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Ref. Detainees in Guantanamo Bay, Cuba
Request for Precautionary Measures

Dear Sirs and Madams:

On behalf of the Inter-American Commission on Human Rights, I wish to acknowledge receipt of your request for precautionary measures dated February 25, 2002 regarding the matter cited above, together with your supplementary observations of March 5, 2002 concerning same.

I also wish to inform you that after carefully deliberating upon your request, the Commission, in a note dated March 12, 2002, addressed the Government of the United States in the following terms:

After careful deliberation on this request, the Commission decided during its 114th regular period of sessions[FN1] to adopt precautionary measures, according to which we ask Your Excellency's government to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal. Given the significance and implications of this request to and for the United States and the detainees concerned, the Commission wishes to articulate the basis upon which it reached this decision. . . .

[FN1]As this request was considered while the Commission was in session, these precautionary measures were approved by all eligible members of the Commission present, namely: Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Julio Prado Vallejo and Clare Kamau Roberts, Commissioners. Commissioner Robert K. Goldman did not take part in the discussion and voting on these precautionary measures, pursuant to Article 17(2) of the Commission's Rules of Procedure.

The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures under Article 25(1) of its Rules of Procedure[FN2] is, as with the practice of other international decisional bodies,[FN3] a well-established and necessary component of the Commission's processes.[FN4] 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.[FN5]

[FN2] Article 25(1) of the Commission's Rules of Procedure provides: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

[FN3] See e.g. American Convention on Human Rights, Art. 63(2); Rules of Procedure of the Inter-American Court of Human Rights, Art. 25; Statute of the International Court of Justice, 59 Stat. 1055, Art. 41; Rules of Procedure of the United Nations Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.6, Art. 86; Rules of Procedure of the European Commission of Human Rights, revised Rules updated to 7 May 1983, Art. 36; Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on 6 October 1995, Art. 111.

[FN4] See Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its 660th Meeting, 49th session held on April 8, 1980, and modified at its 64th, 70th, 90th and 92nd sessions, Art. 29; Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109th special session held from December 4 to 8, 2000, Art. 25; Annual Report of the IACHR 1996, Chapter II(4); Annual Report of the IACHR 1997, Chapter III(II)(A); Annual Report of the IACHR 1998, Chapter III(2)(A); Annual Report of the IACHR 1999, Chapter III(C)(1); Annual Report of the IACHR 2000, Chapter III(C)(1).

[FN5] See IACHR, Fifth Report on the Situation of Human Rights in Guatemala, OEASer.L/V/II.111 doc. 21 rev. (6 April 2001), paras. 71-72; *Juan Raul Garza v. United States*, Case No. 12.243, Report No. 52/01, Annual Report of the IACHR 2000, para. 117.

The mandate given to the Commission by OAS member states, including the United States, under Article 106 of the Charter of the Organization of American States and Articles 18, 19 and 20 of the Commission's Statute is in turn central to the Commission's consideration of the matter presently before it. Through the foregoing provisions, OAS member states have charged the Commission with supervising member states' observance of human rights in the Hemisphere. These rights include those prescribed under the American Declaration of the Rights and Duties of Man, which constitutes a source of legal obligation for all OAS member states[FN6] in respect of persons subject to their authority and control.[FN7] The Commission has been directed to pay particular attention to the observance of Articles I (right to life), II (right to equality before law), III (right to religious freedom and worship), IV (right to freedom of investigation, opinion, expression and dissemination), XVIII (right to a fair trial), XXV (right to protection from arbitrary arrest), and XXVI (right to due process of law) of the American Declaration.

[FN6] See I/A Court H.R., Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights," Ser. A N° 10, paras. 43 – 46; James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 46-49; Michael Edwards et al. v. Bahamas, Case No 12.067, Report No. 48/01, Annual Report of the IACHR 2000.

[FN7]The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control. See e.g. Saldaño v. Argentina, Report No. 38/99, Annual Report of the IACHR 1998, paras. 15-20; Coard et al. v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, para. 37, citing, inter alia., IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985, Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 1985. See similarly Eur. Comm. H.R., Cyprus v. Turkey, 18 Y.B. Eur. Conv. Hum. Rgts. 83 (1975) at 118; Eur. Comm. H.R., Case of Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, Series A No. 310, paras. 59-64.

In addition, while its specific mandate is to secure the observance of international human rights protections in the Hemisphere, this Commission has in the past looked to and applied definitional standards and relevant rules of international humanitarian law in interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict.[FN8]

[FN8] See generally Abella v. Argentina, Case No. 11.137, Report No. 5/97, Annual Report of the IACHR 1997; Coard et. al. v. United States, supra; IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999.

In taking this approach, the Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict.[FN9] In contrast, international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat.[FN10] Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity.[FN11] In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*. [FN12]

[FN9] Abella Case, *supra*, para. 158.

[FN10] *Id.*, para. 159.

[FN11] *Id.*, para. 160-1.

[FN12] ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, para. 25. See also Abella Case, *supra*, para. 161; Coard et al. Case, *supra*, para. 42.

Accordingly, where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.

This basic precept is reflected in the Martens clause common to numerous long-standing humanitarian law treaties, including the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land, according to which human persons who do not fall within the protection of those treaties or other international agreements remain under the protection of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. And according to international norms applicable in peacetime and wartime, such as those reflected in Article 5 of the Third Geneva Convention and Article XVIII of the American Declaration of the Rights and Duties of Man, a competent court or tribunal, as opposed to a political authority, must be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a state. Specifically with regard to the request for precautionary measures presently before it, the Commission observes that certain pertinent facts concerning the detainees at Guantanamo Bay are well-known and do not appear to be the subject of controversy. These include the fact that the government of the United States considers itself to be at war with an international network of terrorists,[FN13] that the United States undertook a military operation in Afghanistan beginning in October 2001 in defending this war,[FN14] and that most of the detainees in Guantanamo Bay were apprehended in connection with this military operation and remain wholly within the authority and control of the United States government.[FN15]

[FN13] See e.g. Remarks by the President in Photo Opportunity with the National Security Team, Office of the Press Secretary, September 12, 2001,

<http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>.

[FN14] See e.g. Radio Address of the President to the Nation, Office of the Press Secretary, October 13, 2001,

<http://www.whitehouse.gov/news/releases/2001/10/20011013.html>.

[FN15] See e.g. Jim Garamone, 50 Detainees now at Gitmo; All Treated Humanely, American Forces Press Service, January 15, 2002, http://www.defenselink.mil/news/Jan2002/n01152002_200201151.html.

It is also well-known that doubts exist as to the legal status of the detainees. This includes the question of whether and to what extent the Third Geneva Convention and/or other provisions of international humanitarian law apply to some or all of the detainees and what implications this may have for their international human rights protections. According to official statements from the United States government, its Executive Branch has most recently declined to extend prisoner of war status under the Third Geneva Convention to the detainees, without submitting the issue for determination by a competent tribunal or otherwise ascertaining the rights and protections to which the detainees are entitled under US domestic or international law.[FN16] To the contrary, the information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State.

[FN16] See White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, February 7, 2002, <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

In light of the foregoing considerations, and without prejudging the possible application of international humanitarian law to the detainees at Guantanamo Bay, the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights. On this basis, the Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.

In its communication to the United States, the Commission also requested that the State provide the Commission with information concerning compliance with these measures within 30 days of receipt of the communication, and thereafter on a periodic basis. In view of the observations of the parties on compliance, the Commission will decide whether to extend or lift the measures.

The Commission wishes to note in accordance with Article 25(4) of the Commission's Rules of Procedure that the granting of these measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

Sincerely yours,
Juan E. Méndez
President . . .