

United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole”

by Richard J. Wilson*

On January 10, 2003, Amnesty International sent a letter to the Bush administration noting that exactly a year had passed since the U.S. military began to place a group of detainees at Guantánamo Bay, Cuba. Amnesty International called the prisoners' situation a “legal black hole,” referring to the fact that the U.S. government continues to argue that the nearly 650 detainees from an estimated 40 nations are not entitled to any of the legal protections of U.S. domestic law or international human rights law.

On February 25, 2002, a group of petitioners filed the first international legal challenge to those detentions with the Inter-American Commission on Human Rights (Commission). The petition was coordinated by the Center for Constitutional Rights, based in New York City, in collaboration with the Center for Justice and International Law in Washington, D.C.; the Human Rights Law Clinic at Columbia University in New York City; Judith Chomsky, a private practitioner; and myself, acting in my personal capacity. After the initial filing, a number of additional law professors, NGOs, and lawyers from England and France joined in signing onto the petition, which was filed in parallel with a federal petition for habeas corpus on behalf of named detainees at Guantánamo pursuant to 28 U.S.C. § 2241, a federal statute by which federal courts grant writs of habeas corpus. The federal action, *Rasul v. Bush*, filed in the United States District Court in Washington, D.C. and later consolidated with a similar case involving Kuwaiti nationals in detention in Cuba, was dismissed for want of jurisdiction because “the military base at Guantánamo Bay, Cuba is outside the sovereign territory of the United States.” On March 11, 2003, the U.S. Court of Appeals for the District of Columbia, under the case name *Al Odah Khaled v. United States*, affirmed the ruling of the district court on similar grounds.

The petition with the Commission was filed to bring together the existing evidence regarding the status and treatment of the Guantánamo detainees, to bring media and community attention to the situation of the detainees, and to obtain a prompt and hopefully favorable interpretation of the international legal obligations of the United States with regard to those detainees. It accomplished all of those goals.

Who Are the Detainees at Guantánamo?

All information about the detainees at Camp Delta and previously at Camp X-Ray in Guantánamo Bay, and the conditions of their confinement, is based upon publicly available information gleaned from press reports both here and abroad. The U.S. government refuses to release the names, nationalities, or addresses of any of the detainees. Detainees are allowed only limited correspondence rights with members of their families, and all access into Camp Delta has been barred except for a limited number of diplomatic missions from detainees' home countries and a visit from the International Committee of the Red Cross, which communicates only privately with the government in question after such visits.

The detainees are mainly nationals of Middle Eastern and Asian countries such as Saudi Arabia, Pakistan, Egypt, and Kuwait, although there are also nationals from European

countries and Australia. The U.S. government maintains that all of the prisoners are either members of the Taliban government's armed forces or of the al-Qaeda terrorist network. All were taken into custody after the beginning of U.S. military actions in Afghanistan on October 7, 2001, although many were not taken prisoner in Afghanistan itself. Six Algerian prisoners, for example, were taken by the U.S. military from Bosnia, while one Australian national was taken from Egypt and a British national was taken from Zambia. More than 200 al-Qaeda suspects picked up in six European countries reportedly were transferred to custody in Guantánamo.

President Bush issued a military order on November 13, 2001, authorizing the detention and trial by military commission of any current or former member of the al-Qaeda organization, as well as anyone who aids or abets its work or harbors its members. Military commission sentences allow for the imposition of the death penalty based on non-unanimous decisions and are subject to limited review in civilian courts. No known trials have been carried out on Guantánamo or elsewhere by those commissions to date. None of the detainees has been charged publicly with any criminal offense, and none has been provided with access to counsel or the courts. Although the president recognized in February 2002 that Taliban detainees “are covered by” the Geneva Conventions, he also concluded that

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neither the Taliban soldiers nor al-Qaeda detainees are entitled to prisoner of war status.

Interrogation of the Guantánamo detainees began on January 23, 2002, and is presumably ongoing. No detainee has been permitted to have access to a lawyer prior to or during that questioning. Furthermore, there is no indication that any of the detainees has been informed of his or her rights under the Vienna Convention on Consular Relations, which permits a foreign national to promptly contact and meet with a consular representative of his home government, or any of the other international instruments that apply to the United States and protect the fundamental human rights of the detainees. Such instruments include the International Covenant on Civil and Political Rights; the American Declaration of the Rights and Duties of Man; and the Geneva Conventions, particularly the third, which deals with prisoners of war.

At the time of the initial filing of a petition with the Commission, the government had detained 254 prisoners. As of early February 2003, 640 prisoners were in detention. The Defense Department has budgeted for up to 2,000 inmates at Camp Delta, with contingency expenditures permitted over the next 20 years. In mid-2002, the press carried graphic pictures of the arrival of some of the detainees at Guantánamo in shackles and blackened goggles. Reports indicate that prisoners are refused access to calendars and watches. Interrogation can take place regularly at all times of day and night. As of September 2002, reports indicated that nearly 60 prisoners were being treated for psychiatric problems, and in January 2003, there were four new suicide attempts reported by the detaining officials themselves, bringing the attempts officially reported to 14 since the facility's opening (press sources placed the number of suicide attempts at "at least 30" during 2002). To date, the only reported releases from Camp Delta are five elderly and infirm detainees returned to Afghanistan.

Amnesty International and Human Rights Watch, as well as other NGOs and foreign governments, have criticized U.S. actions relating to the Guantánamo detainees, particularly after the release of recent press reports stating that up to ten percent of the detainees were determined to have no intelligence value during their interrogations in Afghanistan. Much



Credit: AFP Photo/Roberto Schmidt

U.S. military police handle a detainee at Camp X-Ray on January 17, 2002. In April 2002, the U.S. government transferred the detainees from Camp X-Ray to Camp Delta, also in Guantánamo Bay, Cuba.

more alarming are recent reports that the U.S. military admits to the use of "stress and duress" interrogation techniques condemned as torture or cruel and inhuman treatment by many international bodies. Officials have also reported to the press that some terrorist suspects have been surrendered without proper legal process to countries in which the United States is well aware that torture is used to extract information. No administration official has disputed or denied these reports to date. The unrebutted reports of torture and transfer of detainees to countries known to practice torture led to the filing of another petition with the Commission by the Center for Constitutional Rights and others, detailing those allegations in early February 2003. As of this writing, the Commission has requested additional information from the petitioners. On March 4, 2003, the petitioners submitted additional information responding to the Commission's requests, as well as new

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A related request for precautionary measures was filed with the Inter-American Commission on Human Rights by human rights NGOs in June 2002, on behalf of "INS detainees ordered deported or granted voluntary departure." These detainees are foreign individuals, mostly men of Middle Eastern or Asian nationality, detained within the United States. The Immigration and Naturalization Service (INS), now a part of the new Department of Homeland Security, took these individuals into custody for minor immigration violations such as visa overstays and kept them in custody indefinitely, without criminal charges or the opportunity to leave voluntarily for their home countries. The INS holds closed hearings in these matters, does not release the names of the individuals in question, and refuses to provide public information on the conditions of their confinement or their treatment in custody. Furthermore, the detainees have no effective legal means of challenging their detention. While their exact numbers are unknown, recent detentions in conjunction with new "alien registration" requirements may take the number of detentions above 2,000, although some individuals have reportedly been released or deported.

After repeated requests to the U.S. government for information went unanswered, the Commission issued a formal request for precautionary measures on September 26, 2002. The request noted that the government had failed to clarify or contradict the petitioners' assertions that there is no basis under domestic or international law for continued detention of these persons, that there is no public information on the treatment of these detainees in custody, and that the detainees have no basis for challenging their status. The Commission's request asks the U.S. government for precautionary measures to protect the detainees' "right to personal liberty and security, their right to humane treatment, and their right to resort to the courts for the protection of their legal rights, by allowing impartial courts to determine whether the detainees have been lawfully detained and whether they are in need of protection."

facts relating to deaths in custody of prisoners held at the U.S. air base at Baghram, Pakistan and other secret locations. Those reports coincide with press concerns for the treatment during interrogation by U.S. officials of Khalid Shaikh Mohammad, reportedly one of Osama bin Laden's closest aides, who was arrested in Pakistan in early March.

Responses of the Inter-American Commission on Human Rights to Post-September 11 Events in the United States

The Commission has been active in its responses to the U.S. war on terrorism, not only with the Guantánamo detainees but on other fronts as well. First, in its Annual Report for 2001, the Commission noted that the United States took "exceptional measures" after the tragic events of September 11, 2001. The Commission noted in that regard that although the United States is a party to the International Covenant on Civil and Political Rights, it "has not notified the UN Secretary General in accordance with Article 4 of the Covenant of any resort by it to emergency measures that might justify derogation from the United States' obligations under that treaty." Although the United States has no reporting obligations under the American Convention on Human Rights regarding declarations of emergency measures because it is not a party to that treaty, the Commission also reiterated its oft-stated conclusion that the United States is "subject to the fundamental rights of individuals" contained in the OAS Charter and the American Declaration of the Rights and Duties of Man.

Second, on October 22, 2002, the Commission issued its comprehensive Report on Terrorism and Human Rights, which provides a legal framework and general recommendations regarding governmental responses to acts of terrorism, with which it has had extensive experience throughout the Americas. The Commission has dealt with cases and situations arising from guerrilla or insurgent organizations known for their use of terrorist methods, such as Peru's Shining Path, as well as state terrorism, such as some of the responses to Shining Path and other insurgencies in Peru by the government of former president Alberto Fujimori. Although the report does not address the issues in any national context, there is little doubt it is addressing the United States when it states, in its recommendations, that member states of the OAS must "refrain from the use of . . . military tribunals or commissions to try civilians," and further that:

in situations of international armed conflict, when an individual has committed a belligerent act and falls into the hands of an adversary and a doubt arises as to their status as a privileged or unprivileged combatant or civilian, *[the government must] convene a competent tribunal to determine the status of the detainee*, and ensure that such persons enjoy the protections of the Third Geneva Convention. . . (emphasis added).

It is this last recommendation that also lies at the heart of the decision by the Commission in response to the February petition mentioned above. The petition sought only the issuance of precautionary measures, not a ruling on admissibility or the merits. The rules permit the issuance of such measures "in serious and urgent cases" in order "to prevent irreparable harm to persons." The rule is designed to protect the existing status and legal protections for the alleged victims while the action is pending before the Commission, making it akin to a request for injunctive relief. The Commission's rul-

ing on precautionary measures does not constitute a ruling on the merits. Normally, a request for precautionary measures is sought contemporaneously with the filing of a petition for review of human rights violations on the merits, but in this case, the petitioners sought only precautionary measures. Because it was one of the first rulings on any aspect of the government's new war on terrorism, it received extensive publicity, both nationally and internationally.

On March 12, 2002, the Commission issued one of its most extensively documented requests for precautionary measures ever issued to the United States under Article 25 of its Rules of Procedure, a request that it later reiterated on May 28, 2002. The Commission concluded in its request that the detainees are all "subject to the authority and control" of the U.S. government, wherever they are physically located. Despite U.S. government arguments to the contrary, the Commission has jurisdiction over the detainees in Guantánamo because its powers reach to the extraterritorial acts of nations under an "authority and control" test similar to that used by the European Court of Human Rights. After the Commission's initial request for precautionary measures in March, the U.S. Department of State's Office of the Legal Adviser filed an extensive legal defense of the administration's Guantánamo policy in a 40-page submission to the Commission in April. That submission was the most fully articulated legal justification of U.S. policy filed with any tribunal up to that time, as the first legal challenge to the Guantánamo detentions in the United States was dismissed almost immediately for lack of standing of the petitioners in *Coalition of Clergy, et al. v. Bush et al.*, a decision that was subsequently upheld on appeal.

As it has in the past, the U.S. government argued that the Commission lacks jurisdiction over the United States and is thus wholly without authority to bind the United States with its decisions. The government went on to defend its policies on the merits, however. The gist of that pleading and others that have followed was the assertion that the Guantánamo detainees, by virtue of the president's determination that they are "unlawful combatants," thereby enjoy no legal protections. Thus, they may be held at the military's discretion until the cessation of hostilities, which the executive branch asserts to be the end of the government's war on terrorism. The detainees do not enjoy the protection of basic human rights, the government argued, because those rights have been pre-empted by the more specialized and precise legal concepts of the "separate and distinct humanitarian law rules at issue." Neither can the detainees claim the protections of humanitarian law, however, because the president has properly designated them as unlawful combatants, by which designation they fall outside of the protection of the Geneva Conventions. Thus, while the government asserted that it treats some of the detainees in a fashion consistent with the obligations of humanitarian law, it maintained that it has no legal duty to do so pursuant to human rights or humanitarian law. Thus, according to the government, the detainees legally fail to qualify for any legal protection whatsoever.

The Commission anticipated both the issues of jurisdiction and the merits of the government's claims in its March letter to the State Department. First, it was emphatic in its assertion that the U.S. government has an obligation to follow requests for precautionary measures:

The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures . . . is, as with the practice

of other international decisional bodies, a well-established and necessary component of the Commission's processes. Indeed, where such measures are considered essential to preserving the Commission's very mandate under the OAS Charter, the Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for such measures.

As to the merits of the government's claim, the Commission concluded that the detainees "remain the beneficiaries at least of the non-derogable protections under international human rights law." The applicable international norms, the Commission asserted, require that "a competent court or tribunal, as opposed to the political authority, must be charged with ensuring respect for the legal status and rights" of the detainees. It is noteworthy that the Commission did not pre-judge the outcome of such a court proceeding, suggesting that were the United States to comply with the due process requirements of both human rights and humanitarian law, it could achieve the very outcome it now seeks to defend.

After submission of additional arguments by the petitioners, including the executive branch's assertions as to the application of the Geneva Conventions to the detainees, the Commission issued an additional communication to the United States on July 23, 2002. The Commission weighed the new evidence submitted by both parties, but reiterated its conclusion that "doubts continue to exist concerning the legal status of the detainees," and that the responses by the government "confirm the Commission's previous finding that, in the State's view, the nature and extent of rights accorded to the detainees remain entirely at the discretion of the U.S. government." By the explicit language of its decision and its invocation of numerous cases in which it had interpreted the American Declaration in light of humanitarian law obligations, the Commission also rejected the U.S. government's limited reading of the decision of the Inter-American Court of Human Rights (Court) in the preliminary objections decision in *Las Palmeras v. Colombia*, in which the Court ruled that the Court and Commission cannot directly apply the Geneva Conventions. The Commission, like the Court, nonetheless continues to use Geneva Convention norms as a means to interpret or clarify otherwise ambiguous provisions of human rights law.

The Commission also heard oral arguments in its October 2002 regular session on the status of the detainees, during which the United States reiterated its legal position without change or compromise. The recent adverse ruling by the court of appeals makes it likely that a full petition on the merits of the claim will be filed with the Commission as soon as domestic remedies are fully exhausted.

Finally, on March 18, 2003, the Commission issued a renewed request to the U.S. government for precautionary measures on two grounds. The request reiterated the earlier concerns for the status of the detainees at Guantánamo. It also stated that the new factual allegations regarding torture or other ill-treatment of detainees "raise questions concerning the extent to which the United States' policies and practices in detaining and interrogating persons in connection with its anti-terrorist initiatives clearly and absolutely prohibit treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under international norms." The letter further "requests information from [the U.S.] gov-

ernment concerning the location, status and treatment of individuals detained by the United States in other facilities in connection with its post-September 11, 2001 anti-terrorist initiatives."

Responses by United States and British Domestic Courts to the Executive Branch's "Unlawful Combatant" Claims

The United States judiciary generally has shown little willingness to intervene in cases involving the Guantánamo detainees and other cases involving assertions by the government of unlawful combatant status of detainees or accused persons. The issue is complicated not only because of disputed issues of territorial jurisdiction in the Guantánamo cases, but also because of the general unwillingness of the judicial branch to intervene in what it perceives to be foreign policy issues within the nearly exclusive prerogative of the executive branch. Moreover, because the administration has cast all of these cases as matters arising from combat and war, rather than as violations of criminal law, the courts similarly couch their reluctance to intervene in terms of executive discretion in the exercise of war powers and the military.

The U.S. government, through coordinated efforts of federal prosecution and immigration authorities, also has taken extensive measures to hide the identities of alien detainees, both in Cuba and here at home, and to obstruct legal access to courts or counsel for all detainees, ostensibly to permit interrogations to continue unimpeded and to prevent contacts within terrorist networks. Because of the difficulties experienced by alleged terrorists such as Yaser Hamdi, José Padilla, and Zacarias Moussaoui to achieve favorable treatment from the courts, the Inter-American Commission appears to be one of the few deliberative bodies willing to address the weaknesses in the Bush administration's legal arguments.

The cases of Hamdi, Padilla, Moussaoui, and John Walker Lindh, the so-called "American Taliban," raise complex issues of international law regarding prisoner and combatant status, as well as proper access to and treatment before the courts. As early as July 2002, the federal district court judge in *United States v. Lindh* had ruled that Lindh, a U.S. citizen who had taken up arms with the Taliban, could not invoke the protections of the Geneva Conventions by arguing that he was a lawful combatant—a soldier—fighting a war on the side of the Taliban. José Padilla, a U.S. citizen arrested in Chicago on a material witness warrant, was designated as an "enemy combatant" by the president and is now being held at a naval detention center in South Carolina without formal charges. In December 2002, a federal district court judge in New York affirmed the president's authority to designate Padilla as an "enemy combatant" but nonetheless concluded that he was entitled to the assignment of defense counsel in the exercise of the court's discretion over habeas corpus petitions, rejecting various government arguments that intervention by a lawyer on Padilla's behalf was inconsistent with legitimate goals of intelligence gathering and prevention of further attacks. The judge recently reaffirmed that ruling while expressing his irritation with the government's legal position. For example, he characterized the arguments of the Department of Justice and solicitor general as "permeated with the pinched legalism one usually encounters from non-lawyers."

The United States Court of Appeals for the Fourth Circuit, one of the most conservative federal courts in the nation, went further in its pro-government reasoning in *Hamdi v. Rumsfeld*. On January 8, 2003, that court held, like the other

courts above, that Yaser Hamdi, a U.S. citizen captured during battle in Afghanistan, was properly designated an unlawful combatant under the president's war powers. The court, however, also held that the Third Geneva Convention was a non-self-executing treaty, meaning that Hamdi could not invoke its provisions without further congressional action to implement the treaty domestically. To the contrary, the district court decisions in both *Lindh* and *Padilla* found the treaty to be self-executing. The court's decision effectively leaves Hamdi, now in custody in a naval detention center in Norfolk, Virginia, without access to counsel or further access to the courts.

Two other related decisions recently before domestic courts merit mention. In late January 2003, the trial judge in the federal trial of Zacarias Moussaoui ruled in a closed hearing that Moussaoui should be provided with access to Ramzi Binalshibh, the self-described coordinator of the September 11, 2001 terrorist attacks in the United States and also in U.S. custody, in order to be able to effectively prepare Moussaoui's defense to capital charges of his own involvement in those attacks. Close followers of the trial suggest that the government's resolve not to permit the two alleged terrorists to meet may compel them to seek the first known trial before a military commission, a decision which would unquestionably raise further criticism of such tribunals. Finally, in Boston, the judge who recently sentenced Richard Reid, the admitted al-Qaeda "shoe-bomber," was praised for his strong condemnation of Reid during the sentencing hearing. The judge, responding to assertions by the defense that Reid was a combatant in a war, responded by repeatedly asserting, "You are not an enemy combatant—you are a terrorist." By that reference, the judge seemed to suggest that the criminal law, not the law of war, was the way to deal with terrorism, thus ironically undermining the administration's assertions that their actions are justified as legitimate actions in the war on terrorism.

The term "legal black hole" in reference to the status of the Guantánamo detainees seems to originate with a decision by the British courts in *R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs*. In this case, a British national named Feroz Ali Abbasi, a Guantánamo detainee since January 2002, complained to British judges that he had been without access to a court or any other tribunal, or even to a lawyer, since his arrival in Guantánamo. His representatives sought to compel the British Foreign Office to take some action on his behalf to challenge his arbitrary detention in Cuba. The British court declined, noting that there were several legal actions pending in the United States dealing with the matter, and that Mr. Abbasi is "within the sole control of the United States executive." The court did note, however, that although Mr. Abbasi's detention as an "illegal combatant" may ultimately be justified,

the judges found it "objectionable . . . that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal." It was in that context that the British tribunal expressed its profoundest desire that the U.S. courts assume jurisdiction so as not to leave Mr. Abbasi in arbitrary detention in that "legal black hole" alluded to by Amnesty International and others. The British court also noted that the issue of the validity of the detention in Guantánamo Bay was pending before the Inter-American Commission on Human Rights, but that "it is as yet unclear what the result of the Commission's intervention will be."

Finally, the Canadian courts also may take on the issue of the Guantánamo detentions. Press reports in February of 2003 indicate that a former member of Parliament asked the Quebec Superior Court to rule whether Canadian soldiers in Afghanistan had surrendered alleged enemy soldiers to the U.S. military for transport to Guantánamo in violation of Canada's obligations under the Geneva Conventions. The filing of the suit followed criticism of the government in the Canadian House of Commons for its failure to determine if those captured were prisoners of war prior to their surrender.

The core of the Commission's precautionary measures ruling lies in its conclusion that the executive branch of the U.S. government is not entitled to unilateral and unreviewable designation of the Guantánamo detainees as unlawful combatants under international humanitarian law. What is common to all three of the domestic court decisions in the cases involving Lindh, Padilla, and Hamdi is the courts' assumption that there was no doubt as to the status of the individuals involved in those cases; all were legitimately and properly designated as "illegal," or more properly "unprivileged" combatants, by the executive branch. The petitioners' position in the Guantánamo case relies on Article 5 of the Third Geneva Convention, which requires that the detainees are entitled to a presumption of protection of the Third Convention "until such time as their status has been determined by a competent tribunal." Their argument also relies on customary law and the assertions of many leading international law experts who maintain that the detainees are entitled to a presumption of treatment as privileged combatants until a competent tribunal has determined their status. The detainees must be designated as civilians, combatants, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat. The Commission's view is not a radical position but one consistent with established interpretations of international human rights and humanitarian law. ☹

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eligibility for the death sentence. In considering this and other evidence, the Commission established that a *ius cogens* norm had developed that prohibits the execution of people under 18. The Commission found that the United States violated this norm in the *Domingues* case and breached Article I of the American Declaration.

Recommendations

Based on these findings the Commission recommended that the United States offer Mr. Domingues a commutation of sentence. The Commission further recommended that

the United States review its laws and procedures to ensure that the death penalty is not imposed on anyone who was under the age of 18 at the time of his or her crime. The Commission announced that it would continue to evaluate the measures adopted by the United States with respect to the above recommendations until the United States reaches full compliance. ☹

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