required General Sanchez’s personal approval.⁴⁵ They were based on two sources: (1) the techniques authorized by Rumsfeld in April 2003, which General Miller gave to General Sanchez earlier in the month; and (2) methods suggested by Captain Wood, who brought with her a list of techniques that had been in use by the 519th Military Intelligence Battalion in Afghanistan.⁴⁶ General Sanchez authorized the

⁴¹ SASC Report, *supra* note 4, at 190.

⁴² Hearing of the S. Armed Services Comm. on the Treatment of Iraqi Prisoners, 108th Cong. (2004) (testimony of Stephen Cambone), available at 2004 WL 1053885 (F.D.C.H.).

⁴³ Administration of Torture, *supra* note 7, at 23, A-208 (citing the sworn statement of Col. Thomas M Pappas).

⁴⁴ *Id.* at 25-26, A-234-35.

⁴⁵ *Id.*

⁴⁶ *Id.* at 22, A-196 (citing the sworn statement of Capt. Carolyn Wood).

use of the techniques in September 2003,⁴⁷ within days of Rumsfeld's visiting the U.S.-run Abu Ghraib detention facility.⁴⁸

By order dated October 12, 2003, General Sanchez modified his previous authorization of specific interrogation techniques, withdrawing approval of some abusive techniques, but allowing interrogators to continue to "control" the lighting, heating, food, shelter, and clothing given to detainees. General Sanchez indicated that he could approve the use of even harsher techniques on a case-by-case basis. Little effort was made to enforce the October 12 order, or to explain it properly to interrogators or other military personnel on the ground.⁴⁹

Torture FOIA documents also confirm the pattern of abuse of Iraqi detainees. For example, FBI records describe serious physical abuses such as beatings, strangulation, and the placement of lit cigarettes into detainee's ears, as well as attempts to cover up these abuses.⁵⁰ Other official documents reveal that troops engaged in the physical torture of a student and his family in December of 2003 that resulted in the student's suffering a broken jaw and teeth;⁵¹ that, in an effort to obtain information, U.S. Marines poured peroxide over detainees' open wounds, placed bags over detainees' heads, and repeatedly struck detainees with pick axe handles;⁵² and that U.S. agents subjected

⁴⁷ Memorandum from Gen. Ricardo Sanchez for Commander of U.S. Central Command on CJTF-7 Interrogation and Counter-Resistance Policy (Sep. 14, 2003), *available at* <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20030914.pdf>.

⁴⁸ Torturing Democracy, *Explore the Timelines*, <http://www.gwu.edu/~nsarchiv/torturingdemocracy/timelines/index2.html> (last visited Mar. 13, 2012).

⁴⁹ Administration of Torture, *supra* note 7, at 26-27.

⁵⁰ ACLU Shadow Report, *supra* note 6, at 41-42 (citing Annex B30-32, Report from [name redacted] Supervisory Special Agent, FBI to Bruce J. Gebhardt, Deputy Director, FBI; Cassandra Chandler, Executive Assistant Director, FBI; John Pistole, Executive Assistant Director, FBI; Grant Ashley, Assistant Director, FBI; Gary Bald, Assistant Director; Arthur Cummings, SC, FBI (June 25, 2004)).

⁵¹ *Id.* at 42 (citing excerpt from Investigative Report (full record *available at* http://www.aclu.org/torturefoia/released/032505/1081_1180.pdf)).

⁵² *Id.* (citing excerpt from Army Criminal Investigation Division Report of Investigation Number 0052-04-CID342 (May 11, 2004) (full record *available at*

detainees to burning with cigarettes, electrocution, sodomy with wine bottles and wooden sticks, and forced, extreme physical exercise in temperatures of 150 degrees Fahrenheit (65.5 degrees Celsius).⁵³

In sum, U.S. torture and inhumane treatment of detainees in Afghanistan and Iraq was widespread and systemic, was approved at the highest levels of the U.S. government, and resulted in significant harm to Petitioners and many other detainees. Despite knowing that U.S. agents were in some cases torturing detainees to death, the U.S. government failed to take any reasonable steps, consistent with its international legal obligations, to investigate allegations of abuse and to adopt prompt or effective measures to stop it.

4. Lack of Accountability for Torture and Inhumane Treatment of Detainees

Despite government reports substantiating the use of torture and inhumane treatment on detainees in Afghanistan and Iraq, to date there has been no comprehensive criminal investigation into the policies and practices. Moreover, every civil lawsuit brought by a victim or survivor of the U.S. torture program has been dismissed without any adjudication of the merits of the claims.

Despite highly publicized prosecutions of low-level members of the military such as Private First Class Lynndie England and other Army reservists who tortured and abused some detainees in Iraq,⁵⁴ no senior member of the U.S. military has faced criminal charges for their roles in ordering or condoning the torture and inhumane treatment of

<http://www.aclu.org/projects/foiasearch/pdf/DOD043457.pdf>).

⁵³ *Id.* (citing Excerpt from Army Criminal Investigation Command Report of Investigation Number 0106-04-CID259-80185 (full record available at

<http://www.aclu.org/projects/foiasearch/pdf/DODDOACID005487.pdf>)).

⁵⁴ See, e.g., *Lynndie England Convicted in Abu Gharib Trial*, Associated Press, Sept. 26, 2005, available at http://www.usatoday.com/news/nation/2005-09-26-england_x.htm.

detainees in Afghanistan and Iraq. The highest-ranking member of the military to stand accused of a crime arising out of the abuse of detainees in Iraq was Lieutenant Colonel Stephen Jordan, who was the Director of the Joint Interrogation Debriefing Center at the Abu Ghraib facility. Jordan faced a total of six criminal charges including allegations that between September 2003 and December 2004 he oppressed Iraqi detainees by subjecting them to forced nudity and intimidation by military working dogs. However, the majority of these charges were dismissed at an early stage and he was later acquitted of all charges.⁵⁵

None of the major actors who authorized torture and inhumane treatment in Afghanistan and Iraq, including Secretary Rumsfeld, General Miller, and General Sanchez, has faced even an administrative penalty, let alone criminal charges. In addition, Petitioners' efforts to seek civil redress against senior officials of the U.S. military who authorized or condoned the use of torture and inhumane treatment on detainees in Afghanistan and Iraq have failed, because U.S. courts have determined that those officials are immune from suit. Thus, Petitioners and other victims and survivors of torture and inhumane treatment have had no opportunity to have their cases heard in U.S. courts, nor have they been granted any other form of redress for the violation of their rights.⁵⁶

⁵⁵ Josh White, *Abu Gharib Officer Cleared of Detainee Abuse*, Wash. Post, Aug. 29, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/28/AR2007082800359.html>; see also American Civil Liberties Union, *Lack of United States Accountability and Remedy for Torture and Abuse in the Name of Counter-Terrorism*, Statement submitted to the OSCE Human Dimension Implementation Meeting, HDIM.NGO/0198/11 (Sept. 28, 2011), available at <http://www.osce.org/odihr/83140>.

⁵⁶ See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011); *Rasul v. Myers* (Rasul I), 512 F.3d 644 (D.C. Cir. 2008), vacated, 555 U.S. 1083, and *Rasul v. Myers* (Rasul II), 563 F.3d 527 (D.C. Cir. 2009) (per curiam), cert. denied, 130 S.Ct. 1013 (2009); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010); 28 U.S.C. § 2241(e)(1); *Id.* at (e)(2).

C. Procedural Background - Domestic Legal Proceedings in *Ali v. Rumsfeld*

Petitioners sought redress for their torture and cruel, inhuman or degrading treatment in the U.S. federal court system by filing lawsuits in four separate jurisdictions. In June 2005, these four cases were consolidated and assigned to the District Court in Washington, D.C.⁵⁷ In their suit, Petitioners sued then-Secretary of Defense Rumsfeld, Lieutenant General Ricardo Sanchez, Brigadier General Janis Karpinski, and Colonel Thomas M. Pappas, for their torture and abusive treatment while held in military detention in Afghanistan and Iraq.⁵⁸ They brought their claims under the U.S. Constitution, customary international law as recognized under the Alien Tort Statute, 28 U.S.C. 1350, and the Geneva Convention (IV) Relative to the Treatment of Civilian Persons at Times of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950). Petitioners alleged that their torture had been ordered and condoned at the highest levels of government and that it was part of a widespread and systemic policy of detainee abuse at U.S.-run facilities in Afghanistan and Iraq. Petitioners claimed that they had been subjected to severe and repeated beatings, sexual humiliation and assault, sensory deprivation, mock executions, death threats, and restraint in contorted and excruciating positions.⁵⁹

Defendants sought immediate dismissal of Petitioners' claims.⁶⁰ They argued that as non-resident aliens, Petitioners were not protected by the U.S. Constitution, and that even if they were, Defendants were entitled to "qualified immunity," a doctrine that

⁵⁷ *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 90 (D.D.C. 2007) *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

⁵⁸ First Amended Complaint, *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (Nos. 05-cv-1377, 05-cv-1378, 05-cv-1379, 05-cv-1380).

⁵⁹ *Id.* at ¶ 2.

⁶⁰ *Id.* at 92.

permits government officials to avoid liability for alleged violations of rights that were not clearly established under U.S. law. Defendants also sought immediate dismissal of Petitioners' international law claims on the basis of a domestic statute, the Westfall Act,⁶¹ which in these circumstances effectively immunizes alleged unlawful conduct undertaken "within the scope" of government officials' employment. The District Court acceded to both of these arguments and dismissed the suit without any consideration of its merits. On appeal, the D.C. Circuit Court of Appeals affirmed the lower court's dismissal of the suit.

Petitioners requested that the Court of Appeals reconsider its decision and petitioned to have the case heard by all appellate judges on the Court. That petition was denied on September 19, 2011.

III. LEGAL ARGUMENT

A. The Commission Should Interpret the American Declaration in Light of Recent Developments in Human Rights Law

The American Declaration imposes binding international obligations on the United States,⁶² and the Commission has long recognized that its provisions should be interpreted in light of developing standards in human rights law. Thus, the Commission

⁶¹ Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. §§2671, 2674, 2679 (2006).

⁶² Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394 (entered into force Dec. 13, 1951) (ratified by the United States, June 15, 1951); amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A (entered into force Feb. 27, 1970); amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527 (entered into force Nov. 16, 1988); amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005 (entered into force Sept. 25, 1997); amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009 (entered into force Jan. 29, 1996). *See also Roach v. United States*, Case 9647, Inter-Am. Comm'n H.R., Resolution No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987); *Smith v. United States*, Petition 8-03, Inter-Am. Comm'n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. 1, ¶¶32-33 (2006).

looks to a broad array of treaties, other international instruments, and decisional authority when interpreting the nature and scope of obligations established under the American Declaration.⁶³ Significantly, the Commission considers the American Convention “to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”⁶⁴ Jurisprudence developed in the context of the American Convention therefore represents a particularly important guide for implementing the analogous but less specific provisions of the Declaration. The Commission has also noted that other international laws and practices provide constructive insights into the interpretation and application of rights recognized by the American Declaration,⁶⁵ including authorities from the Human Rights Committee, the Committee Against Torture, U.N. Special Rapporteurs, and regional human rights courts such as the European Court of Human Rights.⁶⁶ Significantly, the Commission and the Inter-American Court have

⁶³ *Gonzales v. United States.*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 ¶ 118 (2011) (“The Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to members states.”)(citing generally *Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010); *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08 (July 25, 2008); *Maya Indigenous Communities of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); *Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)).

⁶⁴ *Statehood Solidarity Comm. v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 ¶ 87 & n.79 (2003) (citing *Garza v. United States*, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 88-89 (2000)); see also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000) [“Canadian Asylum Seekers Report”] (confirming that 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 principles of the Declaration).

⁶⁵ See, e.g., Report on the Situation of Human Rights in the Peruvian State of Cayara, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.83, doc. 32 rev. (1993); Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); *Solidarity Statehood Comm. v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 ¶¶ 91- 93 (2003).

⁶⁶ See, e.g., *Ximenes-Lopes v. Brazil*, Inter Am. Ct. H.R. (ser. C) No. 149 ¶ 51 (2006) (citing *Storck v. Germany*, Eur. Ct. H.R., App. No 61603/00 (2005) and other international declarations, standards and

interpreted the American Declaration in the light of relevant international humanitarian law, including the Geneva Conventions.⁶⁷ This approach recognizes the simultaneous application of certain human rights norms in times of armed conflict – including some of the norms invoked by Petitioners – and comports with the jurisprudence of universal and other regional human rights bodies.⁶⁸

B. Articles I and XXV of the American Declaration Prohibit Torture and Cruel, Inhuman or Degrading Treatment

Articles I and XXV of the American Declaration prohibit torture and other cruel, inhuman or degrading treatment. Article I ensures “life, liberty, and the security of [the] person,” while Article XXV prohibits deprivation of an individual’s liberty without due

principles in order to “illuminate the reach and content” of the right to life and the right to human treatment” in the Inter-American system, and finding “these soft-law documents helpful for the adjudication of the instant case”); *Ricardo Canese Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111 ¶¶ 115-35 (relying on HRC General Comment 27); *YATAMA Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 ¶ 208 (quoting from HRC General Comment 25); *Raxcacó Reyes Case*, 2005 Inter-Am. Ct. H.R., (ser. C) No. 133 ¶¶ 47, 69 (citing HRC Concluding Observations on reports of Iran and Iraq); Canadian Asylum Seekers Report, *supra* note 64, at ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report 40/04, OEA/Ser.L/V/II.122, doc. 5 (2004) ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration).

⁶⁷ See, e.g., Organization of American States, *Regarding the Situation of the Detainees at Guantanamo Bay, United States*, Resolution No. 2/11, MC 259-02 (July 22, 2011); Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba, Inter-Am. Commission H.R. decision of Mar. 12, 2002, 41 ILM 532 (2002); *Bamaca Velazquez v. Guatemala*, Case No. 11/129, Inter-Am. C.H.R. ¶¶ 207-209.

⁶⁸ See, e.g. Concluding Observations on Democratic Republic of Congo, U.N. Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006) (U.N. Human Rights Committee applying the ICCPR to an armed non-international conflict); Legality or Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), at para 25 (“the protection of the International Covenant on Civil and Political Rights does not cease in times of war ...”); Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9) at ¶ 106 (“the protection offered by human rights conventions does not cease in case of armed conflict ...”); *Al Skeini v. U.K.*, Grand Chamber, Judgment of July 2011, no.55721/07 ECHR 2011 at ¶ 164 (holding that “the procedural obligation under Article 2 (duty to investigate) continues to apply in difficult security situations, including in the context of armed conflict ...”).

process of law.⁶⁹ Article XXV also expressly protects every individual's right to "humane treatment" while in custody.⁷⁰ The Commission has defined torture in accordance with Article 2 of the Inter-American Torture Convention.⁷¹ According to the Commission, torture must "(1) produce physical or mental pain or suffering, (2) be inflicted intentionally; and (3) be inflicted by state agents or persons acting under the orders or instigation "of such agents."⁷² Significantly, while an act of torture must be intentional, it need not be committed for any specific purpose.

The Inter-American system recognizes the prohibition against torture as a jus cogens norm that is non-derogable in times of armed conflict or other national emergency.⁷³ The Commission has also stated that "[a]n essential aspect of the right to

⁶⁹ Organization of American States, American Declaration of the Rights and Duties of Man, arts. I, XXV, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁷⁰ *Id.* at art. XXV.

⁷¹ Organization of American States, Inter-American Convention to Prevent and Punish Torture, art. 5, O.A.S. Treaty Series No. 67 (entered into force Feb. 28, 1987), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992) ["Inter-American Torture Convention"].

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

⁷² Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 154 (2002) ["Report on Terrorism"]; *see also Cabrera v. Dominican Republic*, Case 10.832, Inter-Am Comm'n H.R., Report No. 35/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 821 ¶ 79 (1997).

⁷³ *See* Canadian Asylum Seekers Report, *supra* note 64, at ¶¶ 118, 154; *Cabrera v. Dominican Republic*, Report No. 35/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 821 ¶ 79 (1997); *Goiburú v. Paraguay*, Inter-Am. Ct. HR (ser. C) No. 154 ¶ 128 (2006) (on torture).

personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations erga omnes.”⁷⁴

Article I protections are co-extensive with those afforded by Article 5 of the Convention.⁷⁵ Article 5 expressly guarantees every person’s “right to have his physical, mental, and moral integrity respected. . . . No one shall be subjected to torture or cruel, inhuman, or degrading treatment.”⁷⁶ In 2008, the Commission held that all detainees “have the right to live in prison conditions that are in keeping with personal dignity, and the State must guarantee their rights to life and personal integrity. . . . ”⁷⁷

The difference between torture and cruel, inhuman or degrading treatment hinges on “the intensity of the suffering inflicted.”⁷⁸ Inhuman or degrading treatment must reach a minimum threshold of suffering, depending on “the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.”⁷⁹ Infliction of mental and emotional suffering, even without physical abuse, is sufficient to constitute inhuman treatment.⁸⁰ Isolated acts of mistreatment when applied in combination may also increase the severity of an

⁷⁴ Canadian Asylum Seekers Report, *supra* note 64, at ¶ 118.

⁷⁵ Report on Terrorism, *supra* note 72, at ¶ 155 & n.388 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention); *see also, e.g.*, Juan Antonio Aguirre Ballesteros, Case 9437, Annual Report of the Inter-Am. Comm’n H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985).

⁷⁶ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1444 U.N.T.S. 123, art. 5 [“American Convention”].

⁷⁷ *Ferreira Braga v. Brazil*, Case 12.019, Inter-Am. Comm’n H.R., Report No. 35/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008) ¶ 73.

⁷⁸ *Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm’n H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 821 ¶ 80 (citing *Ireland v. United Kingdom*, App. No. 5310/71, Ser. A, No. 25 (Eur. Ct. H.R.) ¶ 167).

⁷⁹ *Id.* at ¶ 78.

⁸⁰ *Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003). ¶ 93 (“[A]ccording to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture, particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts...”).

individual's suffering; individual acts that on their own might not constitute torture or cruel, inhuman, or degrading treatment may rise to this level when performed in combination.⁸¹

1. International Law and Practice Prohibits Torture and Cruel, Inhuman or Degrading Treatment

International law and practice, which this Commission should look to in interpreting the protections afforded by Articles I and XXV, is absolute in its prohibition of torture and other forms of cruel, inhuman or degrading treatment. For decades, this fundamental prohibition has been recognized by international humanitarian and human rights law – as well as by governments and courts around the world⁸² – as a *jus cogens* norm, one that cannot be derogated from during armed conflict or other national emergency.

2. Torture is Prohibited by International Humanitarian Law

International humanitarian law requires that nations treat civilian and combatant detainees humanely at all times. 194 nations, including the United States, have ratified the 1949 Geneva Conventions.⁸³ These four treaties contain numerous provisions

⁸¹ See Nigel Rodley, *The Treatment of Prisoners Under International Law* (2d ed. 1999).

⁸² See Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, 344 (stating that no treaty may violate a *jus cogens* norm); *Filártiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (stating that “for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind”); *Suresh v. Canada*, 1 S.C.R. 3, ¶ 61 (2002); *Jones v. Arabia*, UKHL 26 (2006) (holding that torture can never be an official act of state and so does not attract immunity); *A and others v. Sec’y of State for the Home Dept.*, UKHL 56 (2004) (recognizing the absolute prohibition on torture). *Jus cogens* norms prohibit a “handful of heinous actions” including “torture, summary execution, genocide, and slavery.” *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988)(citation omitted); see also Restatement (Third) of Foreign Relations Law § 702, cmt. n (identifying the prohibition of torture as a *jus cogens* norm).

⁸³ International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 1-Mar-2012 (Mar. 01, 2012), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited Mar. 14, 2012).

prohibiting torture and other cruel, inhuman, or degrading forms of treatment, including article 3 common to all four conventions, which proscribes “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. . . , [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”⁸⁴ As the International Committee of the Red Cross’ commentary on the Third Geneva Convention observes, “[t]he requirement that protected persons must at all times be humanely treated is the basic theme of the Geneva Conventions. . . .”⁸⁵ The Third and Fourth Conventions categorize “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health,”⁸⁶ and “torture or inhuman treatment”⁸⁷ as “grave breaches.” The International Court of Justice has held “that there is an obligation on the United States Government, in the terms of Article I of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances,’ since such an obligation does not

⁸⁴ Common Article 3 of the Geneva Conventions, 6 U.S.T at 3318; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 (entered into force Oct. 21, 1950) [“First Geneva Convention”]; Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217 (entered into force Oct. 21, 1950) [“Second Geneva Convention”]; Geneva Convention (III) Relative to the Protection of Civilian Persons in Time of War, art. 130, Aug. 12, 1949, [1955] 6 U.S.T. 3316 [“Third Geneva Convention”]; Geneva Convention (IV) Relative to the Treatment of Civilian Persons at Times of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950) [“Fourth Geneva Convention”]; *id.* (requiring that “[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely” and prohibiting “[o]utrages upon personal dignity, in particular humiliating and degrading treatment”); *id.* at art. 5 (requiring that such persons be “treated with humanity”); *id.* at art. 27 (requiring “respect for their persons, their honour” and that “[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”); *id.* at art. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them”); *id.* at art. 32 (prohibiting contracting parties “from taking any measure of such a character as to cause the physical suffering . . . of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, [and] mutilation . . . , but also to any other measures of brutality whether applied by civilian or military agents”); *id.* at art. 33 (prohibiting “all measures of intimidation”); *id.* at art. 147 (including among “[g]rave breaches” such conduct as “torture or inhuman treatment, . . . willfully causing great suffering or serious injury to body or health”).

⁸⁵ Jean de Preux, et. al, Third Geneva Convention Relative to the Treatment of Prisoners of War: Commentary 140 [“ICRC Commentary”].

⁸⁶ Third Geneva Convention, *supra* note 84, at art. 130.

⁸⁷ Fourth Geneva Convention, *supra* note 84, at art. 147.

derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”⁸⁸ The U.S. government has also long committed to upholding the Geneva Conventions.⁸⁹

3. Torture is Prohibited by International Human Rights Law

U.N. human rights treaties, their regional counterparts as well as other international instruments, prohibit torture and other cruel, inhuman or degrading treatment.⁹⁰ The International Covenant on Civil and Political Rights (“ICCPR”), ratified by 167 countries, including the United States, provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁹¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”) forbids torture and cruel, inhuman or degrading treatment.⁹² 150 countries, including the United States, have ratified the Convention against Torture.⁹³

In 2006, the Committee Against Torture (“CAT”) examined U.S. detention and interrogation practices used on detainees in connection with the so-called “war on

⁸⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicar. (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27).

⁸⁹ President Bush declared: “The United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years. These Conventions provide important protections designed to reduce human suffering in armed conflict. We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.” President George W. Bush, President’s Statement on the U.N. International Day in Support of Victims of Torture (June 26, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>.

⁹⁰ *See, e.g.*, United Nations, Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res 217A (III), U.N. Doc. A/810 (1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁹¹ United Nations, International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171.

⁹² United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁹³ International Rehabilitation Council for Torture Victims, Convention against Torture, <http://www.irct.org/what-is-torture/convention-against-torture.aspx> (last visited Mar. 14, 2012).

terror.”⁹⁴ The CAT observed that U.S. practices, including sexual humiliation, “waterboarding,” “short shackling,” and “using dogs to induce fear,” violate the Convention against Torture.⁹⁵ It noted that the Convention’s prohibitions on torture are universal and non-derogable, and that its rules against cruel, inhuman or degrading treatment apply to “all areas under the de facto effective control of the State Party, by whichever military or civil authorities such control is exercised.”⁹⁶ The CAT also expressed concern over vague and confusing language in U.S. interrogation rules that provide an open door to torture and cruel, inhuman or degrading treatment.⁹⁷ It directed the United States to “rescind any interrogation technique . . . that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control. . . .”⁹⁸

The U.N. Human Rights Committee has also found that other techniques employed by the United States in Afghanistan and Iraq violate the prohibitions of torture

⁹⁴ Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) *available at* [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf). The CAT issued the findings in this subsection in response to the U.S. 2006 report. The United States, which is expected to report to CAT every four years, has not yet submitted the report that was due in 2010. *See* Office of the U.N. High Comm’r for Human Rights, <http://www2.ohchr.org/english/bodies/cat/reports2011.htm> (last visited Nov. 7, 2011). The Committee has expressed concerns similar to the ones noted above in relation to the pending U.S. report. *See* U.N. Comm. against Torture, List of issues prior to the submission of the fifth periodic report of United States of America, 43rd Sess., Nov. 2-20, 2009, U.N. Doc. CAT/C/USA/Q/5 (Jan. 20, 2010), *available at* <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.USA.Q.5.pdf>.

⁹⁵ Conclusions and Recommendations of the Committee Against Torture: United States of America, *supra* note 94, at ¶ 24. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) (defining 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. . .”).

⁹⁶ *Id.* at ¶ 15.

⁹⁷ *Id.* at ¶ 24.

⁹⁸ *Id.*

and cruel, inhuman or degrading treatment, including prolonged sleep deprivation,⁹⁹ physical beatings, prolonged use of stress positions, and prolonged forced standing.”¹⁰⁰

Other U.N. mechanisms have affirmed the prohibition against torture and other cruel, inhuman, or degrading treatment, specifically of anyone in detention.¹⁰¹ In 1986, then-U.N. Special Rapporteur on Torture stated that practices such as beating, suspension by the arms or legs, exposure to excessive light or noise, prolonged sleep deprivation, prolonged denial of food, sanitary facilities, or medical attention, and total isolation or sensory deprivation can be severe enough to rise to the level of torture.¹⁰²

Regional human rights bodies have also found that practices similar to those used on Petitioners violate the prohibition on torture and other cruel, inhuman or degrading treatment. The European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), which has been ratified by 45 European nations, provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹⁰³ In *Akosy v. Turkey*, the European Court held that

⁹⁹ See Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture, U.N. Doc. A/52/44, ¶ 257 (Sept. 5, 1997). The Committee does not state what constitutes a “prolonged period,” but the Committee considered a specific case from Israel in which the detainee was “interrogated and tortured over the course of the next 30 days” while another detainee was “forced to sit handcuffed and hooded in painful and contorted positions, subjected to prolonged sleep deprivation and beaten over the course of three weeks,” and found it to be torture. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *Report of the Special Rapporteur*, Submitted Pursuant to Commission on Human Rights Resolution 1997/38: Addendum: Summary of Cases Transmitted to Governments and Replies Received, U.N. Doc. E/CN.4/1998/38/Add.1 (Dec. 24, 1997).

¹⁰⁰ Report on Terrorism, *supra* note 72, at 86 ¶ 162.

¹⁰¹ See, e.g., U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49, (1988); Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

¹⁰² Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur*, Appointed Pursuant to Commission on Human Rights Res. 1985/33, U.N. Doc. E/CN.4/1986/15, ¶ 119 (Feb. 19, 1986).

¹⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221; see also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126.

stripping a victim and suspending him by his tied arms for the purposes of interrogation was an act of torture.¹⁰⁴ In addition, the European Court has held that wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation/reduction of food and drink constitute cruel, inhuman or degrading treatment.¹⁰⁵

The African Charter on Human and Peoples' Rights, which has been ratified by each of the 53 members of the African Union, provides that "All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."¹⁰⁶

Governments worldwide, including the United States, have enacted legislation proscribing torture, criminalizing the practice and providing redress for victims and survivors.¹⁰⁷ National courts in the United States and elsewhere have also condemned torture and other cruel, inhuman or degrading treatment as a violation of international human rights law.¹⁰⁸

4. Petitioners Were Subject to Torture and Cruel, Inhuman or Degrading Treatment by Agents of the United States While Detained in U.S. Military Prisons in Afghanistan and Iraq

Petitioners were subjected to multiple and repeated violations of their rights to be free from torture and other cruel, inhuman or degrading treatment. Agents of the United

¹⁰⁴ *Id.* ¶ 163.

¹⁰⁵ *Ireland v. United Kingdom*, App. No. 5310/71, Ser A, No. 25 (Eur. Ct. H.R.), ¶ 167.

¹⁰⁶ African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981); *see also Achuthan v. Malawi*, Afr. Comm'n H.R., Comm. No. 64/92, 68/92, 78/92, 8AR (2000); *Amnesty Int'l v. Sudan*, Afr. Comm'n H.R., Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

¹⁰⁷ *Compilation of Torture Laws*, Association for the Prevention of Torture, http://www.ap.torture.org/index.php?option=com_k2&view=item&layout=item&id=819&Itemid=266&lang=en (last visited Mar. 11, 2012); 18 U.S.C. § 2340 (2006).

¹⁰⁸ *See e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); H.C.J. 5100/94 Public Comm. Against Torture in *Israel v. Israel* [1999] Isr.S.C 46(2), *available at* <http://www.derechos.org/human-rights/mena/doc/torture.html>.

States used the following techniques on them for purposes of interrogation throughout the duration of their detention at military bases in Afghanistan and Iraq:

- Beating with fists and batons
- Kicking
- Burning or shocking with an electrical device
- Mock executions
- Removal of bullets without anesthesia
- Hanging upside down from chains in the ceiling
- Forced stripping
- Forced nudity for prolonged periods
- Sexual assault by means of fondling the detainee during beatings and interrogations
- Sexual assault by means of repeated anal probing
- Using dogs in interrogations
- Sensory deprivation
- Sleep deprivation
- Use of stress positions for prolonged periods
- Prolonged exposure to the elements, including temperatures of up to 50 degrees Celsius, without any protection
- Prolonged use of solitary confinement
- Prolonged exposure to constant bright light and deafening sounds
- Denial of access to toilet facilities

- Denial of food
- Denial of drinking water
- Denial of adequate medical care
- Desecration of the Quran
- Urinating on detainees
- Threat of rape
- Threat of rape and sexual assault of detainee's family members
- Threat of death

These unlawful acts, applied sometimes in isolation and at other times in combination, caused Petitioners to undergo extreme physical and psychological pain and suffering. U.S. agents tortured and otherwise abused Petitioners for interrogation purposes without regard for their safety, dignity, age, status as a minor, medical conditions, or even life threatening injuries. Each of these men carries the physical and mental scars of his mistreatment by U.S. agents. Thus, their treatment amounts to multiple violations of Articles I and XXV of the American Declaration.

C. The Failure of U.S. Courts to Consider the Merits of Petitioners' Claims Violated Their Right to a Judicial Remedy Guaranteed Under Article XVIII of the American Declaration

U.S. courts, in dismissing Petitioners' constitutional and international law claims without a hearing on the merits, violated Petitioners' rights to effective judicial remedies for their torture and inhumane treatment. Despite repeated efforts to have their substantive claims heard, Petitioners were shut out of the U.S. court system when both the trial-level and appellate judges granted the defendants qualified and absolute

immunity from suit. By barring Petitioners' from seeking redress, the United States violated their right to a remedy for the violation of their rights guaranteed under Article XVIII of the American Declaration.

1. Article XVIII of the American Declaration Guarantees an Effective Right of Access to a Tribunal and, Where Appropriate, the Enforcement of Remedies

Article XVIII guarantees the right to resort to domestic courts to ensure respect for legal rights and to obtain protection from conduct that violates any fundamental rights protected by domestic law. The Commission has interpreted Article XVIII in light of the more specific but analogous terms of Articles 8 and 25 of the American Convention.¹⁰⁹

Article 25 provides: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights. . . ." ¹¹⁰ The Commission has found that Article 25, taken together with Articles 1(1) and 2 of the Convention,¹¹¹ must be understood to encompass three separate but related elements: first, "the right of every individual to go to a tribunal when any of his rights have been violated," second, the right "to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place," and third, the right to have

¹⁰⁹ The Inter-American Court has found that the right to a remedy under the Declaration and the Convention (Articles 8 and 25) are similar in scope. *See Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report 40/04, OEA/Ser.L/V/II.122, doc. 5 (2004) ¶ 174; *Maria Da Penha Fernandes*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, Doc. 20, rev. 16, ¶ 37 (2001).

¹¹⁰ American Convention, *supra* note 76, at art. 25.

¹¹¹ Article 1(1) of the Convention requires States to "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." *Id.* at art. 1(1). Article 2 requires States to "adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms." *Id.* at art. 2.

remedies enforced when granted.¹¹² Thus the right to a remedy guaranteed by Article XVIII encompasses a procedural component (access to justice) as well as a substantive component (redress for violations of rights protected by national laws).

Both the Commission and the Court have determined that a judicial tribunal should be available to all persons who allege violations of their fundamental rights and that such a tribunal must be capable of granting a remedy that effectively and adequately addresses the alleged infringement of the right.¹¹³ Importantly, the right to a remedy requires that a State do more than simply ensure that the door of the courthouse is open to aggrieved individuals; rather, it must ensure that available remedies are “effective” in affording the individual whose rights have been violated adequate redress for the harm suffered.¹¹⁴ In the Constitutional Court case, for instance, the Inter- American Court held that:

The inexistence of an effective recourse against the violation . . . constitutes a transgression of the Convention . . . [F]or such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to

¹¹² *Raquel Martin Mejía v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. CHR, OEA/Ser.L/V/II.91 Doc. 7 at 157, 190-91 (1996) (holding that sexual abuse by members of security forces violated right to physical and mental integrity).

¹¹³ *Velásquez-Rodríguez Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), ¶¶ 62-64; Report on Terrorism, *supra* note 72. In *Wayne Smith v. United States*, the Commission affirmed the fundamental role played by Article XVIII in ensuring that the basic rights enshrined in the American Declaration are protected. Citing *Rafel Ferrer-Mazzora*, the Commission reiterated that “when a state fails to provide an adequate and effective remedy to a violation of a fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration.” *Wayne Smith v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 62 (2010) (citing *Ferrer-Mazorra v. United States*, Case No. 9903, Inter-Am. Comm’n H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20, rev. t 1188, ¶ 243 (2001)). See also *Gonzales*, *supra* note 63, at ¶ 172 (stating that “Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations”) (citing *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20, rev., ¶ 37 (2001)).

¹¹⁴ See, e.g., *Mayagna (Sumo) Awajitj Community Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶¶ 113-114 (Aug. 31, 2001); *Ivcher Bronstein Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74 ¶¶ 136-137 (Feb. 6, 2001).

remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.¹¹⁵

The Commission has discussed the requirements of a full and fair remedy under Articles 8 and 25 of the American Convention in a case with a broadly similar procedural history to that of Petitioners. In the Gustavo Carranza case,¹¹⁶ the Commission held that Argentina violated the Convention when its courts applied the political question doctrine and refused to decide a case on the merits. The petitioner was a judge removed from office in 1976 by the military government of Argentina. He sought a judicial remedy but was denied access to domestic courts on the grounds that his dismissal constituted a political question.¹¹⁷ In finding a violation of both Articles 8 and 25, the Commission, highlighting the need for “effective” judicial protection, elaborated on the nature of the right to a remedy guaranteed under Article 25:

[T]he logic of every judicial remedy – including that of Article 25 – indicates that the deciding body must specifically establish the truth or error of the claimant’s allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and a discussion of the allegation, must decide whether the claim is valid or unfounded.¹¹⁸

The Commission also has held that the right to a judicial remedy encompassed by Articles 25 and 8, and by extension Article XVIII of the Declaration, includes the right of victims and society as a whole to know the truth of the facts connected with serious violations of human rights, as well as the identity of those who committed them. In the Oscar Romero case, for example, the Commission found that the right “to know the full,

¹¹⁵ *Five Pensioners v. Peru*, Inter-Am. Ct. H.R., (ser. C) No. 98, ¶ 136 (Feb. 28, 2003).

¹¹⁶ *Carranza v. Argentina*, Case 10.087, Inter-Am. Comm’n. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 80 (1997).

¹¹⁷ Under this doctrine domestic courts had abstained from reviewing acts that presuppose a political or discretionary judgment reserved exclusively for another branch of government.

¹¹⁸ *Carranza*, Case 10.087, Inter-Am. Comm’n. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 73 (1997).

complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them [forms part] of the right to reparation for human rights violations.”¹¹⁹

Finally, the Commission has noted the “fundamental” importance of the protections afforded by Article 25, holding in particular that “states of emergency cannot entail the suppression or ineffectiveness of the judicial guarantees that that the Convention requires States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency, or to control the legality of measures adopted by the executive body due to the state of emergency.”¹²⁰ Among the non-derogable rights recognized by the Convention are rights implicated here: the right to life, and the right to be free from torture and other inhumane treatment.

The European Court also has recognized the importance of the right to a judicial remedy as a safeguard for other rights, even when national security concerns are raised by the State. In *Tinnelly and McElduff v. United Kingdom*,¹²¹ for example, the applicants, Catholics based in Northern Ireland, lodged complaints under the Fair Employment (Northern Ireland) Act 1976, alleging that they had been unlawfully discriminated against in tendering for government contracts. The Secretary of State for Northern Ireland issued certificates under section 42 of the 1976 Act stating that the refusal to offer contracts was “an act done for the purpose of protecting national security or the protection of public safety or order.” Although the Court accepted that the right to a remedy protected by

¹¹⁹ *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Case 11.481, Inter-Am. Comm. H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671, ¶ 147 (1999); *see also*, *Orayce v. Chile*, Cases 11.505, 11.532, 11.541, 11.546, 11.449, 11.569, 11.573, 11.583, 11.585, 11.595, 11.652, 11.655, 11.657, 11.675, 11.705, Inter-Am. C.H.R., Report No. 25/98, OEA/Ser.L/V/II.95 (ser. C).

¹²⁰ *Carranza*, Case 10.087, Inter-Am. Comm’n. H.R., Report No. 30/97, OEA/Ser.L/V/II.9, doc. 7 rev. ¶ 80 (1997).

¹²¹ *Tinnelly and McElduff v. United Kingdom*, Eur. Ct. H.R., Case 62/1997/846/1052–1053, App. No. 20390/92, Judgment of 10 July 1998, (1998) 27 EHRR 249.

Article 6 of the European Convention might be subject to certain limitations, including on national security grounds, it determined that where imposed, limitations must not restrict the exercise of the right in such a way that the very essence of the right is impaired. The Court added that any such limitation must pursue a legitimate State objective and that there must be a reasonable proportionality between this objective and the means employed to achieve it.¹²²

2. Petitioners Were Denied Judicial Remedies for Their Torture and Inhumane Treatment by U.S. Courts

Petitioners filed civil lawsuits against the U.S. officials who ordered, authorized or condoned their torture and abuse. Those officials moved successfully to prevent Petitioners' cases from ever being heard on their merits. At both the trial court and appellate levels, U.S. courts, without considering the veracity of their well-founded allegations of torture and inhumane treatment, held that the defendants were immune from liability. The court accepted the defendants' claims to immunity for Petitioners' claims under both the U.S. Constitution and international law. The qualified and absolute immunity doctrines applied by U.S. courts in Petitioners' litigation prevented a judicial investigation into the facts alleged, denied Petitioners redress for their torture and cruel, treatment, and eviscerated Petitioners' right to a remedy under Article XVIII of the American Declaration.

Petitioners were never afforded an opportunity to present evidence to prove their claims and were denied effective remedies for violations of their rights in the U.S. judicial system. At no point during the litigation did any judge examine Petitioners'

¹²² *Id.* at ¶ 77. *See also, Devenney v. U.K.*, 35 Eur. Ct. H.R. 643, App. No. 24265/94 (2002); *Al-Nashif v. Bulgaria*, 36 Eur. Ct. H.R. 655, App. No. 50963/99 (2002).

well-founded allegations of torture and cruel, inhuman or degrading treatment. In summarily dismissing their claims, U.S. courts instead determined that addressing their truth or falsity would hamper the war effort and adversely affect U.S. national security interests.¹²³

In failing to fully consider the merits of Petitioners' claims of torture and cruel, inhuman or degrading treatment by granting immunity to those responsible for the human rights violations at issue, the United States has failed to protect Petitioners' right of recourse to a court and to effective judicial remedies for the violations of their rights under Article XVIII of the Declaration.

IV. ADMISSIBILITY

A. The Petition is Admissible Under the Commission's Rules of Procedure

The Petition is admissible in its entirety under the Rules of Procedure of the Inter-American Commission on Human Rights ("Commission's Rules of Procedure").

1. The Commission Has Jurisdiction to Hear this Petition

The Commission has personal jurisdiction to hear this Petition because each of the Petitioners is a natural person who, at all relevant times, was subject to the "authority and control" of the United States and whose rights were, therefore, protected under the American Declaration when the violations occurred.¹²⁴

¹²³ *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 779-70 (1950)).

¹²⁴ See *Gonzales v. United States*, Petition 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07 Admissibility, OEA/Ser L/V/II 128, doc. 19, ¶ 37 (2007).

The Commission also has subject matter jurisdiction to review this petition because Petitioners allege violations of Articles I, XXV, and XVIII of the American Declaration, which imposes binding international obligations on the United States.¹²⁵

The Commission has temporal jurisdiction to examine this Petition. The United States has violated Petitioners' rights and has also denied them an effective remedy for the harms that they have suffered. The violations of their rights first occurred in 2003, decades after the United States first assumed obligations under the American Declaration. Moreover, some of the violations are continuing as they involve the United States' failure to provide Petitioners with an effective remedy for their injuries.

Finally, although Petitioners' rights were violated outside of the geographical borders of the United States, the Commission has territorial jurisdiction over their claims. Both the rights protected by the Declaration and concomitant obligation held by the United States to protect them are not geographically limited to the United States. The Commission has long recognized the extraterritorial application of human rights protections and obligations and has developed its jurisprudence in this area most fully in relation to the American Declaration.¹²⁶ In developing this jurisprudence the

¹²⁵ See Part III (C), *supra*.

¹²⁶ See generally John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, Am. Soc'y of Int'l Law Insights (2005), available at <http://www.asil.org/insights051025.cfm>; Christina M. Cerna, *Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law* (Ctr. for Human Rights & Global Justice, Working Paper No. 6, 2006), available at http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Cerna_Final.pdf; Christina M. Cerna, *Current Issues in Extraterritoriality: How Long Is the Long Arm Jurisdiction of International Human Rights Bodies?*, 11 *Ills J. Int'l & Comp L.* 465 (2005); see Michael Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) (Discusses the jurisprudence of other human rights bodies); see also Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 *Geo. Wash. L. Rev.* 1333, 1359-60 (2007) (quoting U.N. Human Rights Comm., *Comments of the Human Rights Committee: United States of America*, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995) (explaining the Human Rights Committee's disagreement with the U.S. view that the Covenant lacks extraterritorial reach and explaining that, "in special circumstances,

Commission has repeatedly looked to international and regional human rights systems and their approaches on the extraterritorial application of treaty-based human rights obligations imposed on States parties.¹²⁷ In short, the protections afforded by the American Declaration are not restricted geographically but rather depend on whether a state exercises “authority and control” over the alleged victim.

The Commission first set forth its “authority and control” test in *Coard v. United States*.¹²⁸ In *Coard*, the Commission made clear that, in determining the application of the Declaration (or Convention), the critical factor is the relationship between the State and the victim, not the geographic location of the individual or the conduct in question.¹²⁹ The Commission followed this approach when it adopted Precautionary Measures on behalf of detainees at Guantánamo Bay. There, the Commission found that detainees were under U.S. jurisdiction because they were both “wholly within the authority and control” and were held at the “unfettered discretion of the United States.”¹³⁰ The Commission reaffirmed its expansive conception of territorial jurisdiction in *Alejandro v.*

persons may fall under the subject matter jurisdiction of a State party even when outside that State’s territory.”)).

¹²⁷ See, e.g., *Ecuador ex rel. Molina v. Colombia*, Inter-State Petition IP-02, Inter-Am. Comm’n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc. 10, ¶¶ 91-95 (2010).

¹²⁸ *Coard v. United States*, Case No. 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev. (1999).

¹²⁹ See *id.* ¶ 37 (suggesting that the important issue is not the victim’s nationality or presence within “a particular geographic area” but whether under the circumstances the state observed rights of those subject to its “authority and control.”). Notably, in this case concerning allegations that the United States violated petitioners’ rights when it detained them, held them *incommunicado*, and mistreated them during a military action in Grenada, the Commission did not base its determination that the petition was subject to its jurisdiction on the fact that the victim was taken into U.S. custody from U.S. territory or that the United States had “effective” territorial control over Grenada.

¹³⁰ Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc 5 rev. 1 P 80 (Mar. 13, 2002) (stating that, regarding jurisdiction over extraterritorial activities, individuals at Guantánamo are under “authority and control” of the United States and that “no one who is 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”); see also Decision of the Commission as to the Admissibility [of Haitians to the United States], Case 10.675, Inter-Am. Comm’n H.R., Report No. 28/93, OEA/Ser.L/V.85 Doc. 9 rev. (1994); *Salas v. United States*, Case 10.573, Inter-Am. Comm’n H.R., Report No. 31/93, OEA/Ser.L/V.85 Doc. 9 rev. (1994).

Cuba, where the State conduct at issue took place outside the territory of any OAS member state. Despite this, the Commission applied its “authority and control” test to find a violation of the Convention.¹³¹ It should do the same here.

Most recently, in 2010, the Commission found admissible an inter-State petition brought by Ecuador against Colombia, which alleged that Colombia was responsible for the extrajudicial execution of an Ecuadorian national on Ecuadorian territory.¹³² Colombia argued that the American Convention bound States with respect to their conduct on their territories and when they were formally occupying another territory, and did not therefore apply because Colombia exercised no territorial control over Ecuador. The Commission rejected this argument and reasserted that human rights obligations run with a member State’s control over an individual—not only a territory—by its agents.¹³³ In arriving at this conclusion, the Commission set forth a framework for the exercise of its jurisdiction:

Thus, the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention’s jurisdiction, it is necessary to determine

¹³¹ *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rec. (1999) (addressing claims related to an incident in which a Cuban military aircraft shot two civilian planes in international airspace).

¹³² *Ecuador ex rel. Molina v. Colombia*, Inter-State Petition IP-02, Inter-Am. Comm’n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc. 10 (2010).

¹³³ *Id.* ¶ 92 (“In international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well. In this sense, the IACHR has established that ‘under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain.’ Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents. This position accords with [how] other international organizations in analyzing the sphere of application of international human rights instruments have assessed their extraterritoriality.”).

whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.¹³⁴

Similarly, in *Alikhani v. United States*, the Commission did not place any geographical restrictions on its jurisdiction. There, the Commission held that it had territorial jurisdiction because the petitioner “was under the jurisdiction of the United States at the time of his arrest, detention and subsequent criminal proceedings.”¹³⁵ Mr. Alikhani was apprehended by the United States, without a warrant, in the territory of Bermuda, and his arrest was formally effectuated on an international flight without Bermuda’s consent to extradition. The Commission concluded that the U.S. agents’ physical custody of Mr. Alikhani, regardless of his geographic location, was sufficient to establish U.S. jurisdiction over him and to impose human rights obligations on the United States.

The Commission has looked to other international human rights systems to define the parameters of its “authority and control” test.¹³⁶ Like the Commission, the European Court of Human Rights has taken a broad view on the jurisdictional reach of the European Convention on Human Rights. In *Issa v. Turkey*, the European Court noted that if applicants establish either a State Party’s (a) “overall control” of the region, or (b) custody of the individual in question, the State could be held responsible for violations of the Convention, regardless of their geographic location.¹³⁷ The European Court recently

¹³⁴ *Id.* ¶¶ 98-99.

¹³⁵ *Alikhani v. United States*, Case 4618/02, Inter-Am. Comm’n H.R. Report No. 63/05, ¶ 42 (2005).

¹³⁶ *Gonzales v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 ¶ 135 (July 21, 2011) (citing *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report 63/08, ¶ 80 (2008)); *Statehood Solidarity Committee v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report 98/03, OEA/Ser. L/V/II.114, doc. 70 rev. 2, ¶¶ 91-93 (2003).

¹³⁷ *Issa v. Turkey*, 41 Eur. H.R. Rep. 567 (2004) (holding that even where state did not occupy a territory, it was responsible for violations of the rights of individuals under its control/authority of its agents). According to the Supreme Court of the U.K., the European Court’s decision in *Issa* “clearly advances state

followed this approach in *Al-Saadoon and Mufdhi v. the United Kingdom*,¹³⁸ where it emphasized that the United Kingdom had “total and exclusive control over the prisons and the individuals detained in them.”

The International Court of Justice has adopted a similar approach regarding the extra-territorial reach of human rights protections and obligations. In its Advisory Opinion to the General Assembly on the Construction of a Wall in Occupied Palestinian Territory, the ICJ found that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹³⁹ This Opinion endorsed the U.N. Human Rights Committee’s approach in General Comment 31,¹⁴⁰ which focuses on

agent authority as an alternative to effective territorial control as a basis of [European Convention] art. 1 jurisdiction.” *R v. Sec’y of State for Defence*, UKSC 29 (2004), [20] (U.K.) (appeal taken from Eng. and Wales), available at http://www.supremecourt.gov.uk/docs/uksc_2009_0103_judgment_v2.pdf. In 2001, the European Court passed a somewhat anomalous decision in *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, to which the Inter-American Commission has not made reference. In *Bankovic*, the Court declined to exercise jurisdiction on the grounds that the Federal Republic of Yugoslavia, of which the plaintiffs were citizens, was not within the European Union and thus outside the *espace juridique* (legal domain) of the Convention. This silence by the Inter-American Commission is an indication that the Commission does not consider that similar territorial restrictions apply in relation to the scope of the protections afforded by the American Declaration. Indeed even in *Bankovic*, the European Court recognized that that under “exceptional circumstances,” jurisdiction would attach extra-regionally. *Id.* at ¶ 78 (finding that because the Convention’s jurisdiction is limited to “*espace juridique*” of the EU, it could not consider a complaint concerning NATO bombings of Belgrade TV and radio station. The Court further explained that the “exceptional circumstances” in which jurisdiction would attach extra-regionally included when “the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation *or* acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”); *see also*, *Ocalan v. Turkey*, 41 Eur. Ct. H.R. 45 (2005); *Medvedyev v. France*, Eur. Ct. H.R., App. No. 3394/03, (2010); Satterthwaite, *Rendered Meaningless*, *supra* note 126, at 1372.

¹³⁸ *Al-Saadoon and Mufdhi v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89, (2009) (holding that Iraqi nationals in British-controlled military prisons in Iraq were under the jurisdiction of the United Kingdom).

¹³⁹ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9).

¹⁴⁰ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (Mar. 29, 2004); *see also* Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee regarding United States of America*, CCPR/C/USA/CO/3, ¶ 10 (Sept. 15, 2006) (“The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice....The State party should in particular (a) acknowledge the

the issue of control over individuals separately from territorial control when determining the scope of the ICCPR's application.¹⁴¹

Thus the jurisprudence of the Inter-American System, as well as that of other international human rights systems, recognizes the extra-territorial reach of human rights obligations. The determinative factor in each system is whether a State has "authority and control" over the person or territory, and whether there is a "causal nexus" between the State and the alleged violation.

a) The U.S. Had Authority and Control over the Petitioners in Iraq

Petitioners Sabbar, Khalid, and Hussein were imprisoned at U.S.-run military detention centers in Iraq. Each man was officially recognized as a detainee and was given a detainee number by the U.S. military. The torture or other cruel, inhuman or degrading treatment alleged in this Petition occurred in enclaves under the exclusive jurisdiction of the United States and the exclusive control of the U.S. military. Access to detainees by any person, including agents or employees of other governments and other U.S. government agencies, could occur only with the express or tacit permission of the U.S. military.

In fact, until June 28, 2004, the United States was the de facto leader of the Coalition Provisional Authority ("CPA"). Together, the CPA and Coalition Forces acted as a complete governing authority, exercising legislative, executive, and judicial authority including detention for security reasons. The CPA created immunity for U.S. soldiers from local law; that immunity has continued after the handover of authority to the

applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war.").

¹⁴¹ Satterthwaite, *Rendered Meaningless*, *supra* note 126, at 1365, n.182 and accompanying text.

Government of Iraq on June 28, 2004. More generally, the CPA evidenced no concern for preserving well-established Iraqi law. So, the United States had complete authority and control over Petitioners and over the entire region during the time that Petitioners were tortured and inhumanely treated.

b) The U.S. Had Authority and Control over the Petitioners in Afghanistan

Petitioners Ahmad, Siddiqi, and Rahman were imprisoned at U.S.- run military prisons in Afghanistan. Each man was officially recognized as a detainee and was given a detainee number by the U.S. military. The torture or other cruel, inhuman or degrading treatment claimed in this Petition occurred in enclaves under the exclusive jurisdiction of the United States and the exclusive control of the U.S. military. Access to detainees by any person, including agents or employees of other governments and other U.S. government agencies, could occur only with the express or tacit permission of the U.S. military.

Since U.S. forces began “Operation Enduring Freedom,” with the support of the U.K. and other countries, the United States has “reserved to itself power in certain spheres.”¹⁴² The “sphere” of power of Operation Enduring Freedom was established in general by the Authorization for the use of Military Force as the ability to use “all necessary & appropriate” force to prevent future terrorist attacks against the U.S.¹⁴³

In May 2005, the United States and Afghanistan agreed that the United States had the “freedom of action” to conduct military operations, after consultations with the

¹⁴² *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

¹⁴³ *See* 107 P.L. 40, 115 Stat. 224 (2001).

Afghan government.¹⁴⁴ This agreement restated existing procedures.¹⁴⁵ It included access to Bagram Air Base, where detainees had been held, and, despite President Karzai's wish to the contrary, did not return to the Afghan government control over prisoners taken by the U.S. military.¹⁴⁶ It simply noted that the Afghan government "intends to maintain capabilities for the detention, as appropriate, of persons apprehended in the War on Terror."¹⁴⁷

In sum, Petitioners were tortured and subjected to other forms of cruel, inhuman or degrading treatment by the U.S. military while they were detained at U.S.-run detention facilities in Afghanistan and Iraq. Their torture and inhumane treatment were ordered or condoned at the highest level of government by Secretary Rumsfeld and senior military and intelligence commanders and were part of U.S. policy on detainee treatment and interrogation. There is a direct causal connection between U.S. policy on detention and interrogation and the abuses that Petitioners suffered. Accordingly, the United States had authority and control over Petitioners and this Commission has territorial jurisdiction over this Petition.

B. Petitioners Have Met the Exhaustion of Domestic Remedies Requirement

Under Article 31 of the Commission's Rules of Procedure, Petitioners must demonstrate that they have exhausted domestic remedies available to them. This requirement does not apply, however, when the laws of the State concerned do not afford

¹⁴⁴ Press Release, White House, Office of the Press Secretary, Joint Declaration of the United States-Afghanistan Strategic Partnership (May 23, 2005), *available at* <http://merln.ndu.edu/archivepdf/afghanistan/WH/20050523-2.pdf> ["Strategic Partnership"].

¹⁴⁵ David E. Sanger, *Bush Deflects Afghan's Request for Return of Prisoners*, N.Y. Times, May 24, 2005, *available at* <http://www.nytimes.com/2005/05/24/politics/24prexy.html?pagewanted=print> (quoting Scott McClellan).

¹⁴⁶ *See id.*

¹⁴⁷ Strategic Partnership, *supra* note 144.

adequate due process of law, when the petitioner has been denied effective access to legal remedies, or when there has been “unwarranted delay” in issuing a decision on those remedies.¹⁴⁸ Petitioners must therefore exhaust only those remedies available domestically that are “adequate to protect the rights allegedly infringed and effective in securing the results envisaged in establishing them.”¹⁴⁹ Petitioners must show either that domestic remedies have been exhausted, that remedy is unavailable as a matter of law, fact, or delay, or that any potential remedy would be inadequate or ineffective to rectify the violations alleged.

1. Petitioners Have Exhausted Domestic Remedies

As discussed in Part II(C), Petitioners sought redress in U.S. courts for their torture and inhumane treatment by litigating their claims in federal court to the en banc rehearing stage. Following the Court of Appeals’ refusal to reconsider its decision dismissing Petitioners’ claims, Petitioners did not seek review by the U.S. Supreme Court, the country’s highest court, but the exhaustion rule does not require Petitioners to seek the “extraordinary” remedy of U.S. Supreme Court review.

Under Article 31(2) of the Commission’s Rules of Procedure, Petitioners need not satisfy the exhaustion requirement where: (a) the domestic legislation of the State

¹⁴⁸ See Inter-American Comm’n on Human Rights, Rules of Procedure, art. 31, Nov. 13, 2009, available at <http://www.cidh.org/basicos/english/Basic18.RulesOfProcedureIACHR.htm>.

¹⁴⁹ *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. Comm’n H.R., Report No. 24/06, OEA/Ser.L/V/II.124 doc. 5 ¶ 33 (2006); see also *Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 62-66 (July 29, 1988); *Garbi v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 06, ¶¶ 86-90 (Mar. 15, 1989); *Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 05, ¶¶ 65-69 (Jan. 20, 1989); *Donoso v. Panama*, Petition 12.360, Inter-Am. Comm’n H.R., Report No. 71/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 21-22 (2002). The Commission has incorporated the longstanding jurisprudence of the Inter-American Court which states that “[a]dequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.” *Castillo v. Mexico*, Petition 12.170, Inter-Am. Comm’n H.R., Report No. 36/05.

does not afford due process of law; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been an unwarranted delay. In *Housel v. United States*, the Commission found that Article 31(2)(a) requires that before domestic remedies need be pursued they “must be (1) adequate, in the sense that they must be suitable to address an infringement of a legal right; and (2) effective, in that they must be capable of producing the result for which they were designed.”¹⁵⁰ Thus a petitioner need not pursue every theoretical possibility for relief at the domestic level; rather a petitioner need only have pursued those “legal remedies that [were] available, appropriate, and effective for solving the presumed violation of [their] human rights.”¹⁵¹

In *Mendoza v. Argentina* the Commission considered application of this component of the exhaustion rule to a case related to Argentinian law that permits juveniles to be sentenced to life without parole.¹⁵² There the Commission rejected the Argentinian government’s arguments that the petitioners should have filed an extraordinary appeal before the highest court in Argentina, the Argentinean Supreme Court, after having found such a remedy was considered “special and discretionary.”¹⁵³

¹⁵⁰ *Housel v. United States*, Petition 129/02, Inter-Am. Comm’n H.R., Report 16/04, OEA/Ser.L/V/II.122, doc. 5 rev., 1 ¶ 31 (2004) (citing *Rodríguez*, Judgment of July 29, 1988, Inter-Am. Ct H.R., (ser. C) No. 4, ¶¶ 64-66.), *accord Graham v. United States*, Case No. 11.193, Inter-Am. Comm’n H.R., Report 51/00, OEA/Ser.L/V/II.111 doc. 20, rev. ¶ 55 (2000), and *Villareal v. United States*, Case 11.753, Inter-Am. Comm’n H.R., Report No. 108/00, OEA/Ser.L/V/II.111, doc. 20, rev., ¶ 60 (2000).

¹⁵¹ *Elias Gattass Sahih*, Report No. 9/05, Inter-Amer. C.H.R., Petition No. 1/03, at 30 (2005).

¹⁵² *Mendoza v. Argentina*, Inter-Am. Comm’n H.R., Admissibility Report No. 26/08, Mar. 14, 2008.

¹⁵³ *See also, Guillermo Patricio Lynn v. Argentina*, Admissibility Report No. 69/08, Oct. 16, 2008 (“In relation to the State’s contention that the extraordinary remedy is the one that should have been exhausted, the Commission notes that in the Argentine legal system, the extraordinary remedy is exceptional in nature and limited to the federal jurisdiction. As such, it is not meant as an adjunct to all legal proceedings, but rather functions as a jurisdiction of restricted scope and access, which is limited to federal matters, to address arbitrary sentences. The federal extraordinary remedy in Argentina, therefore, is not designed to remedy any error, but rather to address issues of a specific nature.”); *Domingues v. Argentina*, *supra* note 63, at ¶ 42 (noting that so-called “extraordinary,” or discretionary remedies need not be pursued in cases where domestic law does not support adequate or effective redress.). The European Court of Human Rights

The petition for writ of certiorari to the U.S. Supreme Court is discretionary in nature. In practice, the U.S. courts of appeals are the final decision-making courts in over 98 percent of federal cases.¹⁵⁴ As such, certiorari is not meant as an adjunct to all legal proceedings, but rather functions as an extraordinary jurisdiction of restricted scope and access. Like an appeal to the Argentinian Supreme Court, a petition for writ of certiorari to the U.S. Supreme Court in Petitioners' case is "special and discretionary." Accordingly, the exhaustion rule does not require that Petitioners explore that venue before submitting this petition.

C. There Are No Proceedings Pending Before Any Other International Tribunals

Pursuant to Article 33 of the Commission's Rules of Procedure, counsel for Petitioners confirms that the subject matter of this Petition has not been decided nor is it pending before neither this nor any other international adjudicatory body.

has also adopted this standard, repeatedly finding that discretionary or extraordinary remedies need not be exhausted. *See e.g., Cinar v. Turkey*, No. 28602/95, 13 Nov. 2003; *Prystavka v. Ukraine*, No. 21287/02, 17 Dec. 2002.

¹⁵⁴ *See also*, Table II(B) Cases Granted Review, 120 Harv. L. Rev. 372, 380 (2006), available at <http://hhr.rubystudio.com/media/pdf/statistics06.pdf>. For example, in the 2005 term the Court granted certiorari in only 0.9% of the petitions made to it.

V. CONCLUSION AND PETITION

The facts alleged in this Petition establish that the Government of the United States of America is responsible for the violation of Petitioners' rights guaranteed under Articles I, XXV and XVIII XXV of the American Declaration. Thus, Thahe Mohammed Sabbar, Sherzad Kamal Khalid, Ali Hussein, Mehboob Ahmad, Said Nabi Siddiqi, and Haji Abdul Rahman respectfully request that the Inter-American Commission on Human Rights:

1. Declare this Petition admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;
3. Declare that the Government of the United States of America is responsible for the violation of Petitioners' rights as protected under the American Declaration, including, *inter alia*, their right to be free from torture and inhumane treatment guaranteed under Articles I and XXV, their right to an effective remedy protected under Article XVIII;
4. Declare that the U.S. detention and interrogation programs operational in Afghanistan and Iraq from 2003-2004 violated the American Declaration;
5. Recommend such other remedies as the Commission considers adequate and effective for addressing the violations of Petitioners' fundamental human rights, including, *inter alia*, requesting that the United States government and those directly responsible for Petitioners' torture and

inhumane treatment publicly acknowledge such involvement and publicly apologize to Petitioners' for the violation of their rights.

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Respectfully Submitted,ⁱ

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